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Home Use of Videotape Recorders (VTRs): Infringement or Fair Use - Universal City Studio's, Inc. v. Sony Corp. of America

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The copyright clause\(^1\) of the United States Constitution empowers Congress to promote the progress of technology and to protect intellectual property rights\(^2\) by granting to authors the exclusive right to the use of their work. In reality, however, those rights are subject to an intricate balancing of the interest in exclusivity of the copyright owner against the public interest in unrestricted access to copyrighted works.\(^3\) The copyright scheme, as currently embodied in the 1976 Copyright Act,\(^4\) requires the accommodation of these competing interests. In order to accomplish this accommodation, courts have developed the "fair use" doctrine as a principal balancing tool.\(^5\)
The growing use of home videotape recorders (VTRs) by private individuals to record copyrighted television programs raises the question of whether such recording infringes the copyright owner's exclusive right to make copies of the televised material or whether such recording is protected under the fair use doctrine. In *Universal City Studios, Inc. v. Sony Corp. of America,* the United States Court of Appeals for the Ninth Circuit recently held that unauthorized home video recording of copyrighted materials on the Betamax VTR constituted copyright infringement and was, therefore, not entitled to protection under the fair use doctrine. In reversing the district court's finding of fair use, the Ninth Circuit stressed the need to avoid a blurring of the distinction between the issue of liability and the type of relief available to copyright owners as a result of home copying.

This comment will focus on the Ninth Circuit's opinion in *Universal City Studios, Inc. v. Sony Corp. of America,* with particular attention paid to the court's application of the fair use doctrine. It will attempt to place the decision in perspective through a brief review of the genesis of the fair use doctrine as applied under the 1909 Copyright Act and

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6. Sony began to market its Betamax VTR to the public in November, 1975. Wall St. J., Mar. 28, 1977, at 6, col. 2. The VTR is a device capable of off-the-air recording and playback of material broadcast for television reception. The VTRs included various options such as built-in timers and remote pause controls. The timer enables the VTR to record a television program at a preselected time, while the owner is otherwise engaged. The pause control allows the interruption of whatever function the machine is in. Thus, if an individual views the broadcast while recording with Betamax, the pause button may be used to omit undesirable segments, such as commercials, from the recording. The fast forward capability enables the playback viewer to pass over undesirable portions. *Universal City Studios, Inc. v. Sony Corp. of America,* 480 F. Supp. 429, 435-36 (C.D. Cal. 1979), rev'd, 659 F.2d 963 (9th Cir. 1981), cert. granted, 102 S. Ct. 2926 (1982).

7. The copyright implications of the new VTR technology were not fully addressed by the Act since the interest of the public vis-a-vis the copyright owner were not defined. 17 U.S.C. §§ 101-810 (Supp. III 1979). Videotapes would be included within the statutory definitions of "audiovisual works" and "copies" as set forth in § 101 but generally, except for provisions such as § 108(f)(3) concerning "archives of an audiovisual news program" and § 111(e) concerning "non-simultaneous secondary transmissions by cable systems," the new Act does not consider videotapes.


9. Id.

10. Id. at 976.

The purpose of a copyright is to grant copyright owners a limited property right in the form of expression of their ideas. The celebrated Statute of Anne was the first statute to recognize the rights of authors to their works and was the foundation of all subsequent copyright legislation both in the United States and abroad. However, the Statute of Anne was limited in scope, since it was applicable solely within Britain to British books. Thus, after the Revolutionary War, several states passed laws to afford a measure of protection to authors, but these laws were similarly limited in scope to operate solely within the boundaries of the particular state.

The framers of the United States Constitution sought to remedy this problem by including within the Constitution a copyright clause that serves as the basis for all federal copyright law. Implicit in the Constitution is the idea that authors should be encouraged to create and disseminate their creative works through the promise of economic reward.

Congress quickly became the champion of authors' rights and in 1790 the first federal Copyright Act was created to implement constitutional goals concerning copyright protection. Thus, a copyright is entirely the creature of the federal statute which created it. The pre-

15. 8 Anne ch. 19, 1710.
16. So far as existing works were concerned, the statute provided that the authors or their assigns should have the sole right of publication for 21 years, but for new works the right was to run for 14 years, and the author was granted the privilege of renewal for another 14 years. See H. HOWELL, THE COPYRIGHT LAW 3 (3d ed. 1952).
20. A copyright has been defined as “the right of literary property as recognized and sanctioned by positive law” or as “an intangible, incorporeal right granted by statute to the author or
amble of the 1790 Act recited that the purpose of the Act was to encourage learning "by securing the copies of maps, charts and books to authors and proprietors of such copies, during the times mentioned therein."21

From the beginning, courts construed the 1790 Act very strictly. The first case that came before the Supreme Court regarding authors' rights22 addressed the question of whether the 1790 Act granted perpetual rights to authors in their works, thereby enabling them to obtain relief against piracy. The Court concluded that whatever exclusive rights the author may have had in his manuscript before publication would be abolished forever upon publication unless the author had strictly complied with all the requirements of the Act.

New subjects were gradually added to the 1790 Act and the scope and term of copyright protection was enlarged. The Copyright Act of 190923 was the outcome of several years of extensive negotiations on behalf of every interest involved, including eminent members of the bar. The "purpose" preamble of the 1790 Act disappeared. However, an accompanying legislative report24 stated that the purpose of copyright was primarily to benefit the public welfare and to promote the progress of technology and the advancement of ideas. But the 1909 Act was largely a compromise measure embodying different and disparate points of view. Changes were made in one place without the seemingly necessary corresponding changes in other places, resulting in a lack of clearness and coherence. The 1909 Act began by simply defining the elements of the exclusive right conferred on authors. It contained very few statutorily recognized exemptions.25 All other exceptions26 to copyright controls were governed by the judicially created doctrine of originator of certain literary or artistic productions, whereby he is invested, for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them." BLACK'S LAW DICTIONARY 304 (5th ed. 1979).

21. Act of May 31, 1790, ch. 15, 1 Stat. 124. The Act of 1790 assured protection to the author or his assigns of any book, map or chart for 14 years upon:
1) recording the title in the Register book of the Clerk’s Office of the District Court where the author or proprietor resided;
2) publishing a copy of the record so made in one or more newspapers for four weeks;
and
3) depositing a copy of the work itself in the office of the Secretary of State within six months after publication.

Id.

23. 1909 Act, supra note 12.
25. The 1909 Act recognized only one qualified exemption for making a tangible copy of anything else (for making phonorecords of copyrighted music) and two exemptions for certain "performances" of copyrighted works—one for nonprofit performance of musical or nondramatic
fair use, a doctrine that arose in order to permit the buffering of the seemingly absolute statutory grant of monopolistic rights afforded the copyright owner under the 1909 Act.

In the first fair use case, Folsom v. Marsh, Justice Story, the principal Supreme Court architect of early copyright adjudication, laid down what have since become known as the four traditional fair use factors: 1) the nature of the work copied, 2) the quantity of materials used (the substantiality factor), 3) the purpose for which the work was used, and 4) the degree to which the use may prejudice the sale or diminish the profits of the original work (the harm factor). Commenting on the applicability of the fair use doctrine, Justice Story said, "it is not easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases . . . the lines . . . sometimes, become almost evanescent, or melt into each other."

Case law on the availability of a fair use defense in the context of home videotaping is sparse since the taping of television programs is a relatively new practice. There are, however, a few cases analogous to the home videotaping situation which have utilized a fair use analysis in a noncommercial aspect under the 1909 Act. For example, the case of Wihtol v. Crow involved the use by a choral director of the song My God and I as the basis for a new arrangement, multiple copies of which were used by both a church and school choir in performing the ar-

literary work, and another for the playing of records on coin-operated machines. 1909 Act, supra note 12, at § 1(e).

An important distinction between the fair use exception and a home use exemption to copyright liability is that the former must be balanced on the four factor scale of § 107 of the 1976 Act. A home use exemption, however, could be of broader scope since the exemption would arise purely out of public policy considerations and would not depend on the § 107 test. See Note, Betamax and Copyright: The Home Videorecording Controversy, 1 WHITTIER L. REV. 229, 249 (1979).

See infra notes 52-125 and accompanying text.

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26. See infra notes 52-125 and accompanying text.

27. See infra notes 52-125 and accompanying text.

28. 1909 Act, supra note 12 at § 1 provided in part: "Any person entitled thereto, upon complying with the provision of this Act, shall have the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work . . . ." Upon its face, this statutory provision would apparently reserve the right to copy the broadcasted television programs to the copyright owner and would not allow unauthorized copying.

29. 9 F. Cas. 342 (C.D. Mass. 1841) (No. 4901).

30. Id at 344.

31. It should be noted that fair use is only a defense to a charge of copyright infringement; it confers no blanket immunity from such charges.


33. The district court in Sony recognized that the case at bar was noncommercial use in a new context. Id. at 448. For a discussion of commercial/educational use see infra notes 86-104 and accompanying text.

