

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

IN THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1687

TITLE SONY CORPORATION OF AMERICA, ET AL., Petitioners,
v. UNIVERSAL CITY STUDIOS, INC., and WALT DISNEY
PRODUCTIONS, Respondent.

PLACE Washington, D. C.

DATE October 3, 1983

PAGES 1 thru 52

* SEE ALSO,
OT 1982, vol. 12

AR
ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

2

3 - - - - - x

4 SONY CORPORATION OF AMERICA, ET AL., :

5 Petitioners, :

6 v. : No. 81-1687

7 UNIVERSAL CITY STUDIOS, INC. and :

8 WALT DISNEY PRODUCTIONS, :

9 Respondents. :

10 - - - - - x

11

12 Washington, D.C.

13 Monday, October 3, 1983

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:51 a.m.

17

18 APPEARANCES:

19 DEAN C. DUNLAVEY, Esq., Los Angeles, Cal.; on behalf of
20 Petitioners.

21

22 STEPHEN A. KROFT, Esq., Beverly Hills, Cal.; on behalf
23 of Respondents.

24 - - -

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

ORAL ARGUMENT OF:

PAGE

DEAN C. DUNLAVEY, Esq.,

3

on behalf of Petitioners

STEPHEN A. KROFT, Esq.,

20

on behalf of Respondents

DEAN C. DUNLAVEY, Esq.,

47

on behalf of Petitioners -- rebuttal

- - -

P R O C E E D I N G S

1
2 CHIEF JUSTICE BURGER: Mr. Dunlavey, you may
3 proceed whenever you're ready.

4 ORAL ARGUMENT OF DEAN C. DUNLAVEY, ESQ.,
5 ON BEHALF OF PETITIONERS

6 MR. DUNLAVEY: Mr. Chief Justice and may it
7 please the Court:

8 Since the advent of free off-the-air
9 television in the United States in about 1948, it has
10 become what is undoubtedly today's most important
11 communication medium. There has been a lot of technical
12 progress since all of that time, which most of us lived
13 through. The small screen has gone to the large screen,
14 black and white has gone to color, tubes have gone to
15 transistors, and live broadcasting has gone to delayed
16 broadcasting using pretty much the same VTR that we're
17 concerned about here this morning.

18 The Court can remember that the early
19 television shows all had to be broadcast live because
20 there was no means of recording them. As a matter of
21 fact, in 1976 Sony got an Emmy from the National Academy
22 of Television Arts and Sciences for the VTR, which had
23 enabled delayed broadcast of an earlier recorded show.

24 And now progress has continued. That same VTR
25 has been put in the hands of the public so that, instead

1 of a necessary live viewing, there can be a delayed
2 viewing. And the question this morning is: Can the
3 copyright owners or a few of them who are profiting by
4 exploiting their product on free television arrest this
5 latest progress of science?

6 For the Court's information, by the end of
7 this year there are expected to be something like 9-1/2
8 million video tape recorders in television households.
9 That is at or near at or past the ten percent mark of
10 television households in America.

11 Now, this case has left us with three issues
12 that I would like to address this morning. The first,
13 of course, is does the homeowner commit a direct
14 infringement when he records the program at home with
15 his VTR? In short, when he makes the tape has he
16 committed a direct infringement?

17 The answer to that lies in the fair use
18 section. That's Section 107 of the Copyright Act, and
19 that's a discretion-type statute which tells the court
20 that you can apply common sense to any instance where
21 there seems to be literal infringement and if it's not a
22 fair result then it doesn't have to be treated as
23 infringement.

24 The Ninth Circuit subdivided that into two
25 questions. First of all, it said that fair use has to

1 be a productive use, like the first author using a
2 second author's works -- a second author using a first
3 author's works in creating something new. The converse
4 of that is called intrinsic, where you're using a
5 copyrighted article in much the same way or exactly the
6 same way as you would have used the original. The Ninth
7 Circuit says it has to be productive as a matter of
8 law.

9 It also left us with a factual question as to
10 what is the effect vis a vis the copyright owner of the
11 home recording, because if you're testing for fair use
12 the effect on the copyright owner is probably the most
13 important.

14 The third test, assuming, just assuming that
15 home recording is direct infringement, the question is
16 has there been contributory infringement by the VTR
17 suppliers, manufacturers and suppliers, for having done
18 nothing more than to make the machine available.

19 Now, taking those three ad seriatim, the
20 productive test is best answered if you could find some
21 indication on the part of Congress that a productive use
22 was in fact contemplated among the variety of fair
23 uses.

24 QUESTION: Well, Mr. Dunlavey, would you agree
25 that Congress when it kind of codified the fair use

1 doctrine intended to keep that doctrine pretty much as
2 it had been developed by the courts?

3 MR. DUNLAVEY: It said it. The answer is yes,
4 but they did not intend that it should go rigidly along
5 the lines that it had been going. They said we're not
6 intending to change it, but they also indicated that
7 common sense has been the rule in the past and should
8 continue to be in the future. So the fair uses in the
9 future don't have to be the same things that have been
10 found to be fair use in the past.

11 QUESTION: Isn't it accurate to say, with
12 respect to the law at the time Congress codified it,
13 that fair use required some sort of a productive use,
14 like one author -- a book reviewer quoting a text in a
15 book review or something like that?

16 MR. DUNLAVEY: I submit, Justice Rehnquist,
17 that that was most definitely not Congress' intention,
18 and I have three examples to put before Your Honor to
19 support that.

20 First of all, remember the Williams & Wilkins
21 case had been an intrinsic kind of usage, where medical
22 articles were Xeroxed and distributed to doctors in lieu
23 of originals. That was an intrinsic use.

24 QUESTION: It was affirmed by an equally
25 divided Court here.

1 MR. DUNLAVEY: Which left it the law of the
2 land, at least in the Court of Claims. So it was a very
3 well known case of intrinsic use just at the time
4 Congress was passing the new Act, and Congress made no
5 indication that it disapproved of the outcome of that
6 case. So arguably Williams & Wilkins was in Congress'
7 mind and they accepted the intrinsic use.

8 But I can do better than that. In the 1975
9 Senate report at pages 65 and '6, it talked about the
10 school whose classroom schedule does not synchronize
11 with a broadcaster's television schedule. It means that
12 the time the broadcaster is putting out an educational
13 program that the students want to see, the students
14 aren't in class.

15 That specific example was in the Senate report
16 and it said that that school could record off the air
17 the broadcast for delayed viewing at a time when class
18 was in session and that would be an example of fair
19 use. And there we've killed four birds with one stone
20 because, first of all, that's an intrinsic use and
21 Congress is approving it.

22 Secondly, it's the copying of an entire work
23 and Congress is approving that.

24 Thirdly, the purpose is time shift and
25 Congress is approving that.

1 And lastly, it's for convenience, the very
2 same reason that the homeowner is doing it. He can't
3 see the show when it's broadcast, so he records it for
4 later.

