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Sony Corp. of America v. Universal City Studios, Inc.

464 U.S. 417 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

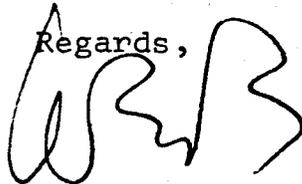
November 25, 1983

Re: No. 81-1687 - Sony Corporation of America v.
Universal City Studios, Inc.

Dear John:

I join. I would be happier not to rest on the first of your "two conclusions" at the top of page 36. For me, the "second" is enough to make out the case for your result.

Regards,

A handwritten signature in dark ink, appearing to be 'WRS', written over the typed word 'Regards,'.

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 1, 1983

No. 81-1687

Sony Corporation of America
v. Universal City Studios, Inc.

Dear John,

I agree.

Sincerely,

Paul

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 29, 1983

Re: 81-1687 - Sony Corporation of America
v. Universal City Studios, Inc.

Dear John,

Please join me.

Sincerely,



Justice Stevens

Copies to the Conference

cpm

PRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

October 4, 1983

Re: 81-1687 -- Sony v. Universal Studios

Dear Harry:

I am still with you on this case. A fresh look at the briefs has left me convinced that, under current law, home VTR taping of copyrighted programs is direct infringement and that, at a minimum, a remand is necessary to determine Sony's liability for contributory infringement. My conclusion rests in part on my analysis of one aspect of the case that perhaps merits more attention than it has received thus far. It concerns the economic impact of time-shifting on copyright holders.

§107 of the 1976 Copyright Act lists four factors that should be taken into account when deciding "whether the use made of a work in any particular case is a fair use." The fourth criterion, which the parties and many members of the Court regard (rightly or wrongly) as especially important, is "the effect of the use upon the potential market for or value of the copyrighted work."¹ Similar references to impacts upon "potential" markets may be found in many cases decided both before and after Congress, in §107, lent its imprimatur to the judicially-created doctrine of fair use.²

¹17 U.S.C. §107(4) (Supp. V 1981) (emphasis added).

²See, e.g., Iowa State University Research Foundation v. American Broadcasting Co., 621 F 2d 57, 60 (CA2 1980) ("the effect of the

~~Footnote continued on next page.~~

The requirement that a putatively infringing use of a copyrighted work, to be "fair," must not impair a "potential" market for the work has two implications. First, an infringer cannot prevail merely by demonstrating³ that the copyright holder suffered no net harm from the infringer's action. Indeed, even a showing that the infringement has resulted in a net benefit to the copyright holder will not suffice. Rather, the infringer must demonstrate that he has not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group of people who would otherwise be willing to pay to see or hear the copyrighted work.

Second, the fact that a given market for a copyrighted work would not be available to the copyright holder were it not for

use on the copyright holder's potential market for the work"); Meeropol v. Nizer, 560 F.2d 1061, 1070 (CA2 1977) ("A key issue in fair use cases is whether the defendant's work tends to diminish or prejudice the potential sale of plaintiff's work"), cert. denied, 434 U.S. 1013 (1978); Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (~~1973~~ 1973) ("the effect of the use on a copyright owner's potential market for and value of his work"), aff'd ~~per curiam~~ by an equally divided Court, 420 U.S. 376 (1975); Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F.Supp. 1156, 1173 (WDNY 1982) ("[T]he concern here must be focused on a copyrighted work's potential market. It is perfectly possible that plaintiffs' profits would have been greater, but for the kind of videotaping in question.") (emphasis in original).

³As my phrasing of this point suggests, I think that, to avail himself of the fair-use doctrine, the infringer should be obliged to prove the absence of a likelihood that his activities will adversely affect the copyright holder. However, the argument advanced in this memorandum -- regarding the significance of the impact of time-shifting upon the "potential" market for copyrighted works -- is independent of the question of who should bear the burden of proof regarding the existence of such an impact.

the infringer's activities does not permit the infringer to exploit that market without compensating the copyright holder. This point is aptly illustrated by the recent decision of the Second Circuit in Iowa State University Research ^{Foundation, Inc.} Group v.

