

SONY CORPORATION OF AMERICA, et al., *Petitioners*, v. UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS, *Respondents*.

No. 81-1687

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October Term, 1982

August 27, 1982

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for the States of Missouri, Alabama, Arkansas, Georgia, Hawaii, Illinois, Iowa, Louisiana, Mississippi, Montana, North Carolina, Ohio, Oklahoma, Rhode Island, Vermont, Virginia and Wisconsin as Amici Curiae in Support of Petitioners Sony Corporation of America, et al.

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INTEREST OF AMICUS CURIAE

The State of Missouri is home to nearly five million persons, more than three million of whom reside in metropolitan areas, the remainder living in rural areas of the state. These five million Missourians live in approximately 1,791,270 households; over 98% of these households (approximately 1,760,200) are "television" households. Approximately 24,400 of these "television" households are also "videotape" households, i.e., they have home videotape recorders (VTRs).

There are twenty-two (22) commercial television stations and four (4) public/educational television stations currently licensed by the Federal Communications Commission (FCC) to broadcast within Missouri, over VHF and UHF assigned frequencies. Applications presently are pending before the FCC for additional broadcast licenses for new stations to operate over VHF and UHF frequencies in the state. Moreover, applications to the FCC for 46 low power (neighborhood or LPTV) television stations have been made by Missourians.

America is television oriented; Missourians, like their counterparts in the other 49 states, are television oriented. Television is no longer a luxury; it has become a necessity. Missouri's citizens rely upon this widely-accepted technological phenomenon not only for entertainment, but also for education, cultural enrichment and news. Television has become more than a source of these; it plays a role in shaping our society. Its broadcasts allow us to experience history, form the substance of coffee-klatch conversation, become the subjects of sermons and speeches, and provide instant commonality between strangers. Accessibility to the full range of television programming is an essential component of the well-rounded citizen. Videotaping enhances accessibility to television programming; the use of videotape recorders contributes to the public welfare.

The district court below was confronted with the singular issue of whether any one or

more of *only* 32 instances of off-the-air home recording, by *only* four individuals of commercial television entertainment-type programming licensed by only two copyright owners, was infringement. The district court's opinion was that none of these instances constituted a direct infringement (Pet. App. 34, 56, 115) -- and, even more importantly, that there could have been no contributory infringement by those who supplied the videotaping equipment (here, the Betamax) (Pet. App. 34, 89, 115).

This very limited factual situation resulted in an opinion by the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") which far transcends the original issue and which affects millions of citizens of the United States, including citizens of the State of Missouri. The Court of Appeals' opinion ignores the facts of the case and makes generalized holdings that:

(a) "we conclude that off-the-air copying of copyrighted audiovisual materials by owners of videotape recorders in their own homes for private noncommercial use, constitutes an infringement of appellants' copyrighted audiovisual materials." (Pet. App. 12 -- see also pp. 18, 27, 30.)

(b) "Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming, Virtually all television programming is copyrighted material. Therefore, videotape recorders are not "suitable for substantial noninfringing use." (Pet. App. 25-6);

(e) "[Petitioners] are legally responsible for the infringing activity." (Pet. App. 30);

(d) "statutory damages may be appropriate... The district court determined that an injunction would not be an appropriate remedy... The court should reconsider this action." (Pet. App. 28).

The opinion thus holds that "*virtually all*" home video recording by Missouri citizens of free off-the-air television broadcasting is copyright infringement, imposes liability therefor on VTR suppliers, and indicates remedies (*viz.*, mandatory statutory damages for each infringement, a discretionary injunction, or both) which, if imposed, will terminate home VTR availability. No citizen of Missouri, in fact no citizen of any state, was afforded an opportunity to have counsel and to be represented in any court below before this sweeping pronouncement of law was made. n2

n2 Defendant Griffiths was the only VTR owner named as a party in the proceedings below. He never appeared as a party, he never had counsel, and respondents waived all claims against him for legal relief (Pet. App. 43-44; Tr. 488, A158-9).