5 But that still isn't the end of it, because in
6 the 1976 Conference Committee report they acknowledge
7 that the educators and the copyright owners had
8 negotiated and would continue to negotiate on what were
9 called guidelines, and those were to be examples of fair
10 use. And the conference report said that whatever these
11 people agree upon will be regarded as part of the
12 conferees' understanding of fair use.

13 QUESTION: Do you think that involves any
14 problem of unlawful delegation?

15 MR. DUNLAVEY: That's occurred to me and I
16 can't answer it. But fortunately, Universal has come
17 along and agreed to guidelines, and therefore Universal,
18 of all people, is not in a position to claim that there
19 are not of validity.

20 In 1981 guidelines were adopted for off the
21 air recording for educational purposes. They
22 encompassed any broadcast that was for the use of the
23 general public without charge. You could copy it, show
24 it twice within the next ten days, either in the
25 classroom or at home, and then you were supposed to

1 erase it after 45 days.

2 Very clear Congressional precursor of the time
3 shift concept. So it's a reinforcement of the intrinsic
4 use, the entire work, time shift and convenience. And
5 who agreed to it? Wouldn't you know, it was Universal
6 and a large share of their amici who were on the amici
7 brief saying they now protest. So they are all on
8 record as having agreed to these standards as satisfying
9 fair use.

10 So I would submit that the Ninth Circuit by
11 one of those three, two of them or all three of those
12 has erred because it has said productive is a sine qua
13 non. It obviously is not.

14 QUESTION: Mr. Dunlavey, I suppose of course
15 the Court doesn't have to resolve this question in order
16 to resolve the contributory infringement question. The
17 Court could resolve it as a means of getting to the
18 contributory infringement question, but does it have
19 to?

20 MR. DUNLAVEY: Justice O'Connor, that's
21 precisely right. There are two roads to Rome. You can
22 say that there is direct infringement but nevertheless
23 there was no contributory infringement or, as you have
24 just suggested, you can say, whether or not there was
25 direct infringement, and we bypass that question, there

1 clearly was nothing that constitutes contributory
2 infringement. So Your Honor is correct, you can resolve
3 this case without resolving whether home use is
4 infringement.

5 Now, if you're going to make the conventional
6 fair use test, assuming that it can be fair use, the
7 question is whether it is, the most important test of
8 all by common sense and by general acknowledgment is
9 what's the effect on the copyright owner. Because I
10 don't think anybody has trouble with the concept that
11 you really shouldn't be using the copyright owner's
12 works against him, all other things being equal.

13 So the question is, recognizing that the
14 copyright owner for some reason doesn't want you to do
15 it -- you have to assume infringement -- but recognizing
16 that there may be other reasons why he should have to
17 put up with it, the test is first of all let's see what
18 is the effect on him.

19 Now, the Ninth Circuit with no explanation
20 simply says, it seems clear that home recording does
21 tend to diminish the potential market for the
22 Universal-Disney works. No explanation, just ipse
23 dixit.

24 Conversely, the district court had said
25 several things. Firstly, it said that Universal-Disney

1 admit there's been no harm to date. That's a fact.
2 There's no argument about that. At the time of the
3 trial, which was several years after most of the
4 recordings, there wasn't a vestige of harm.

5 Then the question comes about predicting the
6 future, and the district court listened to the witnesses
7 and the surveys and came to the conclusion that there
8 was no likelihood of prospective harm and there was no
9 reduction in the potential market for Universal's and
10 Disney's.

11 Now, the district court did that after hearing
12 four general kinds of complaints by Universal-Disney.
13 First of all, Universal-Disney said, the money that we
14 get for putting our shows on television is determined by
15 the ratings systems, and the bigger the audience the
16 more we make. And if the VTR owner joins the audience
17 but the ratings system doesn't pick him up, then we
18 don't get paid, so we've been hurt.

19 The district court listened to a ratings
20 expert and concluded that the VTR owners will be
21 measured as part of the broadcast audience by the
22 ratings services, and he was dead right. Nielson counts
23 the VTR set in a household just the same as it counts a
24 TV set, so the audience of the VTR owners is measured.

25 Secondly --

1 QUESTION: Can I interrupt there? You're
2 telling me that's done now or was that done at the time
3 of trial?

4 MR. DUNLAVEY: It was either being done at the
5 time of trial or was just on the verge. It is being
6 done now.

7 QUESTION: Well, let me put it differently.
8 Did the district court find that it was being done?

9 MR. DUNLAVEY: I think the district court said
10 that it is being done. It said they had the capability
11 of doing it, and then at another point I believe it said
12 that they were doing it.

13 QUESTION: I thought he said that they could
14 do it. I didn't think he said they did it. In fact, I
15 don't see how they could have made the argument that
16 they made if they were doing it. They were saying they
17 were losing the benefit of these counts because it
18 wasn't being done, I thought. They were losing the
19 benefit, you know, in their ratings of the people who
20 heard it only on a time shift basis because the time
21 shifts weren't being considered by Nielson and similar
22 people.

23 Didn't they argue that?

24 MR. DUNLAVEY: Then argued it then and they
25 still argue it.

1 QUESTION: Well, if they make that argument
2 then doesn't the record have to have indicated that as
3 of the time of trial -- I don't know what's happening
4 now -- the record did not support what you just said?

5 MR. DUNLAVEY: No, the fact that they make the
6 argument today certainly does not indicate that the
7 record stood in their favor at the time of trial. The
8 fact -- I'm sorry, I don't want to take a position and
9 have bitten off a little bit more than I can chew.

10 I know that the district court said that they
11 have the ability to do it.

12 QUESTION: Right.

13 MR. DUNLAVEY: I think the district court may
14 have said they are doing it. But if not, the fact is
15 that they're doing it now, so that the district court's
16 conclusion was right.

17 QUESTION: But I take it you would also argue
18 that the mere fact that they have the ability to do it
19 should be an adequate answer to the argument?

20 MR. DUNLAVEY: It should be an adequate
21 answer. The better argument, of course, is that they
22 are doing it.

23 QUESTION: If we know that.

24 MR. DUNLAVEY: Another complaint that they
25 made was that, by virtue of having recorded something at

1 home, you'll take a man out of the potential market for
2 buying that same work if it's ever put in a prerecorded
3 cassette. The district court at that point said,
4 Universal-Disney stands ready to make prerecorded tapes
5 available. At that point they said they weren't doing
6 it because they weren't going to help a technology that
7 they were fighting.

8 But the fact of the matter is, and it's common
9 knowledge and judicial notice today, that the
10 prerecorded movie is available across the country, has
11 become very popular. In fact, the use of the home VTR
12 now constitutes 30 percent of the primary reason why
13 people are using video tape recorders, 30 percent.