American Broadcasting Co., 621 F 2d 57 (CA2 1^80). The defendant in that case (ABC) had copied and broadcast portions of a student-produced film, without the permission of the copyright holder. ABC sought shelter in the fair-use doctrine, partly on the grounds that ABC had no obligation to afford the plaintiff access to the enormous market monopolized by ABC (in connection with its exclusive coverage of the Olympics) and that "the market value of [the film] increased after ABC's offending telecasts' due to a dramatic upsurge in demand for rentals of the film." The Court of Appeals properly rejected the defendant's argument, reasoning that the plaintiff's copyright "entitled it to attempt to exploit the commercial market controlled by ABC, and, if it could not, to withhold permission to use the film in that market."⁴

In this case, respondents (and amici) point out that the advent of VTR technology has created a potential market for their copyrighted programs. That market consists of the people who

⁴By way of further illustration of the point, consider the following case: A translator of a copyrighted novel publishes his translation without the author's permission. The author brings an infringement action. Can the translator escape liability by showing that, but for his activity, there would be no market whatsoever, amongst readers of the foreign language, for the author's book?

find it impossible or inconvenient to watch the programs at the times they are broadcast, and who wish to watch them at other times. Those people are willing to pay for the privilege of watching copyrighted works at their convenience, as evidenced by the fact that they are willing to pay for VTRs and tapes; undoubtedly, most would also be willing to pay some kind of royalty to the copyright holders. Respondents plausibly argue that they have been deprived of the ability to exploit this sizeable market.

To the foregoing argument, Sony answers: But respondents are in fact being (indirectly) compensated by the members of this newly created market -- in precisely the same way that they are compensated by ordinary "live" viewers of respondents' programs.⁵ When time-shifters watch copyrighted shows, they also watch the advertisements contained therein. As a result, they later buy the advertised products. The manufacturers of those products, aware of the benefits they reap from the increase in audience size caused by time-shifting, are willing to pay the television networks or individual stations larger fees for the privilege of advertising their goods on the copyrighted shows. The copyright holders, accordingly, are able to demand larger fees from the networks and stations in return for the right to broadcast their

⁵I leave to one side the question whether respondents' exclusive property interests in their copyrighted works accord them the right to set the terms by which they are compensated by the members of the new market -- i.e., whether respondents have the statutory right to demand larger fees from time-shifters than they demand from ordinary viewers.

works.

Sony's argument has two flaws. First, the record does not show -- and the District Court did not find -- that the system in fact operates as Sony describes. There was testimony at trial -- testimony credited by the District Court -- that the rating services are capable of measuring the size of time-shifting audiences.⁶ But there was no testimony that the rating services do now (or will soon) make such measurements. There was thus no showing that the copyright holders currently are receiving any compensation from the time-shifters.

Second, even if the system operated as described above, rational advertisers would not pay for the time-shifters who edit out the advertisements (by pressing the fast-forward buttons on their machines when the advertisements appear on their screens during playback). It is undisputed that a sizeable proportion of the time-shifters do edit out the advertisements.⁷ Thus, at a

⁶The District Court observed: "There was testimony at trial ... that Nielsen Ratings had already developed the ability to measure when a Betamax in a sample home is recording the program. Thus, the Betamax owner will be measured as a part of the live audience. The later diary can augment that measurement with information about subsequent viewing." 480 F.Supp. at 466.

⁷Sony concedes that at least 31% of the ads are expunged. *Petr's* br. at 14 n.19. Other surveys introduced at trial suggest that the percentage may in fact be much higher.

I note in passing that there may well be an additional reason why copyright holders are not fully compensated by time-shifters for the privilege of viewing copyrighted programs. Respondents argue that advertisers are unwilling to pay for audiences of time-shifters at the same rate they pay for audiences of "live" viewers because time-shifters sometimes watch the programs after the advertisements have lost much of their value (e.g., programs containing toy advertisements broadcast just before Christmas,

Footnote continued on next page.

minimum; the copyright holders have been denied the opportunity to demand payment from the members of a significant subset of the newly created market for their programs. To put the point slightly differently, advertisement-editing time-shifters themselves comprise an important "potential market" for the copyright holders' works. The net effect of home VTR copying is that the copyright holders are foreclosed from exploiting that market.⁸

To summarize, it is apparent from the record and the findings of the District Court that time-shifting does have a substantial adverse effect upon "the potential market for" respondents' copyrighted works. Accordingly, even under the formulation of the fair-use doctrine advocated by petitioners,

viewed after Christmas), and because some time-shifters are drawn from social groups different from those the advertisers are especially interested in reaching.

⁸Cf. Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 394 (1974). The Court there justified its conclusion that a retransmission of a copyrighted television program by a cable television system did not constitute a "performance" (which would give rise to liability for infringement), partly on the basis of the facts (as found by the District Court) that, "[b]y extending the range of viewability of a broadcast program, CATV systems ... do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor.... [In the ordinary situation, the broadcaster] gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation.... From the point of view of the copyright holders, [the net effect of CATV retransmissions] is that the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market." Id., at 412-13 (footnotes omitted). The prevalence of advertisement-editing by time-shifters renders this case fundamentally different from that presented in Teleprompter.

time-shifting cannot be deemed a fair use.