34. 309 F.2d 777 (8th Cir. 1962). There, the Eighth Circuit reversed the district court and held that the use was an infringement despite the fact that the use made was without intent to infringe and despite the argument that the use was fair. Id. at 780-81.
rangement. In *Wihtol*, the Eighth Circuit rejected the fair use defense because it felt that the Act was meant to be inflexible and because the use of all or substantially all of a copyrighted work was an infringement.  

The court in *Walt Disney Productions v. Alaska Television Network, Inc.* addressed the issue of copyright infringement as it related to cable television systems. The *Walt Disney* court found that the mere preparation of video tapes of copyrighted works for delayed broadcast on a cable system infringed upon the copyright owner's rights under the then applicable statutory law. By recognizing two distinct acts of copyright infringement, preparation of video tapes and dissemination of videotaped programs, the *Walt Disney* decision thus demonstrated that courts have little difficulty placing videotaping within the exclusive province of the copyright owner.

Similarly, the court in *Encyclopedia Britannica Educational Corp. v. Crooks* found infringement where a nonprofit corporate defendant videotaped a number of plaintiff's copyrighted films without permission and subsequently distributed the videotapes among over 100 schools. The court granted a preliminary injunction because it found it difficult to reconcile defendant's large-scale copying with fair use and the potentially great injury which threatened plaintiff's market.

In response to rapid technological changes which had rendered the 1909 Act obsolete, Congress enacted the 1976 Copyright Act. Changing technology has made application and effective enforcement of the copyright law difficult. Looking to both case law and the 1976 Act's legislative history, the primary purpose of the Act was to stimu-

35. Id.    
38. 310 F. Supp. at 1075.    
39. 447 F. Supp. 243 (W.D.N.Y. 1978). *Encyclopedia Britannica* dealt only with the issue of whether a preliminary injunction should issue enjoining the defendant from videotaping plaintiff's educational films off the public airwaves. Defendant admitted the copying but asserted the fair use doctrine as an affirmative defense. The preliminary injunction was granted on a prima facie showing of infringement. In copyright law, such showing requires that there be a copying and that the plaintiff owns the copyright for the copied, allegedly infringed work. This case did not go to the merits and thus did not involve a fully developed fair use analysis. *Id.*    
40. Since the enactment of the 1909 Act, subsequent developments in the music and radio industries, along with a substantial increase in the use of the "new" photocopying technology, created problems that the 1909 Act was incapable of addressing.    
41. 1909 Act, see supra note 12.    
home use of video recorders

late creativity for the public welfare. The new Act is the result of an intricate balancing process between two competing interests: the author's financial interest and the public's interest in the dissemination of copyrighted works for public enlightenment. Yet, as will become evident, the interests of authors and the public are so compelling and so interwoven that it is often difficult to maintain a balance.

A copyright owner has exclusive control over all uses which are statutorily given to him.45 The current federal copyright law grants to the copyright owner "the exclusive rights of reproduction, adaptation, publication, performance, and display."46 Among the rights provided for in the 1976 Copyright Act,47 which took effect January 1, 1978, is that the copyright owner is notably deemed to be the only person who can reproduce the copyrighted work in copies or authorize such reproduction.48 Thus if a person, unauthorized by the copyright owner, uses a copyrighted work in a way that is within the scope of one of the exclusive rights of the copyright owner, there is infringement of the copyright.49

However, Congress and the courts have often found it necessary to fashion exceptions to this general grant of monopolistic rights in situations where the public's interest in promoting the development of ideas and technology conflicts with the author's economic interest in exclusive control over his copyrighted product. While the Act grants to authors the exclusive rights50 to the use of their works, it also places limits on the exclusivity of those rights by listing a number of qualifications, exceptions, and exemptions51 designed to safeguard the public's interest in guaranteed access to, and use of, certain modes of information. The most comprehensive limitation on a copyright owner's exclusive control over his works is found in the fair use doctrine.52

47. Id. at §§ 101-810.
48. Id. at § 106(1).
49. Id. at § 390 (1968).
50. See supra note 4.
51. Id.
52. "Fair use" has been defined as "the privilege in others than the owner of a copyright, to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner [by the copyright]." Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306-07 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967), quoting, Ball, Copyright and Literary Property 260 (1944). See also Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Cl. Ct. 1973), aff'd per curiam by an equally divided court, 420 U.S. 376 (1975). In its discussion of the fair use doctrine, the Senate Report accompanying the 1976 Act stated:

The bill endorses the purpose and general scope of the judicial doctrine of fair use . . . but there is no disposition to freeze the doctrine in the statute, especially during a period
THE FAIR USE DOCTRINE

Fair use was proclaimed over 140 years ago as a judicial rule reflecting a public policy of encouraging progress and the dissemination of knowledge by allowing subsequent authors, composers and publishers to make fair use of previously protected works. Progress and learning would be seriously hindered without such access to copyrighted works. Some use of prior copyrighted works must be permitted in connection with the independent creations of other authors, for the very policy which leads the law to encourage creativeness also justifies facilitating creativeness in others.

Unlike the previous copyright acts, which contained no express recognition of a fair use doctrine, the 1976 Act codified this doctrine in section 107. In addition to recognizing the doctrine, section 107 delineates the four primary factors to be used in making a fair use determination. The Act provides in part that a court consider:

1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2) the nature of the copyrighted work;
3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4) the effect of the use upon the potential market for or value of the copyrighted work.

If a court finds that an unauthorized use of a copyrighted work is not a fair use, then a finding of copyright infringement would be justified.

Generally, the affirmative defense of fair use has been defined as the reasonable, but unconsented, use of copyrighted works despite the copyright owner's exclusive rights. However, such definition is only suggestive of its meaning since the doctrine has remained flexible and

of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

6. Id. It should be noted that in drafting § 107, Congress essentially codified the fair use doctrine as expressed in Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff'd per curiam by an equally divided court, 420 U.S. 376 (1975).
7. See supra note 30.
is to be applied in an *ad hoc* manner. Neither the statutory language of section 107 nor its legislative history indicates the relative importance of the various factors involved in the fair use analysis. Since the doctrine is an equitable rule of reason designed to balance the competing interests of encouraging creative work through copyright protection and promoting broad public availability to various forms of expression, fair use has been considered a factual determination to be made on a case-by-case basis and cannot be determined exclusively by arbitrary rules or fixed criteria.

**The Threshold Considerations**

An analysis of section 107 makes it clear that the exclusive rights granted to copyright owners by section 106 are to be tempered by the fair use doctrine. According to the first sentence of section 107, fair use may be claimed "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." These fair uses may be further categorized as *productive* uses, whereby the user incorporates the information contained in the copyrighted work in a developmental process, that is, in creating a second work or in carrying on research or education.  

59. Congressional legislative history behind the 1976 Act supports this observation: Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 65, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5679.

60. The general intention behind § 107 of the 1976 Act was stated in the House Report which accompanied S. 22 as follows: The endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way. H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 66, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5680.

61. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 447 (C.D. Cal. 1979) (quoting Twentieth Century City Music Corp. v. Aiken, 422 U.S. 151, 156 (1974)). Despite the policy of encouraging creative work, the primary concern of copyright law is public benefit rather than benefit to the individual author. 480 F. Supp. at 447 (quoting H.R. REP. No. 2222, 60th Cong., 2d Sess. 9 (1909)).


64. *Id.* at § 107.

Although fair use has always involved the use by a second author of a first author's work, it has previously never involved the mere reproduction of a work in order to use it for its intrinsic purpose—its "ordinary" use.66 It has been suggested that the courts' and commentators' emphasis on the importance of the harm to the copyright owner's market has obscured the more fundamental fact that fair use is productive use.67 Proof that a particular use did not harm the copyright owner's market would not conclusively establish fair use.68 Thus, the productivity of the use presents a threshold consideration in a fair use analysis.

The House Report accompanying the Act69 also emphasized the importance of the public's ability to use the ideas embodied in a copyrighted work and transcribe them into another form of expression. It stressed that the productive uses enunciated in the first sentence of section 107 alone established the basic fair use doctrine while the four traditional fair use factors70 were only relevant for determining whether the doctrine applies in a particular case.71 In other words, once a determination is made that a particular use is productive, only then should a court consider whether the use is a fair one by applying the traditional four factor fair use analysis. Thus the productivity of a use, while implicitly acknowledged by case law, has been explicitly recognized by statute as a threshold consideration.72

Though necessary, a finding of productive use, absent consideration of the four fair use factors, is insufficient to justify a finding of fair use. For example, in Loew's, Inc. v. Columbia Broadcasting System, Inc.,73 where defendants televised an adaptation of plaintiff's copy-

66. L. Seltzer, Exemptions & Fair Use in Copyright 24 (1978). Such "consumptive" copying has not been the subject of previous judicial consideration because copyright owners have difficulty detecting infringement that does not result in the promulgation of additional material, and because until recent technical developments made reproduction inexpensive, there was little or no incentive for private consumptive infringement. Id. at 37-38, 50, 52; Perlman & Rhinelander, Williams & Wilkins Co. v. United States: Photocopying, Copyright and the Judicial Process, 1975 Sup. Ct. Rev. 355, 385-91.


70. For a list of the four traditional fair use factors, see supra text accompanying note 53.


73. 131 F. Supp. 165 (S.D. Cal. 1955), aff'd sub nom., Benny v. Loew's, Inc., 239 F.2d 32 (9th
righted play, the court denied the defense of fair use. There, the court said:

The mere absence of competition or injurious effect upon the copyrighted work will not make a use fair. The right of the copyright proprietor to exclude others is absolute and if it has been violated the fact that the infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial.  

Furthermore, while the court recognized that parody is a productive use, which in some instances may be considered fair use, it suggested that courts are likely to apply the fair use tests more strictly where the use is for entertainment purposes than where it is for scientific or educational purposes. Finding a broad scope given to fair use in the field of science and the fine arts, the court noted that fair use "permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writings dealing with the same subject matter." The writer of such works "invites reviews, comments and criticism" for the purpose of the advancement of learning.  

However, in Williams & Wilkins Co. v. United States, where two government libraries copied entire articles from medical journals and distributed them to an in-house research staff, the court held such copying to be fair use even though recipients would make "ordinary" use of the copyrighted material, by reading the copy rather than the original work. The court rationalized its finding, however, on the basis that the ordinary use in that case directly promoted the advancement of medicine and medical research. Hence the public interest in access to or dissemination of information was held to outweigh the copyright interest of the medical publishers.

The Four Factors of Fair Use

Although the fair use doctrine has only been recently codified, it
has a long history as a judicially created doctrine. A look at this history, and more particularly, at the history of each factor of the fair use doctrine could help answer the question of whether home video recording of television broadcasts would fall under the doctrine or would constitute copyright infringement.

The Purpose Factor

The first factor to be considered in a fair use analysis is whether the purpose and character of the use is for educational purposes or is of a commercial nature. Traditionally, the purpose factor has been applied to determine whether the use of the copyrighted work would further the public interest in the dissemination of creative works. While educational use has received congressional approval as a subject deserving of fair use protection, commercial use has not. Commercial uses were excluded from fair use in the recent case of Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., which involved a newspaper’s display of the cover of plaintiff’s publication in a televised advertisement to promote sales of its competing publication by comparative advertising. However, the court found that defendant’s use of plaintiff’s work in the commercial was protected by the first amendment and could not be constitutionally enjoined.

At least one commentator, however, has noticed a new trend emerging in the character and purpose factor that has expanded the fair use doctrine by including commercial uses within its scope. This trend began in the case of Rosemont Enterprises, Inc. v. Random

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87. Id.

88. The Triangle case may well be the first American decision relying expressly and solely on the first amendment as a defense against copyright infringement. See Note, The First Amendment Exception to Copyright: A Proposed Test, 1977 WIS. L. REV. 1158, 1176.

which involved the alleged infringement of a Howard Hughes biography. There, defendant published a biography that incorporated two quotations and an eight-line paraphrase from a series of articles published in plaintiff's magazine. In holding that fair use could properly be used as a defense, the court stressed the public's right to know about important public figures and the critical public interest in the free dissemination of information that would be served by the distribution of this material.\textsuperscript{91}

The trend of allowing commercial uses to be considered fair use continued in the case of \textit{Time, Inc. v. Bernard Geis Associates},\textsuperscript{92} where the reproduction in defendant's book of several frames of a copyrighted film showing President Kennedy's assassination was held to be fair use. After balancing the value of the copyright to the copyright owner against the importance of disseminating the material, the court found that the public interest in having the fullest information available on the murder of President Kennedy outweighed the interests of the copyright owner.\textsuperscript{93} Since the court found that there was no competition between plaintiff and defendant, it concluded that there was little, if any, injury to the plaintiff from defendant's use of the film.

Similarly, the court in \textit{Meeropol v. Nizer}\textsuperscript{94} reasoned that the use of all or portions of previously published and copyrighted letters of Ethel and Julius Rosenberg in another book constituted fair use. Like the \textit{Time} court, the \textit{Meeropol} court found that a public interest existed in and would be furthered by the dissemination of information about important public figures such as the Rosenbergs. The \textit{Meeropol} court held that the book's commercial success was no reason to deny defendants the benefit of the fair use defense.\textsuperscript{95}

However, neither prior case law nor the Act recognizes entertainment as a purpose sufficient to invoke the fair use doctrine.\textsuperscript{96} In \textit{Rohauer v. Killiam Shows, Inc.},\textsuperscript{97} a case involving the telecast of a silent movie starring Rudolph Valentino, the court held that neither the enduring fame of Valentino nor the intrinsic literary or historical merit of the movie served any public interest sufficient to justify a finding of

90. 366 F.2d 303 (2d Cir. 1966).
91. \textit{Id}. at 307, 309.
93. \textit{Id}. at 146.
95. \textit{Id}. at 1068.
96. Even the public's interest in the free dissemination of information has not been found to include pure entertainment. \textit{Rohauer v. Killiam Shows, Inc.}, 379 F. Supp. 723, 733 (S.D.N.Y. 1974).
97. \textit{Id}.
fair use. Thus, while the presence of commercial motives generally precludes a finding of fair use, the absence of commercial motives even in conjunction with an educational purpose, does not conclusively determine fair use.

The Nature Factor

The second factor courts must consider in a fair use analysis—the nature of the copyrighted work—has not been the subject of much commentary or judicial interpretation, but refers primarily to the character of the copyrighted material and whether its dissemination would serve the public interest. This factor includes certain aspects of the purpose factor but can be distinguished because it restricts scrutiny to a consideration of the particular purpose for which the copyrighted work is published. While congressional consideration of section 107 of the Act focused primarily on the issue of reproduction for classroom purposes, particularly photocopying, one Senate report explained that the key to the nature factor, although not necessarily determinative, was the copyrighted work's availability to the potential user. If the work has been published but is currently out of print and unavailable through normal channels, there is more justification for copying than if the work were readily available. However, unpublished works receive a narrow fair use interpretation because, although

98. Id.
100. Modern television is not entirely an entertainment medium. News documentaries, news programs, and other educational programs make television a mixed medium, primarily entertainment, but partially a disseminator of important information. Television broadcasts contain not only entertainment and commercials, which are outside the scope of the fair use doctrine, but also works in the fields of science, law, medicine, history, and biography. However, considering the overwhelming entertainment nature of this medium, it would be a substantial extension of the new trend for a court to find that it permitted the videotaping of television broadcasts to fail under the fair use doctrine.
105. S. REP. No. 94-473, 94th Cong., 2d Sess. 64 (1975).
106. Id.
the work is unavailable, the unavailability is a deliberate choice of the copyright owner.\textsuperscript{107}

The Substantiality Factor

The third fair use factor concerns the substantiality of the copying.\textsuperscript{108} Analysis of this factor involves an examination of the extent to which the original work was copied.\textsuperscript{109} The substantiality of copying ranges from small segments to entire works.\textsuperscript{110} Generally, a complete copying is never considered fair use even if the copying is done to further educational goals and is done without intent to profit from the copying.\textsuperscript{111} In order to determine whether the use will lead to a reduction in incentive to create,\textsuperscript{112} it is also necessary to consider whether the use made of the reproduction consists of a substantial portion of a copyrighted work. The traditional approach is to examine the significance of the copying\textsuperscript{113} both in qualitative and quantitative terms.\textsuperscript{114} It is therefore necessary to consider not only the sheer amount of the

\textsuperscript{107} Id.


\textsuperscript{111} Withol v. Crow, 309 F.2d 777 (8th Cir. 1962). Many cases have held that the defense of fair use is never available where the copying is virtually total. See, e.g., Walt Disney Prods. v. Air Pirates, 481 F.2d 751, 756-57 (9th Cir. 1978), cert. denied sub nom. O'Neill v. Walt Disney Prods., 439 U.S. 1132 (1979) (interpreting fair use standards in parody context and interpreting Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956), aff'd per curiam by an equally divided court sub nom. Columbia Broadcasting Sys., Inc., 356 U.S. 43 (1958), as setting a threshold that eliminates fair use defense where copying is "virtually complete or almost verbatim"); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484, 486 (9th Cir. 1937); Nimmer supra note 11, at § 13.05[D][1]; Note, Betamax and Copyright: The Home Videorecording Controversy, 1 WHITTIER L. REV. 229, 248 (1978) (under traditional view, copying entire work precludes application of fair use defense).

\textsuperscript{112} See Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 454 ("in the normal case of copying, the effect that the infringing copy has on the market for the original will depend to a large extent on whether the copy can substitute for the original").


work appropriated (the quantitative factor) but also whether the portion copied contains the essence, central premise, or main idea of the copyrighted work;\textsuperscript{115} whether there is similarity in style or form of expression between the original and copied works;\textsuperscript{116} and whether the copies need to use the appropriated work in the production of the new work\textsuperscript{117} (the qualitative factors).

While the Senate Report accompanying the Act\textsuperscript{118} provides no guidance as to whether a complete copying of a copyrighted work would always prevent a finding of fair use, it stated that excerpts from the copyrighted work that were not "substantial in length" should be considered a fair use, providing the other fair use factors were present.\textsuperscript{119} However, the court in \textit{Williams & Wilkins Co. v. United States}\textsuperscript{120} indicated that the general rule was an overbroad generalization and rejected the concept of total reproduction as a bar against finding fair use. Therefore, at least one court has determined that while the extent of the copying was an important factor, it was not dispositive of the determination of fair use.\textsuperscript{121}

The Harm Factor

The last fair use factor cited in the Act, the inquiry into whether the alleged infringer's work tends to diminish or prejudice the potential sale of the copyrighted work,\textsuperscript{122} has usually been considered the most important factor of the fair use doctrine.\textsuperscript{123} In fact, it has been used to


\textsuperscript{116} A verbatim copying or very close paraphrasing suggests substantiality, \textit{id.} at 690; Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966), \textit{cert. denied}, 385 U.S. 1009 (1967); whereas little or no similarity indicates no substantial copying, see Gardner v. Nizer, 391 F. Supp. 940, 943 (S.D.N.Y. 1975).

\textsuperscript{117} New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 222 (D.N.J. 1977). The "need qualitative factor" is a qualification of the statement of many courts that one is not entitled to utilize the fruits of another's labor in lieu of his own independent research. \textit{See}, e.g., Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950). Courts have modified the sweeping generality of this reasoning by allowing the use of portions of a copyrighted work where the use of the work is reasonably necessary under the circumstances. \textit{See}, e.g., New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 223 (D.N.J. 1977) (the nature of the copyrighted material is such that for all practical purposes defendants needed to copy portions of the work); Marvin Worth Prods. v. Superior Films Corp., 319 F. Supp. 1269, 1275 (S.D. N.Y. 1970) (copyrighted work deliberately suppressed and out of circulation for many years).

\textsuperscript{118} S. REP. No. 94-473, 94th Cong., 2d Sess. (1975).

\textsuperscript{119} \textit{Id.} at 65.

\textsuperscript{120} 487 F.2d 1345 (Ct. Cl. 1973), \textit{aff'd per curiam by an equally divided court}, 420 U.S. 376 (1975).

\textsuperscript{121} \textit{Id.} at 1353 n.12.


\textsuperscript{123} NIMMER, \textit{supra} note 11, at §§ 145, 646.
explain decisions which would otherwise be quite puzzling. Potential injury or decrease in value of the copyrighted work is sufficient to prevent invoking a fair use defense; actual injury is not required.

**Contrasting Congressional Treatment of Audio & Video Recording**

While home recording of telecasts is a relatively new phenomenon, home recording of phonorecords by the use of tapes has been present for some time. The past treatment of phonorecording, therefore, could give substantial insight into the future treatment of home video recording.

In 1971, Congress amended title 17 of the United States Code and granted a limited copyright in sound recording to protect such recordings against unauthorized duplication. At the same time, however, Congress did not intend to stop home audio recording where home recording was for private use with no purpose of multiple reproduction or commercial benefit. The congressional reasoning for exempting home audio recording was that it was by then a very common and un-restrained practice. Such a widespread practice certainly raises concerns about privacy and enforcement problems.

However, to extend the legislative exception applicable to home audio recordings to home video recordings is inappropriate for two reasons. First, although the incidence of home video recording has in-

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124. *Id.*


Applying the last fair use factor to home use of VTRs, it appears that the market for copyrighted telecasts could be injured. In determining the possible harm to the television market resulting from the home-use recording of televised programs, an understanding of the economics of television is essential. Copyright owners in broadcast films do not derive their revenue from payments by the viewer but from royalties paid by the broadcasters to the owners for the right to show the copyrighted films on television. Broadcasters, in turn, are compensated by advertisers who use the televised works as a means of reaching potential consumers of their products. *See* Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 440 (C.D. Cal. 1979) (discussion of the rudiments of television economics).


129. *Id.* However, this reasoning has been criticized as not providing a sufficiently concrete basis for governmental approval. NIMMER, *supra* note 11, at §§ 109.212, 442.7.
creased, video recording has not yet become a common and unrestrained practice. Policy concerns applicable to a well-established practice do not necessarily apply to a fledgling technology. Second, and most importantly, the statutory language does not support such an extension. Section 102(a) of the Act, in listing the categories of "works of authorship" that receive copyright protection, sets out audiovisual works and sound recordings in separate categories, so that audiovisual works are separate definitional entities from "sound recordings" or "phonorecords." Section 106 describes the author's exclusive rights in copyrighted works and section 114 limits those exclusive rights in sound recordings. Thus, any express or implied exemption arising from the conjunction of sections 102(a), 106 and 114 cannot apply directly to audiovisual works because the statute delineates audiovisual works and sound recordings as separate categories of protected materials.

ESTABLISHING A CAUSE OF ACTION FOR COPYRIGHT INFRINGEMENT

To establish a prima facie case of copyright infringement, the plaintiff must prove both his ownership of the copyrighted material and a "copying" by the alleged infringer. A copyright certificate is prima facie proof of one's ownership in the copyright as well as proof of its validity. However, it should be noted that compliance with the statutory requirements of notice, deposit, and registration is a pre-
condition to a suit for infringement.\textsuperscript{139}

To prove "copying," the plaintiff must show that the defendant had access to the copyrighted work and that the infringing work is substantially similar to the work copyrighted.\textsuperscript{140} Access is established by showing a reasonable opportunity to view the work.\textsuperscript{141} A substantial similarity between the copyrighted material and the infringing work is determined by asking whether an ordinary lay observer would detect a substantial similarity between the two works.\textsuperscript{142} If the above factors are found, then a "copying" has occurred. A "copying" sufficient to warrant a finding of infringement need not be a conscious act, but may be the result of one's subconscious memory derived from hearing, seeing, or reading the copyrighted work in the past.\textsuperscript{143} To rebut a prima facie case of infringement, the defense of fair use may be raised.

Although the concept of fair use permits a subsequent use of copyrighted material in a reasonable manner without the owner's consent, without such use constituting infringement, the exact point at which a permissible or fair use becomes an infringing use is difficult to determine. To aid in this determination, courts look to the four factors of the fair use doctrine.

For example, the use of a fifteen-second segment of a copyrighted song in a televised political commercial has been held to be fair use.\textsuperscript{144} The purpose of the political use was sufficiently removed from the original's entertainment purpose, and the fifteen-second borrowing was an

\begin{footnotes}
\footnote{138. \textit{Id.} at §§ 408-12.}
\footnote{142. Novelty Textile Mills Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1093 (2d Cir. 1977); Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315 (2d Cir. 1969); Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021 (2d Cir. 1966). Judge Learned Hand expounded upon the lay observer test when he said that substantial similarity existed where "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).}
\end{footnotes}
adequately small amount of the entire copyrighted work to permit fair use.\textsuperscript{145} The nature of the borrowed work used in the advertisement was merely a small segment of a political message rather than an independent recording. Further, it was found that the use of the short segment would not greatly diminish future markets for the original work. Thus, fair use is applied when it is in the public’s best interest to allow “copying” of another’s work.

**History of the Sony Opinion**

In November of 1975, the Sony Corporation began marketing the Betamax, a videotape recorder that enables private television owners to record broadcasts and replay them on their own television sets. Universal City Studios and Walt Disney Productions, two major producers and owners of copyrighted audiovisual works, some of which were telecast over public airwaves, initially filed suit in 1976 seeking an injunction to halt consumer use of the Betamax.\textsuperscript{146} The complaint named as defendants Sony Corporation (the manufacturer of Betamax recorders and tapes), Sony Corporation of America (Sonam, the distributor of the Betamax), four retail stores that sold the Betamax, and a representative individual owner and user of a Betamax VTR.

Plaintiffs contended that home recording of their copyrighted programs by individual Betamax owners constituted copyright infringement and that the corporate defendants were either directly or contributively liable for such infringement.\textsuperscript{147} Relying implicitly on the fair use doctrine, defendants asserted that home use recording with VTRs by individual Betamax owners did not amount to copyright infringement.\textsuperscript{148}

After three years of litigation and a five-week nonjury trial, the district court entered judgment for defendants. Finding protection for home videorecording under the fair use doctrine and an implied exception for home videorecording in the legislative history of the copyright law, the court also held that even if home videorecording constituted copyright infringement none of the corporate defendants could be held directly, contributarily, or vicariously liable.

\textsuperscript{145} *Id.* at 961.

\textsuperscript{146} Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429 (C.D. Cal. 1979).

\textsuperscript{147} Plaintiffs also alleged that retail defendants violated the copyright law by recording portions of plaintiffs' programs when demonstrating Betamax recorders to prospective customers. *Id.* at 432.

\textsuperscript{148} All references made to the “Sony court” in this article shall apply to the recent opinion issued by the United States Court of Appeals for the Ninth Circuit.
Plaintiffs appealed the decision to the United States Court of Appeals for the Ninth Circuit. In a partial reversal of the district court decision, the Ninth Circuit held that off-the-air copying of telecasts of copyrighted audiovisual materials by VTR owners for private, non-commercial use constituted infringement; home users of VTRs did not fall within the scope of the fair use doctrine. The Ninth Circuit also held that appellees were contributorily liable for infringement because they knew that the videotape recorders would be used to reproduce copyrighted materials. However, the case was remanded to the district court for a consideration of the appropriate relief to be granted.

REASONING OF THE SONY COURT

The Sony court devoted most of its discussion to and began its analysis by addressing the issue of whether off-the-air copying of copyrighted works by Betamax owners for private, noncommercial use constituted infringement. To aid it in reaching a decision, the court found it necessary to subdivide its discussion of this issue by separately addressing the questions of whether the district court erred in finding an implied videorecording exemption in the copyright law, and whether home videorecording constituted fair use, with an emphasis on the lat-

149. The Sony court found no error in the district court's decision regarding the retail defendants and thus affirmed that part of the district court's decision. 659 F.2d 963, 976 (9th Cir. 1981). Any further reference in this article to corporate appellees will not include a discussion of retail appellees.

150. Contributory infringement is a concept borrowed from patent law. The court in Stamicarbon, N.V. v. McNally-Pittsburg Mfg. Corp., 302 F. Supp. 525 (D. Kan. 1969), defined contributory infringement as the intentional aiding of one person by another in the unlawful making, selling or using of a patented invention. A contributory infringer is a person who induces, aids or contributes to the wrongful acts of another that constitute infringement. Id. at 531. Contributory infringement thus results from the furnishing of plans of an infringing device or from designing and helping to build an infringing machine. Id.

To prevail on a cause of action for contributory infringement, patentees (copyright owners) must establish infringement of a valid patent (copyright). Wilbur v. Superior Concrete Accessories, 217 F. Supp. 600, 602 (N.D. Cal. 1963). A plaintiff in a contributory infringement suit must establish that defendant sold material to be used in a patented (copyrighted) process; that such material constituted part of a patented (copyrighted) process; that defendants knew such material was especially adapted for use in the infringement of such patent (copyright); and that such material was not a staple item of commerce suitable for substantial noninfringing use. Sing v. Culture Products, Inc., 469 F. Supp. 1249 (E.D. Mo. 1979). For a discussion on the "staple item of commerce" theory, see infra note 163.

It has been held that suits involving contributory infringement are limited to where defendant himself has not directly infringed a patent (copyright) by making, using or selling the invention but has induced someone else to infringe the patent (copyright). Self v. Fisher Controls Co., Inc., 566 F.2d 62, 64 (9th Cir. 1977). The Sony court, therefore, correctly held that defendants met the definition of contributory infringers.

151. See supra note 148.
Since there was no prior case law to look to concerning home use of VTRs, apart from the district court's decision below, the Sony court sought guidance from and stressed the importance of the copyright scheme as encompassed under current statutory law.\footnote{152}{659 F.2d at 965.}

The Sony court found the statutory framework unambiguous and noted that the only limitations upon copyright owners' exclusive rights to their works were the limitations imposed by the statutory exceptions.\footnote{153}{The Sony court explicitly referred to § 106 of the Act and noted that the general approach of the Act was to set forth the copyright owner's exclusive rights in broad terms, and then to provide various limits, qualifications or exemptions in the following sections. In other words, §§ 107-18 must be read in conjunction with § 106. Id., citing H.R. REP. 94-1476, 94th Cong., 2d Sess. 61, reprinted in U.S. CODE CONG. & AD. NEWS 5659, 5674.}

Emphasizing that courts should not carve out exceptions to the Act's broad grant of rights absent clear direction from Congress, the Sony court maintained that the district court misread the Act and thus confused the scope of the relevant issue which needed to be addressed.\footnote{154}{659 F.2d at 966.}

According to the Sony court, the question that should have been asked was whether Congress had intended to limit the rights of copyright owners in ways not specified in sections 107-118 of the Act.\footnote{155}{Id.}

Absent consideration of the fair use doctrine, the Sony court concluded that an analysis of the Act precluded a finding of an implied home video recording exception and that, therefore, the district court had erred in this respect.

The Sony court then discussed the distinction between judicial treatment that should be afforded to sound versus video recordings. The court first stressed the Act's separate treatment of sound recordings and audiovisual works as categories of protected materials.\footnote{156}{The question to be answered was not whether Congress exhibited an intent to protect a copyright owner from certain reproduction of his works. Congress had already answered that question by extending the rights given copyright owners set forth in § 106, subject to the specific sections of 107-18. Id.}

The Act's separate treatment of sound recordings and audiovisual works was emphasized by noting that the Act excluded audiovisual works from limited exceptions provided by section 108 of the Act, the court concluded that Congress clearly did not intend to create a blanket exemption for home video recording, even if the recording was not for commercial purposes.\footnote{157}{Section 102(a)(6) of the Act lists "motion pictures and other audiovisual works" as works that are copyrightable, and § 102(a)(7) lists "sound recordings" as copyrightable. 17 U.S.C. at §§ 102(a)(6), (a)(7) (Supp. III 1979).}

Next, the court mentioned that most of the rationale for rec-
ognizing an exemption for home sound recording, first recognized in the 1971 Sound Recording Amendment, was simply not applicable to videorecording. Since Congress was not addressing the problem of video recording in its discussion of the 1971 amendment, the Sony court concluded that the district court's attempted analogy between a sound and video recording exemption was erroneous. For a justification of this conclusion, the Sony court reiterated the rule that silence cannot be viewed as an expression of congressional intent and also cited the proposition that resort to the legislative history of an act is entirely unnecessary when the act is facially unambiguous.

To complete its discussion of whether the home videorecording at issue was an infringement, the Sony court next discussed, at length, the applicability of the fair use doctrine. After an in-depth analysis of the four factors of the fair use doctrine, as codified in section 107 of the Act, and a review of the Act's legislative history, the Sony court concluded that the doctrine did not sanction home videorecording. Thus the Sony court reversed the holding of the district court and found that off-the-air copying of copyrighted audiovisual materials by owners of Betamax VTRs constituted an infringement.

The next issue confronted by the Sony court was that of the liability of the corporate appellees. In this context, the Sony court again disagreed with the district court. The district court's reliance on the "staple item of commerce" theory was criticized by the Sony court as

162. 659 F.2d at 971.
163. The "staple item of commerce theory" is used in the patent context to define contributory (patent) infringement. 659 F.2d at 975. A staple item of commerce is simply an article of commerce that is put to ordinary use; an article of commerce suitable for substantial noninfringing use. See, e.g., Aralac, Inc. v. Hat Corp. of America, 166 F.2d 286, 293-95 (3d Cir. 1948); 35 U.S.C. § 271(c)(1976). The extent of a product's noninfringing capabilities determines the proper application of the "staple item" doctrine. The less substantial a product's noninfringing use, the less compelling is the staple article of commerce argument. Under current patent law, the key to determining contributory infringement lies in the knowledge of the seller. 35 U.S.C. at § 271(c). For example, § 271(c) of the statute requires that the seller know that the component is "especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use." Id.

The status of a component as a staple or commodity suitable for substantial noninfringing use is essentially a question of fact. Compare Rex Chainbelt, Inc. v. Harco Prods., Inc., 512 F.2d 993 (9th Cir. 1975) with United States Indus., Inc. v. Otis Eng'r Corp., 277 F.2d 282 (5th Cir. 1960).
inappropriate.\textsuperscript{164} The district court analogized VTRs to cameras or photocopying machines stating that the sale of a staple article of commerce, while technically contributing to any subsequent infringing use made thereof, would expand the basis of liability to an extent beyond judicial management.\textsuperscript{165} Since virtually all television programs are copyrighted, and VTRs are manufactured, advertised, and sold for the primary purpose of recording televised programs, the VTRs themselves are not "suitable for substantial noninfringing use."\textsuperscript{166}

The \textit{Sony} court also denounced the district court’s holding that an alleged contributory infringer have actual knowledge that the activity which he made possible constitutes copyright infringement. The \textit{Sony} court stressed that it was only necessary for the copyright appellees to have had knowledge of the infringing activity—not its legal consequences. After adopting the district court’s definition of a contributory infringer,\textsuperscript{167} the \textit{Sony} court concluded that the corporate appellees met this definition.

The \textit{Sony} court then addressed the problem of fashioning the appropriate relief. While recognizing that this was an exceedingly complex and difficult problem, and, as such, could have been the reason why the district court did not find appellees liable, the \textit{Sony} court urged that such difficulty must not deter federal courts from affording appropriate relief to those whose rights have been infringed. In remanding the issue of relief to the district court, the \textit{Sony} court set forth some guidelines that would be appropriate for the district court to follow.\textsuperscript{168} Warning the district court not to be overly concerned with the prospective harm to appellees, the \textit{Sony} court stated that once a determination of copyright infringement is made, the continued profitability of appellees’ business is of only secondary concern.\textsuperscript{169}

However, it is well settled that "the mere addition of extenders to a staple article does not make the article nonstaple." Rex Chainbelt, Inc. v. Harco Prod., Inc., 512 F.2d 993, 1002 n.3 (9th Cir. 1975).
\textsuperscript{164} 659 F.2d at 975.
\textsuperscript{165} 480 F. Supp. at 459.
\textsuperscript{166} \textsuperscript{166} Nimmer, supra note 11, at \S 12.04[A], 12-39.
\textsuperscript{167} A contributory infringer was defined as "[o]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted).
\textsuperscript{168} The \textit{Sony} court listed a few possibilities, such as statutory damages and equitable remedies, that the district court could consider in fashioning the appropriate relief. Stating that the district court should reconsider the usefulness of an injunction, the \textit{Sony} court noted the general rule that a copyright plaintiff is entitled to a permanent injunction when liability has been established and there is a threat of continuing violations. 659 F.2d at 976.
\textsuperscript{169} Id.
HOME USE OF VIDEO RECORDERS

ANALYSIS

Necessity of Considering the Legislative History of Copyright Law

The Sony court properly found that home videorecording of telecasts constitutes copyright infringement since such recording is neither exempted from the protection afforded copyright owners under the current copyright law nor encompassed by the fair use doctrine. Unlike the district court, which bypassed the statutory framework of the 1976 Act, the Sony court's statutory analysis directly confronted the real issue of whether Congress intended to limit the rights of copyright owners in ways not specified in the Act under sections 107-118.

The Statutory Distinction Between Audio and Visual Recording

Concluding that Congress had not impliedly created a home videorecording exemption in the Act, the Sony court contrasted home videorecording with home sound recording, which is exempt. The Sound Recording Amendment and its analogue in the Act clearly did not support the district court's conclusion that Congress intended to exclude control of private, noncommercial videotaping from the scope of the copyright owner's exclusive rights. Not only did section 102(a) of the Act delineate audiovisual works and sound recordings as separate categories, thus deserving of separate treatment, but sections 106 and 114 also provided justification for concluding that any exemption granted for sound recordings would be inapplicable to audiovisual works.

Fair Use: The Threshold Consideration

The question of whether the recording was infringement could not be answered, however, without an analysis of the four factors of the fair use doctrine as embodied in section 107 of the Act. Before addressing

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170. In its incorrect analysis of both the 1976 Act and the legislative history behind the Act, the district court erroneously characterized its task as a search for whether Congress intended to protect a copyright owner from certain reproductions of his work. A closer look at § 106 would have revealed to the district court that Congress had already expressed its intent to extend such protection. 659 F.2d at 966.


these four factors, the Sony court considered several preliminary issues. As stated in the first sentence of section 107, fair use has traditionally involved "productive uses" of copyrighted material. That is, a subsequent use of information contained in the original copyrighted work is permissible while a mere reproduction of a copyrighted work for use for its intrinsic purpose—its "ordinary" use—generally is not protected under the fair use doctrine. Although not in itself a sufficient indicator of fair use without the traditional four-factor analysis, the productivity of the use presents a threshold consideration in a fair use analysis. Since the home user of the VTR merely wishes to increase his access to television entertainment and neither adds anything to the copied work nor uses it in the development of a new work, home use of a VTR lies beyond the scope of fair use. Unlike the district court, which failed to address this crucial threshold question, the Sony court correctly concluded that the fair use doctrine did not sanction home videorecording.

Although the Sony court mentioned Williams & Wilkins Co. v. United States as an illustration of a recent case that rejected the productive use theory, it clearly distinguished Williams & Wilkins from the instant case. In Williams & Wilkins, two government libraries copied entire articles from medical journals and distributed them to an in-house research staff. The United States Court of Claims held this to be fair use on the theory that, even though the recipients would make ordinary use of the copied material (by reading the photocopy rather than the journal), the ordinary use directly promoted the advancement of medicine and medical research. The Sony case, in comparison,
had no corresponding countervailing societal benefit to weigh against the interests of the copyright owner.

The Purpose Factor

Proceeding to examine the four fair use factors found in section 107 of the Act, the Sony court found that home videorecording was in no way sanctioned by the fair use doctrine. In its analysis of the purpose factor, the Sony court noted that courts have traditionally applied this factor to exempt copyrighted material used for criticism, research or other independent work. The fact that home videorecording did not further a traditionally accepted purpose clearly weighed against a finding of fair use. In an apparent attempt to avoid a finding of infringement and the ensuing difficulty of providing an appropriate remedy, the district court had emphasized the private, noncommercial aspect of home videorecording. However, a simple commercial/noncommercial distinction, as used by the district court, is not only absent from the Act but is also of limited predictive value. The Act contrasts commercial with nonprofit educational purposes, and the copying of entertainment works for convenience clearly does not fall within the latter category.

Since courts generally subordinate the user's motive to a consideration of the economic detriment to the copyright owner, the absence of commercial motive, even in conjunction with an educational purpose, does not conclusively determine fair use.

The Nature Factor

Analysis of the second fair use factor—the nature of the copyrighted work—similarly did not support a finding of fair use. Despite the accepted notions that home VTRs are used primarily for entertainment purposes and that such purposes do not fall within the scope of fair use, the district court found the nature of the copyrighted works indicative of fair use by virtue of their being voluntarily broadcast over public airwaves. As noted by the Sony court, the method chosen to

factor of the scientific nature of the work and its intended use, the court concluded that library photocopying of technical journals in limited number may be fair use. Id. at 1362.

179. 659 F.2d at 972.
180. Id.
181. See supra note 103.
182. See supra note 102.
183. The only possible argument for the district court's holding was one raised in anticipation of the Supreme Court decision in Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975). However, the holding in Aiken, that the playing of radio broadcasts in a restaurant by restaurant owners did not infringe the copyright in the broadcast songs, failed to support the argument that broadcasting signals are dedicated to the public. Id. at 161-62.
distribute copyrighted works is clearly irrelevant to this second fair use factor. Moreover, an examination of the Act would not reveal any implied license for public copying simply by virtue of the voluntary nature of broadcasting films over public airwaves. While granting some limited exemptions from copyright sanctions, the Act further states that off-the-air taping of audiovisual works not falling within the express exemptions would only be noninfringing if they fell within the fair use defense. Therefore, the fact that the copyrighted programs were voluntarily broadcast did not in itself indicate that their copying was fair use.

The Substantiality Factor

The third factor—the substantiality of the copying—also did not support a finding of fair use. While acknowledging that home use recording off-the-air usually involved an exact duplication of the entire original copyrighted work which would generally preclude a finding of fair use, the district court seemed to simply ignore this general rule and found that copying the entire work in this case was fair use. The court recognized the obvious error in the district court's attempt to connect the substantiality of the copying with the harm factor and properly denounced such reasoning as prior case law certainly did not make such connection.

The Harm Factor

Concluding its fair use analysis, the court properly maintained that the fourth factor—the effect of the use upon the potential market or value of the copyrighted work—did not dictate a contrary result. Adopting the dissenting view in Williams & Wilkins, the court recognized that the district court's requirement of proof of actual

184. 659 F.2d at 972.
185. See supra note 24.
186. Walt Disney Prods. v. Alaska Television Network, Inc., 310 F. Supp. 1073 (W.D. Wash. 1969), also supports the conclusion that the nature of the copyrighted works at issue as voluntarily telecast over public airwaves is not indicative of fair use.
187. 659 F.2d at 973.
188. The district court in Loew's, Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165, 184 (S.D. Cal. 1955), stated that "[t]he right of a copyright proprietor to exclude others is absolute and if it has been violated the fact that the infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial."
189. 487 F.2d 1345 (Ct. Cl. 1973), aff'd per curiam by an equally divided court, 420 U.S. 376 (1975). The Williams & Wilkins decision has been criticized for placing seemingly paramount importance on the showing of concrete harm by the copyright owner. See Nimmer, Photocopying and Record Piracy: of Dred Scott and Alice in Wonderland, 22 U.C.L.A. L. Rev. 1052 (1975). A recognized leading authority on copyright law, Professor Nimmer expressed that the Court of
damages was too great a burden to impose on copyright plaintiffs. The *Sony* court further recognized that failure to prove damages would not automatically justify a finding of fair use, but would, in fact, encourage a finding of minimum statutory damages liability.

Furthermore, the *Sony* court's analysis of the fourth fair use factor found significance in a critical factor which the district court overlooked—the cumulative effect of mass reproduction of copyrighted works made possible by VTRs. While damage to copyright owners might have been minimal if home users of VTRs acted in isolation, the aggregate effect of mass copying as home VTRs proliferate creates a strong argument in favor of prohibiting unauthorized reproductions of any copyrighted work. Absence of any inquiry into the full scope of the infringing practice would clearly leave copyright plaintiffs facing insuperable obstacles to the protection of their rights. When the full scope of the infringing activity is considered, however, the potential market for appellants' works is clearly diminished.