14 They still complain of librarying, Justice
15 Stevens. But the fact of the matter was at the time of
16 the trial there was no evidence of any librarying of
17 their works. The district court said specifically that
18 there'll be no librarying to any significant extent.
19 And today, the current use of the VTR, 60 percent is
20 primarily for the purpose of time shift. So that
21 squeezes librarying down into what's left of 60 plus 30
22 or 90 percent, the difference between that and 100
23 percent.

24 So, although they still argue librarying, the
25 fact was then and the fact is now that it just isn't

1 taking place and they're not being hurt by it.

2 Finally, they complained that there would be a
3 decrease in the future audiences of their television
4 product and their motion picture product. In fact, Mr.
5 Sheinberg, who was the President of Universal, took the
6 stand and in all seriousness said this will be the
7 ruination of the movie industry.

8 The district court there said that there was
9 in fact no likelihood of a decrease in the movie or
10 television audience. Once again, the district court is
11 dead right. MCA has just reported its highest six
12 months revenue in history.

13 And right after Mr. Sheinberg came Mr.
14 Wasserman, who's the head of MCA and Universal, and gave
15 his testimony, often quoted, that forecasts of doom in
16 the entertainment industry had historically been wrong.

17 So the summary on the effect test is that no
18 one is viewing the home recordings off the air except
19 members within the intended audience at the time of the
20 broadcast and Universal has been amply paid for that
21 audience. There is no sense in wandering off into a
22 hypothetical assumption of horrors as to what might be
23 done with the tapes. The fact of the matter is that
24 they're staying within the household, only people within
25 the intended audience are seeing them and then they're

1 being erased, and absolutely no harm is being done.

2 QUESTION: Could all of the horrors that are
3 postulated that you've just referred to be corrected or
4 dealt with by Congress? If the parade of horrors came
5 to be true, could Congress deal with that?

6 MR. DUNLAVEY: Yes, I suppose Congress could
7 deal with any of these problems. But having given the
8 courts the fair use statute, the courts can deal with
9 this one equally one, perhaps better.

10 The prerecorded cassette has been a bonanza in
11 the hand of the studios. The net effect on the studios
12 of the VTR has been a substantial benefit, certainly no
13 detriment. So the effect test does not weigh in the
14 copyright owner's favor at all and the public policy of
15 letting people copy what they can off the air and
16 thereby enhance their ability to get information
17 certainly should prevail.

18 And that brings us to the third of the
19 questions, the staple item of commerce. That is a
20 transplant to a great extent from the copyright law, but
21 it's also founded in common sense. If you make
22 something that people can use for legitimate purposes,
23 there is no legal justification in holding you
24 responsible if somebody somewhere uses it for an
25 improper purpose.

1 Now, I'm not conceding by any means --

2 QUESTION: If we agreed with you on that we
3 wouldn't need to reach the questions you've been talking
4 about, is that it?

5 MR. DUNLAVEY: That has crossed my mind,
6 Justice White. But let's look at the fairness.

7 QUESTION: Well, isn't that right? You say
8 it's crossed your mind. I'm wondering, do we have to
9 reach the questions you've been discussing if we agreed
10 with you that this is a staple article of commerce and
11 that there's no contributory infringement?

12 MR. DUNLAVEY: If you agreed with me you would
13 think this case would be over.

14 QUESTION: Yes. But we wouldn't have to talk
15 about fair use at all, would we?

16 MR. DUNLAVEY: Then may I review the innocent
17 uses, because --

18 QUESTION: Well, we wouldn't have to talk
19 about fair use at all, would we, if we agreed with you
20 that this is a staple article of commerce?

21 MR. DUNLAVEY: Justice White, that's correct.

22 QUESTION: Has any court ever so held so far
23 as the copyright is concerned?

24 MR. DUNLAVEY: On the staple items theory?
25 Nobody to my knowledge who has made a product has ever

1 been held as a contributory copyright infringer for
2 having made and sold that product.

3 QUESTION: That isn't my question. My
4 question was, has the staple article of commerce patent
5 law principle ever been applied in a copyright context?

6 MR. DUNLAVEY: By direct analogy, I suppose
7 the answer is no. But I think back to Justice Holmes in
8 the Kalem case, where he was using the very same
9 reasoning and the very same words and the very same
10 conclusion.

11 Now, if there are non-infringing uses they
12 certainly are not going to have the VTR available to
13 pursue those non-infringing uses if the manufacturer has
14 to make good for somebody who uses it improperly. No
15 manufacturer can stand that kind of risk.

16 For non-infringing uses we have the guidelines
17 and the Senate report. We also have Universal's
18 publicly taken position that they will never sue a VTR
19 owner, no matter what he copies. Now, that has to have
20 some impact on their position, Justice White. They
21 simply should not be allowed to tell the public that
22 they can copy at random and we'll hold Sony responsible
23 for it. That isn't equitable.

24 And the district court, adding to those,
25 referred to the considerable testimony at trial about

1 the legitimate copyings -- that is, I shouldn't say
2 legitimate because that implies some isn't -- about the
3 unchallenged copying. We had 18 witnesses at that
4 trial. We had 482 pages of reporter's transcript, which
5 was 67 percent of our case in chief, that had to do with
6 unchallenged consent-type uses of the VTR.

7 So the Ninth Circuit has erred when it says
8 that the VTR is not suitable for substantial
9 non-infringing use. It most certainly is.

10 But even more than that, at the last argument
11 we got into a consideration of, supposing we took a poll
12 of copyright owners and 50 percent approved and 50
13 percent didn't, or more than 50 or less than 50. On
14 reflection, I would like to submit to the Court that
15 it's not up to the copyright owners to decide for the
16 American public whether we're going to have delayed
17 television viewing.

18 If you want to play football, you've got to
19 give up your personal rights against assault and
20 battery. That's just the rule of the game. By the same
21 token, if you want to make money off the public
22 television you should have to bend with respect to your
23 copyrights, and the copyright owners should not be able
24 to tell the American public what they can or cannot do
25 when it comes to progress in the television science.

1 Now, if I may, Mr. Chief Justice, if there are
2 no further questions I'll reserve the balance of my time
3 for rebuttal.

4 CHIEF JUSTICE BURGER: Very well.

5 Mr. Kroft.

6 ORAL ARGUMENT OF STEPHEN A. KROFT, ESQ.,

7 ON BEHALF OF RESPONDENTS

8 MR. KROFT: Mr. Chief Justice and may it
9 please the Court: .

10 Underneath all the legal arguments and legal
11 labels that we've thrown around in this case, the case
12 is really very simple and straightforward. Petitioners
13 have created a billicn dollar industry based entirely on
14 the taking of somebody else's property, in this case
15 copyrighted motion pictures, each of which represents a
16 huge investment by the copyright owners.