The foregoing conclusion does not, of course, dispose of the case. But it means that the decision below can be reversed only if a sufficient amount of home VTR taping is "unchallenged" by the owners of the copyrights on the programs being copied to enable Sony to satisfy whatever test for contributory infringement the Court settles upon. On the latter issue, I remain persuaded by the analysis sketched in Part V, section C, of your most recent draft.

Regards,

T.M.

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 6, 1983

Re: No. 81-1687-Sony Corp. v. Universal Studios

Dear Harry:

I will be delighted to join your dissent in
this case.

Sincerely,

T.M.
T.M.

Justice Blackmun

cc: Justice Powell
Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 28, 1983

Re: No. 81-1687-Sony v. Universal

Dear John:

I await the dissent.

Sincerely,

Jm.

T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 3, 1984

Re: No. 81-1687-Sony v. Universal City Studios

Dear Harry:

Please join me.

Sincerely,



T.M.

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 6, 1983

Re: No. 81-1687 - Sony Corp. of America
v. Universal City Studios, Inc.

Dear Thurgood:

In view of yesterday's vote, I shall, with your permission, undertake the dissent in this case. Is this all right with you?

Harry

Justice Marshall

cc: Justice Powell
Justice Rehnquist

*I will be delighted to join
your dissent in this case*

JH

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 6, 1983

Re: No. 81-1687 - Sony Corp. of America
v. Universal City Studios, Inc.

Dear Thurgood:

I was pleased to see your proposed letter. I think the points made are good ones and I shall endeavor to incorporate them into the forthcoming dissent. I wish they would be persuasive with our good friend, Bill Brennan.

Sincerely,



Justice Marshall

M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 11, 1983

Re: No. 81-1687 - Sony Corp. v. Universal City Studios

Dear John:

As you will have surmised, I shall be undertaking the dissent in this case.

Sincerely,



Justice Stevens

cc: The Conference

PRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1687

SONY CORPORATION OF AMERICA, ET AL., PETITIONERS *v.* UNIVERSAL CITY STUDIOS, INC., ET AL.

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

[January —, 1984]

JUSTICE BLACKMUN, dissenting.

A restatement of the facts and judicial history of this case is necessary, in my view, for a proper focus upon the issues. Respondents' position is hardly so "unprecedented," *ante*, at 2, in the copyright law, nor does it really embody a "gross generalization," *ante*, at 17, or a "novel theory of liability," *ante*, at 18, and the like, as the Court, in belittling their claims, describes the efforts of respondents.

I

The introduction of the home videotape recorder (VTR) upon the market has enabled millions of Americans to make recordings of television programs in their homes, for future and repeated viewing at their own convenience. While this practice has proved highly popular with owners of television sets and VTRs, it understandably has been a matter of concern for the holders of copyrights in the recorded programs. A result is the present litigation, raising the issues whether the home recording of a copyrighted television program is an infringement of the copyright, and, if so, whether the manufacturers and distributors of VTRs are liable as contributory infringers. I would hope that these questions ultimately will be considered seriously and in depth by the Congress and be resolved there, despite the fact that the Court's decision today provides little incentive for congressional action. Our

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

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STYLISTIC CHANGES
PP. 1, 40, +42

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1687

SONY CORPORATION OF AMERICA, ET AL., PETITIONERS *v.* UNIVERSAL CITY STUDIOS, INC., ET AL.

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

[January —, 1984]

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

A restatement of the facts and judicial history of this case is necessary, in my view, for a proper focus upon the issues. Respondents' position is hardly so "unprecedented," *ante*, at 2, in the copyright law, nor does it really embody a "gross generalization," *ante*, at 17, or a "novel theory of liability," *ante*, at 18, and the like, as the Court, in belittling their claims, describes the efforts of respondents.

I

The introduction of the home videotape recorder (VTR) upon the market has enabled millions of Americans to make recordings of television programs in their homes, for future and repeated viewing at their own convenience. While this practice has proved highly popular with owners of television sets and VTRs, it understandably has been a matter of concern for the holders of copyrights in the recorded programs. A result is the present litigation, raising the issues whether the home recording of a copyrighted television program is an infringement of the copyright, and, if so, whether the manufacturers and distributors of VTRs are liable as contributory infringers. I would hope that these questions ultimately will be considered seriously and in depth by the Congress and be resolved there, despite the fact that the Court's decision to-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 31, 1984

MEMORANDUM TO THE CONFERENCE

Re: No. 81-1687 - Sony Corp. v. Universal City Studios, Inc.