Subsequent to this opinion, and as an opening salvo in what has developed into an obvious attempt to extend the opinion to bar off-the-air *radio* audio recording, the president of the Record Industry Association of America, Inc. announced: "There is no legal immunity for home audio taping in the current copyright law. There is no immunity for home audio taping in any of the statutory exemptions, or anywhere else in the 1976 [copyright] act or its legislative history." n3 *The Washington Post*, December 15, 1981.

n3 In contrast, the same man told Congress in 1971, when the sound recording provisions of the 1976 Copyright Revision Act were being given advance consideration and implementation:

"[T]he pirate also argues that granting a copyright may raise questions about the individual who in his home may duplicate a commercial performance on home-recording equipment. We in the industry certainly have known that such amateur practices go on in the home, and we realistically recognize that no such enforcement is possible, and

certainly none is intended." (Hearings before Subcommittee No. 3 of the House Judiciary Comn., 92nd Cong., 1st Sess. on S. 646 and H.R. 6927, June 9 and 10, 1971, p. 26).

This case threatens the citizens of Missouri with a loss of their ability to home record at all; not only would the Ninth Circuit's opinion, if upheld, potentially bar recording of free off-the-air television programming, it may also, indirectly, bar recording of audio programming broadcast over radio.

Although petitioners have some interests in common with your *amicus*, your *amicus* believes it best can represent the interest of the citizens of the State of Missouri in preserving their fundamental and traditional personal right to home record from free off-the-air television for subsequent private family viewing at home.

JURISDICTIONAL STATEMENT

This Honorable Court has granted the petition of Sony Corporation of America, et al., for a Writ of Certiorari. This brief, *amicus curiae*, respectfully is submitted by the State of Missouri and by John Ashcroft, its Attorney General, pursuant to Rule 36.4 of this Court.

The states and attorneys' general listed in footnote 1 accept and agree with the positions and arguments expressed herein. n1

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SUMMARY OF ARGUMENT

Since the advent of public off-the-air broadcasting in the United States in 1920, both radio and television broadcasting have been the profitable *privilege* of a few, whereas free reception and use of such broadcasts by all Americans, including Missourians, in the privacy of their homes has been an absolute *right* -- an American heritage. The home VTR is one "means" of such reception. Clearly, home recording of respondents' programming should not be infringement since the home VTR is merely a "means" of "receiving" a program which has been broadcast "for the use of the general public."

It appears that the owners of most television programming consent to home reception with VTRs; out of all broadcasters, advertisers and program owners, only two owners of television programming (viz., respondents) over have brought an action to stop home recording -- and one of these now says it would not do so again. Respondents, seemingly aberrants within the industry, are participating voluntarily in the privilege and profits of broadcasting. In the course of so doing, they should not be allowed to use their copyrights to arrest "the Progress of Science" and to dictate to Missourians that no television programming whatsoever may be received by means of a home VTR.

ARGUMENT

1. *VTR Serves the Longstanding Public Policy of Free Off-The-Air Radio and Television Broadcasting*

Federal regulation involving the air waves began with the Wireless Ship Act of 1910 (36 Stat. 629); soon thereafter, the Radio Act of 1912 (37 Stat. 302) forbade any radio broadcasting without a license from the Secretary of Commerce and Labor, but gave the Secretary no power to regulate the broadcast frequency, power or hours of operation of a licensee and no power to limit the number of licenses notwithstanding limited available frequencies (see *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-4 (1942)).

Radio station KDKA, established by Westinghouse in East Pittsburgh on November 2, 1920, was the first commercial radio broadcasting station in the United States and probably in the world (see *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158 n.9 (1975); *The Radio Industry*, Harvard Graduate School of Business Administration Lectures, 1927-28). Its initial broadcast was returns of the Harding presidential election; thereafter, its early programming was drawn largely from musical phonograph records, soon augmented by live bands and orchestras, religious services, political addresses and conventions, news, sports, theatrical programs, opera, weather forecasts, livestock and grain reports, and educational pick-ups from schools and universities. n4 KDKA, several other stations that commenced broadcasting soon thereafter, was financed by a manufacturer of home radio receivers so as to promote the sale of receivers.

n4 *The Radio Industry, supra*, pp. 189-225.

Station WEAJ in New York City, established in 1922 by the American Telephone & Telegraph Company, inaugurated a different kind of broadcast station financing called "toll broadcasting." Under the toll broadcasting plan, broadcast facilities were supported financially by being made available for short periods of time (analogously to telephone facilities) to those who sponsored programming (often good music) interspersed with "courtesy" announcements (forerunners of the commercial). n5 From the outset of public radio in the United States, no matter the mode or motivation of broadcasting financing, *reception* of the broadcasts has been free.

n5 In contrast, most European nations finance broadcasting by an excise tax on receivers. J. Greenfield, *Television, The First 50 Years* (1977).

