

SONY CORPORATION OF AMERICA, et al., Petitioners, vs. **UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,** Respondents.
No. 81-1687

OCTOBER TERM, 1981

May 24, 1982

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

DEAN C. DUNLAVEY, (Counsel of Record), DONALD E. SLOAN, GIBSON, DUNN & CRUTCHER, 515 South Flower Street, Los Angeles, Calif. 90071, (213) 488-7000, Attorneys for Petitioners, Sony Corporation of America, et al.

Of Counsel: MARSHAL RUTTER, RUTTER, EBBERT & O'SULLIVAN, Suite 2200, 1900 Avenue of the Stars, Los Angeles, Calif. 90067, (213) 879-9494.

TABLE OF AUTHORITIES

H.R. 4808, 97th Cong., 1st Sess., 127 Cong. Rec. H 7591 (daily ed. Oct. 21, 1981)

S. 1758, 97th Cong., 1st Sess., 127 Cong. Rec. § 11810 (daily ed. Oct. 21, 1981)

Newsweek, April 26, 1982

TV Digest, April 26, 1982

TEXT: This Reply Brief is filed pursuant to Rule 22.5,.6, Sup. Ct. Rules -- it is addressed solely to an argument, first raised in respondents' Brief in Opposition and based substantially on events transpiring since the Petition was filed, that "Pending Congressional legislation will likely dispose of the issues before this Court" and that "such legislation is imminent" n1 (emphasis added; Br. Opp. 10 -- see also pp. 5, 6, 9).

n1 The limitation of this Reply Brief to this one argument does not imply petitioners' concurrence with the correctness of other misstatements or arguments in respondents' Brief in Opposition.

It is correct that bills pertaining to free off-the-air home VTR recording are pending both in the House of Representatives and in the Senate, and that both House and Senate Committees have held hearings thereon since the Petition was filed (see Br. Opp. 5-6, fn. 7, 8). The initial such bills were spontaneous on the part of the legislators who introduced them; they provide an express exemption for home VTR recording. n2 Subsequent bills or "amendments", spawned and intensely lobbied for by respondents inter alios, provide for highly controversial royalty fees on VTRs and tapes -- and, in turn, have themselves been amended to further entail comparably

controversial proposed royalties on audio recorders and tapes, as well as alteration of the "first sale" doctrine. n3

n2 S. 1758 has 14 sponsors, including Strom Thurmond (D. So. Car.), Chairman of the Senate Judiciary Committee, and three other members of that committee; the corresponding H.R. 4808 has over 98 sponsors, including the House majority whip.

n3 For relative support of the initial and subsequent bills, compare fn. 2, supra, with Br. Opp. p. 5, fn. 8.

Considering the diametrically opposed nature of the bills and the appreciable support for each, and the congested condition of Congress' calendar between now and the end of the current session, it is gross overreaching and overstatement for U/D to represent to this Court that any "such legislation is imminent". The legislative process has in no way neared completion. The House Subcommittee on Courts, Civil Liberties and the Administration of Justice has scheduled at least one further hearing in the latter half of June. There is no indication by either the House or Senate that any of the bills will be voted on even at the committee level in the foreseeable future.

One of the major themes in the Congressional debate over the issue is the interpretation of the current law as it applies to off-the-air videotaping of television programs. Only this Court can clarify the uncertainties created by the lower courts' decisions, and it should do so now so as to assure that such debate can be pursued (if at all) under the correct premises.

Moreover, none of the bills even addresses, let alone "disposes of", those "Questins Presented" herein arising from the Court of Appeals' limitation of "fair use" to productive use, nor from its introduction of a "compulsory license/continuing royalty" remedy into copyright law.

Contrary to respondents' assertion that "this Court should defer to the legislative process already underway" (Br. Opp. p. 10):

Rep. Kastenmeier n4 has said "that he favors giving courts time to act before legislating" (TV Digest, April 26, 1982, p. 10);

n4 D. Wisc. - Chairman, House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee.

Universal's president told the Senate Judiciary Committee on November 30, 1981 that "the Sony-Betamax case... will continue in the courts... in our judgment there is present and existing jeopardy which the present Congress cannot do much about...."; and

Newsweek magazine reported "Most likely... Congress will duck the issue as long as possible... hoping it will be settled by the Supreme Court" (April 26, 1982, p. 72).

The Court of Appeals effectively held a trial de novo with the parties in absentia,

contravened the district court's findings of fact based on evidence with "facts" drawn from assumptions and statements found in treatises and law review articles, and committed errors of law giving rise to five substantial "Questions Presented". The record number of amici curiae at the petition stage, on both sides, vividly emphasizes the importance of the far-reaching problems which the Court of Appeals has created and which only this Supreme Court (and not Congress) can and should rectify.

Respectfully submitted,

DEAN C. DUNLAVEY, (Counsel of Record), DONALD E. SLOAN, Attorneys for
Petitioners, Sony Corporation of America, et al.

Of Counsel: MARSHALL RUTTER

May 23, 1982