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BETAMAX AND FAIR USE: A SHOTGUN MARRIAGE

Adrienne J. Marsh*

I. INTRODUCTION

Although the revision of copyright law effected by the Copyright Act of 1976¹ was largely brought about by Congress' realization that the Copyright Act of 1909² was inadequate to deal with the numerous technological advances made since then,³ the new act did not deal with all new technological discoveries previously made to which the copyright law would apply.⁴ In particular, the 1976 Copyright Act contained no specific provision regarding the home use of audiovisual tape recording of television broadcasts (VTR)⁵ despite the

* 1981 by Adrienne J. Marsh.

* B.S., University of Chicago; M.S., N.Y.U.; J.D., 1980, Fordham University; Member, New York Bar. The author wishes to express her appreciation to Professor Hugh Hansen for his comments on an earlier draft of this article.

1. 17 U.S.C. §§ 101-2318 (Supp. II 1978). For a history of the development of copyright protection see L. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); Note, *Copyright: Limitation on Exclusive Rights, Fair Use*, 13 HOUSTON L. REV. 1041, 1042-46 (1976).

2. Act of March 4, 1909, ch. 320, 35 Stat. 1075 (current version at 17 U.S.C. §§ 1-216 (1976)).

3. See Selkirk, *Copyright Act of 1976*, 49 NEW YORK STATE B.J. 558, 558 (1977); Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977).

At the time of the drafting of the 1909 Act, radio, television, phonographs, and even motion pictures were not yet known. Subsequently the Townsend Amendment of 1912 revised section 5 of the 1909 Act to provide copyright protection for motion pictures. Act of Aug. 24, 1912, ch. 356, § 5, 37 Stat. 488 (codified at 17 U.S.C. § 5 (1970)). The Sound Recording Amendment of 1971, Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972 - Jan. 1, 1975), dealt with the problems of record piracy. At the time of the revision, the 1909 Act dealt with sound recordings and juke boxes and motion pictures. However, the 1909 Act did not deal at all with areas such as cable television and photocopying.

4. The 1976 Act contained specific provisions regarding photocopying (§ 108) and cable television (§ 111) but did not specifically deal with audiovisual recording of television broadcasts for home use. Nor did it make specific provisions for computers. See notes 7-10 and accompanying text *infra*.

5. The term VTR is an abbreviation for video tape recording and includes various video systems: videotapes, videodiscs, videocassettes. The Betamax machine which underlies the suit in *Universal City Studios, Inc. v. Sony Corp. of America*, 480

fact that such technology was known at the time Congress enacted the 1976 Act.⁶

In legislating the new copyright statute, Congress dealt with new forms of technology in three ways. Specific exemptions were enacted to cover some activities⁷ while others⁸ were left entirely to resolution by the general "fair use"⁹ defense, and some areas were covered partially by specific exemptions and partially by fair use.¹⁰

Congress, through the 1976 Act, made the first statutory provision for the judicially created doctrine of fair use.¹¹ Section 107¹² provides that "fair use of a copyrighted work . . . is

F. Supp. 429 (C.D. Cal. 1979), is but one type of VTR system. In particular, the Betamax enables television owners to record broadcasts for later replay on their own sets. As presently manufactured, the viewer may delete commercials or skip them when replaying by using the "pause switch" or "fast-forward switch" respectively. The user may record the program he is watching, or may record on one channel while viewing another, or he may set the Betamax to record while he is not at home. *Id.* at 435. See note 19 *infra*.

6. Progenitor models of the Betamax have been manufactured since 1965.

7. For instance, exemption for reproduction by libraries is found in § 108; exemptions of certain types of performances are found in § 110; secondary transmission exemptions are found in § 111; ephemeral recordings are dealt with in § 112.

The concepts of exemption and fair use should not be confused. An exemption is an express statutory provision which removes an activity from the scope of copyright protection. Fair use is a non-infringement of an otherwise protected area. See L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 17 (1978).

8. Audiovisual tape recording (VTR) is left entirely to fair use apart from specific instances where it is expressly excluded from other exemptions. See, e.g., § 112(a), § 110(1), § 108(h), and § 108(f)(3) which grants an exemption for reproduction of audiovisual news programs to libraries and archives. Similarly § 117 freezes copyright protection with respect to computers to the law in effect December 31, 1977. In addition, all forms of technology yet to be discovered are left to fair use. See note 16 and accompanying text *infra*.

9. See text accompanying notes 36-172 *infra*.

10. While § 108 deals with reprography, it does so only in the context of libraries and archives. Thus, while reproduction for archival purposes is covered by specific exemption all other areas of reprography not covered by § 108 are left to fair use. For instance, photocopying by educators is dealt with by the fair use doctrine. However, specific guidelines exist for classroom copying and for educational uses of music. See H. R. REP. NO. 1476, 94th Cong., 2d Sess. 66-72 (1976) [hereinafter cited as HOUSE REPORT].

11. See M. NIMMER, 3 NIMMER ON COPYRIGHT § 13.05 (1980); A. LATMAN, THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 204 (5th ed. 1979); Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832, 832 (1968); Latman, *Fair Use of Copyrighted Works*, in 2 STUDIES ON COPYRIGHT 5 (1963) [hereinafter cited as Latman Study]; HOUSE REPORT, *supra* note 10, at 65. See note 36 and accompanying text *infra*.

12. 17 U.S.C. § 107 (Supp. II 1978).

not an infringement of copyright."¹³ The statute provides an illustrative list of permissible uses¹⁴ as well as an illustrative list of guidelines¹⁵ for determining which non-enumerated uses should be considered fair. The revisers contemplated that this doctrine of fair use would be both sufficiently general and sufficiently specific to deal with new technologies not yet contemplated¹⁶ as well as some already-known technologies such as VTR, with which the statute did not deal completely or at all.¹⁷

This article will discuss the potential liability for audio-visual tape recording of television broadcasts for home use under the Copyright Act of 1976 and concludes that such use cannot be considered a fair use as presently practiced.

It is further contended that recent decisions—namely *Williams & Wilkins Co. v. United States*¹⁸ and *Universal City Studios v. Sony Corp. of America*¹⁹ (*Betamax*)—have

13. *Id.* See notes 46-49 and accompanying text *infra*.

14. The statute reads: "including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. . . ." 17 U.S.C. § 107 (Supp. II 1978).

