

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81--1687

TITLE SONY CORPORATION OF AMERICA, ET AL., Petitioners
v.
UNIVERSAL CITY STUDIOS, INC., ETC., ET AL.

PLACE Washington, D. C.

DATE January 18, 1983

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SONY CORPORATION OF AMERICA, ET :

4 AL., :

5 Petitioners :

6 v. : No. 81-1687

7 UNIVERSAL CITY STUDIOS, INC., ETC., :

8 ET AL. :

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10 Washington, D.C.

11 Tuesday, January 18, 1983

12 The above-entitled matter came on for oral argument

13 before the Supreme Court of the United States at

14 1:01 p.m.

15 APPEARANCES:

16 DEAN C. DUNLAVEY, ESQ., Los Angeles, California; on
17 behalf of the Petitioners.

18 STEPHEN A. KROFT, ESQ., Beverly Hills, California; on
19 behalf of the Respondents.

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| | <u>C O N T E N T S</u> | |
| 2 | <u>ORAL ARGUMENT OF</u> | <u>PAGE</u> |
| 3 | DEAN C. DUNLAVEY, ESQ. | 3 |
| 4 | on behalf of the Petitioners. | |
| 5 | STEPHEN A. KROFT, ESQ. | 26 |
| 6 | on behalf of the Respondents. | |
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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Before we hear the
3 arguments in Sony Corporation against Universal City
4 Studios, in case counsel were not in the courtroom at
5 10:00 o'clock this morning, I'm authorized to announce
6 that Mr. Justice Brennan is unavoidably absent,
7 attending the funeral of a member of his family, and he
8 will participate in these cases on the basis of the
9 papers and the recording, the tape recording of the oral
10 arguments.

11 (Laughter.)

12 CHIEF JUSTICE BURGER: Mr. Dunlavey, you may
13 proceed whenever you're ready.

14 ORAL ARGUMENT OF DEAN C. DUNLAVEY, ESQ.

15 ON BEHALF OF PETITIONERS

16 MR. DUNLAVEY: Mr. Chief Justice and may it
17 please the Court:

18 The first issue presented by this case is
19 whether a person who receives a free off-the-air
20 television broadcast in his home by use of a video tape
21 recorder, as distinguished from a television set, is
22 thereby committing direct copyright infringement on the
23 program that he is receiving.

24 Now, in this case no remedy is sought against
25 any so-called direct infringer, but the Ninth Circuit

1 has answered the question yes, and if the Ninth Circuit
2 is upheld then there are some five million-plus video
3 tape recorder owners who will be at the mercy of any
4 copyright owner who seeks to take advantage of the
5 situation.

6 The second issue before the Court is whether
7 there has been contributory copyright infringement by
8 the Petitioners in this case, and bear in mind that they
9 are the manufacturer, the American distributor, and the
10 American national advertiser of a video tape recorder
11 whose brand name is Betamax.

12 Again, the Ninth Circuit has answered that
13 question yes, and Universal has moved immediately to
14 exploit the situation by filing a second action in the
15 Ninth Circuit against some 50 additional VTR suppliers,
16 and also has filed a second suit against the same
17 Petitioners in this action alleging that, on information
18 and belief, one or more video tape -- one or more
19 Betamax owners has copied every single production that
20 Universal has put on television since genesis and must
21 account for that in statutory damages.

22 Now, the pernicious point in the contributory
23 infringement aspect is that Universal is seeking either
24 an injunction -- and they are dead serious about it --
25 an injunction against the video tape recorder and/or

1 statutory damages. And when we talk statutory damages,
2 it's \$250 for every owner for every program, and that's
3 the financial liability that they seek to assess upon
4 the Petitioners.

5 So it only takes common sense to realize that
6 the ultimate issue before the Court in this case is
7 whether under the current law all Americans are going to
8 be denied the benefit of time shift home television
9 viewing because a few program owners object.

10 If there is to be time shift viewing, and by
11 that I mean a viewing of a program at some time not too
12 long after the broadcast, then manifestly there has to
13 be a record of that program to exist between the time of
14 the broadcast and the time of the viewing. In this case
15 that something is a video tape. It, by definition of
16 Congress at least, is a copy, and thereby comes the rub,
17 because the copyright law says that only the copyright
18 owner has the right to make a copy of his copyrighted
19 work, unless of course he gives consent.

20 So the direct infringement question here is
21 whether that copy that exists in the form of the
22 videotape between the broadcast and the playback is an
23 infringing copy or is it an example of fair use. There
24 is no problem with the playback. The playback is
25 authorized specifically by statute. The problem lies

1 with the copy.

2 The case has been presented by the Respondents
3 through four individual owners. Now, three of those
4 owners really are atypical if you want to look at it
5 from the standpoint of the American public. One of them
6 had 100 tapes, one of them had 170 tapes, one of them
7 had 340 tapes -- all this at a time when the norm was 30
8 tapes.

9 Amongst those four, however, there is a
10 commonality that gives the issue to the Court this
11 morning. Whatever else they did, they copied 32
12 programs that belonged either to Universal or to
13 Disney. Nothing else; the issues to this case reside
14 solely within those 32 copies.

15 Each of these persons made his copy at home.
16 There is no commercial aspect of it. It never got out
17 of his house. It was only intended for his use and
18 perhaps his friends in a couple of instances, and the
19 usage was singularly of the kind we call time shift. As
20 the opinion states, it's the recording, the holding for
21 a short period of time, then watching and then erasing,
22 and the erasing is automatic as you record something
23 else.

24 Because of the trial judge's wishes, there are
25 surveys in the case. They have to do with the use of

1 the Betamax generally by the persons who were surveyed.
2 But it must be borne in mind that none of those surveys
3 has anything to do with the particular works which have
4 been infringed allegedly. None of those surveys
5 pertains to Respondents' work at all, neither those in
6 issue nor of any other kind.

7 And again specifically, none of those surveys
8 shows any librarying of Respondents' work. Now,
9 librarying is the other kind of home use that creeps
10 into the case. If a person keeps his tape for a
11 prolonged period of time -- and that's never been
12 defined -- and looks at it for a number of times -- and
13 the number has never been defined -- then at least
14 theoretically there becomes a time when he becomes
15 saturated with that program.

16 But if that happens, it's outside of this
17 case, because it is not a factor as to any of the 32
18 works that are in issue. The trial judge's only
19 comments, a summarization of his comments with respect
20 to librarying, was simply that it has not been proven
21 that many persons will library to any significant
22 extent.

23 The trial judge also ruled out certain
24 additional uses that can be made of these tapes if the
25 owner is so inclined. You can duplicate them,

1 theoretically. That is, once you've got one tape you
2 can make a copy from it. Or you can record from pay
3 television. Or, having made your copy, you can take it
4 outside the home for one purpose or another. Or you can
5 swap.

6 All of those things are theoretically
7 possible, but there is no evidence in this case that any
8 of that was done with respect to any of the Respondents'
9 works. So the trial judge specifically said, there are
10 problems inherent in modern technology that are not in
11 this case and that this case does not purport to
12 resolve.

13 QUESTION: Mr. Dunlavey, you keep using the
14 word "theoretically." I suppose it's really possible,
15 as opposed to just theoretically possible.

16 MR. DUNLAVEY: It is possible, but it's not in
17 the evidence.

18 QUESTION: Would it not make any difference,
19 Mr. Dunlavey, whether it was used once or 25 times under
20 the Ninth Circuit's holding, the second run?