17 And contrary to what Petitioners would have
18 this Court believe, Respondents are not the only
19 copyright owners who have raised express objections to
20 these activities. The Court has before it amicus briefs
21 raising such objections from over 70 copyright owners,
22 including such people as the CBS television network, the
23 producers of approximately 90 percent of the programs on
24 prime time network viewing, and many, many producers of
25 educational and cultural programs, such as the

1 Children's Television Workshop, the Lincoln Center for
2 the Performing Arts, and the producers of the National
3 Geographic series and the Smithsonian Institute
4 specials.

5 Despite what Petitioners again would have this
6 Court believe, the record establishes beyond question
7 that the Petitioners are selling and know that they're
8 selling an instrument for use in infringement. They
9 recognized the legal problem in 1965. They continued to
10 wrestle with it up until -- and they're still wrestling
11 with it up until today.

12 QUESTION: Suppose the evidence in the case
13 put on by witnesses that your friend referred to
14 indicated, just suppose it indicated, that about ten
15 percent of all programming could be copied without any
16 interference by the producer or whoever owned the
17 program. Suppose that there was at least ten percent
18 that a homeowner could copy without violating anybody's
19 copyright.

20 Would you think that would make any difference
21 in this case?

22 MR. KROFT: I don't think that would make any
23 difference. I think ten percent is too small of an
24 amount.

25 QUESTION: Well, what about 50?

1 MR. KROFT: I'll go you one better, Justice
2 White. If there was only one show on the air that were
3 copyrighted and which could not be copied without
4 objection, if the Petitioners sold this device with
5 knowledge that it would be used to copy that show, under
6 the Inwood test laid down by this Court in the trademark
7 area I believe the Petitioners would be liable.

8 However, I would concede that I think it might
9 be very difficult for us to prove if there was only one
10 show.

11 QUESTION: Well, let's take 50 percent. You
12 certainly would argue that Sony would be liable if it
13 sold this machine knowing that homeowners would copy a
14 good many of the 50 percent that are copyrighted, in
15 which there would be an infringement.

16 MR. KROFT: Yes, I would, and the reason I
17 would --

18 QUESTION: And you don't -- is this because
19 you say the staple article of commerce doctrine doesn't
20 apply at all, or that this is just the way it should be
21 applied?

22 MR. KROFT: No, I'm saying it doesn't apply at
23 all and it doesn't apply at all for a number of
24 reasons. The first reason it doesn't apply is because
25 when the Petitioner sells this product with knowledge or

1 reason to know, under the cases decided by this Court,
2 that it will be used in an infringing manner -- and with
3 the 50 percent test that would be certain knowledge --
4 then the Petitioners are held liable.

5 They're also held liable, even if they don't
6 have that knowledge, if they sell the product and
7 suggest even by implication that the product be used for
8 an infringing purpose.

9 QUESTION: Well, what if on every set they
10 have -- the owner's manual has it at the top and at the
11 bottom and on each margin: Do not use this to record
12 copyrighted works.

13 MR. KROFT: I think that that would be a very
14 disingenuous way by the Petitioners to try to avoid
15 liability, and I expect if the Court rules in our favor
16 they'll try to do that. And the reason I think it's
17 disingenuous is because that kind of a warning doesn't
18 come anywhere close to telling the homeowner what in the
19 world he can do with this product. The homeowner's not
20 going to know when he sees that, that kind of a
21 warning.

22 The real way for Sony to have avoided this
23 problem would have been to cooperate with the copyright
24 owners in devising technology which would allow the
25 broadcaster to jam the video recorder from copying the

1 kind of material that is owned by people who object.
2 That's the only real surefire way to do it, because
3 these warnings aren't going to be understood by the
4 normal homeowner.

5 QUESTION: Mr. Kroft, can I ask you a question
6 about the staple article of commerce test? We don't
7 have any precedent in the copyright field for what the
8 test of that problem is. You rely on a precedent from
9 the trademark field, and of course there is an analogy
10 to the patent law.

11 Do you think we should look to one of those
12 two fields for precedent, and if so would you not look
13 to the patent law? Why not?

14 MR. KROFT: I do not think you should look to
15 the patent law in this particular case because the
16 patent law is a statute which was designed specifically
17 to meet years of history in this Court dealing with
18 certain patent problems, that is misuse and contributory
19 infringement.

20 And it also deals, Justice Stevens, with the
21 very peculiar attributes of patents. Patents are made
22 up of a series of components which together, taken as a
23 whole, end up being something that's protected as an
24 invention. And that's not the case with copyrights.

25 In addition to that, I might add that the

1 staple article of commerce doctrine in the patent field
2 was developed to protect the sale of ordinary items,
3 like paper and ink, dry ice, salt tablets. Those are
4 the products that came out of the cases of this Court.
5 But it was not designed to protect the sale of items
6 designed specifically for infringement when the
7 manufacturer and seller of that machine knew or had
8 reason to know it would be used for infringement.

9 QUESTION: Well, specifically for copying
10 purposes. Under your test, supposing somebody tells the
11 Xerox people that there are people who are making
12 illegal copies with their machine and they know it.
13 Must they -- what are they supposed to do?

14 MR. KROFT: I think that probably now puts the
15 cart before the horse, Justice Stevens. That wasn't
16 happening when Xerox began selling its machine. Xerox
17 first started selling the machine for business
18 applications. We can all remember what they looked
19 like. You'd have to put one page in. You couldn't run
20 through pages and pages and pages like you can today.

21 And over the years I suppose people have come
22 to use Xerox for different reasons. Xerox has tried to
23 protect itself -- and I don't know if it's doing it
24 adequately or not -- by giving every Xerox renter -- and
25 I believe most of these machines are rented -- a little

1 list of do's and don't's. And one of the don't's is
2 don't copy copyrighted material.

3 QUESTION: But you just said that wouldn't
4 protect Sony.

5 MR. KROFT: I don't believe it would, and
6 that's why I say I'm not sure --

7 QUESTION: Does it protect Xerox?

8 MR. KROFT: That's why I just said I'm not
9 sure if it does.

10 QUESTION: But your view of the law is that as
11 long as Xerox knows that there's some illegal copying
12 going on, Xerox is a contributory infringer?

13 MR. KROFT: To be consistent, Your Honor, I'd
14 have to say yes.

15 QUESTION: A rather extreme position.

16 MR. KROFT: Justice Stevens, the reason I say
17 that I think Xerox may be different is Xerox didn't
18 start out as a machine sold --

19 QUESTION: But isn't it true that you've told
20 eight or nine million people that as of now -- we're not
21 concerned with what's happened in the past --

22 MR. KROFT: We have told eight or nine million
23 people that we are very concerned about what's happened
24 in the past, but we're --

25 QUESTION: But you do not seek to recover

1 damages from them.

2 MR. KROFT: But we seek to recover our damages
3 not against them, but against the propagators of this
4 problem, the manufacturers and sellers of the article.
5 And of course, under standard contributory infringement
6 doctrine we're allowed to do that. So all we've said is
7 we're going to be exercising our legal rights. We
8 haven't told the homeowners that what they're doing is
9 okay or permitted.