Absent dissent, I shall change the second and third sentences of part A on page 31 of the dissent in this case to read as follows:

"I agree with the Gershwin court that contributory liability may be imposed even when the defendant has no formal control over the infringer. The defendant in Gershwin was a concert promoter operating through local concert associations that it sponsored; it had no formal control over the infringing performers themselves."

This is more factually correct than the sentences as they originally appeared.

Larry —

cc: Henry C. Lind
Reporter of Decisions

M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 2, 1984

Re: No. 81-1687, Sony Corporation
v. Universal City Studios, Inc.

Dear John:

One change has been suggested for footnote 45 of my dissent in Sony. I propose to change the last sentence of the first paragraph of that footnote to read as follows: "It is unclear whether the sports leagues have authority to consent to copying the broadcasts of their events."

Mr. Linds tells me that it is not too late to do this. As the Chief says, "absent dissent," I shall proceed.

Sincerely,

H.A.B.

Justice Stevens

cc: The Conference

81 MAY -5 63:40

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 28, 1983

81-1687 Sony v. Universal

Dear John:

I will await the dissent.

Sincerely,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 4, 1984

81-1687 Sony v. Universal City Studios

Dear Harry:

Please join me in your dissent.

Sincerely,

Lewis

Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

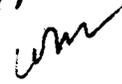
January 5, 1984

Re: No. 81-1687 Sony Corp. v. Universal City Studios

Dear Harry:

Please join me in your dissenting opinion.

Sincerely,



Justice Blackmun

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

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Lawrence
AS
the dissent

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1687

SONY CORPORATION OF AMERICA, ET AL., PETITIONERS *v.* UNIVERSAL CITY STUDIOS, INC., ETC., ET AL.

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

[November —, 1983]

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners manufacture and sell home video tape recorders. Respondents own the copyrights on some of the television programs that are broadcast on the public airwaves. Some members of the general public use video tape recorders sold by petitioners to record some of these broadcasts, as well as a large number of other broadcasts. The question presented is whether the sale of petitioners' copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act.

Respondents commenced this copyright infringement action against petitioners in the United States District Court for the Central District of California in 1976. Respondents alleged that some individuals had used Betamax video tape recorders (VTR's) to record some of respondents' copyrighted works which had been exhibited on commercially sponsored television and contended that these individuals had thereby infringed respondents' copyrights. Respondents further maintained that petitioners were liable for the copyright infringement allegedly committed by Betamax consumers because of petitioners' marketing of the Betamax VTR's.¹ Re-

¹The respondents also asserted causes of action under state law and § 43(a) of the Trademark Act of 1946, 60 Stat. 441, 15 U. S. C. § 1125(a).

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

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NOV 30 '83

§. 19, 22, 34

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1687

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

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

[December —, 1983]

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners manufacture and sell home video tape recorders. Respondents own the copyrights on some of the television programs that are broadcast on the public airwaves. Some members of the general public use video tape recorders sold by petitioners to record some of these broadcasts, as well as a large number of other broadcasts. The question presented is whether the sale of petitioners' copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act.

Respondents commenced this copyright infringement action against petitioners in the United States District Court for the Central District of California in 1976. Respondents alleged that some individuals had used Betamax video tape recorders (VTR's) to record some of respondents' copyrighted works which had been exhibited on commercially sponsored television and contended that these individuals had thereby infringed respondents' copyrights. Respondents further maintained that petitioners were liable for the copyright infringement allegedly committed by Betamax consumers because of petitioners' marketing of the Betamax VTR's.¹ Re-

¹The respondents also asserted causes of action under state law and § 43(a) of the Trademark Act of 1946, 60 Stat. 441, 15 U. S. C. § 1125(a). These claims are not before this Court.

PRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

20, 21, 29, 30, 31

From: Justice Stevens

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1687

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

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

[January —, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners manufacture and sell home video tape recorders. Respondents own the copyrights on some of the television programs that are broadcast on the public airwaves. Some members of the general public use video tape recorders sold by petitioners to record some of these broadcasts, as well as a large number of other broadcasts. The question presented is whether the sale of petitioners' copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 30, 1983

No. 81-1687 Sony v. Universal City Studios

Dear John,

Please join me.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference