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JUSTICE STEVENS INVENTED THE INTERNET

Co-writing today's post is Jonathan Band of [policybandwidth](#), with CCIA's Matthew Schruers, on the recently-announced retirement of Justice John Paul Stevens:

JUSTICE STEVENS INVENTED THE INTERNET

Justice John Paul Stevens's announcement that he will resign from the Supreme Court at the end of this term has caused a flood of newspaper articles and blogs about the most significant opinions he authored during his 34 years on the Court. With the exception of an insightful [piece](#) by Joe Mullin at Corporate Counsel, the media has largely overlooked one of his opinions that has had a direct daily impact on virtually all Americans: the majority opinion in [Sony v. Universal](#), decided by the Supreme Court in 1984. This decision is the legal foundation of the Digital Age.

The case involved the lawfulness of the Betamax video-cassette recorder manufactured by Sony. The motion picture studios took the position that the Betamax contributed to copyright infringement by allowing consumers to tape over-the-air broadcasts of television programs. After a five-week trial, a federal district court in California ruled that Sony was not liable for contributory infringement. The U.S. Court of Appeals for the Ninth Circuit reversed the district court, and found that Sony did contribute to infringement.

By a 5-4 vote, the Supreme Court reversed the Ninth Circuit. Justice Stevens in his opinion for the majority explained that copyright law's fair use doctrine permitted a consumer to tape an over-the-air broadcast for later viewing – what Justice Stevens called “time-shifting.” Interpreting the fair use doctrine to permit widespread, systematic copying by consumers for private use was truly revolutionary.

Equally revolutionary was the standard Justice Stevens articulated for contributory infringement. The Copyright Act does not define when the manufacturer of a device should be liable for the infringing conduct of the device's consumers. Relying on language in the Patent Act, Justice Stevens ruled that so long as a device is “capable of substantial noninfringing uses,” the manufacturer of the device cannot be liable for infringing copies consumers make with the device.

These two holdings enabled an explosion of innovation that all of us enjoy in our daily lives. All digital devices, including personal computers, DVRs, and iPods, allow consumers to make copies. Justice Stevens's opinion made clear that the manufacturers of these devices were not liable for infringements made with the devices because the devices were also capable of substantial noninfringing uses – the fair use private copies. This meant that companies could invest in the development of new digital technologies without the incurring the risk of enormous liability for the potential misuses of those technologies by some of their consumers.

Justice Stevens did more than just write the majority opinion in this decision that is the legal foundation of the Digital Age. He also played a decisive role in changing the direction of the Supreme Court from affirming the Ninth Circuit to reversing it. When Justice Thurgood Marshall's papers were opened to the public after his death, it became evident how skillfully Justice Stevens had maneuvered the Court in a new course (see Jon Band's 1994 [article](#)).

At the internal conference held by Supreme Court after the oral argument in 1983, a majority of justices appeared to support affirming the Ninth Circuit's

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finding that Sony contributed to copyright infringement. Justice Blackmun was assigned the task of writing the majority opinion. Justice Blackmun fashioned an opinion that quickly gained the approval of Justices Marshall, Rehnquist, and Powell.

Meanwhile, Justice Stevens built a consensus to reverse the Ninth Circuit. His initial outline of what he expected would be a dissenting opinion focused on the theory that [section 106](#) of the Copyright Act did not prohibit a person from making of a single copy for private use. Justices Brennan and White disagreed with this theory; they believed that the Copyright Act did prohibit the making of a single copy. Nonetheless, they indicated that the copying in this case might fall within the fair use doctrine under [section 107](#) of the Copyright Act.

Over a series of drafts, Justice Stevens moved away from his section 106 theory and towards the Brennan/White fair use approach. Once Justice Stevens satisfied Justices Brennan and White, he convinced Chief Justice Burger to join them.

That left Justice O'Connor with the deciding vote. Justice Blackmun refused to make changes to his opinion that she requested, declaring that "[f]ive votes are not that important to me when I feel that proper legal principles are involved. It therefore looks as though you and I are in substantial disagreement." Justice O'Connor then began working with Justice Stevens, who was willing to accommodate her concerns about the appropriate standard for contributory infringement. Eventually she joined his opinion, and Justice Stevens had five votes necessary to reverse the Ninth Circuit.

By convincing a majority of the Court to change direction and find Sony innocent of infringement, Justice Stevens eliminated a major obstacle to the creation of the Internet. Companies could now build the innovative products and services that comprise the Internet without fear of crippling copyright liability.

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