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IN THE SUPREME COURT OF THE UNITED STATES

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SONY CORPORATION OF AMERICA, ET s

AL., a

Petitioners

v. s No. 81-1687

UNIVERSAL CITY STUDIOS, INC., ETC.,

ET AL. s

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Washington, D.C.

Tuesday, January 18, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 101 p.m.

APPEARANCES

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

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

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?_2_0 C E E _D I N G S

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

(Laughter.)

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

ORAL ARGUMENT OF DEAN C. DUNLAVEY, ESQ.

ON BEHALF OF PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

with the copy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: The first copy.

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

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

MR. DUNLAVEY: Could it?

QUESTION: Yes.

MR. DUNLAVEY: Yes, it could.

QUESTION: And how would one know, really?

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

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

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

Now, looking at the Betamax -- and realize

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

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

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

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

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

MR. DUNLAVEY: Yes, it was.

QUESTION& And the Court of Appeals upset that finding of fact?

MR. DUNLAVEY& The Court of Appeals rolled over it like it wasn't even there. The Court of Appeals

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

MR. DUNLAVEY: The Court of Appeals really

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION; So in your view that would protect both the manufacturers and the retailers and wholesalers?

MR. DUNLAVEY: And the distributor and the

advertiser.

QUESTION: Distributors.

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

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

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

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

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

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

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

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

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

Now, the other aspects of contributory --

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

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

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

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

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

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

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

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

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

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

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

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

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

trouble directly from Respondents.

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

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

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

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

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

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

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

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

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

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

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

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

MR. DUNLAVEY: The Court of Appeals --

QUESTION: Or just ignored it?

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

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

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

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

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

non-infringing use within the meaning of this doctrine?

MR. DUNLAVEY: If he says --

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

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

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

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

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

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

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

programs that are broadcast are not copyrighted or not-copyrightable?

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

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

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

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

MR. DUNLAVEY: They would be copyrightable, yes.

QUESTION: But not copyrighted, but perhaps not copyrighted?

MR. DUNLAVEY: Perhaps not.

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

QUESTION: What about a station that produces

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

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

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

MR. DUNLAVEY: Yes.

QUESTION: -- composers.

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

(Laughter.)

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

There is the problem of copyrighted work within copyrighted works.

QUESTION: All right, thank you.

MR. DUNLAVEY& In the limited time I have lefts As far as fair use is concerned --

CHIEF JUSTICE BURGER& You realize you're into your rebuttal time now.

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

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

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

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

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

KR. DUNLAVEY: It's more like the publisher, Justice Rehnquist, who, havin⁷ put his book in the bookstore, knows that whoever buys it can *then* read it, give it to a friend. He knows what's going to happen to it.

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

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

infringement?

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

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

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

Thank you.

CHIEF JUSTICE BURGER: Mr. Kroft.

ORAL ARGUMENT OF STEPHEN A. KROFT, ESQ.

ON BEHALF OF RESPONDENTS

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

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

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

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

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

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

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

a litigated case?

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

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

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

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

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

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

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

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

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

QUESTION: How does the manufacturer know that

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

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

QUESTION: Can you hypothesize any kind of proof that would give **YOU** any rational measure?

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

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

QUESTIONS How many samples out of the millions of machines were there in evidence?

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

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

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

MR. KROFTS That's what I'm suggesting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTIONS Did the Court of Appeals characterize it or not?

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

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

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

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

QUESTION: Yeah, one way or another.

MR. KROFT: Correct.

QUESTIONS And if the Court of Appeals thought that kind of a finding was relevant, I take it, why, I would have thought it might have remanded to the district court to -- if the district court used the wrong standard or didn't make the findings that it should have, why did the Court of Appeals make its findings?

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

The Defendants, the Petitioners here, had the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I think it's also very important to emphasize

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

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

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

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

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

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

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

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

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

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

order to have its protection?

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: But it did disagree on that.

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

With respect to the fair use question, this

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

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

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

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

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

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

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

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

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

ASR. KROFT: The issue --

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

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

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

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

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

QUESTION: I understand it can have commercial ramifications.

MR. KROFT: Right.

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

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

QUESTION: I understand.

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

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

MR. KROFT: I think the findings establish that there will be an adverse effect. The findings are the following, Justice Stevens⁴

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

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

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

MR. KROFT: I don't believe so.

QUESTION: I couldn't myself and I just was

Wondering what your view was.

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

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

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

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

QUESTIONS Would that be close to Williams against Wilkins?

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

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

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

QUESTION: Right.

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

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

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

(Laughter.)

MR. KROFT: When's the reunion?

(Laughter.)

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

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

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

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

QUESTION: If there is an injury.

MR. KROFTs -- many motion pictures that are on television are available for rental in cassette form. The injury is you wouldn't be -- Respondents wouldn't be --

QUESTION: Not all, though.

MR. KROFT: Not all.

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

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

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

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

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

Petitioners' own survey showed that less than

nine percent of all recordings consist of sports, religious and edu--ational programming, and that's all sports, religious and educational programming, not just the programming owned by the few witnesses that were brought to the trial by the Petitioners. In contrast, over 80 percent of all the recordings are of entertainment programming, which was defined in Petitioners' own survey to mean motion pictures, television series and game shows.

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

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

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

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

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

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

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

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

QUESTIONS You think that would satisfy the requirements of showing a contributory infringement, if you just knew that it was possible?

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

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

(Laughter.)

QUESTIONS Is that an unscrupulous user?

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

QUESTIONS They think they've paid for it,

too .

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

Thank you.

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

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

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the
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