10 QUESTION: Well, is it okay?

11 MR. KROFT: Excuse me, Your Honor?

12 QUESTION: Is it okay for the people to
13 continue to copy?

14 MR. KROFT: As a matter of law or as a matter
15 of consent?

16 QUESTION: Either. Well, as a matter of
17 consent, which would then determine the legal
18 consequence.

19 MR. KROFT: Of course. As a matter of law, I
20 do not believe it would be. As a matter of consent, it
21 most certainly is not. We have not consented to off the
22 air recording of our works, except with respect to the
23 guidelines that Mr. Dunlavey mentions.

24 QUESTION: Well, do you speak for the other 90
25 percent who you represent? The amici join you. Do they

1 also consent to copying?

2 MR. KROFT: Universal does not consent to
3 copying in the home use context. Let me make that
4 clear. The guidelines that Mr. Dunlavey referred to are
5 guidelines with respect to educational copying. With
6 respect to your question --

7 QUESTION: No, I was referring to the
8 statement by the president of your company that's quoted
9 in your adversary's brief. It says that, we've won this
10 case but we're not going to try and interfere with any
11 copying by people who now have VTR's. As I understand,
12 they said something like that.

13 MR. KROFT: It said we would seek our remedy
14 from the contributory infringer, which has joint and
15 several liability, and which we're entitled to do.
16 That's what the statement was intended to mean.

17 But I don't want to leave your last question
18 unanswered. I don't represent amici, no. I am not
19 authorized to speak for them today.

20 But they have spoken on their own behalf by
21 filing their amicus briefs.

22 QUESTION: Well, is it their position, or do
23 we know, that the homeowner who copies tonight may incur
24 some liability?

25 MR. KROFT: I'm sorry, there was a cough.

1 QUESTION: The homeowner who copies tonight,
2 not your program but the 90 percent that the amici
3 represent, does that homeowner risk any liability?

4 MR. KROFT: I believe so. But I don't believe
5 --

6 QUESTION: Do you think he's going to get rid
7 of his machine?

8 MR. KROFT: Excuse me, Justice?

9 QUESTION: Do you think the homeowner is going
10 to get rid of his machine and throw it away? If so,
11 dream on.

12 (Laughter.)

13 MR. KROFT: Justice Marshall, I don't believe
14 that a copyright owner, after seven years of litigation
15 here, is going to sue the homeowner. I think that by
16 not doing it they've implied they won't.

17 I think that the remedy here, though, can be
18 that a continuing royalty be granted against the
19 Petitioners and in favor of the Respondents, which would
20 require the Petitioners, who are reaping all the
21 economic benefit from this machine, to share some of it
22 with the copyright owners whose product made this
23 machine such an attractive consumer device in the first
24 place, and in that way the homeowner would not be
25 disturbed, Justice Marshall.

1 Now, it must be emphasized that we're not
2 talking about one or two individuals here, one or two
3 copies. We're talking about millions of copies. The
4 estimates are that by the end of the decade there will
5 be something like 40 or 50 million of these machines in
6 homes. And it only takes common sense and a brief
7 examination of the district court's findings to realize
8 that the economic loss to Respondents from these
9 millions of copies will be enormous.

10 We believe this harm will manifest itself in a
11 number of ways, but I think only an examination of three
12 of them is necessary to illustrate the point.

13 QUESTION: Mr. Kroft, the district court found
14 no harm, present, past or prospective, did it?

15 MR. KROFT: I don't believe that's correct,
16 Justice C'Connor. The district court found that we did
17 not put on proof of past damages, and the reason for
18 that is we elected to recover statutory damages, which
19 we had the absolute right to do.

20 The district court found -- its language
21 sounded like it was talking in the present. It said
22 there is no reduction because we didn't put on any
23 evidence of present harm. But remember, at that time
24 there were only something like 130,000 Betamax and less
25 than a million total VTR's in the marketplace, compared

1 to something like 75 million television homes at that
2 time.

3 But he did not say there will be no future
4 harm, and that's the insidious problem with Petitioner's
5 characterization of the district court's opinion. The
6 burden of proving -- let me back up.

7 In copyright law, once there's been proof of
8 infringement there is a presumption that there will be
9 future harm. That's established by all of the cases.
10 And at that point it falls on the Petitioners, the
11 Defendants, to prove that there will not be, and the
12 district court must find that there will not be, future
13 harm.

14 The district court did not make that finding.
15 The district court made the mistake of reversing the
16 burden of proof and requiring the Respondents, in
17 addition to the presumption, proving that there will be
18 harm. And all the district court said was that the
19 Respondents did not meet a burden that they didn't have
20 in the first place.

21 Now, the first area in which this harm is
22 apparent, and which the district court didn't consider
23 at all but the Ninth Circuit did, is that off the air
24 recording is going to -- uncompensated off the air
25 recording is going to interfere with the copyright

1 owner's ability to license off the air recording of its
2 copyrighted works for a fee, whether that's recording
3 done for time shift purposes or library purposes.

4 The district court did repeatedly recognize
5 that off the air recordings have value to homeowners,
6 thereby indicating, I think implicitly, that they would
7 be willing to pay for it. And in fact, of course, they
8 are paying substantially for it, but right now they're
9 not paying the copyright owner.

10 And as I explained at the last argument, AEC
11 is about to commence a service to exploit this value by
12 beaming scrambled signals between 2:00 and 6:00 a.m. in
13 the morning to owners of special equipment furnished to
14 them. They will be paying a license fee for it, and
15 they'll be able then to unscramble the signal and watch
16 it after it's been recorded.

17 What's interesting about this service, I now
18 realize and didn't explain to the Court last time we
19 were here, is that Sony has manufactured and will be
20 furnishing the equipment for receiving and recording and
21 descrambling that scrambled signal. And furthermore, as
22 I understand the technology, the scrambled tape will
23 only be viewable for a month and after a month it will
24 become indecipherable. And I can't explain the
25 technology because it's beyond me, but that's what I

1 understand will happen.

2 Now, these attributes make it very clear to me
3 that Sony realizes that there's a big business in time
4 shifting, even in time shifting, for the copyright
5 owner. ABC currently projects that by 1990, when
6 there's about 40 million of these machines in households
7 and there's only been about 15 percent penetration of
8 this scrambled service, that it will generate over \$500
9 million annually in revenues.

10 Much of that will be going to the copyright
11 owners if they agree to do this with ABC, because they
12 will be furnishing the material that will be recorded.
13 They'll be getting paid for this off the air recording.
14 And it doesn't take much imagination to realize that if
15 people can continue to do this off the air for free
16 during the rest of the broadcast day -- that is, between
17 6:00 a.m. in the morning and 2:00 a.m. the following
18 morning -- that they're not going to be willing to pay
19 for it. They're simply not going to want to pay for
20 something that they now get and have been getting for
21 quite a long time for nothing.

22 QUESTION: May I ask one other question. If
23 the effect of this time shifting -- and I know you
24 dispute the reading of the findings, but if the effect
25 were to enlarge the size of the audience for your first

1 transmission, would you then be able to establish harm?

2 MR. KROFT: Yes, I believe so, Justice
3 Stevens. First of all, the cases have said that merely
4 because there might be a speculated increase in one
5 market --

6 QUESTION: No, no. Assume there was proof and
7 you took it as a fact -- I know you don't -- that there
8 were, that the time shifting actually enlarges the size
9 of the audience. Assume that's a fact. Then could you
10 possibly show harm?

11 MR. KROFT: Yes. There are two answers to
12 that, Justice Stevens, one legal and one factual.

13 The legal answer is that the cases have held
14 that just because there may be an increase in one market
15 -- and let's assume under your hypothetical that there
16 is -- that does not destroy the copyright owner's rights
17 to enforce his copyright under the fair use doctrine if
18 there are going to be harms in other markets, because
19 it's up to the copyright owner to determine how and in
20 what manner and in what markets and in what progression
21 he will exploit his product.

22 The factual answer to your question is that
23 the so-called increase in audience depends on who's in
24 that increased audience. The name of the game here is
25 advertiser support. They pay for the audiences and the

1 broadcasters in turn then pay the suppliers of the
2 product.

3 If that increased audience, for example,
4 included people whom the advertiser of a particular
5 program wasn't interested in reaching -- for example, a
6 truck driver who doesn't buy the family detergent, likes
7 to record soap operas for some reason or another, and
8 the advertiser now picks him up as a viewer at night
9 because he watches his time shift recording -- the
10 advertiser's not going to be willing to pay for him.

11 To allude to a question you asked earlier,
12 although the district court in fact did find that the
13 ratings services at the time of trial were measuring
14 recordings, they were not -- and the district court also
15 found this -- they were not measuring playbacks, neither
16 when it was played back nor when it was played back for.

17 Another example of why your hypothetical would
18 not necessarily increase revenues or cause the fair use
19 defense to come into play is because it depends when the
20 advertisement is watched. If a Christmas advertisement
21 is broadcast the week before Christmas and it's watched
22 the day after New Year's, it's of no value to the
23 advertiser and he's not going to pay for it.

24 Now, another area, the second area where off
25 the air recording is going to cause substantial harm to

1 copyright owners is in the market for the sale and
2 rental of prerecorded cassettes. And it must be borne
3 in mind that this market doesn't depend on the sale of
4 machines that can record off the air. At the time of
5 trial -- and this is in the record -- Sony was selling
6 machines that had no off the air recording capability.
7 They were just players like an ordinary record player.
8 And those players can play back these prerecorded tapes
9 and cassettes.

10 So it's quite misleading to suggest that we
11 only have that market because off the air recorders are
12 out there. That's not at all the case.

13 The district court expressly found that off
14 the air recordings, both time -- and he didn't
15 differentiate in this finding between time shift and
16 library copies -- will compete with the sale and rental
17 of those devices. It doesn't take much imagination to
18 realize that that competition is going to reduce the
19 income to the Respondents from the sale and rental of
20 their copyrighted motion pictures.

21 This is probably best illustrated by the fact
22 that this year the Electronics Industry Association has
23 estimated that there will be a sale of approximately 55
24 million blank cassettes in this country, as opposed to
25 only 8 million prerecorded cassettes. Now, the reason

1 people are buying so many more blank tapes than they are
2 prerecorded tapes seems obviously to me to be that
3 they're just not willing to pay the extra price to buy a
4 copyrighted motion picture when they can take it off the
5 air for the mere price of a blank cassette.

6 QUESTION: Could I ask you, do you think under
7 the present Act there can be -- that just sound
8 recording is a violation of the copyright?

9 MR. KROFT: I believe it is, Justice White. I
10 believe it is.

11 QUESTION: You think this present Act changed
12 the law?

13 MR. KROFT: I don't believe that there was
14 ever a law necessarily that permitted home recording of
15 audio. But I'm giving you my off the cuff response.

16 QUESTION: But if there was such a law before,
17 you think that is no longer the law?

18 MR. KROFT: Well, maybe I should be a little
19 bit more prudent and say I think there's a good chance
20 that it is no longer the law, because the legislative
21 history of the 1976 statute specifically said with
22 respect to sound recordings that recapturing those sound
23 recordings off the air is a violation, and when it said
24 that it did not repeat the home recording exemption that
25 had been mentioned in 1971.

1 Mr. Justice Stevens, one further answer to
2 your question about increasing the audience. I was
3 assuming in my answer to you that all these commercials
4 would be watched. In fact, most people that are
5 recording off the air are taking the commercials out, so
6 that the commercials aren't even reaching --

7 QUESTION: Except they can't do that unless
8 they're watching the program at the time.

9 MR. KROFT: Well, that's not entirely true.
10 They can take them out of the recording if they're
11 watching them at the time.

12 QUESTION: But they get them on the tape in
13 the first place unless they're watching it at the time.

14 MR. KROFT: That's correct.

15 QUESTION: Then they can fast forward when
16 they watch it.

17 MR. KROFT: You understand the technology
18 quite well. That's right.

19 (Laughter.)

20 MR. KROFT: There are devices coming on the
21 market, however --

22 QUESTION: May I ask, since you went back to
23 that question, you pointed out that the audience, people
24 in the audience are not all alike. Some people might
25 not want to buy the thing that's advertised with the

1 soap opera and so forth.

2 But do the ratings take that into account, or
3 do they treat all viewers alike?

4 MR. KROFT: The ratings are not one integrated
5 thing. The ratings are done in a variety of ways. You
6 have the metered ratings which just tell you if the
7 set's turned on or not; doesn't tell you who's
8 watching. And then you also have diaries that tell you
9 who's watching at the time that the television set is
10 turned on.

11 QUESTION: Let me put it this way. The
12 ratings that are used to fix the rates that the
13 copyright owner charges for his programs, do they
14 distinguish between different kinds of viewers?

15 MR. KROFT: They do, because the diaries tell
16 the advertisers what are the demographics of the
17 audience that are watching the shows at the particular
18 time the television is turned on. So in that way the
19 advertiser knows.

20 But with respect to video recording, we're
21 never going to know against what program a particular
22 recording is viewed, if it's viewed at all, when it's
23 viewed. Because all you have to do is think about it
24 for a moment and you can realize that a diary is never
25 going to be able to tell you if the recording made today

1 is watched in a month or a month and a half. There's
2 not going to be a diary that can be put together that
3 can do that.

4 I would like to talk about the staple article
5 of commerce argument for a moment. But before I do, I'd
6 like to leave what I've been generally talking about in
7 this area, the harm issue, with this one thought.