21 MR. DUNLAVEY: No. As far as the Ninth
22 Circuit is concerned, the number of times it's run is
23 immaterial. The infringement occurs instantly that the
24 copy is made.

25 QUESTION: The first copy.

1 MR. DUNLAVEY: The copy per se is the
2 infringement.

3 QUESTION: If the use was time shifting today,
4 could it not be librarying tomorrow?

5 MR. DUNLAVEY: Could it?

6 QUESTION: Yes.

7 MR. DUNLAVEY: Yes, it could.

8 QUESTION: And how would one know, really?

9 MR. DUNLAVEY: One can only find out what's
10 going on with surveys. The surveys -- if you get
11 outside the evidence, and I don't want to do that
12 because my emphasis is to stay within the evidence. If
13 you get outside the evidence, librarying is on the
14 decrease because these prerecorded copies are being made
15 available, which are better and they serve the purpose.

16 Librarying also is something that the owner
17 first thinks of when he buys his machine. Here he's got
18 a device for built-in home entertainment. But as a
19 matter of fact it turns out to be very expensive, and
20 even one or two of our owners in issue bought with the
21 intent of librarying and then said specifically that
22 they didn't.

23 So could it take place? Yes, but in fact it's
24 decreasing.

25 Now, looking at the Betamax -- and realize

1 that there's only one public television game going on in
2 this country. Everybody has to abide by the same
3 rules. So in trying to find out what kind of a machine
4 is being sold, the district court looked at evidence of
5 a number of kinds of uses of this machine which clearly
6 were not infringement, for the owners of the copyright,
7 who might otherwise have said it was infringement,
8 instead said they consented to it. Many program owners,
9 in addition to the public in general, are in favor of
10 Betamax because many program owners would rather be seen
11 as a second choice some time later than to be missed
12 entirely.

13 The trial judge said that this was a staple
14 item of commerce, that it is suitable for a variety of
15 non-infringing uses, and in that finding he had all
16 kinds of backup evidence, because we had specific owners
17 of various kinds of programs who said that they did not
18 object or consented to the recording. Without wasting
19 time on the details, they included sports program
20 copyright owners, religious owners, children's
21 programming owners, entertainment programming owners.
22 And as an aside, the American Broadcasting Company right
23 now is on the verge of broadcasting programs at night,
24 or early in the morning, really, from 2:00 to 6:00,
25 intended for reception with a VTR, so that somebody can

1 watch them later on during waking hours. And there were
2 also educational programs.

3 And although Universal prevailed upon the
4 court to find that there was no legitimate use for the
5 Betamax -- on the Ninth Circuit Court -- Universal
6 itself is a signatory to an agreement called Guidelines,
7 which is a type of agreement between copyright owners
8 and educators. It has been given the dignity in the
9 House Committee report and sanctioned by the Senate
10 Committee, the Conference Committee report that followed
11 it, that what they could agree upon would be deemed a
12 fair use.

13 QUESTION: Mr. Dunlavey, this was a finding of
14 fact, was it, by the district court, that it was a
15 staple of commerce?

16 MR. DUNLAVEY: Yes, it was.

17 QUESTION: And the Court of Appeals upset that
18 finding of fact?

19 MR. DUNLAVEY: The Court of Appeals rolled
20 over it like it wasn't even there. The Court of Appeals
21 --

22 QUESTION: So you must be saying that the
23 Court of Appeals what, misapplied the clearly erroneous
24 test?

25 MR. DUNLAVEY: The Court of Appeals really

1 didn't apply the clearly erroneous test at all. It
2 ignored the findings. It didn't take a single finding
3 and say that this finding is wrong. It simply
4 substituted its own impressions in every respect.

5 QUESTION: I certainly got the impression from
6 reading Judge Kilkenney's opinion that the opinion said
7 in effect this finding was wrong. I realize, he didn't
8 say in so many words it was "clearly erroneous."

9 MR. DUNLAVEY: Judge Kilkenney said that the
10 machine was not suitable for substantial non-infringing
11 use. But to the extent that he gave any reason for it,
12 it was that all broadcast programs now can be
13 copyrighted, from the time they're broadcast at least,
14 and since the Betamax is intended to record a television
15 program, ergo it must follow that it was designed only
16 to copy something that was copyrighted.

17 What the Ninth Circuit missed was that there
18 are a lot of copyright owners, far more than those who
19 object in fact, who consent to copying. Yes, they may
20 have copyrights, but they have agreed that the Betamax
21 may copy it.

22 Also, there's another category of copyright
23 owner, at least in the first instance, who might have
24 had copyright protection, but before he can bring an
25 infringement suit he has to register his work and

1 thereby lay the groundwork for having an infringement
2 suit to follow it. No registration, no infringement.
3 And there are a number of stations around the country
4 which don't go to the trouble of registering or
5 copyrighting their programs. They use their tape for
6 one broadcast and then turn around and reuse it for
7 another. They have decided, apparently, that it's not
8 worthwhile copyrighting it.

9 It is our contention that those people have
10 knowingly forfeited their right to enjoin home
11 recording, and that that kind of programming, even
12 without their specific consent, is also a legitimate
13 use.

14 QUESTION: Mr. Dunlavey, what are the
15 practical effects of finding that it's a staple item of
16 commerce? And that's a doctrine that was developed in
17 the patent field. Are there cases that have adapted it
18 to the copyright area? And as a practical matter what
19 would be the effect of such a finding?

20 MR. DUNLAVEY: The answer is yes, it has been
21 alluded to in the copyright area, but it was a long time
22 ago. It was Justice Holmes in the Kalem case, and he
23 was confronted with a motion picture which had been made
24 without authority of a copyrighted book called "Ben
25 Hur." And nobody even questioned that the makers of the

1 camera and the film were infringers, but there was a
2 question as to whether the person who had made the film
3 was a contributory infringer when the person he gave it
4 to exhibited it -- exhibited it.

5 And Justice Holmes made a very terse but
6 pointed comment that there are a lot of things in
7 society that when you sell them they might be useable
8 for a wrongful purpose, and you set your mind to
9 inquiring when the man makes and sells that product,
10 does he really have cause to know that it's going to be
11 used for a wrongful purpose?

12 So the staple item concept came up. Justice
13 Holmes said that if you have an indifferent supposition,
14 that the buyer might be going to use your product for a
15 wrongful purpose, that certainly does not suffice to
16 make you a contributory infringer. By the same token,
17 if you're selling something that's a staple item of
18 commerce -- and by definition that is something that has
19 got legitimate uses -- then you as a manufacturer cannot
20 have the buyer's motive imputed to you. That's where
21 the staple item is important.

22 QUESTION: So in your view that would protect
23 both the manufacturers and the retailers and
24 wholesalers?

25 MR. DUNLAVEY: And the distributor and the

1 advertiser.

2 QUESTION: Distributors.

3 MR. DUNLAVEY: There are so many legitimate
4 uses to which this machine can be put that it's grossly
5 unfair to hold the manufacturer if somebody misapplies
6 it, assuming that it is a misapplication.

7 Now, the other thing of course that the
8 supplier --

9 QUESTION: What would you say, Mr. Dunlavey,
10 if every program that came over television was not only
11 copyrighted, but the copyright owners didn't want their
12 programs copied on a Betamax? Let's just assume that.
13 Then what about the contributor? What about the Betamax
14 manufacturer?