By 1926, there were more radio stations than available frequencies, stations used any frequency and power they desired, and the result was interference, confusion and chaos. Consequently, Congress enacted the first comprehensive scheme of control over radio transmission and communication within and between the states by the Radio Act of February 23, 1927 (44 Stat. 1162). That jurisdiction over radio, and later over television, has continued to date under the Federal Communications Act of June 19, 1934 (*47 U.S.C. Section 301 et seq.*; 48 Stat. 1081 *et seq.*).

Commercial television broadcasting in the United States commenced in 1941 (six stations), was stagnated by World War II, and resumed in 1948 using VHF channels. The first commercial UHF station commenced broadcasting in 1952 -- the first public-educational station began broadcasting in 1953.

Following the radio precedent, early commercial television programs were sponsored, and often supplied, by a single advertiser (e.g., The Kraft Television Theater). Most programming, local and network, necessarily was "live." The videotape recorder (VTR) was first utilized to tape live programs for delayed broadcast in 1956; in fact, Sony received an Emmy from the National Academy of Television Arts and Sciences for "outstanding achievement in engineering development for the U-Matic (VTR) video cassette concept."

In the mid-1950's, NBC initiated segmented sponsorship -- which enabled several different advertisers to finance a single program, generally originated by the broadcaster or licensed from someone else. ABC was the first to involve the major movie studios in the production of routine prime-time programming (Disney in 1954, Warner Brothers in 1955). n6 During the 1950's, for the most part, the motion picture industry resisted television and released only its pre-1948 feature films for television broadcasting.

n6 S. Head, *Broadcasting in America: a Survey of Television and Radio*, 4th ed. (1982); L. Bogart, *The Age of Television*, 3d ed. (1972); W. Emery, *Broadcasting and Government: Responsibilities and Regulations* (1961).

47 U.S.C. Section 303(g) spells out our country's policy to "generally encourage the larger and more effective use of radio [including television] in the public interest." Under Sections 307(a), 309(a) (as under Sections 9, 11 of the Radio Act), public radio and television broadcast stations are licensed for the purpose of serving "the public interest, convenience and necessity." The Third Annual Report of the Federal Radio Commission (p. 32) said:

Broadcasting stations are licensed to serve the public and not for the purpose of

furthering private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this.

"[B]roadcasting is subject to an inherent physical limitation. Broadcasting frequencies are a scarce resource; they must be portioned out among applicants." (*Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94, 101 (1973)). "No one has a First Amendment right to a license or to monopolize a radio frequency...; licensees [are] given the privilege of using scarce radio frequencies as proxies for the entire community...." (*Red Lion Broadcast Co. v. FCC*, 395 U.S. 367, 389, 394 (1969)).

Although those who *broadcast* do so as a *privilege*, Missourians have a *right* to *receive* such broadcasts which approaches a First Amendment right -- especially when received in the privacy of their homes. The First Amendment provides "Congress shall make no law... abridging the freedom of speech...." and this Court repeatedly has held that the freedom of speech guaranteed by the First Amendment "necessarily protects the right to receive" communications. *Kleindienst v. Mandel*, 408 U.S. 753, 762-3 (1972); see also *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-7 (1976). Furthermore, "a man's home is his castle." (*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973)).

In *Red Lion*, *supra*, p. 390, this Court said:

... the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment... It is the right of the people to receive suitable access to social, political, esthetic, moral and other ideas and experience which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."

As stated by this Court in *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 397-8 (1968):

Television viewing results from combined activity by broadcasters and viewers. Both play active and indispensable roles in the process... The broadcaster... converts the visible images and audible sounds of the program into electronic signals, and broadcasts the signals at radio frequency for public reception. Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into the visible images and audible sounds of the program. The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer."

This Court further said, both in *Fortnightly*, *supra*, p. 400, and in *Teleprompter Corp. v. CBS*, 415 U.S. 394, 410 (1974), that television programming, once broadcast, has been "released to the public"; and in *Teleprompter*, *supra*, added that once the television program is broadcast, the broadcaster and the program owner have "no control over the segment of the population which may view the program" (p. 412), and that, "The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so." (p. 408).

Like the cable systems in *Fortnightly* and *Teleprompter*, home VTRs "enhance the viewer's capacity to receive the broadcaster's signals" (*Teleprompter*, *supra*, p 401). The radio and television set enabled reception and contemporaneous listing and/or listening and viewing. Tape recorders are "time machines" enabling reception and *delayed* or *Lime-shift* listening/viewing -- as tools which expand the ability of a person to receive a broadcast they are a boon to the public for reception just as they are to broadcasters for broadcasting.