8 Fair use was a very narrow doctrine designed
9 for very limited application, for use in the creation of
10 scholarly or research works or works for contemporary
11 comment or news reporting purposes, and only then when a
12 small amount was taken. Off the air recording for home
13 entertainment purposes doesn't even come anywhere close
14 to fitting that definition. It takes the whole thing,
15 which traditionally under the cases has required an
16 exclusion of the fair use defense. And it's not for the
17 purpose of encouraging and advancing creativity of new
18 intellectual works.

19 I believe that Petitioner's counsel errs when
20 he suggests that, because an off the air recording in
21 Alaska, which is what the Senate report referred to,
22 which has six time zones, for educational purposes may
23 be allowed, that that means that off the air recording
24 in all circumstances, not involving education, not
25 involving a salutary purpose like research or

1 contemporary comment, can somehow be fair use.

2 And with respect to the Williams & Wilkins
3 case, I should point out to the Court that even though
4 that case talked about it being okay to record entire
5 copyrighted works, in fact what it was talking about was
6 only one article in an entire copyrighted journal. And
7 then when the Senate got to Williams & Wilkins, at page
8 71 of the Senate report, it said that Williams & Wilkins
9 failed to significantly illuminate the application of
10 the fair use doctrine and gave little guidance to
11 Congress on the application of the doctrine.

12 Now, when you realize that this can't be a
13 fair use use because it doesn't advance one of the
14 traditional purposes and it takes too much of the
15 copyrighted work, then you realize that you never have
16 to get to the fourth factor, the prospective harm
17 factor, because you don't have fair use in the first
18 place. You don't just get into this issue by invoking
19 the words "fair use," and if it's not a fair use case
20 then you don't have to look at harm, and that's the case
21 here.

22 In addition to that, as I said, harm is
23 presumed in a copyright case unless the defendant proves
24 it won't occur in the future and the district court
25 makes that finding. The Petitioner didn't prove that

1 here and the district court most assuredly did not make
2 that finding.

3 QUESTION: Mr. Kroft, did you say Alaska
4 within itself had six different time zones?

5 MR. KROFT: I did say that. I may have erred
6 in the amount, but the reference in the House report did
7 talk about the fact that Alaska, being so large, did
8 encompass several time zones, and that was the reason
9 that the House report in that unusual example indicated
10 that off the air copying for educational purposes there
11 might be allowed.

12 But the House report also went on to make very
13 clear that, even in the educational context, the fair
14 use doctrine had to be very narrowly circumscribed with
15 respect to motion pictures and generally should be
16 applied only to the use of excerpts.

17 With respect to the staple article of commerce
18 doctrine, I've explained, I believe, that it's not
19 really designed for the sale of things other than salt
20 tablets and dry ice and things of that nature. But in
21 addition to that, if we're going to analogize to the
22 patent statute, the patent statute also has a section
23 that says that when the seller of an article, even a
24 staple article, sells it with encouragement, urging or
25 inducement of some sort that it be used in an infringing

1 way, and it is used in that way, then the seller of that
2 article cannot escape liability even though the article
3 may be a staple and even if he can prove the separate
4 and second test.

5 It has to be a staple and it has to be
6 suitable for substantial non-infringing use. Even if he
7 could prove those two things, if he sells it with
8 inducement and encouragement that it be used in an
9 infringing way then he'll be held liable.

10 And in this case the evidence shows beyond
11 dispute, and the district court did not find otherwise,
12 that Sony is selling this machine for the primary
13 purpose of recording copyrighted works off the air,
14 including copyrighted works owned by the Respondents;
15 and that the advertising and selling activities, as well
16 as the instruction manuals, which give very detailed
17 instructions as to how to record television programs off
18 the air, exhort and contribute to this copying.

19 In fact, in recognition of what this machine
20 could and would do, Sony gave its advertising agency a
21 written indemnity agreement against any liability for
22 advertising Betamax because, in the words of the
23 agreement, "our legal counsels were concerned about the
24 risks of advertising a video recording product that can
25 be used to record copyrighted material."

1 Now, given those facts, you don't ever have to
2 reach the staple article of commerce doctrine. And I
3 might add that even if the Court were to try to avoid
4 the fair use issue by reaching the contributory
5 infringement issue here, we still have other theories of
6 liability that weren't addressed by the Ninth Circuit
7 below on which we also hold the Petitioners
8 responsible.

9 But even if the Court did reach the staple
10 article doctrine here, Petitioners have the burden of
11 proving that the Betamax is available and suitable for
12 substantial actual non-infringing uses, and the district
13 court very pointedly refused to find on the evidence
14 brought before the court by Petitioners that that was
15 enough to allow the district court to find that Betamax
16 was suitable for substantial and actual non-fringing
17 use.

18 QUESTION: What do you have to put on? What
19 do your clients have to put on on your side of the
20 case?

21 MR. KROFT: We have to put on, Justice White,
22 that Sony sold this product with knowledge or reason to
23 know that it would be used in an infringing way, which
24 we did through the admissions of Sony's executive; or in
25 the alternative, that it was sold with the suggestion,

1 even by implication, that it be used in an infringing
2 way, which again we did, through the advertisements, the
3 brochures, and the instruction manuals.

4 QUESTION: Well, what about -- do you think,
5 assuming the staple article of commerce notion applies
6 in the ccopyright field, do you think it's an affirmative
7 defense?

8 MR. KROFT: Absolutely, Justice White.

9 QUESTION: Is it in the patent field, or is it
10 part of the plaintiff's case?

11 MR. KROFT: In the only case that I can think
12 of where it was extensively discussed, which is the
13 Fifth Circuit case of Fromberg versus Thornhill,
14 although the court didn't discuss whose burden it was,
15 the entire tenor of that whcle decision was that the
16 burden was on the defendant, that it was an affirmative
17 defense.

18 QUESTION: Well then, there isn't much
19 authority, then, on who's got the burden in connection
20 with the staple article of commerce notion. Just one
21 case and that by inference?

22 MR. KRCFT: That case by inference. Again, it
23 did not arise in the -- it hasn't arisen to my knowledge
24 in the ccopyright field, and I believe -- and I'm not an
25 expert on the patent statute in its entirety. But in

1 the cases I've seen, that's the one that comes to mind.

2 Petitioners only put on evidence from a few
3 educational, sports and religious people that claimed
4 that they owned their copyrights, and as we pointed out
5 in our brief we think that proof was deficient. But
6 even if you took the notion that all sports, educational
7 and religious programming could be copied with impunity
8 -- and that's not the record here, because we do have
9 objections from other educational and religious
10 copyright owners -- all that the Petitioners' survey
11 shows is that the use of the Betamax is to copy -- it is
12 used 9 percent of the time to copy that kind of
13 material, as opposed to 80 percent of the time to copy
14 the type of entertainment programming owned by the
15 Respondents and the amici that have come to this Court.

16 Based on those figures, the district court was
17 entirely correct in ducking the substantial
18 non-infringing use issue. On those numbers and on the
19 evidence before the trial court, it never could have
20 made a finding that Betamax was suitable, the off the
21 air recording aspect was suitable, for substantial
22 non-fringing use.

23 Thank you.

24 CHIEF JUSTICE BURGER: Very well.

25 Do you have anything further, Mr. Dunlavey?

1 REBUTTAL ARGUMENT OF DEAN C. DUNLAVEY, ESQ.,
2 ON BEHALF OF PETITIONERS

3 MR. DUNLAVEY: Justice Marshall, when Mr.
4 Kroft says that he wants the manufacturer of Betamax to
5 be enjoined, he could not be more serious. When we were
6 down in the district court, the court was asking him at
7 the time he had finished his case and before the defense
8 started -- and I'm reading now. It says:

9 "You are not asking that Sony be enjoined from
10 further manufacture of the Betamax, or are you?

11 And Mr. Kroft says: "Yes, I am."

12 To be sure there was no misunderstanding, a
13 little bit later the Judge said: "Let's get back to the
14 relief you are actually seeking. You say, one, you want
15 an order prohibiting Sony from manufacturing Betamax?"

16 And Mr. Kroft says: "That is where we
17 start." Then he went on and he said: "We want to get
18 all the Betamaxes that have been out on the market and
19 we want to recall them and disembowel them so that they
20 can no longer record off the air."

21 And he's not kidding. He wants that relief,
22 which I suppose is within the injunctive power of the
23 Court, and/or he wants \$250 per infringement every time
24 a homeowner copies one of his programs. There's no
25 manufacturer in the world that can stand up to that kind

1 of relief.

2 Now, it would be nice if there were a way of
3 distinguishing in free off the air television what
4 programs are free for copying without objection and what
5 programs are not. But for the moment there isn't. The
6 VTR is inanimate. It can't tell.

7 The question of jamming is an interesting
8 scientific theory, but that, as the district court said,
9 requires the cooperation of the FCC and the broadcasters
10 and the VTR manufacturers, and that is something that is
11 wholly beyond Sony's power.

12 So the question really becomes, can the movie
13 studios take the VTR out of the hands of the public, or,
14 if we're going to look at the big picture, can they
15 exact some kind of a royalty in another forum for the
16 privilege of their use?

17 Remember that these movie studios have not
18 contributed a thing to the genesis of television.
19 Television had to get along in its earlier years without
20 any help from the movie studios because they were afraid
21 of it. They saw competition with the theaters and they
22 weren't about to supply their product to it, and they
23 didn't.

24 So television got started and came a long way
25 before the movie studios realized that it was a place

1 where they could exploit their product. And they got
2 into it as a matter of profit, and they're still into it
3 as a matter of profit.

4 QUESTION: Well, you're not suggesting Scny
5 isn't into it as a matter of profit?

6 (Laughter.)

7 MR. DUNLAVEY: I am not, and I'm not
8 suggesting that the television receiver makers are not
9 in it for profit. But when you're in it for profit
10 you've got to yield to the public benefit. And I submit
11 to you, Justice Rehnquist, that the chance for a man who
12 works at night and has no opportunity to see prime time
13 television when it's being broadcast live should not be
14 foreclosed from seeing it the next morning if the
15 technology makes it possible for him to do so.

16 I have to work during the daytime and quite
17 often in the evening. Why should I be deprived of
18 seeing something that's going on in the afternoon,
19 perhaps a presidential address to the nation that takes
20 place at 4:00 o'clock out in California? Why can't we
21 see those?

22 QUESTION: Why shouldn't you pay for it?

23 MR. DUNLAVEY: Because the television audience
24 is a free audience historically. The pay is being
25 made. It's simply being made at the front end. The man

1 who makes the because is being paid, and he's being paid
2 with the understanding that anybody who's got the
3 technology of receiving that broadcast has the right to
4 do it. In fact, that's one of the things this Court has
5 said in previous cases.

6 The prerecorded market that these people are
7 benefiting so handsomely from does require an off the
8 air capability in the product. These people make a
9 video disc player which is a playback only type of
10 device. It has never sold well because the public
11 doesn't want it.

12 It's only when you combine the playback and
13 the record capabilities together that you have something
14 the public wants, and it's that device, made by the
15 electronic industry, which is benefiting the movie
16 studios so handsomely.

17 QUESTION: The only thing the public wants is
18 copyrighted material?

19 MR. DUNLAVEY: May I ask you to repeat that,
20 Justice Marshall?

21 QUESTION: Is your position that the only
22 thing the public wants is copyrighted material? Is that
23 your position?

24 MR. DUNLAVEY: No, not in the way you express
25 it, Justice Marshall. It so happens that under the

1 copyright statute as it's now written anything that is
2 broadcast either from a tape or recorded onto a tape is
3 automatically copyrighted in the first instance. So the
4 public can't help it that the broadcast is subject to
5 copyright.

6 Later on comes the time when you have to
7 register it if you want to sue and, as we covered at the
8 last argument, there's a lot of programming that is not
9 registered because the people don't care enough to do
10 it. Manifestly, that's a bill for free copying.

11 But it's not a question of the public wanting
12 copyrighted material. It's just a fact that whatever
13 goes to the public over free off the air television now
14 is technically copyrighted at the time of the
15 broadcast.

16 We conclude this case just where we started it
17 many years ago. The fact of the matter is that the VTR
18 is only being used by people in the intended audience,
19 for whom the movie studios have been adequately and
20 handsomely paid once. I would submit to this Court, as
21 I did to the district court, that there is no reason in
22 the world why a man who has to see Monday night football
23 on Tuesday morning should have to pay for the
24 privilege.

25 If something is done that is improper with the

1 tape once it's made, the courts can deal with those
2 improper instances, and they have. Taking a tape to
3 Fiji, putting a tape in the theater -- those things have
4 been encountered and stopped.

5 But to use it at home a short time after the
6 broadcast, to see nothing more than your neighbor or the
7 rest of your family saw a few hours earlier for free,
8 there is no reason in common sense why you should have
9 to pay for that. The studios have been paid once.
10 There is no reason why they should have to be paid
11 twice.

12 Thank you.

13 CHIEF JUSTICE BURGER: Thank you, gentlemen.

14 The case is submitted.

15 (Whereupon, at 11:52 a.m., the case in the
16 above-entitled matter was submitted.)

17 * * *

18

19

20

21

22

23

24

25

CERTIFICATION

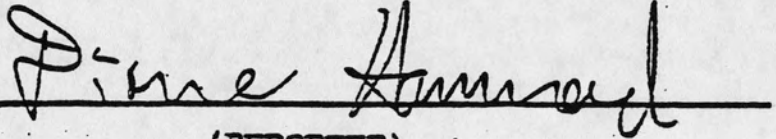
Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

SONY CORPORATION OF AMERICA, ET AL., Petitioners v. UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS, Respondent

#81-1687

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY



(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'83 OCT -4 P4:17