Claims' treatment of the harm element was erroneous because actual harm need not be shown to establish liability. *Nimmer supra* note 11, at § 13.05[E][4][C].

Furthermore, the new copyright law has a provision for granting statutory damages. 17 U.S.C. § 504 (Supp. III 1979). Such provision would be a nullity if actual damages were required to be shown. The only possible justification for the *Williams & Wilkins* decision is that the doctrine of fair use has always been flexible, but the totality of circumstances must still be evaluated. *See*, e.g., Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978); Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F.2d 279 (5th Cir.), cert. denied, 398 U.S. 928 (1970). Congressional legislative history behind the 1976 Act supports this reasoning: Although the courts have considered and ruled on the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.


190. Courts generally state that irreparable harm is presumed since defendants have an opportunity at trial to rebut the presumption. Encyclopedia Britannica Educ. Corp. v. Crooks, 447 F. Supp. 243 (W.D.N.Y. 1978). The *Sony* court found it clear that appellees did not establish with any degree of certainty that such harm would not occur.

191. Professor Nimmer maintained that a finding of fair use could only be justified when there is a "general dissemination of an allegedly infringing work by all potential defendants, and without limitation as to the number of reproductions, and the volume of users would still not adversely affect the plaintiff's potential market." *Nimmer supra* note 11, at § 13.05[E][4][C], 13-84.

192. 659 F.2d at 974.

193. The aggregate effect theory has been recognized in other contexts, such as limiting the number of copies of a work that may be made for classroom use because of potential damage to textbook publishers. H.R. Rep. 94-1476, 94th Cong., 2d Sess. 169, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659, 5682-83.
THE TROUBLESOME PROBLEM OF FASHIONING THE APPROPRIATE REMEDY FOR COPYRIGHT INFRINGEMENT

The Confusion and Inconsistency of the District Court's Reasoning

In its discussion of the home use aspect of videorecording as it applied to the purpose and nature factor, the district court notably confused the issue of liability with the problem of fashioning the appropriate relief. The district court incorrectly reasoned that private videorecording of copyrighted programs by private individuals in their homes should be considered a fair use because of the protection afforded by the first amendment's right of privacy. The Supreme Court discussed this right in support of its holding in Stanley v. Georgia that a statute prohibiting the mere possession of filmed or printed obscene matter in the privacy of the home violated the first amendment. The Stanley Court considered it beyond the power of the state to tell a person what books he may read or what films he may watch.

The home-use VTR situation is clearly distinguishable from Stanley, however, since prohibiting the copying of televised programs does not prevent an individual from viewing the programs that are broadcast in the privacy of the home. While possession of home videotapes produced by recordings of television programs may be protected by the first amendment right to privacy, the making of those tapes is legitimately prohibited by the 1976 Act.

It may also be argued that since the copying of copyrighted programs occurs in the home and there is no intent to further distribute the tapes, the Stanley Court's holding extends the right of privacy to protect such copying. Since the Stanley decision was rendered, however, numerous Supreme Court cases have indicated an extreme reluctance to extend the holding beyond the precise factual setting in Stanley. The Sony court correctly noted the district court's confusion and stated that first amendment privacy concerns did not permit an unrestrained dissemination of copyrighted works in the name of the public interest at the expense of legally recognized rights in intellectual property. An

194. The concept of home use was developed as an extension of fair use in University City Studios, Inc., v. Sony Corp. of America, 480 F. Supp. 429 (C.D. Cal. 1979).
196. Id. at 565.
inquiry into privacy concerns would thus be best suited for determining relief sought, not for determining the liability of alleged infringers.

The Strengths of the Sony Court Reasoning

After a finding of infringement, the Sony court did not try to excuse liability of appellees as did the district court. Rejecting the district court’s reliance on the clearly inappropriate "staple item of commerce" theory, the Sony court held that VTRs were in no way suitable for substantial noninfringing use. VTRs were manufactured, advertised, and sold primarily for the purpose of reproducing television programs, and since virtually all television programs consisted of copyrighted works, VTRs could not be compared with staple items of commerce that only technically contribute to an infringing use subsequently made of them. The Sony court again dismissed the district court’s fallacious reasoning that the corporate appellees’ knowledge was insufficient to make them contributory infringers. Neither a copyright defendant’s innocence nor his mistake as to the legal consequences of his actions would absolve him of liability for infringement; such innocence or mistakenness only affects the remedies available.

Adopting the district court’s definition of a contributory infringer, the Sony court logically concluded that it was impossible to find that the corporate appellees did not know that the Betamax would be used to reproduce copyrighted materials, since that was its most conspicuous use. Beyond any doubt, therefore, the corporate appellees met this definition.

The Problems of Coping with Technological Change

While many commentators have viewed legislation, rather than

198. See supra note 163.
199. 480 F. Supp. at 461.
200. NIMMER supra note 11, at § 13.08 (1976). The Copyright Act supports the Sony court’s reasoning in its provisions for a reduction of statutory damages if the infringer “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright,” 17 U.S.C. at § 504(c)(2) (1976), and a remission of statutory damages, if the “infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use.” Id. This discussion of liability obviously pertains only to civil, not criminal, liability.
201. See supra note 167.
202. There was also no doubt that appellees met the other requirements for contributory infringement—inducing, causing, or materially contributing to the infringing conduct of another. 659 F.2d at 976.
judicial pronouncement, as an obvious technique for effecting a large-scale overhaul of copyright law, it should be noted that legislation cannot go far beyond mandating the Act's four general guidelines. In an era of rapidly changing technology, it is important to recognize Congress' inability to keep pace with rapid changes. For example, it notably took Congress almost seventy years before it devised a "new" Copyright Act that was supposed to answer pressing problems concerning transcription and its application to the copyright law.

Within just five years of the enactment of the 1976 Act, Congress has again been confronted with a new technology, the VTR, demanding a change in the copyright law. In response to the Sony decision, five bills have been introduced in Congress proposing an exemption for home use of VTRs. Even if it decides this issue in a timely fashion,
Congress' decision would most likely be not only too narrow in scope, but would also be subject to subsequent expansion or modification when confronted with new modes of technology. Furthermore, any congressional determination will, of necessity, ultimately be returned to the courts for a proper interpretation. Given Congress' failure to articulate a coherent rationale for copyright, its failure to define fair use, and its failure to clarify the confusion it created between fair use and exempted use, there is grave doubt that legislation is a practicable method for applying the fair use concept to the endless variety of situations that can arise in particular cases.

Future Forums for Coping with Copyright Disputes

Current copyright law is clearly incapable of meeting the challenges confronting it: challenges under the guise of new forms of media technology. The most practical forum for resolving controversy and for converting the fair use doctrine into a workable set of rules is the conference table. A quasi-judicial body composed of representa-

royalty scheme can reflect the varied uses to which home VTRs are put by an individual, such as making home video movies, or taping programs that either are uncopyrighted or are available for home taping by consent of their owners. Id. The CRT's dismal record in discharging its existing responsibilities, however, suggests that it would be absurd to burden with substantial and complex new duties a body whose own chairman has recommended be abolished. Oversight Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Committee on the Judiciary, 97th Cong., 1st Sess. 51 (March 4, 1981) (testimony of Clarence James, Chairman, Copyright Royalty Tribunal).

Another congressional bill exempting home videorecording from infringement states in pertinent part that:


Similarly, H.R. 4783, 97th Cong., 1st Sess. (1981), introduced on 10/20/81, states:

Notwithstanding the provisions of section 106, it is not an infringement of copyright for an individual to record copyrighted works on a home video recorder in a private home if—

1. The recording is made without any purpose of direct or indirect commercial advantage; and

2. The recording is to be utilized exclusively in a private home.

Another congressional bill exempting home videorecording from infringement, H.R. 5705, 97th Cong., 2d Sess. (1982), introduced on 3/3/82, is similar to the Mathias amendment as it also proposes the establishment of a compulsory license/royalty system for video recording devices and media.

Since the Sony court failed to deal with other confusing issues presently confronted by the courts, any statutory exception to the Sony decision would also fail to address such issues and would thus be a piecemeal approach to this copyright problem. Issues such as videotaping from cable or pay television, tape swapping, tape duplication, and off-the-air recording for classroom or business purposes would remain unresolved.

atives of the various communications industries, members of the general public, and attorneys representing copyright creator groups, teachers, and librarians should be brought together to make a concentrated effort to work out commercially viable rules that would reasonably implement the two basic rights of the copyright system: compensation to the copyright owner and fair use to the copyright user.

It would be advantageous to establish this body as a permanent institution. In this respect, it would be similar to the statutorily created Copyright Royalty Tribunal (CRT) which is responsible, in part, for determining copyright royalty rates for records, jukeboxes and certain cable transmissions. Like the statutorily enumerated objectives of the CRT, the proposed forum should strive to maximize the availability of creative works to the public while affording the copyright owner a fair return for his creative work. Efforts should be made to reflect the relative roles of the copyright owner and the copyright user in the product made accessible to the public with respect to their capital investment, cost, risk, relative creative contribution and technological contribution, as well as their contribution to creating new markets for creative expression.

208. The various industries involved would include, but not necessarily be limited to, those of photography, motion pictures, television, and videotape publishing.


The CRT is composed of five members appointed to seven-year staggered terms by the President with the advice and consent of the Senate. 17 U.S.C. § 802(a) (Supp. III 1979). The purposes of the CRT are three-fold. The first is to fix initial terms and rates of royalty payments by public broadcasters under compulsory noncommercial broadcasting licenses. Id. at § 118(b). The second is to review and adjust periodically royalty rates under the: compulsory musical recording licenses, Id. at §§ 801(b)(1), 804(a), compulsory coin-operated phonorecord players licenses, Id., the compulsory noncommercial broadcasting licenses, Id. at §§ 118(c), 801(b)(2), and the compulsory cable television secondary transmission licenses, Id. at § 118(b)(2). The third is to distribute royalty fees under compulsory coin-operated phonorecord players licenses, Id. at §§ 116(c), 801(b)(3), and compulsory cable television secondary transmission licenses, Id. at §§ 111(d)(5), 801(b)(3), after settling any controversies over distribution. Id. at §§ 801(b)(3), 804.

In addition to publishing reports on each of its final determinations, the CRT is required to make an annual report to the President and Congress concerning the CRT's work during the preceding fiscal year, including a detailed financial statement of account. Id. at § 810. CRT decisions are subject to judicial review by the courts of appeals. Id. at § 810.


212. Id. at § 116.

213. Id. at § 111.

214. Id. at §§ 115, 116. See H. Henn, Copyright Primer 292 n.21 (1979).

215. Despite its admirable goals, the CRT has been plagued since its creation by inadequacies and failures. A principal problem has been its apparent inability to establish workable criteria for determining royalties caused by the lack of any congressionally created clear-cut standards. The Copyright Act simply directs the CRT to balance such vague and subjective criteria as "the relative roles of the copyright owner and the copyright user in the product made available to the
Unlike the CRT, however, this forum should not become an outgrowth of congressional power. Its membership should neither consist of political appointees nor should the forum itself be directly accountable to the executive or legislative branch of government. Rather, its composition would prove more viable as a private sector body analogous to the American Society of Composers, Authors & Publishers (ASCAP), or Broadcast Music, Inc. (BMI). The forum would thus function as a conduit between copyright owners and members of the general public seeking access to copyrighted works. Like ASCAP and BMI, this forum should have the authority to police copyright users as well as to enforce procedures that will be established to assure access to copyrighted works while simultaneously safeguarding the rights of copyright owners against infringement.

However, the scope of its authority should not be limited to specific copyright problem areas. Instead, the scope of its authority should reflect the composition of its membership. That is, its authority should

public"; "maximizing the availability of creative works to the public"; and the need to provide "a fair return" to copyright owners for their creations. 17 U.S.C. § 801(b) (Supp. III 1979).

Even if Congress had set out clearer standards for CRT decisions, the agency would still not be able to handle complex rate review and distribution matters. This is due to several basic organizational flaws which impede the CRT's ability to reach decisions. For example, the CRT receives only such evidence as the parties before it choose to submit because it lacks subpoena power. In addition, CRT members have demonstrated a lack of expertise in the areas in which they render decisions. For instance, the CRT has no general counsel, although its duties require it to deal with complex legal issues involving contracts law, the first amendment, and the Administrative Procedure Act, as well as copyright law. Home VCR & Copyright, Compendium of Arguments in Support of Legislation to Exempt from Copyright Infringement Home Recording of TV Programs for Private Viewing. Similarly, although economic analysis is critical in determining appropriate royalty rates and distribution, the CRT retains no economic consultants. Id.

216. These are statutorily recognized (17 U.S.C. § 116(e)(3) (Supp. III 1979)), nonprofit organizations which license the nondramatic public performance of musical works. Each organization is responsible for different collections of music. All of the license fees they receive, less operating expenses and reserve, are distributed to affiliated song writers and music publishers. Goldstein, Questions and Answers About the Performance of Music under the New Copyright Law, in CURRENT DEVELOPMENTS IN COPYRIGHT LAW 806 (1982). The typical BMI or ASCAP license provides that, upon the payment of an annual fee, the licensee is given permission to make an unlimited number of nondramatic performances of all of the licensing organization's music, without any necessity for the licensee to keep any records of the music actually used. Id. at 807. Virtually all music publishing companies are thus licensed by both BMI and ASCAP to avoid charges of copyright infringement.

ASCAP is a classic example of the possibility of a harmonious relationship between copyright owners and users. Its membership is composed of 50% songwriters and 50% music publishers. In this type of "co-op" 12 writer-members are elected to a Board of Directors by other writers while 12 publisher-members are elected to the Board by other publishers. See Finkelstein, The Role of ASCAP in Licensing the Right to Perform Copyrighted Musical Works, 17 IDEA 15, 18 (Fall 1975). All fees received are divided equally in half to be distributed to writers and publishers. Id. Because of its membership composition, this organization is able to promote the competing self-interests of its members in such a way as to satisfy both copyright owners and users. The theme of cooperation among various copyright participants should also be instituted in the proposed forum.
extend to encompass a wide spectrum of copyright issues, both present and future. In this way, flexibility of the copyright law as well as the forum itself will be maintained. Perhaps certain panels of judges could be established consisting of members not from the specific area in which the controversy arises, since bias or the appearance of bias would be hard to avoid, but from allied fields to assure that they are capable of understanding the arguments presented. Although panels would change over time, allowing for both membership and industry modification, the basic framework of such body would remain stable, and presumably a body of procedural rules, customs and usages would arise. The decisions of the judges could then either become directly applicable as the new law itself, a most desirable result given the rapidity of current technological changes, or be embodied as a recommendation for Congress to act upon. The crucial point is that the law must be flexible if it is to remain contemporary.

Two main justifications exist for creating such a forum. The first is the need to establish an accurate framework in which the various media industries would use a certain specified technology. This is the point at which the dialogue between copyright creators and copyright users would best be utilized. In effect, such dialogue will produce an enlightened perception of each party's respective long-term interest reflecting both the proper cost-benefit ratios for copyright owners and users and the proper balancing between compensation to the copyright owner and fair use to the copyright user.

A second goal for settling copyright issues is to limit the power exercised by any one media faction at a particular time. The constant give-and-take of ideas, along with the assured representation of the various industries involved, will prevent any one industry from dominating the current market and will again produce the proper balance between the needs of copyright owners and users. Thus, the virtue of such a decision-making body is that it would harness bias and self-

217. In this collaborative enterprise, the entertainment industry should recognize the benefits that the teaching, research and librarian professions confer on the copyright owner by training people to create, produce and promote their copyrighted works. These professions are responsible for exposing current audiovisual products to the public thereby stimulating the commercial demand for those products and for raising the performance and aesthetic standards of creators. While having the right to sue those believed to be plagiarizing the copyrighted works, copyright owners should be aware of the heavy cost and uncertainties of litigation and should engage in litigation only after applying the appropriate cost-benefit ratios. However, educational users of copyright should be aware that the first amendment does not insulate them from a copyright owner's exclusive right to his work, except where political matters and news events are involved. Moreover, fair use is only a defense to a charge of copyright infringement; it confers no blanket immunity from such charges.
interest and achieve an impartial, well-balanced approach to divergent copyright problems through the use of an active dialogue among all disciplines represented, including the benefit of legal advice.

CONCLUSION

The United States Court of Appeals for the Ninth Circuit properly found that home videorecording constituted copyright infringement. Neither the legislative history nor the statutory language of the federal copyright law supported a congressional intention to exempt home users of VTRs from the scope of exclusive rights granted to copyright owners over their works. Considering the nonproductive purpose of the use, the substantiality of the taking, the primarily entertainment aspect of the recorded material, and the potential economic harm to appellants, home videorecording did not fall within the scope of the fair use doctrine and thus infringed appellants copyrights. Sony, the manufacturer of the Betamax VTR, and other corporate appellees,\(^\text{218}\) were thus found liable as contributory infringers for advertising and promoting the Betamax's infringing use. The Sony court's nonhesitation to directly answer the issues with which it was confronted was commendable.

While the increasing availability and use of the Betamax VTR raises serious policy questions, it is far from certain that Congress would be the best forum for devising appropriate answers to those questions. A better solution, perhaps, would be the formation of a continuing body of various copyright experts which would be able to keep pace with the rapidly changing technology and would be best suited for making the difficult decisions now faced by uncertain courts and legislators. Such a well-informed body would be able to reach decisions reconciling the needs of both copyright owners and the public.

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\(\text{218. All corporate appellees except the retailers were found guilty of contributory infringement by the Sony court. 659 F.2d at 976.}\)