15 MR. DUNLAVEY: If it were the case that no
16 substantial number of copyright owners wanted their
17 televised programs copied, then the argument that I have
18 just made wouldn't have much weight to it.

19 QUESTION: Yes. And so you think in this
20 record there's enough evidence to support the notion
21 that a majority of the programs on the air will not
22 cause the Betamax user any trouble?

23 MR. DUNLAVEY: That's right, that's right. As
24 a matter of fact, at the time of the trial the only two
25 people in the whole country who had ever brought an

1 action to try and prevent the use of the VTR were the
2 two Respondents today, and that's still the fact.

3 QUESTION: What about these cassettes that are
4 rented? People don't want to pay a babysitter, so they
5 rent a cassette and have a movie at home. Are those
6 generally copyrighted, so that this doctrine would apply
7 to them?

8 MR. DUNLAVEY: Those are copyrighted. This
9 doctrine really doesn't reach that point because one of
10 the facets of the VTR in home reception off the air is
11 its aspect to record a program being broadcast. Mr.
12 Chief Justice, you have surmised that the man was given
13 a copy with the consent of the copyright owner to begin
14 with, and that takes us out of the field of this case.

15 Now, the other aspects of contributory --

16 QUESTION: There is evidence in this record,
17 isn't there, particularly about the early advertising on
18 the part of Sony that indicated that, copyright or not,
19 this machine could produce this for use and the like?
20 In other words, there is some evidence against your
21 position.

22 MR. DUNLAVEY: Not with respect to the
23 particular alleged infringements in issue. There were
24 advertisements. They did get into evidence. But nobody
25 who made any of the recordings in issue saw or was

1 influenced by them. So whatever those advertisements
2 were, they are not germane to the infringement in
3 issue.

4 And needless to say, once the litigation
5 started Sony's advertisements were toned down markedly
6 so that they didn't induce somebody into the wrong kind
7 of usages.

8 Now, the other half of contribution, or
9 contributory infringement, is did you induce or cause
10 somebody to do the direct infringement, and the district
11 court said, no, there was no evidence in this case that
12 the ads or statements by any of the Petitioners in any
13 way induced or caused the copying that took place. The
14 district court also held the obvious, that there is no
15 right, no ability on the part of the Petitioners to
16 control the use of the Betamax once it's bought and
17 taken home.

18 On the other hand, the Ninth Circuit did the
19 same thing that it did throughout. It simply said ipse
20 dixit that there is "no doubt" that Petitioners induced
21 or caused this direct infringement. It also said that
22 Petitioners are sufficiently engaged in the enterprise
23 to be held accountable. No explanation.

24 As a side matter on this inducement, Sony has
25 put in every Betamax carton a printed warning to the

1 buyer that the unauthorized recording of copyright
2 programs may be contrary to copyright laws.

3 QUESTION: Didn't the district court make a
4 finding that the package was delivered to the purchaser
5 with that thing wrapped up inside so he'd never see it
6 until after he got it home?

7 MR. DUNLAVEY: That's true, he does not see it
8 'til he's unwrapped it. But he does see it before he
9 uses it, if he reads it.

10 QUESTION: And when was this program
11 instituted? After the litigation began?

12 MR. DUNLAVEY: No. That kind of warning has
13 been in Betamax from day one, from before the
14 litigation. And I mention it because there's an analogy
15 in the Copyright Act, Section 108(f), which says that if
16 libraries will give that kind of a warning to their
17 patrons when they enjoy unsupervised use of the library
18 Xerox machine then the library will not have
19 contributory liability.

20 Now, as we tell these consumers to be careful,
21 the Respondents are coming right along behind us and
22 telling the public that they don't ever have to worry
23 about being sued, at least not by Universal and Disney.
24 So as fast as we tell them to be careful, Respondents in
25 effect are telling them that they'll never have any

1 trouble directly from Respondents.

2 The gist of the Ninth Circuit opinion is that
3 each Petitioner is contributorily liable for each
4 instance where a Betamax owner makes a copyright --
5 makes a copy of a copyrighted program where the owner
6 objects, as a matter of law.

7 QUESTION: Mr. Dunlavey, what findings did the
8 district court make that you think protects Sony from
9 being held a contributory infringer?

10 MR. DUNLAVEY: That the article is a staple
11 item --

12 QUESTION: That's the first one. What's the
13 next one?

14 MR. DUNLAVEY: And that we didn't do a single
15 thing to affirmatively induce the copying of
16 Respondents' programs, unless you want to count the bare
17 act of making the machine. There was nothing between
18 any of the Petitioners and the Respondents --

19 QUESTION: Well, what if the rule -- is it the
20 rule that if you know the machine is going to be used
21 for an infringing use and you sell it, is that enough?

22 MR. DUNLAVEY: If you know that the machine is
23 going to be used and know that the use is to be
24 infringing, that is a facet of a contributory
25 infringement test.

1 QUESTION: What did the district court -- did
2 the district court make any findings in that regard?

3 MR. DUNLAVEY: The district court goes back to
4 the point that there is so much material where it's
5 acceptable to copy that you don't have to anticipate a
6 particular wrongful use.

7 QUESTION: I see. So he couldn't have -- he
8 couldn't have -- there was so much non-copyrighted
9 material or so much material whose owners didn't really
10 care that Sony couldn't have known?

11 MR. DUNLAVEY: Is not charged with enough
12 knowledge to make it a contributory infringer, yes. As
13 Holmes, Justice Holmes, said, an indifferent supposition
14 doesn't do it.

15 QUESTION: What did the -- did the Court of
16 Appeals take issue with this particular part of the
17 court's finding --

18 MR. DUNLAVEY: The Court of Appeals --

19 QUESTION: Or just ignored it?

20 MR. DUNLAVEY: The latter. The Court of
21 Appeals didn't take issue with any finding of the
22 district judge per se. It simply substituted its own
23 findings, like there had been a whole new trial in
24 absentia in the Ninth Circuit and it had reached its own
25 conclusions.

1 QUESTION: Mr. Dunlavey, may I ask you a
2 question about this staple article of commerce issue,
3 which of course is mainly a patent problem normally in
4 the cases. But under your view, what are the
5 non-infringing uses? Obviously, when material is not
6 copyrighted it wouldn't be. And the second are
7 copyrighted materials where the copyright owner doesn't
8 care. And thirdly there are copyrighted materials where
9 the copyright owner might care but is not a party to
10 this case. And then fourthly are Universal and Disney
11 copyrights.

12 Now, which of those four should we count as
13 non-infringing uses within this argument?

14 MR. DUNLAVEY: You should -- I would urge you
15 to consider, Justice Stevens, as non-infringing uses the
16 cases where the copyright owner consents; the case where
17 the copyright owner has forfeited his right to an
18 infringement action by putting it beyond his power any
19 longer to register his work; also, the work which is not
20 copyrightable from the outset, and that includes, for
21 example, government-produced matters; and there are also
22 matters where copyright has expired.

23 QUESTION: But as to those copyrights where if
24 he were asked the copyright owner would say, no, I don't
25 want you to make copies, you'd say that would not be a

1 non-infringing use within the meaning of this doctrine?

2 MR. DUNLAVEY: If he says --

3 QUESTION: You're not saying it's limited to
4 Universal and Disney copyrights?

5 MR. DUNLAVEY: That's a very interesting
6 point, Justice Stevens, and you're getting now to where
7 public policy mixes with the copyright owner's rights.
8 I would say that if the copyright owner says, I'd rather
9 you didn't do it but I don't care enough to sue you
10 about it, then I would say that the public's interest in
11 having access to the information should take precedence
12 over his --

13 QUESTION: You see, if you take that legal
14 position, then I suppose 99 percent of the stuff is
15 non-infringing.

16 MR. DUNLAVEY: And that's about where this
17 case is right now.

18 QUESTION: But you haven't taken that position
19 before, I don't think.

20 MR. DUNLAVEY: We have taken the position that
21 if it hasn't been challenged, if it hasn't been
22 challenged with a suit to stop it, that it's been free
23 for unchallenged recording. That's been our language.

24 QUESTION: If you have mentioned the figure I
25 missed it. What proportion, if it is known, of all the

1 programs that are broadcast are not copyrighted or not
2 copyrightable?

3 MR. DUNLAVEY: I'm sorry, Mr. Chief Justice.
4 I cannot give you a --

5 QUESTION: I should know, but I don't, for
6 example, whether National Geographic Society programs
7 are copyrighted by them. Since they're educational, I
8 would take a wild guess that they'd have no objection to
9 their being copied for private use.

10 MR. DUNLAVEY: I don't disagree with that, and
11 the --

12 QUESTION: But they are copyrightable, aren't
13 they?

14 MR. DUNLAVEY: They would be copyrightable,
15 yes.

16 QUESTION: But not copyrighted, but perhaps
17 not copyrighted?

18 MR. DUNLAVEY: Perhaps not.

19 And then the stations that produce their
20 programming and don't bother to copyright it. We know
21 that there is some 27 hours a week coming out of the
22 average local station that fits that description. What
23 proportion is I don't know, but that's the ratio --
24 that's the absolute.

25 QUESTION: What about a station that produces

1 a show but doesn't copyright the show, but in the show
2 is a musical composition that's copyrighted?

3 MR. DUNLAVEY: The copyright within the
4 copyright presents a problem. I think we'd have to say
5 that the copyright owner of the broadcast program --

6 QUESTION: I see there are amicus briefs filed
7 here by --

8 MR. DUNLAVEY: Yes.

9 QUESTION: -- composers.

10 MR. DUNLAVEY: Those people have come out of
11 the weeds in just the last couple of weeks.

12 (Laughter.)

13 MR. DUNLAVEY: I'm sorry. But we didn't have
14 that to contend with at trial.

15 There is the problem of copyrighted work
16 within copyrighted works.

17 QUESTION: All right, thank you.

18 MR. DUNLAVEY: In the limited time I have
19 left: As far as fair use is concerned --

20 CHIEF JUSTICE BURGER: You realize you're into
21 your rebuttal time now.

22 MR. DUNLAVEY: Yes, I realize and I'm afraid
23 I'm going to have to expend it.

24 As to fair use itself, there was one point
25 that the district court emphasized and that we

1 emphasized, that the direct -- that the copying itself
2 should not be direct infringement, and that is that
3 these people have put their programs on television
4 intentionally, with the purpose that anybody who has the
5 means of doing it can receive it, and that's all that's
6 happened.

7 Now, those people by definition have given
8 their implied consent to reception.

9 QUESTION: Well, that's like saying a
10 publisher puts his book in a bookstore and so, no, he
11 should have no objection to people making a lot of Xerox
12 copies of the book.

13 MR. DUNLAVEY: It's more like the publisher,
14 Justice Rehnquist, who, having put his book in the
15 bookstore, knows that whoever buys it can then read it,
16 give it to a friend. He knows what's going to happen to
17 it.

18 But when you broadcast you know that everybody
19 within reach of that station's signal has got the right
20 to receive that signal.

21 QUESTION: But what if a book publisher
22 publishes a book, I buy it as an individual, I make
23 three Xerox copies because I've got an office, a house
24 here in Washington, and maybe a summer cabin, I want to
25 have a copy in each place. Am I guilty of

1 infringement?

2 MR. DUNLAVEY: I do not know, and I don't
3 think there was ever a case until now that would answer
4 that question. Personal use has been urged by the
5 Solicitor General back in the Fortnightly-Teleprompter
6 area, that personal use, copying for personal use should
7 be permitted, that it was never intended to be within
8 the gamut of the copyright statute.

9 Now, the other half of the coin fair use, the
10 Ninth Circuit said that fair use by definition has to be
11 a productive use. Unless you are creating a second work
12 by relying upon the first, by definition you can't have
13 fair use. And that is manifestly wrong, because
14 Universal, having agreed to this educational off-the-air
15 recording, has agreed that 100 percent copying for the
16 same kind of use that the film was intended for is fair
17 use.

18 The points that I'm not going to reach, and
19 I'll have to pay the price for it: legislative history
20 has been covered in the brief, and argument I feel can
21 add nothing to it. The compulsory royalty, that's
22 something that is not provided by the statute.

23 Thank you.

24 CHIEF JUSTICE BURGER: Mr. Kroft.

25 ORAL ARGUMENT OF STEPHEN A. KROFT, ESQ.

1 ON BEHALF OF RESPONDENTS

2 MR. KROFT: Thank you. Mr. Chief Justice and
3 may it please the Court:

4 Although the technology involved in this case
5 makes the case more interesting than the normal
6 copyright case, all that the case really involves is
7 unauthorized and uncompensated copying of entire motion
8 pictures, and that's something that's never been
9 permitted by the Copyright Act. Neither Congress nor
10 any court has ever permitted such copying, merely
11 because it takes place in the home rather than someplace
12 else, or because the copy is taken from the television
13 air waves rather than from some other source.

14 QUESTION: Has anybody ever tried to stop it
15 when it's done in the home?

16 MR. KROFT: No, Your Honor, I don't think it's
17 ever come up before this case.

18 QUESTION: Do you think there's never been a
19 case where there has been a copying in the home before
20 of a motion picture?

21 MR. KROFT: I am not aware of any case where
22 there's been copying in the home before this case, Your
23 Honor. And I have diligently searched. I hope I have
24 been diligent enough.

25 QUESTION: You use the term "case" in terms of

1 a litigated case?

2 MR. KROFT: A litigated case or to my
3 knowledge an unlitigated situation.

4 Before Betamax came on the market, while there
5 were some aborted attempts to try to sell home video
6 recorders, Sony executives in the trial below all
7 admitted that they failed. So as far as I'm aware, the
8 only home video recorder that came to market and stayed
9 here for more than a fleeting moment was Betamax.

10 QUESTION: What about other copyrighted works
11 that are reproduced in the home for personal use? Do
12 you know of any cases that have involved that
13 situation?

14 MR. KROFT: I think that there is no such
15 case, no litigated case where that's come up, Justice
16 White. Not that I'm aware of --

17 QUESTION: And in spite of the fact that it
18 happens a good deal in connection with a lot of
19 copyrighted work?

20 MR. KROFT: Your Honor, I'm not prepared to
21 say whether it happens a good deal or not. But I would
22 say that if other copyright owners have sat on their
23 rights, we've been diligent and we shouldn't be
24 penalized because they have sat on their rights. We
25 haven't.

1 Both Congress and the courts have recognized
2 that there are property rights involved here with these
3 copyrighted motion pictures. We're not talking about
4 something of no value. Congress recognized this value
5 as far back as 1912 and it continued to emphasize this
6 value when it passed the new copyright statute in 1976.

7 Now, before I get into the legal issues I'd
8 like to emphasize three overriding facts that pervade
9 this case and I think they must be brought out early.
10 First, it's got to be emphasized that if the Ninth
11 Circuit is affirmed it is not true that absolutely all
12 future sales of video tape recorders will be banned from
13 this country forever. As we've stated in our briefs,
14 there are several alternate remedies that are available,
15 and I think are even likely when the district court
16 finally gets to the remedy issue on remand.

17 One such remedy, for example, would be the
18 continuing royalty suggested by the Ninth Circuit. It
19 could be accomplished by withholding a permanent
20 injunction on the condition that Sony and the
21 Petitioners pay a license fee to the Respondents for the
22 continued use of their works. In fact, this is
23 something that Sony's own president advocated six years
24 ago, shortly after this lawsuit --

25 QUESTION: How does the manufacturer know that

1 it is going to be so used, and if so how frequently?
2 How would you measure that?

3 MR. KROFT: Your Honor, I think that would be
4 a matter of proof put before the district court in the
5 form of surveys and other evidence.

6 QUESTION: Can you hypothesize any kind of
7 proof that would give you any rational measure?

8 MR. KROFT: Yes, Your Honor. There are
9 surveys in this record, although they weren't taken or
10 devised for the purpose of getting at this issue, which
11 show the types of programs that are being copied. They
12 didn't ask about them by title, but they showed, for
13 example, that over 80 percent of what's being copied are
14 entertainment programs.

15 Now, I suppose all you need to do is ask
16 another question which says, give us the titles of what
17 you've copied. Then you'd know exactly how many
18 Universal and Disney motion pictures have been --

19 QUESTION: How many samples out of the
20 millions of machines were there in evidence?

21 MR. KROFT: There were two samples -- excuse
22 me. Before the lawsuit was filed Sony did its own
23 marketing survey, which consisted of just a few hundred
24 people and showed, for example, substantial librarying
25 and deletion of commercials from broadcasts.

1 After the litigation was filed, there were two
2 surveys taken by the parties at the district court's
3 request, each of which was based basically on a 1,000
4 sample each. Now, they were random samples, so I
5 believe they were probably different samples.

6 QUESTION: May I ask on your continuing
7 royalty, that would be a royalty paid to Universal and
8 Disney; is that what you're suggesting?

9 MR. KROFT: That's what I'm suggesting.

10 QUESTION: Would it not be true that all other
11 copyright owners who have programs that go over the TV
12 would also be entitled to a similar royalty. And you're
13 a very small portion of the total copyright owners,
14 aren't you?

15 MR. KROFT: We may be a small portion
16 ourselves, Your Honor, but we are not a small portion of
17 those who have taken a position as to whether they
18 object or don't object to off-the-air recording.

19 QUESTION: Well, I would suppose there'd be
20 quite a few people who would decide they want to object
21 if you prevail, wouldn't they?

22 MR. KROFT: Well, there are quite a few people
23 who have already objected, Your Honor, yes.

24 QUESTION: Well, I mean, I'm really trying to
25 understand. It is your suggestion that all copyright

1 owners would be entitled to a royalty from the
2 manufacturer of Betamax because it's sold primarily, as
3 you suggest, for infringing use.

4 MR. KROFT: I think if we get that royalty and
5 this Court affirms the Ninth Circuit and the royalty is
6 affirmed, as I believe it would be and should be, I
7 think I have to say yes, Your Honor, that's true.

8 QUESTION: Mr. Kroft, was the district court
9 finding that the items were staple items of commerce a
10 finding of fact?

11 MR. KROFT: Your Honor, it may have been a
12 finding of fact, but it was an incomplete finding if it
13 was a finding of fact. Because if you analogize to the
14 patent statute, which we strenuously resist here, the
15 patent statute requires that not only must the product
16 be a so-called staple article of commerce, but it must
17 be suitable for substantial non-infringing uses. And
18 the cases have put a gloss on that requirement and said
19 that that may not just be a theoretical non-infringing
20 use, but these substantial non-infringing uses must also
21 be actual non-infringing uses, actual uses found of the
22 product.

23 The district court very pointedly did not find
24 that Betamax is suitable for substantial non-infringing
25 use. And I think if you'll at Petitioner's appendix at

1 page 97, you will see that the district court said that
2 it was going to be applying its staple article of
3 commerce rationale whether or not there was a
4 substantial amount of non-infringing use of this
5 machine. And at page 116, I believe it is, of
6 Petitioners' appendix, he said, whatever the percentage
7 of legal versus nonlegal recording may be, he would
8 still apply his standard.

9 So while calling this Betamax a staple article
10 may or may not be a finding of fact, it just doesn't go
11 far enough.

12 QUESTION: Well, if it isn't a finding of fact
13 then it's a mixed question of law and fact, I suppose?

14 MR. KROFT: I think whether something is a
15 "staple," a word that's not defined anywhere in the law
16 that I'm aware of, must be a mixed question of fact and
17 law.

18 QUESTION: Did the Court of Appeals
19 characterize it or not?

20 MR. KROFT: The Court of Appeals did not
21 characterize it, but the Court of Appeals said that
22 because everything on television is protected in the
23 first -- not everything, excuse me. Virtually
24 everything that's on television is protected in the
25 first instance from copying, that there was not a

1 sufficient showing that the amount of that material that
2 might be legally copied, if any, was a substantial
3 enough amount to make this a staple article of commerce
4 to the level or sufficient to say that the patent
5 doctrine, for example, would apply.

6 QUESTION: Well, that's a finding that the
7 district court didn't make, isn't it?

8 MR. KROFT: The district court made no finding
9 on that issue.

10 QUESTION: Yeah, one way or another.

11 MR. KROFT: Correct.

12 QUESTION: And if the Court of Appeals thought
13 that kind of a finding was relevant, I take it, why, I
14 would have thought it might have remanded to the
15 district court to -- if the district court used the
16 wrong standard or didn't make the findings that it
17 should have, why did the Court of Appeals make its
18 findings?

19 MR. KROFT: Your Honor, because there's a
20 doctrine under the clearly erroneous standard that says,
21 if the evidence below only permits one conclusion of
22 fact then there is no need to remand. That of course
23 was articulated by this Court last term in the Pullman
24 versus Swint case.

25 The Defendants, the Petitioners here, had the

1 burden of coming forward and showing, if they were going
2 to rely on the staple article doctrine, that there was a
3 substantial amount of non-infringing material. The
4 reason the district court did not make that finding was
5 because it couldn't make that finding on the evidence,
6 and therefore there was no need for the Court of Appeals
7 to return the case after it decided it.

8 QUESTION: If a copying machine, Xerox, IBM or
9 whatever, advertised that this was a good way to make
10 copies of books for private use, taking the hypothetical
11 that Justice Rehnquist suggested to you, is there any
12 analogy to this situation there?

13 MR. KROFT: If your hypothetical existed, Mr.
14 Chief Justice, I would say the analogy would be that the
15 seller of a photocopying machine which is advertised and
16 manufactured for the purpose of having people make
17 copies of copyrighted works in their home or anywhere
18 else would be liable. But those aren't the facts
19 concerning Xerox.

20 QUESTION: Now take the hypothesis that they
21 do not advertise it. Is there any literate person in
22 the United States who doesn't know that you can make
23 copies of books on a Xerox or an IBM or any other
24 copier, without being told in ads that that's so?

25 MR. KROFT: Well, by now Xerox's entire

1 advertising and marketing campaign over the years that
2 it's been in the market has been such that it has made
3 the public aware of that, Your Honor, yes. But Xerox
4 has never from the beginning advertised or promoted or
5 marketed its equipment for the purpose of recording or
6 making copies of copyrighted material.

7 That's the way Betamax started out. Betamax
8 has done a very good job of it. Everybody in this
9 country I think, most literate people anyway, probably
10 know that. And so the mere fact that Sony has now
11 changed its advertisements, it's too late. They have
12 infected this country with the knowledge that causes
13 copyright infringement, and I think at that point it
14 really doesn't matter any more exactly what the ads
15 say.

16 I might say that under the standard in the
17 trademark area, articulated by this Court in the Inwood
18 case last term, it was suggested by the Court that if a
19 product is sold merely with the implication that it can
20 be used for copyright -- for infringing purposes,
21 trademark infringing purposes in that case, that's
22 sufficient for contributory infringement, at least in
23 the trademark infringement area.

24 I think it's also important to emphasize to
25 the Court that what we're talking about here is an end

1 result after all these machines are used that is no
2 different than the end result of commercial piracy.
3 Now, I'm not suggesting to the Court that an individual
4 Betamax owner in his home is the same as a commercial
5 pirate. But we're not talking in this case about a
6 single individual Betamax owner. We're talking about
7 millions of Betamax owners. And when they get done
8 making their copies, they end up with millions of copies
9 of Respondents' copyrighted works.

10 It just makes no difference that the millions
11 of copies end up in their hands because they make them
12 individually, without seeing or hearing each other,
13 rather than buying them from a film pirate. The end
14 result is exactly the same. And the 1976 copyright
15 statute under which we're now operating was specifically
16 designed to protect copyright owners from mass copying
17 activities in all contexts.

18 I think we've quoted for the Court a provision
19 from the legislative history that I will take a chance
20 at quoting now because I think it's important. Congress
21 said at least three times in the course of the
22 legislative history that isolated instances of minor
23 infringements, when multiplied many times, become in the
24 aggregate a major inroad on copyright that must be
25 prevented.

1 QUESTION: Mr. Kroft, what affect does the
2 mere delayed viewing, as opposed to librarying use, the
3 mere effect of delayed viewing have on the value of the
4 copyrighted work? I mean, presumably the copyright
5 owner has made arrangements to have the program put out
6 over the air waves for people to see. And the mere
7 delayed viewing of the copyrighted work, how does that
8 affect the market?

9 MR. KROFT: I believe, Your Honor, that has
10 several effects, both under existing markets and as yet
11 untapped but emerging markets. First, many of the
12 motion pictures that are shown on television are also
13 available for sale or rental on video cassettes or video
14 discs which are licensed by the copyright owners.
15 They're available for rental, which means generally a
16 person would just want to see it once and then return
17 it. The time shift recording, which I think is what
18 you're referring to, would serve exactly the same
19 purpose.

20 ABC, referred to by Mr. Dunlavey, is now
21 exploring the use of technology that would permit the
22 copyright owner to license home owners the right to
23 record copyrighted works off the air for a fee, which of
24 course is a right within the exclusive control of the
25 copyright owner. That's a market that doesn't exist

1 yet, but with Sony's cooperation modifying its circuitry
2 so that you couldn't record off a scrambled signal, for
3 example, off the air without permission, that's a market
4 that could be available to copyright owners.

5 So the time shifting type of recording that
6 exists now would destroy that kind of market, because
7 people don't have to pay for it now; they certainly
8 aren't going to want to pay for it in the future.

9 There's an additional area, Your Honor, that
10 we haven't really touched on in our briefs. When a
11 television series or a motion picture goes off network
12 and goes to the local stations around the country in the
13 syndication market, it's typically licensed for six
14 runs. I don't think there could be much dispute that a
15 syndicated station will not want to take six runs in a
16 license if it knows that people have already been seeing
17 this product many times before it reaches the local
18 station.

19 QUESTION: Six runs means six times through
20 from beginning to end of the series?

21 MR. KROFT: Yes, the entire series would be
22 shown six times, that's what it means. And motion
23 pictures are generally offered for syndication licenses
24 anywhere from three to eight runs per picture.

25 I think it's also very important to emphasize

1 here what the economics are of what's going on. Just as
2 in commercial piracy, here somebody else is being paid
3 for unauthorized copies of copyright owners' works.
4 Betamax purchasers are paying enormous sums to the
5 Petitioners for the right to make their off-the-air
6 recordings. They're not getting these copies for free.
7 Anybody that thinks that is just laboring under a
8 misconception. They're paying Petitioners and they're
9 paying them very handsomely.

10 Yet Petitioners are not sharing any of their
11 revenues with the copyright owners whose product, whose
12 television motion pictures, make Betamax such an
13 attractive consumer device. The economic reality is
14 certainly that if these machines couldn't be used to
15 record motion pictures and other type of copyrighted
16 entertainment programming owned by the Respondents and
17 the amici who have filed briefs here, there would be a
18 very substantially reduced demand for that product.

19 QUESTION: Well, there'd be a very
20 substantially reduced demand for television sets if
21 there weren't any network television, too.

22 MR. KROFT: I suppose that's true, Justice
23 Rehnquist. But you know, Sony had an opportunity here
24 to work with the copyright owners to devise a jamming
25 system that would prevent copying only of the works

1 owned by the Respondents and others who might object.
2 They abhorred that possibility. They've run from it.

3 Now, to me that proves that they think that
4 our product is the most important product to people that
5 buy Betamax in terms of what they want to record.

6 QUESTION: How is the householder to know, how
7 is it going to find out, if he has one of these gadgets
8 and wants to make a copy? Let's say it's a National
9 Geographic or a Smithsonian, and assume for the moment
10 that they have no objection to being copied, or whether
11 it's something where your clients would object. How are
12 they going to find out?

13 Must they assume that everything is
14 copyrighted and that copying is forbidden unless some
15 announcement is made that it's open to copy?

16 MR. KROFT: I think that's the presumption of
17 the copyright law, Your Honor. Once a product is
18 protected by copyright, under the lower court cases --
19 and this Court has never reached that issue -- there is
20 a presumption that unauthorized use is prohibited. And
21 I think it may be appropriate at this point to talk a
22 little bit about what's copyrighted and what's protected
23 on the air and what is not.

24 QUESTION: Well, isn't there some requirement
25 that copyrighted material must be identified as such in

1 order to have its protection?

2 MR. KROFT: No, Your Honor, that is not
3 correct. Under the current Copyright Act, a work which
4 is fixed in a tangible form becomes immediately
5 protected by copyright at the moment of its creation.
6 That's unlike the old scheme that we operated under up
7 until 1976, where you had to have publication with
8 notice. That's no longer required.

9 As soon as there's creation of the copyrighted
10 work, it's protected by copyright. That copyright
11 protection subsists even if there's never even
12 registration, for example.

13 QUESTION: Doesn't that -- does that go beyond
14 the time when the copyright may be applied for?

15 MR. KROFT: Well, the -- Your Honor, I think
16 you -- Mr. Justice, Chief Justice, you're talking about,
17 when you say "applied for," you're talking about
18 registering the copyrighted work with the Copyright
19 Office. Registration only affects certain remedies that
20 a copyright owner may have. It does not affect the
21 substance or the existence of the copyright.

22 For example, you must register the work before
23 you can bring suit on it. But your inability to bring
24 suit doesn't mean that you lose your copyright and it
25 doesn't mean you lose your ability to object, to tell

1 somebody, for example, that you don't want them copying
2 your product.

3 So I think Petitioner's counsel is laboring
4 under a bit of a misconception when he says that because
5 some local stations with some of their material erase
6 the only copies that they keep of their local television
7 programming and therefore don't register it -- that
8 doesn't mean there's no copyright protection. That
9 copyright protection continues.

10 And in answer to your -- in further answer to
11 your question, Mr. Chief Justice, I think it would be
12 incumbent on Sony, who is selling a machine that's used
13 primarily, by their own admission, to record television
14 programming, and by their own admission the majority of
15 which would be copyrighted material, to let the public
16 who's going to buy this machine know what can be
17 copied. That shouldn't be the burden of the copyright
18 owner; it should be the burden on the parties creating
19 this problem.

20 I want to emphasize something else. We've
21 been talk -- I've heard some discussion earlier about
22 the findings below and what did the Ninth Circuit do
23 with them. As I read the Ninth Circuit's opinion -- and
24 I feel very comfortable in telling the Court this --
25 every thing in the Ninth Circuit's opinion is based

1 either on a specific finding of the lower court, even
2 though maybe not referenced as such in the Court of
3 Appeals' opinion, or on admissions by the Petitioners.

4 I have seen no reversal or upsetting of a
5 specific finding of fact in the trial court by the Court
6 of Appeals which is at all relevant to this proceeding
7 or which exists at all. Now, probably --

8 QUESTION: Well, as long as you don't call the
9 staple article finding a finding of fact.

10 MR. KROFT: As long as I don't call staple
11 article a finding of fact, although as I said, Mr.
12 Justice White, I believe that it really doesn't matter
13 whether it is or it isn't, because you have to have the
14 further finding.

15 QUESTION: But it did disagree on that.

16 MR. KROFT: It did disagree with the
17 analysis. But actually, Mr. Justice White, what it said
18 was the staple article doctrine doesn't remotely raise
19 copyright problems. The Ninth Circuit didn't go on in
20 very great detail to tell us what it meant by that, but
21 it might have meant that there was no finding of
22 substantial non-infringing use and therefore it really
23 didn't matter whether you call it a staple article or
24 not.

25 With respect to the fair use question, this

1 issue has to be examined in the context of the overall
2 statutory scheme. As we've discussed in our briefs --
3 and I'm not going to take the Court through chapter and
4 verse now -- Congress gave greater protection to motion
5 pictures than to any other works. It did not explicitly
6 state either in the legislative history or in the
7 statute itself that home recording of motion pictures
8 was permitted.

9 Given this special attention to motion
10 pictures and the absence of any statement that home
11 recording is permitted, we submit that any suggestion
12 that Congress nevertheless intended a home video
13 recording fair use exemption is just impossible to
14 accept.

15 QUESTION: Mr. Kroft, may I ask you a question
16 here. Do you think the legal issue would be different
17 if instead of it being video tape recorder it were just
18 tape recording of music programs, say, strictly sound?

19 MR. KROFT: The fair use issue, Mr. Justice
20 Stevens?

21 QUESTION: Yes, just in the infringement,
22 forgetting the contributory infringement, which would be
23 quite different, I think.

24 MR. KROFT: I think that the analysis would be
25 different because we're faced with some rather loose

1 language that occurred in 1971 with respect to audio
2 tape recordings. I don't think that issue need be
3 reached in this Court, but I can make an argument, and I
4 think probably very persuasively, that audio tape
5 recording is an infringement under the new Act.

6 But whether it is or it isn't, it's our
7 position that makes no difference to the issues in this
8 case.

9 QUESTION: Well, I just was trying to find out
10 whether you thought the issue was different. I
11 understand what your view would be on the merits of the
12 issue.

13 MR. KROFT: The issue --

14 QUESTION: Applying the statutory language in
15 the fair use section, wouldn't it apply the same as to
16 the infringement itself?

17 MR. KROFT: Yes, and the music interests have
18 very forcefully argued that that should be so. They do
19 have to contend with that language in 1971, which we
20 don't believe we have to contend with in the video
21 area.

22 QUESTION: Let me ask you this, then. On the
23 first of the four statutory requirements of fair use, do
24 you think that, just confining it to that for a moment,
25 that the private copying within the home is of a

1 commercial nature within the meaning of the statute, for
2 time shift purposes?

3 MR. KROFT: I suppose if I wanted to get
4 philosophical with you, Mr. Justice --

5 QUESTION: I understand it can have commercial
6 ramifications.

7 MR. KROFT: Right.

8 QUESTION: I understand the economics of it.
9 But do you think within the meaning of the statute it
10 would be regarded as commercial?

11 MR. KROFT: It probably wouldn't. But in that
12 statute it also wouldn't be determined to be
13 noncommercial educational purposes, which is the
14 counterbalance to the commercial.

15 QUESTION: I understand.

16 MR. KROFT: But I don't think in general you'd
17 call it commercial, Mr. Justice.

18 QUESTION: May I ask you one other question,
19 about the fourth prong of the statute. Do the findings
20 answer the question on this record whether the -- what
21 the effect on the potential market for your copyrighted
22 materials is? Is it plus or minus?

23 MR. KROFT: I think the findings establish
24 that there will be an adverse effect. The findings are
25 the following, Justice Stevens:

1 One, the district court repeatedly found that
2 Betamax recordings will compete with licensed versions
3 of Respondents' works in many markets, particularly the
4 emerging market for the sale and rental of cassettes and
5 disks. I don't think we gave complete transcript
6 references in our brief. They're found at pages 78,
7 107, 112, and 116. Now, obviously the Respondents are
8 not going to always prevail in that competition, and I
9 think that finding itself is sufficient to show an
10 adverse effect.

11 The district court also expressly found that
12 Betamax copies serve the same function as the original,
13 and we have a doctrine of law in the fair use cases that
14 when a copy and the original serve the same function
15 then there is a detrimental, a potential detrimental
16 effect established for fair use purposes. That's not
17 just a mechanical sort of made up rule. It's based on
18 common sense.

19 QUESTION: I understand. There are arguments
20 why you would be harmed and there are also arguments to
21 the contrary. And what I am really asking is, do you
22 think that one can read the district court's opinion as
23 saying what the net result is one way or the other?

24 MR. KROFT: I don't believe so.

25 QUESTION: I couldn't myself and I just was

1 wondering what your view was.

2 MR. KROFT: I don't believe so. I believe
3 that what happened was the district court reversed the
4 burden of proof, which is quite clearly under
5 established case law on the Petitioners, put it on the
6 Respondents and said the Respondents didn't meet that
7 burden.

8 But if he had looked at what the Petitioners'
9 proof was, because he said it's so speculative in his
10 mind as to what's going to happen in the future, he
11 couldn't have found the Petitioners carried their
12 burden, either.

13 QUESTION: Mr. Kroft, may I ask a
14 hypothetical. Assume that a film is copied solely for
15 use in a drama class at college. Would that be a fair
16 use?

17 MR. KROFT: There are certain guidelines, Your
18 Honor, that Mr. Dunlavey alluded to, which are a subject
19 of agreement between copyright owners and educators,
20 which give the copyright owners the kind of control
21 they're entitled to under the Copyright Act, that might
22 or might not permit that activity. I'm sorry, I'm not
23 familiar enough with those guidelines.

24 QUESTION: Would that be close to Williams
25 against Wilkins?

1 MR. KROFT: I don't think so, Your Honor. I
2 don't believe --

3 QUESTION: The copying there was for a
4 scientific use. Would it really be different for use in
5 a drama class in a college, for educational use?

6 MR. KROFT: I don't think it would be
7 different in the sense that it would be for a salutary
8 purpose of furthering education, science, research.
9 Medical research was the example in Williams and
10 Wilkins. But those are far different than this case --

11 QUESTION: Right.

12 MR. KROFT: -- where all we have is copying
13 for home entertainment.

14 QUESTION: I'll ask you the easy one. I have
15 the same film for use at my clerks reunion. Would that
16 be fair use?

17 MR. KROFT: Your Honor, I don't think it is a
18 fair use.

19 (Laughter.)

20 MR. KROFT: When's the reunion?

21 (Laughter.)

22 MR. KROFT: With respect to the staple article
23 of commerce --

24 QUESTION: Let me ask you, while we've got you
25 stopped: I can see the point of some conceivable

1 damage, the injury, where it is libraried, in this
2 verbalizing, verbing, making a verb out of that noun,
3 "librarying." But you're going to be out for dinner at
4 7:00 o'clock when there's a program on and then you want
5 to see it when you get home at 11:00 or 12:00 or the
6 next evening. Where's the injury and how do you measure
7 it?

8 MR. KROFT: Mr. Chief Justice, as I said, many
9 --

10 QUESTION: If there is an injury.

11 MR. KROFT: -- many motion pictures that are
12 on television are available for rental in cassette
13 form. The injury is you wouldn't be -- Respondents
14 wouldn't be --

15 QUESTION: Not all, though.

16 MR. KROFT: Not all.

17 Respondents wouldn't be able to rent those
18 pictures. As I also mentioned a moment ago, there
19 appears to be an emerging market, which the Registrar of
20 Copyrights said may be even more important than existing
21 markets when you examine this aspect of the fair use
22 defense, and that is the opportunity of the copyright
23 owner to license the home owner who's out for dinner the
24 right to copy the Respondent's work off the air, by
25 using the proper technology for a fee. And what's being

1 interfered with here is the opportunity to ever get to
2 that point because now people are doing it for no fee.

3 I'm running out of time. There are a couple
4 of things I would like to mention very quickly. With
5 respect to this argument that there is consent by
6 certain people to record off the air, Mr. Justice White
7 alluded to the fact that a motion picture doesn't just
8 spring out of the air. It's based on a lot of
9 underlying material: the music, which is copyrighted;
10 written work, such as books and plays, which are
11 copyrighted.

12 And unless you -- and they're all separately
13 copyrighted. And unless the Petitioner or the copier
14 has the permission of the owners of all of the works
15 that are embodied in that motion picture, there is no
16 valid consent to the recording of that material.

17 But even if there were consent to some
18 material, I think it's very important to emphasize, as
19 the Ninth Circuit did, that just because some copyright
20 owners don't choose to enforce their rights doesn't mean
21 that other copyright owners who choose to enforce theirs
22 cannot do so. And when you look at how much is
23 supposedly consented to, you find out it's almost
24 nothing compared to what isn't.

25 Petitioners' own survey showed that less than

1 nine percent of all recordings consist of sports,
2 religious and educational programming, and that's all
3 sports, religious and educational programming, not just
4 the programming owned by the few witnesses that were
5 brought to the trial by the Petitioners. In contrast,
6 over 80 percent of all the recordings are of
7 entertainment programming, which was defined in
8 Petitioners' own survey to mean motion pictures,
9 television series and game shows.

10 QUESTION: Well, a lot of sports programs are
11 copyrighted. At least they announce that they are.

12 MR. KROFT: They are copyrighted, Mr. Justice
13 Rehnquist, and you can't copy those programs, based on
14 the evidence that the Petitioners brought to the trial.
15 Because if you watched the Redskins game on Saturday and
16 you heard the little announcement, it said that there
17 could be no use made of that broadcast without the
18 permission of the Washington Redskins and the National
19 Football League.

20 Only the National Football League's Office of
21 the Commissioner gave any testimony on this issue, and
22 the records show that they didn't discuss this issue
23 with any of the individual teams, for example the
24 Washington Redskins. So there's not enough consent to
25 allow even that kind of copying in this record.

1 I think we should leave the staple article of
2 commerce and the contributory infringement issue with
3 this thought: I think that Petitioners conceded in
4 their brief, and I believe it very clearly to be the
5 law, that if there's knowing contribution to the direct
6 infringement involved here, you don't ever have to reach
7 the staple article of commerce argument. That was an
8 approach that was approved by this Court in the Kalem
9 Brothers case.

10 It's exactly the approach that is followed in
11 Section 271 of the patent statute, where very
12 specifically the patent statute says that when a
13 defendant causes, furthers, or urges the use of his
14 product, which might otherwise be a staple, in an
15 infringing way then he is liable for patent infringement
16 under Section 271(b) even if you call that product a
17 staple article.

18 QUESTION: Mr. Kroft, let me ask, suppose it
19 were perfectly clear that 50 percent of the material was
20 not copyrighted or copyrightable that was coming over
21 the air and 50 percent was, and that all the 50 percent
22 of the owners of the copyright would object. Now,
23 suppose that that were the case.

24 MR. KROFT: If that were the case, Your Honor,
25 I would submit that under the test laid down in the

1 Inwood case Sony would be selling this product with
2 knowledge or reason to know that it would be used to
3 record copyrighted works at least sometimes and would
4 therefore be --

5 QUESTION: You think that would satisfy the
6 requirements of showing a contributory infringement, if
7 you just knew that it was possible?

8 MR. KROFT: If you just thought that there
9 were a few unscrupulous people out there that couldn't
10 resist the temptation, no, I don't think that would be
11 enough, Justice White. But if you knew as a matter of
12 belief and encouragement and instruction in your
13 instruction manuals that that would happen, I think it
14 would be enough.

15 QUESTION: When you use the term
16 "unscrupulous," do you include the time shift users?
17 You're perfectly free, because I don't have one of these
18 things.

19 (Laughter.)

20 QUESTION: Is that an unscrupulous user?

21 MR. KROFT: I don't label home owners in this
22 context as unscrupulous. I think they've been duped by
23 the Petitioners into believing that what they're doing
24 is legal.

25 QUESTION: They think they've paid for it,

1 too.

2 MR. KROFT: And they haven't paid the
3 copyright owner, Mr. Justice White.

4 Thank you.

5 CHIEF JUSTICE BURGER: Thank you, gentlemen.
6 The case is submitted.

7 (Whereupon, at 2:03 p.m., the case in the
8 above-entitled matter was submitted.)

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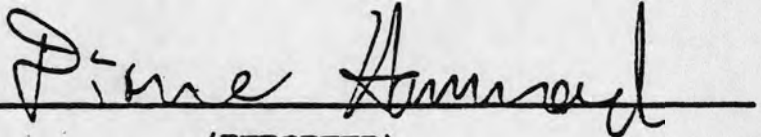
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Sony Corporation of America, Et Al., Petitioners
v. Universal City Studios, Inc., Etc., Et Al. # 81-1687

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BY

A handwritten signature in dark ink, appearing to read "Peter Hammar", is written over a horizontal line.

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