Television programming in Missouri includes news, weather reports, current events, documentaries, talk shows (national and local), sports, religious, educational and instructional, market reports, children's programs -- as well as entertainment.

The people of the State of Missouri include both urban and rural residents, all of whom have an interest in free off-the-air television programming. Many Missourians are employed (or otherwise unavailable) at the time of broadcasts which they want to see and which their status as informed citizens demands that they see (e.g., farmers need weather and market reports but their free time from work frequently does not coincide with television broadcast schedules; night shift workers are entitled to keep current with the rest of the nation as to prime time broadcasting even if they have to view it the next day; etc.) The home VTR furthers the public's "interest, convenience, and necessity" by enabling persons to see programming which they otherwise would have to miss.

Respondents (and their *amici curiae* studios) were not contributors to "the Progress of Science" which brought free television (and radio) to the American public. However, respondents capitalized on television once it was established.

By commercially exploiting their works in public broadcasting, respondents voluntarily are participating in, and profiting handsomely from, the broadcaster's "privilege." Respondents' concurrent effort's to use their copyrights to limit the "means" utilized by Missourians in the privacy of their homes to exercise their "right" to receive public broadcasts are in derogation of "the Progress of Science," the First Amendment and the larger and more effective use of radio and television.

The federal law always has provided for free reception and viewing of radio and television programs which are "broadcast... for the use of the general public" (47 U.S.C. Section 605, Section 27 of the Radio Act). Never has the law limited the means of public reception; never has the law required listening or viewing by the public to be simultaneous with the broadcast.

2. Most of-The-Air Television Broadcasts Are Available for Unchallenged Home Recording

Evidence at the trial of this action showed both professional and amateur sports broadcasts available for home VTR reception with the owners' consent -- and showed that 49% of VTR owners record sports broadcasts.

Evidence showed religious programming available for home VTR reception with the owners' consent -- and showed that 10% of VTR owners record religious broadcasts.

Evidence showed educational programming available for home VTR reception with the owners' consent -- and showed that 63% of VTR owners record educational programming.

Evidence showed that 42% of home VTR owners record National Broadcasting Company programs -- and showed that NBC's parent corporation, RCA, markets VTRs.
n7

n7 The American Broadcasting Company has announced "Home View Network" over its owned and affiliated stations -- early morning broadcasts intended specifically for home recording and later viewing. *The Washington Post*, April 30, 1982; *The Wall Street Journal*, April 30, 1982.

Evidence showed that 74% of home VTR owners record local programming (news, documentaries, public events) -- and showed that broadcast stations erase most of their local programming without even registering it for copyright.

A "Home Video" study prepared for the FCC dated 1 November 1979 synopsis "five major studies of VCR use," finding "it is clear that the principal use of the VCR to date is for time-shift viewing." Also, "because rating services are prepared to report such time-shifting, broadcasters should actually be helped by this consumer convenience. An audience that was previously unavailable to them is now viewing, and the viewing is properly attributed in audience reports... Most [playback] occurs relatively quickly after the recording (almost all within a week). Most of such recordings are viewed only once (usually only by members of that household)...." (pp. 61-62).

A March 15, 1980, report prepared for the Corporation for Public Broadcasting showed home recording from Public Broadcasting Service (PBS) stations was highest during fringe-time periods (the three hours before prime time) when *MacNeil/Lehrer*, *Washington Week*, *Wall Street Week*, etc., were broadcast. At least 68% of PBS recordings is played back within two days. (Respondents' programming does not appear on PBS.)

The 1976 Act specifically authorizes some non-infringing off-the-air VTR usages by educators and libraries -- 17 U.S.C. Section 108(h), 118(d)(3). Respondent Universal expressly has acknowledged some non-infringing off-the-air VTR usage in the educational area (127 Cong. Rec. No. 145, E4751, daily ed. October 14, 1981).

The significance of the foregoing is unmistakable. Today's free off-the-air television broadcasting (some copyrighted, some not) is comprised substantially, in fact primarily, of programming whose owners consent to home recording by Missourians. n8

n8 The Court of Appeal's statement that "Virtually all television programming is copyrighted material" (Pet. App. 26) is both erroneous and irrelevant.

3. *This Action Shows No Justification for Preventing Home-Use Recording of Free Off-The-Air TV*

The district court found, based on uncontroverted evidence, that the home VTR is a "staple item of commerce," n9 used for purposes where no infringement could be alleged (e.g., recording material which is not copyrighted or where permission to record is given) (Pet. App. 92, 106-7). The Court of Appeals' contrary and arbitrary holding that "videotape recorders are not "suitable for substantial noninfringing use" (Pet. App. 26) is untenable if the accepted and usual course of judicial proceedings is to be followed.

n9 The consequence of this finding presumably is that the mere manufacture, distribution, sale or advertisement of such an item, *per se*, cannot constitute contributory infringement when that item is used by the consumer for patent or copyright infringement. 35 U.S.C. Section 271(c); *Dawson Chemical Co. v. Rohm & Hass Co.*, 448 U.S. 176 (1980); *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), overruled on other grounds by *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917).

If home VTR suppliers are held liable for infringing home-use recording which they cannot control (the district court found and common sense makes obvious, that petitioners "have neither the right nor the ability to control Betamax purchasers' use of the machines in their home" -- Pet. App. 98), they cannot be expected to supply VTRs for any purpose.

The evidence showed only time-shift usage of the Betamax home VTR with respect to respondents' works n10 -- and no damage. For many Missourians, the "recording" (which respondents say constitutes the infringement) is a necessary mechanical step

(ergo, a "fair use") in the only reception process which ultimately will enable them to view at home the program which the broadcaster intended them to view. In fact, respondents well could be deemed to have consented to such usage of their copyrighted works when they elected to exploit them on free television. Home viewing by anyone and everyone within range of his signal is exactly that the broadcaster intended; and, when all is said and done, nothing more occurs with home VTR usage. But even assuming *arguendo* that home recording of respondents' works were infringement the price of depriving the public of home VTRs for any purpose n11 in order to prevent home recording of respondents' works is far too high -- as well as legally unjustifiable.

n10 This *amicus curiae* brief is directed only to home VTR time-shift usage. This case does not involve commercial expropriation, or piracy, of any work and this brief manifestly does not condone such.

n11 There is no doubt about respondents' goal to obtain and use an injunction in order to terminate, or control, all home VTR recording by Missourians. Respondents told the district court herein at the beginning of trial "that is really what this case is all about, that is, an injunction" (R.T. 70-1) and at the close of trial "Certainly at the very least we think that the Court should issue an injunction prohibiting the sale of Betamax" (R.T. 3278). The complaint in Universal's suit filed November 6, 1981 against 50 defendants, including the balance of VTR suppliers (No. 81-5723 FW, C.D. Cal.), prays "that an injunction issue against defendants... to protect [Universal's] copyrighted motion pictures from recording and copying on the aforesaid VTR's and video cassettes". The complaint in Universal's suit filed July 1, 1982 against petitioners herein, seeking a finding of contributory infringement as to *every* motion picture ever licensed by Universal to television (No. 82-3271 FW, C.D. Cal), likewise prays "That an injunction issue against [petitioners]... to protect [Universal's] copyrighted motion pictures from recording and copying on the aforesaid VTR's and videocassettes".

Respondent's obvious recourse is to seek a remedy against individual direct infringers (if such they be) n12 -- but respondents have stated, separately and jointly, that they never will seek any relief against a consumer (Appendix 1 hereto). Since respondents refuse to help themselves, this Court should have little concern for their supposed plight.

n12 See *Encyclopedia Britannica Educational Corp. v. Crooks*, F.Supp. (W.D.N.Y. 1982).

CONCLUSION

Home-use VTRs were sold in the United States for ten years (1965-75) without objection from anyone before respondents brought this action. This action was commenced some six and one-half years ago and no other copyright owner has brought an infringement action against anyone for home recording. Respondent Disney has said publicly it would not do so again (Appendix 2 hereto). Like radio, free off-the-air TV is not "for private gain... It is a public concern, impressed with a public trust, and to be considered primarily from the standpoint of public interest..." (2 Ann. Rept. Fed. Radio Comm. 168-9). This Court should not regard the economic motivations of one or two (or even several) owners of copyrighted entertainment-type programs as sufficient grounds to allow them to destroy Missourians' utilization of technological advances for the reception and use at home of limited radio and frequencies which were allotted long ago for the public's interest, convenience and necessity.

Respectfully submitted,

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