The word "including" is defined in § 101 as "illustrative and not limitative." 17 U.S.C. § 101 (Supp. II 1978). See M. NIMMER, *supra* note 11, at 13-56; A. LATMAN, *supra* note 11, at 204-05; HOUSE REPORT, *supra* note 10, at 65. See notes 67-74 and accompanying text *infra*.

15. 17 U.S.C. § 107 (Supp. II 1978). See notes 114-15 and accompanying text *infra*. The list of factors is preceded by the word "include," which indicates an illustrative list. See note 14 *supra*.

16. HOUSE REPORT, *supra* note 10, at 66.

17. *Id.* See notes 8 & 10 and accompanying text *supra*.

18. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975). The copyright infringement suit was brought under the Copyright Act of 1909 by a publisher of medical journals alleging that two government institutions, the National Institutes of Health (a government medical research organization) and the National Library of Medicine had infringed its copyrights by making photocopies of articles in its medical journals. The Court of Claims held the copying to be fair use. The court based its decision on eight criteria: plaintiff did not show substantial economic harm, medicine and medical research would be injured if the photocopying were held to be an infringement, the matter called for legislative solution, the defendants were non-profit institutions, copying was restricted, library photocopying was a longstanding practice, doubt existed as to the meaning of "copy" under the 1909 Act, and the practice in foreign countries required such a holding. *Id.* at 1353-62.

19. 480 F. Supp. 429 (C.D. Cal. 1979). See note 5 *supra*. The district court held that noncommercial home use recording of material broadcast via the public airwaves to television sets is not an infringement of either the Copyright Act of 1909 or the 1976 Act because it was fair use. The suit was brought by Universal City Studios, Inc. and Walt Disney Productions, owners of copyrighted audiovisual material, against the manufacturers, distributors, advertisers, and retailers of the "Betamax" videotape re-

made fundamental errors in applying the doctrine of fair use to new forms of technology which could set unfortunate precedents for all newly-developed forms of technology which impinge on copyright law. Unless corrected, these decisions will ultimately deprive copyright holders of their recognized property rights which will in turn deprive society of progress in the arts and sciences.

II. THE INFRINGEMENT ISSUE: BETAMAX AND THE COPYRIGHT ACT OF 1976

The basic issue to resolve in applying copyright law to new forms of technology, such as audiovisual recording, is whether or not the given use creates an infringement²⁰ of the relevant Copyright Act. However, before a court need consider whether a copyright infringement has occurred, certain preliminary requisites must be established.

The first question is whether or not the material at issue was copyrightable. Motion pictures were added to coverage of the 1909 Act in 1912²¹ and are listed in section 102(a)(6)²² as subject matter of the 1976 Act. Therefore, the material underlying the Betamax suit is copyrightable under both acts.

Assuming a work is copyrightable the next issue is, does valid copyright protection exist. Under both acts notice of copyright is required upon publication.²³ Notice must "give reasonable notice of the claim of copyright."²⁴ The *Betamax* court did not discuss the issue of whether valid notice of copyright was placed on the material broadcasted, but a question arises whether the plaintiffs made a good faith effort at reasonable notice. Is the © symbol with year and owner of the

corder as well as one individual defendant. 480 F. Supp. at 432.

20. "Infringement" is not defined in the 1976 Act, 17 U.S.C. § 101 (Supp. II 1978). Nor was it defined under the 1909 Act. Rather than defining infringement, the statute specified the exclusive rights of the copyright owner. See Latman Study, *supra* note 11, at 1.

21. Act of Aug. 24, 1912, ch. 356, § 5, 37 Stat. 488 (codified at 17 U.S.C. § 5 (1970)), known as the Townsend Amendment of 1912. Movies were listed as copyrightable in § 5(1) and § 5(m) of the 1909 Act. See note 3 *supra*.

22. 17 U.S.C. § 102(a)(6) (Supp. II 1978).

23. 17 U.S.C. § 401 (Supp. II 1978). Similarly § 10 of the 1909 Act required notice of copyright. 17 U.S.C. § 10 (1970).

24. 17 U.S.C. § 401(c) (Supp. II 1978). The 1976 Act is more liberal than the 1909 Act on the placement of notice (any location which gives reasonable notice is adequate).

copyright of reasonable size in relation to a viewer's television screen, as opposed to when blown-up on a movie theatre screen? It would not be burdensome to copyright holders to incorporate a "still" of enlarged copyright notice within any material released for television broadcasting. Because uncopyrighted material such as live performances could legitimately be recorded with a Betamax,²⁵ it is important to give the public reasonable notice of what is copyrighted.²⁶

Other requisites to a plaintiff's claim of copyright infringement are that plaintiff held title to the copyright²⁷ and had standing to sue.²⁸ Of particular relevance here is that under the 1976 Act, the owner of *any* exclusive right in the work is treated as a copyright owner and has standing to sue.²⁹

Assuming a valid copyright exists, a court must next address the issue of infringement. To find infringement of either Act an exclusive right granted the copyright owner under the relevant statute must have been violated.

Section 106 of the 1976 Act³⁰ grants to a copyright holder exclusive rights of reproduction, derivation, distribution, performance, and display. Infringement occurs when one of these

25. Any program not "fixed" in a tangible medium of expression is not copyrightable. "A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." 17 U.S.C. § 101 (Supp. II 1978). The work must be "fixed" "by or under the authority of the author." *Id.* Thus many "live" television performances may not be copyrighted, e.g., coverage of presidential news conferences. However, under § 301, the preemption section, those programs not covered by the Copyright Act of 1976 are governed by state statutes or common law, where applicable.

26. See 17 U.S.C. §§ 401(c), 405 (Supp. II 1978); 17 U.S.C. §§ 10, 19-21 (1970); note 24 *supra*.

27. 17 U.S.C. § 501(b) (Supp. II 1978); M. NIMMER, *supra* note 11, at 13-3 to 13-5; A. LATMAN, *supra* note 11, at 94.

28. 17 U.S.C. § 501(b) (Supp. II 1978). The Betamax defendants argued that the suit was a collusive one. Defendants' Memorandum of Contentions of Fact and Law (Trial Memorandum) at 196, Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429 (C.D. Cal. 1979). The only defendant who made actual home use of the Betamax to record plaintiffs' movies after January 1, 1978 and thus could be liable under the 1976 Act, Griffith, was a client of plaintiff's law firm. *Id.* at 195-96. However, a genuine controversy does exist between plaintiff and defendant and the court was correct in reaching the merits of the suit. See Comment, *Betamax and Infringement of Television Copyright*, 1977 DUKE L.J. 1181, 1184 n.16.

29. 17 U.S.C. § 201(d) (Supp. II 1978). The concept of indivisibility has been abolished. Under the Copyright Act of 1909 if plaintiff did not hold title to *all* rights in the work he was deemed a mere licensee and could not sue.

30. *Id.* § 106.

exclusive rights is violated. The rights of reproduction³¹ and derivation³² are particularly implicated by VTR copying.

Under the 1976 Act "copies" are defined as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . ."³³ Thus, a VTR tape is a "copy" under the 1976 Act

31. *Id.* § 106(1). This section confers an exclusive right "to reproduce the copyrighted work in copies or phonorecords."

32. *Id.* § 106(2). A right "to prepare derivative works based upon the copyrighted work" is stated.

33. *Id.* § 101.

Under the 1909 statute "copy" meant a version of the work which a user could directly perceive without any special equipment. The 1909 Act reincorporated the holding of *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), that the piano rolls involved in the suit were not "copies" and therefore did not infringe the composer's copyright in the underlying work. The Court's rationale was that the rolls were unintelligible without the machine. *Id.* at 13. See M. NIMMER, *supra* note 11, § 25-3; Comment, *The Copyright Act of 1976: Home Use of Audiovisual Recording and Presentation Systems*, 58 NEB. L. REV. 467, 471 (1979) [hereinafter cited as *Nebraska Note*]. The same reasoning was applied to deny copyright protection for material incorporated in phonograph records and therefore necessitated the Sound Recording Amendment of 1971. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972 - Jan. 1, 1975). See *Capitol Records Inc. v. Mercury Records*, 221 F.2d 657 (2d Cir. 1955); M. NIMMER, *supra* note 11, § 35.21 n.57; note 3 *supra* & note 92 *infra* and accompanying text.

Videotape is not decipherable to the naked eye and therefore is not a "copy" under the 1909 Act. Since videotapes are not "copies," despite the copyrightability of the underlying subject matter, there is no infringement of § 1(a) of the 1909 Act.

A distinction must be made between "copy" when used in conjunction with an infringement of the 1909 Act versus when used to denote a copyrightable material under the 1909 Act. The two are not synonymous. An argument has been made that VTR software is not copyrightable under the 1909 Act. See Comment, *The Copyright Act of 1976: Home Use of Audiovisual Recording and Presentation Systems*, 58 NEB. L. REV. 467, 471-72 (1979). However, the issue in *Betamax*, as in any copyright infringement suit, is not whether the material created by copying (VTR software) is copyrightable but whether the material copied from (movies) is copyrightable. Movies were clearly copyrightable under § 5(1) and § 5(m) of the 1909 Act. See notes 3 & 21 and accompanying text *supra*.

In fact, videotape itself is copyrightable under the 1909 Act. The Copyright Office has registered magnetic videotape under § 5(1) and § 5(m) of the 1909 Act since 1961. See Colby, *An Historic "First"—Copyright Office Accepts Magnetic Video Tape for Registration*, 8 BULL. COPYRIGHT SOC'Y 205 (1961). However, irrespective of whether or not videotape is copyrightable under the 1909 Act, VTR does not create "copies" which infringe § 1(a) as the term "copy" with respect to § 1(a) exclusive rights has come to mean.

One author has argued that *Betamax* recording might violate § 1(d) as well as § 1(a) of the 1909 Act. Note, *Copyright: The Betamax Case*, 10 U. TOLEDO L. REV. 203, 210-14 (1978). Section 1(d) confers an exclusive right "to make or to procure the making of any transcription or record." 17 U.S.C. § 1(d) (1970). The author draws an

and a VTR user infringes section 106(1) when he reproduces a copyrighted work on tape. Furthermore, if the viewer makes deletions or other modifications while recording the original copyrighted work, a derivative work³⁴ is created, and an infringement of section 106(2) occurs.³⁵ Thus, two possible infringements occur through VTR use, and the fair use defense becomes crucial.

III. THE FAIR USE DEFENSE

A. Fair Use Is an Undefined Term

Fair use was a judicially-created doctrine codified for the first time in section 107 of the 1976 Act.³⁶ Section 107, unaltered from prior case law, contains no definition of the concept of fair use³⁷ but merely contains illustrative lists of permissible uses³⁸ and guidelines³⁹ for construing the doctrine. The code states clearly, however, that fair use is non-infringement and not excused infringement.⁴⁰

Various definitions have been offered by commentators.⁴¹

analogy to *Walt Disney Productions v. Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969), where videotaping for delayed replay on cable television in Alaska of a copyrighted motion picture televised by stations in Seattle and Tacoma, Washington was held to infringe § 1(d) rights. See also Holland, *The Audiovisual Package: Handle with Care*, 22 BULL. COPYRIGHT SOC'Y 104, 106 & 122 (1974).

This article will discuss infringement under the 1976 Act only. Thus the issue of fair use need not be reached in reference to the 1909 Act.

34. "A 'derivative work' is a work based upon one or more preexisting works, such as a . . . motion picture version . . . or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions . . . or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'." 17 U.S.C. § 101 (Supp. II 1978).

35. Sections 106(3), 106(4), and 106(5) all involve public activities and are thus not germane to the issue of non-commercial home use. The sections grant the copyright holder exclusive rights of *public* distribution, performance, and display. 17 U.S.C. § 106(3) - (5) (Supp. II 1978).

36. See note 11 and accompanying text *supra*. The concept of fair use was first introduced by Mr. Justice Story in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841). See note 115 *infra*.

37. See 17 U.S.C. § 107 (Supp. II 1978) as well as 17 U.S.C. § 101 (Supp. II 1978); L. SELTZER, *supra* note 7, at 19; Freid, *Fair Use and the New Act*, 22 N.Y.L. SCH. L. REV. 497, 497 n.4 (1977).

38. See note 14 and accompanying text *supra*.

39. See note 15 and accompanying text *supra*.

40. 17 U.S.C. § 107 (Supp. II 1978). See notes 46-49 and accompanying text *infra*.

41. Fair use has been defined as "a use technically forbidden by the law, but allowed as reasonable and customary, on the theory that the author must have fore-

One analysis argues that fair use is a "privilege in other than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent" ⁴² As an equitable doctrine based on reasonableness, fair use depends on the facts of each case. ⁴³

B. *The Burden of Proof on the Issue of Fair Use*

The burden of proof question in fair use cases has been a confusing one. The courts in both *Williams & Wilkins Co. v. United States* ⁴⁴ and the *Betamax* case ⁴⁵ assumed that the plaintiff was obligated to prove that defendant's actions were *not* fair use and hence were led to decide against the respective plaintiffs in both cases. An argument can be made, however, that defendant has the burden of proving fair use.

While the revisers of the Copyright Act did not intend to change the case law when they codified the concept of fair use, ⁴⁶ the statement in section 107 that "fair use . . . is not an infringement of copyright" ⁴⁷ arguably altered the prior judicial view that fair use was a defense which *excused* an infring-

seen it and tacitly consented to it." DEWOLF, AN OUTLINE OF COPYRIGHT LAW 143 (1925), *quoted in* Cohen, *Fair Use in the Law of Copyright*, ASCAP COPYRIGHT L. SYMP. 43, 45 (1955). Crossland defines fair use as "privileged use of copyrighted material without express license." Crossland, *The Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media*, 20 S. CAL. L. REV. 153, 160 (1968). Finally, a paraphrase of the Golden Rule is: "Take not from others to such an extent and in such a manner that you would be resentful if they so took from you." McDonald, *Non-Infringing Uses*, 9 BULL. COPYRIGHT Soc'y 466, 467 (1962), *quoted in* M. NIMMER, *supra* note 11, at 13-58.

Fair use is *not* the copying of the theme or ideas rather than their expression. This erroneous definition was coined by Judge Learned Hand in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936). For other definitions of fair use see REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. 24 (1961).

42. H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* § 125 (1944).

43. *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Rosemont Enterprises v. Random House*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Latman Study, *supra* note 11, at 5; HOUSE REPORT, *supra* note 10, at 65.

44. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). See note 18 *supra*.

45. 480 F. Supp. 429 (C.D. Cal. 1979). See note 19 *supra*.

46. See A. LATMAN, *supra* note 11, at 205; M. NIMMER, *supra* note 11, at 13-54; HOUSE REPORT, *supra* note 10, at 66. See notes 11 and 36 and accompanying text *supra*.

47. 17 U.S.C. § 107 (Supp. II 1978).

ing use.⁴⁸ If fair use is viewed as a defense, or a form of excused infringement, the burden of proof lies with the defendant. However, by stating that a fair use is noninfringement, it can be argued that the burden of proof lies with the plaintiff.⁴⁹

Some commentators have argued that the allocation of the burden of proof is immaterial.⁵⁰ They argue that in most copyright cases the trier-of-fact is a judge and therefore the burden of persuasion is of less importance than it would be before a jury. They further argue that a judge is unlikely to find all other factors so evenly balanced that the burden of proof on the fair use issue will be determinative.⁵¹

Nevertheless, whether from a purely theoretical point of view or because in close cases the allocation of the burden of proof may be decisive, the issue of the burden of proof is an important one. Most of the noted commentators view fair use as a defense.⁵² However, others have argued that the plaintiff should bear the burden of proof,⁵³ while one Congressional re-

48. Numerous commentators have viewed fair use as a defense. Nimmer treats fair use as a defense in his treatise and states that "fair use is a defense not because of the absence of substantial similarity but rather despite the fact that the similarity is substantial." M. NIMMER, *supra* note 11, at 13-56. Similarly, Latman refers to the "defense of fair use." Latman Study, *supra* note 11, at 7. THE HOUSE REPORT, *supra* note 10, at 65, states that "[t]he claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years. . . ." Other commentators have also viewed fair use as a defense. Cohen, *supra* note 41, at 47 n.23; Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 ASCAP COPYRIGHT L. SYMP. 43, 50 (1971); Rosenfield, *Customary Use As "Fair Use" in Copyright Law*, 25 BUFFALO L. REV. 119, 121 (1975) [hereinafter cited as Rosenfield I].

49. Encyclopedia Britannica Educational Corp. v. Crooks, 447 F. Supp. 243, 251 (W.D. N.Y. 1978). See also Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW., 790, 804 (1975) [hereinafter cited as Rosenfield II]; Note, *Home Videorecording: Fair Use or Infringement?*, 52 S. CAL. L. REV. 573, 607 (1979) [hereinafter cited as *Home Videorecording*]; Note, *Copyright: Limitation on Exclusive Rights, Fair Use*, 13 Hous. L. REV. 1041, 1059-60 (1976) [hereinafter cited as Houston Note].

50. See Note, *Copyright Fair Use - Case Law and Legislation*, 1969 DUKE L. J. 73, 106 n.188 [hereinafter cited as 1969 Duke Note]. See also Crossland, *supra* note 41, at 160 n.50; Latman Study, *supra* note 11, at 6; Note, *Fair Use: A Controversial Topic in the Latest Revision of Our Copyright Law*, 34 U. CINCINNATI L. REV. 73, 76 (1965) [hereinafter cited as *Controversial Topic*].

51. 1969 Duke Note, *supra* note 50, at 106-07 n.188.

52. See note 48 and accompanying text *supra*.

53. Rosenfield II, *supra* note 49, at 807. Educators have argued that the burden of proof in a fair use case should be on the plaintiff. *Hearings on S. 597 Before the Subcom. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 173 (1967).

port stated that "any special statutory provision placing the burden of proving fair use on one side or the other would be unfair and undesirable."⁵⁴ A resolution of the controversy is necessary.

Because the codification of fair use was not intended to change preexisting case law,⁵⁵ one can argue that the burden of proof must lie with the defendant irrespective of the statement that fair use is non-infringement. Under this reasoning the *Betamax* court misinterpreted the law by placing the fair use proof burden on plaintiffs.

IV. AUDIOVISUAL TAPE RECORDING OF TELEVISION BROADCASTS FOR HOME USE PURPOSES IS NOT A FAIR USE

A. *The Purpose of the Fair Use Doctrine and the Lack of Countervailing Societal Interest Support the Copyright Holder's Rights in the Betamax Case*

The theory behind the copyright law is that authors and other originators of copyrightable works will be encouraged to create by the economic incentive of a copyright "monopoly."⁵⁶ The increased output of works of the intellect will in turn inure to the public's benefit. However, strict construction of the copyright laws in some instances would impede the "Progress of Science and useful Arts"⁵⁷ by hindering a second work. The fair use doctrine is therefore applied when the societal interest in promoting second works or widening dissemination of first works outweighs the financial interest of the copyright holder.⁵⁸ The doctrine reflects the judgment that, while the

54. H. R. REP. NO. 88, 90th Cong., 1st Sess. 37 (1967).

55. See notes 36 & 46 and accompanying text *supra*.

56. *Mazer v. Stein*, 347 U.S. 201 (1954). The Supreme Court stated: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the Useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." *Id.* at 219.

The copyright scheme is authorized by the constitutional grant "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

57. U.S. CONST. art. I, § 8, cl. 8.

58. *Wainright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). The philosophy of the copyright system in this country was initially expressed in the English case of *Sayre v. Moore*, 1 East 361, 102 Eng. Rep. 139 n.140 (K.B. 1785):

copyright system seems to exist for the benefit of the "author," the ultimate purpose of copyright is to benefit society.⁵⁹

For a fair use privilege to be found, a greater value to the public must be found to override the copyright holder's interest. "The Progress of Science and useful Arts"⁶⁰ is not promoted unless the underlying actions broaden dissemination of knowledge or serve some other intellectual use. Without this countervailing societal interest there is no need to apply the equitable doctrine of fair use to override the copyright holder's exclusive rights.

Thus in *Williams & Wilkins Co. v. United States*⁶¹ a key factor considered by the court was whether medical research would be hampered if fair use were not found. Similarly, other fair use cases involved balancing some artistic or literary value against the rights of a copyright owner. *Encyclopedia Britannica Educational Corp. v. Crooks*⁶² and *Wihtol v. Crow*⁶³ both involved education. *Rosemont Enterprises v. Random House*,⁶⁴ *Time, Inc. v. Bernard Geis Associates*,⁶⁵ and *Meero-*

We must take care to guard against the two extremes equally prejudicial; the one that men of ability, who have employed their time for the service of the community may not be deprived of their just merits and reward for their ingenuity and labor; the other that the world may not be deprived of improvements nor the progress of the arts retarded.

See L. SELTZER, *supra* note 7, at 13-14; Cohen, *supra* note 41, at 49-50; Comment, *Copyright Implications Attendant Upon the Use of Home Videotape Recorders*, 13 U. RICHMOND L. REV. 279, 289 (1979) [hereinafter cited as *VTR Implications*].

59. "[C]ourts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry." *Rosemont Enterprises v. Random House*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (quoting *Berlin v. E.C. Publications Inc.*, 329 F.2d 541, 544 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964)). Similarly, *Mazer v. Stein*, 347 U.S. 201 (1954), held: "The copyright law . . . makes reward to the owner a secondary consideration." *Id.* at 219. See L. SELTZER, *supra* note 7, at 8-10. See also REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. 6 (1961); H.R. REP. NO. 2222, 60th Cong., 2d Sess. (1909); Crossland, *supra* note 41, at 163-65, 215.

While the United States copyright scheme is predicated on the superior interest of the public, the concept of copyright originated in England as a device for the protection of publishers. Early state statutes in this country served primarily to protect authors. See Houston Note, *supra* note 49, at 1046. See note 1 *supra*.

60. U. S. CONST. art. I, § 8, cl. 8. See note 56 *supra*.

61. 487 F.2d at 1354.

62. 447 F. Supp. 243 (W.D.N.Y. 1978).

63. 309 F.2d 777 (8th Cir. 1963).

64. 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

65. 293 F. Supp. 130 (S.D.N.Y. 1968).

*pol v. Nizer*⁶⁶ involved creation of a book incorporating material from plaintiff's copyrighted work. Other traditional areas for fair use have been hand-copying for private use by researchers and scholars,⁶⁷ quotations for use in criticism or review,⁶⁸ incidental use,⁶⁹ parody,⁷⁰ summary or brief quotation for use in news reports,⁷¹ reproduction for use in legislative or judicial proceedings or reports,⁷² reproduction of a portion by a library to replace a damaged copy,⁷³ and quotation of short passages for illustration of a scholar's observations.⁷⁴

The *Betamax* court failed to adequately address the lack of a compelling countervailing societal interest against which to weigh copyright protection. On the facts of the *Betamax*

66. 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

67. There has been an absence of litigation in this area. See *Williams & Wilkins Co. v. United States*, 487 F.2d at 1353; *M. NIMMER*, *supra* note 11, at 13-80, 81; *Latman Study*, *supra* note 11, at 11-12. Care must be taken not to confuse what is customary use with fair use. *Cohen*, *supra* note 41, at 51-52. *Contra*, *Rosenfield I*, *supra* note 48, at 119. See also note 141 and accompanying text *infra*.

68. See *HOUSE REPORT*, *supra* note 10, at 65; *M. NIMMER*, *supra* note 11, at 13-64. The absence of reported cases in this area may be due to the authors' desire to encourage review of their works. *Latman Study*, *supra* note 11, at 8-9. See, e.g., *Lawrence v. Dana*, 15 F. Cas. 26, No. 8136 (C.C. Mass. 1869); *Robert Stigwood Group, Ltd. v. O'Reilly*, 346 F. Supp. 376 (D. Conn. 1972); *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970); *Consumers Union of United States v. Hobart Mfg. Co.*, 189 F. Supp. 275 (S.D.N.Y. 1960).

69. The *HOUSE REPORT*, *supra* note 10, at 65 lists "incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported." See *Mura v. Columbia Broadcasting Sys., Inc.*, 245 F. Supp. 587 (S.D.N.Y. 1965); *M. NIMMER*, *supra* note 11, at 13-72; *Latman Study*, *supra* note 11, at 8-9; *Cohen*, *supra* note 41, at 58-59.

70. *HOUSE REPORT*, *supra* note 10, at 65. See, e.g., *Loew's Inc. v. CBS, Inc.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.*, *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958); *Hill v. Whalen & Martell*, 220 F. 359 (S.D.N.Y. 1914). See *M. NIMMER*, *supra* note 11, at 13-66 to 13-70; *Latman Study*, *supra* note 11, at 9-10; *Cohen*, *supra* note 41, at 54-57.

71. *HOUSE REPORT*, *supra* note 10, at 65; *H.C. Wainwright & Co. v. Wall Street Transcript Corp.*, 418 F. Supp. 620 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *A. LATMAN*, *supra* note 11, at 208-09; *Latman Study*, *supra* note 11, at 12. In the area of news reports conflicts between copyright protection and First Amendment rights will be especially crucial. See note 75 *infra*.

72. *HOUSE REPORT*, *supra* note 10, at 65. See *M. NIMMER*, *supra* note 11, at 13-71; *Latman Study*, *supra* note 11, at 13.

73. *HOUSE REPORT*, *supra* note 10, at 65. See 17 U.S.C. § 108(c) (Supp. II 1978) which now makes this an exemption where a replacement is unavailable rather than leaving it to fair use (but note that § 106(f)(4) states that rights of fair use are preserved).

74. *HOUSE REPORT*, *supra* note 10, at 65. See *Latman Study*, *supra* note 11, at 10-11; *A. LATMAN*, *supra* note 11, at 206-07; *But see Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

case, plaintiffs' movies were the copyrighted works which were the basis of the alleged infringement. These movies are viewed primarily for their entertainment value. Because fair use is grounded on the dissemination of knowledge and progress of art and science, and not on entertainment, it is difficult to justify the copyright infringements involved in *Betamax* as fair use.⁷⁵

While it can be argued that VTR recordings *can* be made of documentaries and other educational television shows, and thereby be used to broaden dissemination of knowledge, the solution proposed by this article⁷⁶ would not preclude maximum dissemination of such knowledge. It promotes broad access to all televised works, whether copyrighted or not, but also ensures that copyright holders will be awarded their property rights.⁷⁷

B. *The Legislative History of the Copyright Act of 1976 As Well As the Act Itself Do Not Indicate that VTR Is a Fair Use*

The Copyright Act of 1976 makes no explicit provision for audiovisual recording for home use, despite the fact that

75. *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723, 733 (S.D.N.Y. 1974). See note 58 and accompanying text *supra*. Entertainment is not a purpose which supports fair use under the copyright law of the United States. See S. REP. NO. 473, 94th Cong., 1st Sess. 66 (1975); *VTR Implications*, *supra* note 58, at 289; Note, *Copyright - The Home Video Recording Controversy*, 81 W. VA. L. REV. 231, 238-39 (1979) [hereinafter cited as *Video Controversy*]; Note, *Copyright: The Betamax Case*, 10 U. TOLEDO L. REV. 203, 229 (1978) [hereinafter cited as *Betamax Note*]. However, Portuguese law has granted a privilege for recreational use. See Latman Study, *supra* note 11, at 24-25.

While recent years have seen the development of the idea that "public interest in the free dissemination of information," *Rosemont Enterprises, Inc. v. Random House*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), is a factor to be considered in determining whether a fair use exists, constitutional implications are not strong in the *Betamax* suit. The material which underlies the suit is primarily of entertainment value and not educational. 480 F. Supp. at 452. See *Meeropol v. Nizer*, 361 F. Supp. 1063 (S.D.N.Y. 1973); *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968). See generally Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. REV. 1180 (1970); Rosenfield II, *supra* note 49; Sobel, *supra* note 48; *Video Controversy*, *supra* at 238-40; Note, *Constitutional Fair Use*, 20 WM. & MARY L. REV. 85 (1978). See also note 71 *supra*.

76. See notes 198-207 and accompanying text *infra*.

77. *Id.*

VTR technology was already known at the time.⁷⁸ However, the references to audiovisual recording made in the Act indicate a Congressional intent to give audiovisual work greater protection than other forms of copyrighted material.⁷⁹ The *Betamax* court concluded that the legislative history of the new Act indicated a Congressional intention not to include home use of off-the-air recording of audiovisual materials within a copyright owner's monopoly.⁸⁰ The court's analogy to home-use sound taping from broadcasts is not, however, persuasive.

The fact that Congress established only limited copyright protection for owners of sound recordings and permitted home audio recording for private, non-commercial use from broadcasts,⁸¹ does not necessarily determine whether Congress intended a similar treatment for audiovisual material.⁸² The circumstances surrounding sound recording and audiovisual recordings are sufficiently different that treatment of the two need not be parallel under the 1976 Act. In particular, the treatment of sound recording was based less on copyright theory than on the practical reality of inability to police home use of sound recordings.⁸³ The basis of the exemption for home sound recording was that the practice was "common and unrestrained" by then and too difficult to control.⁸⁴ However, methods of control of audiovisual taping exist⁸⁵ which, while not adaptable to audiorecording, preserve the constitutional mandate of promoting "progress of Science and the useful Arts" without impinging any first amendment rights to

78. See notes 4-8 and accompanying text *supra*.

79. See, e.g., 17 U.S.C. §§ 108(h), 110(1), 112(a) (Supp. II 1978), which all specifically exclude audiovisual material from exemptions granted by the 1976 Copyright Act. See note 8 *supra*.

80. 480 F. Supp. at 443.

81. 17 U.S.C. § 114(a) (Supp. II 1978).

82. See Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 STAN. L. REV. 243, 247, n.18 (1979) [hereinafter cited as Stanford Note]; *Home Videorecording*, *supra* note 49, at 601.

83. "[Home sound recording] is common and unrestrained today." H.R. REP. NO. 487, 92d Cong., 1st Sess. 7, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 1566, 1572. Similarly, the Assistant Register of Copyrights stated: "You simply cannot control it." *Hearings on S. 646 Before the Subcomm. No. 3 of the House Judiciary Comm.* 92d Cong., 1st Sess. 22 (June 9, and 10, 1971) (Statement of Barbara Ringer), quoted in, 480 F. Supp. at 445.

84. 480 F. Supp. at 444-45. See note 83 *supra*.

85. See notes 198-207 and accompanying text *infra*.

privacy and to receive information⁸⁶ or fourth amendment rights to be secure in one's home.⁸⁷

Several distinctions between VTR and audiorecording establish that no analogy can be drawn between the two for copyright purposes. While sound recording was too widespread at the time the statute was enacted to control it,⁸⁸ audiovisual recording has not as yet spread to the same extent.⁸⁹ Secondly, the tape recorders and tapes used to record sound off the air have independent uses which are beneficial to society and commerce, such as dictation or private taping of events one wishes to memorialize. Thus any limitation imposed on their availability would be to the detriment of other useful functions. In particular, this is true for self-erasing tapes.⁹⁰ The Betamax, and similar devices, however, have as their primary function recording audiovisual material off the air, *i.e.*, recording of material not original to the user. While individuals may derive enjoyment from creating a library of individually recorded videotapes, no direct benefit accrues to society. Furthermore, the combined availability of prerecorded videocassettes, videodiscs, movie rentals, and television reruns provides alternative permanent sources for the material VTR generates while not depriving copyright owners of their fair reward.

A third distinction between VTR and audiorecording is the fact that record producers and performers were in no different position by the exemption of home-use audiorecording from the copyright statute than they had previously been,⁹¹

86. See note 75 *supra*.

87. The proposed solution, notes 198-207 and accompanying text *infra*, involves no intrusions on the sanctity of the home. However, as the *Betamax* opinion states: "Not all activity is made legal by virtue of occurring in a private home." 480 F. Supp. at 446. Thus other solutions which might involve monitoring VTR use in private homes should not be automatically discarded. Utility companies make periodic entry into private homes to ascertain the quantity of use. Nor does society countenance illegal acts merely because they occur in private.

88. See notes 83-84 and accompanying text *supra*.

89. The statement of Rep. Kastenmeier to the contrary, is one of opinion and not of fact. 480 F. Supp. at 446. The statement was made on the House floor during debate on the 1971 Sound Recording Amendment which did not reach audiovisual recording. *Id.* at 445-46. See also Stanford Note, *supra* note 82, at 247 n.18.

90. See note 200 and accompanying text *infra*.

91. H.R. REP. NO. 487, 92d Cong., 1st Sess. 7, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 1566, 1572, quoted in 480 F. Supp. at 444. This House Report which accompanied the 1971 Sound Recording Amendment stated: "[R]ecord producers and performers would be in no different position from that of the owners of copy-

since the 1909 Copyright Act had offered them no protection.⁹² However, since movies were specifically made copy-rightable under the old act,⁹³ denying them protection from VTR copying puts their copyright owners in a substantially different position.

A fourth flaw in analogizing the treatment of audiorecording to VTR under the copyright law arises when the concept of fair use is confused with that of exemption⁹⁴ from the copyright act. The *Betamax* case does not raise an issue that a specific exemption for home use of VTR exists under the Copyright Act(s). Rather, the question is whether VTR for home use is a fair use. While the language of section 106(4) is modified with respect to sound recordings by section 114(a)⁹⁵ to explicitly exempt off-the-air sound recordings for noncommercial private use, no such explicit provision was made for audiovisual materials despite the fact that science had by then developed the VTR capability. Thus no specific exemption for home use of VTR was made and none should be implied.⁹⁶

The *Betamax* court cited the treatment of home sound recordings to establish that the language of section 106 is not always to be construed literally.⁹⁷ However, the court glossed over the fact that the modification of the language in section 106(4) with respect to sound recordings is made by other explicit language in the statute. Moreover, section 106 states that the section is "[s]ubject to sections 107 through 118."⁹⁸ Nothing in sections 107 through 118 creates an exemption for VTR. There is thus no reason to read the language of section 106 to mean anything other than it states when determining the validity of home-use recording of audiovisual material.

A fifth distinction between audiorecording and audiovisual recording lies in the different effect each has on the audience. While a viewer's appetite for audiovisual material may be exhausted by viewing the tape several times, people have

right in recorded musical compositions over the past 20 years." *Id.*

92. See note 33 *supra*.

93. 17 U.S.C. §§ 5(l), (m) (1970). See note 3 *supra*.

94. See note 7 *supra*.

95. 17 U.S.C. § 114(a) (Supp. II 1978).

96. See note 111 and accompanying text *infra*.

97. 480 F. Supp. at 443.

98. 17 U.S.C. § 106 (Supp. II 1978).

been known to listen to records hundreds of times and still enjoy them.⁹⁹ Thus VTR recording for home use is more likely to reduce the rerun market¹⁰⁰ for televised films and other audiovisual material than home audiotaping hurts record sales. In fact, repeated playing of an audio recording may induce the listener to buy the record, or generally enhance the listener's desire to hear the recording repeated.¹⁰¹ "Indeed, radio is the basic marketing tool for sound recordings. . . ."¹⁰²

A sixth distinction between audiotaping and VTR is that the materials copied by VTR require greater copyright protection than do materials which are purely sound.¹⁰³ As one commentator has noted,

The pirating user of a motion picture . . . appropriates not merely the plot and dialogue, but also 'the best and only production containing the services of artists and actors otherwise unavailable, [and] can give unlimited identical performances in any place for any gathering, which compete with and destroy the value of the work for the copyright owner and his legitimate exhibition licensees.'¹⁰⁴

The costs of producing a movie involve not only the creation

99. See Holland, *The Audiovisual Package: Handle with Care*, 22 BULL. COPYRIGHT SOC'Y 104, 132 (1974); Note, "Disk-Television": Some Recurring Copyright Problems in the Reproduction and Performance of Motion Pictures, 34 U. CHI. L. REV. 686, 694-99 (1967) [hereinafter cited as *Disk-Television*]; *Home Videorecording*, *supra* note 49, at 601.

Nor is there any contradiction between the fact that plaintiffs complain that Betamax owners are recording their movies for "librarying" while plaintiffs allege that the public's "visual boredom" precludes repeated viewings of audiovisual works. For a Betamax owner may "library" something shown on television and yet only replay it once, or at most a few times. Plaintiffs' economic injury arises from the fact that they are denied financial reward from the limited repeat viewing which is diverted from movie theatres, television reruns, or sale of videodiscs. Furthermore, the public will view a movie at most a few times while it will listen to a sound recording many times.

100. Producers of televised shows depend heavily on the rerun market for profits. See Stanford Note, *supra* note 82, at 247; *Home Videorecording*, *supra* note 49, at 601; Nebraska Note, *supra* note 33, at 469-70 n.10.

101. *Home Videorecording*, *supra* note 49, at 601.

102. Holland, *supra* note 99, at 131. Furthermore, the difference in quality of sound between a home audiorecording and a professionally recorded version can more significantly affect the listener's enjoyment than the poorer quality of a home audio-visual recording.

103. See Holland, *supra* note 99, at 131; *Disk-Television*, *supra* note 99, at 694-99; Nebraska Note, *supra* note 33, at 469-70 n.10; Stanford Note, *supra* note 82, at 247. See generally *Home Videorecording*, *supra* note 49, at 574-83.

104. *Disk-Television*, *supra* note 99, at 695.

or purchase of the screenplay, but the costs of the scenery, actors and actresses, production staff, costumes, musicians, advertising and promotion, as well as the costs of financing a "risky" venture.¹⁰⁵

Finally, the legislative history of the Sound Recording Amendment of 1971¹⁰⁶ cannot be construed to endorse home use audiovisual recording. The *Betamax* opinion relies on statements of Ms. Ringer, the Register of Copyright, and Rep. Kastenmeier, made without any factual support, indicating¹⁰⁷ their concern that home recording of audiovisual material could not be controlled or would involve an invasion of the sanctity of the home. The opinion of the Copyright Office that home recording off-the-air of audiovisual materials should not be a copyright infringement¹⁰⁸ is not determinative. Opinions expressed at committee hearings, though aids to determining ambiguous intent, unless incorporated into the statute itself are not binding law.¹⁰⁹ The language of the statute did not confer an analogous limitation on copyrights of audiovisual recordings to that for sound recordings, and legislative history is relevant only where the plain meaning of the statute is not clear.¹¹⁰ Moreover, the fact that the issue was raised at legislative hearings indicates that the drafters were aware of the problem, but chose not to take affirmative statutory action at the time. This fact strongly implies that no special treatment was intended.¹¹¹

105. The costs of producing a motion picture can far outdistance the production costs of "cutting" a record. See *Disk-Television*, *supra* note 99, at 694-99; note 79 and accompanying text *supra*.

106. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972 until Jan. 1, 1975). See H.R. REP. No. 487, 92d Cong., 1st Sess. 2, 7 reprinted in [1971] U.S. CODE CONG. & AD. NEWS 1566.

107. 480 F. Supp. at 445-46. See notes 83-84, 88-89 and accompanying text *supra*.

108. 480 F. Supp. at 446.

109. *McCaugh v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931); *Railroad Retirement Bd. v. Duquesne Warehouse Co.*, 149 F.2d 507, 510 (D.C. Cir. 1945), *aff'd*, 326 U.S. 446 (1946).

110. *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 921 (9th Cir. 1975).

111. In fact, a strong argument can be made that by excluding "sounds accompanying a motion picture or other audiovisual work," 17 U.S.C. § 101 (Supp. II 1978), from the definition of "sound recordings" in the Copyright Act of 1976 Congress intended to create two completely distinct categories of copyrighted material. The inference arises that Congress intended to treat the two areas differently. Similarly, the Sound Recording Amendment of 1971 was never intended to apply to sound accom-

Though various statements from the legislative history seemingly support defendant, numerous other statements can be quoted in support of plaintiffs.¹¹² For instance, the statement that "[t]he committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use' "¹¹³ clearly supports the plaintiffs' position and tends to negate Congressional intent to provide fair use protection for VTR devices.

In conclusion, isolated quotations from the legislative history of the Act are not determinative where the language of the statute itself is clear. Congress, though fully aware of the home audiovisual recording problem, chose not to exempt such use from the copyright laws. It thus cannot be said that VTR use is an exempt use or is a fair use.

C. Applying the Guidelines Suggested in the Statute Indicates that VTR Is Not Fair Use

Section 107 of the Act lists¹¹⁴ four key factors which should be included

[i]n determining whether the use made of a work in any particular case is a fair use . . .

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.¹¹⁵

panying motion pictures. H.R. REP. No. 487, 92d Cong., 1st Sess. 5, 6, *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 1566, 1570 [hereinafter cited as 1971 HOUSE REPORT]. See *Video Controversy*, *supra* note 75, at 246.

112. *E.g.*, "[I]f there is an unauthorized reproduction of the sound portion of a copyrighted television program fixed on video tape, a suit for copyright infringement could be sustained . . ." 1971 HOUSE REPORT, *supra* note 111, at 1571.

113. SEN. REP. No. 473, 94th Cong., 2d Sess. 66 (1976).

114. This list is illustrative and not exclusive. See notes 14-15 and accompanying text *supra*.

115. 17 U.S.C. § 107 (Supp. II 1978). These four factors were first delineated in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), by Mr. Justice Story: "In short we must often look to the nature and objects of the selection made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Id.* at 348. See note 36 *supra*.

The fourth factor is crucial.¹¹⁶

1. The Purpose and Character of the Use

The first guideline for determining whether a fair use exists specifically states that purpose and character of the use shall "includ[e] whether such use is of a commercial nature or is for nonprofit educational purposes."¹¹⁷ Fair use has traditionally been more readily found for noncommercial uses, especially nonprofit educational purposes.¹¹⁸ Thus a key consideration in any fair use case is the characterization of the use as commercial or noncommercial. The purpose and character of the use is judged in relation to the "infringer." In discussing the purpose and character of the use, the *Betamax* court correctly stated¹¹⁹ that, though noncommercial use is not necessarily fair use,¹²⁰ the fact that a use is noncommercial home

Other commentators had offered different sets of guidelines. Cohen listed eight factors as the test of fair use, any one of which could be decisive in a particular case: "(1) the type of use involved; (2) the intent with which it was made; (3) its effect on the original work; (4) the amount of the user's labor involved; (5) the benefit gained by him; (6) the nature of the works involved; (7) the amount of material used; and (8) its relative value." Cohen, *supra* note 41, at 53.

Yankewich cited a three-pronged test: "(1) the quantity and importance of the portions taken; (2) their relation to the work of which they are a part; (3) the result of their use upon the demand for the copyrighted publication." Yankewich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203, 213 (1954).

A factor not included in any of the above tests is the necessity of the use, e.g., is the material otherwise available? Such a factor had been included in the 1964 bill to amend the copyright law. *Hearings on H.R. 4347 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., ser.8, pt. 3, at 1694-1719 (1965) (statement of John Schulman). See also Latman Study, *supra* note 11, at 30-31. As all the commentators have recognized, all these factors are merely guidelines to be used in judging each case on its facts.

116. *H.C. Wainright & Co. v. Wall Street Transcript Corp.*, 418 F. Supp. 620 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968); A. LATMAN, *supra* note 11, at 214; M. NIMMER, *supra* note 11, at 13-61.

117. 17 U.S.C. § 107(1) (Supp. II 1978).

118. *Loew's Inc. v. Columbia Broadcasting Sys., Inc.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958). See H. HENN, COPYRIGHT PRIMER 156 (1978); M. NIMMER, *supra* note 11, at 13-59.

119. 480 F. Supp. at 453.

120. *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1963). See M. NIMMER, *supra* note 11, at 13-58 to 13-59.

use does indeed have bearing on the issue of fair use.¹²¹ The court then observed that the purpose of VTR use is "to increase access to the materials plaintiffs choose to broadcast."¹²² However, all copyright infringements inevitably create greater access to the materials. The court accurately pointed out that the use widens access which would otherwise be precluded by viewers' need to work or by counterprogramming.¹²³ Nevertheless, the desire for wider access does not answer the question of whether the copyright holder should be rewarded for the viewers' use of his material.

Finally, the court asserted without support that because the use occurs in private homes, "enforcement of a prohibition would be highly intrusive and practically impossible"¹²⁴ and suggested that plaintiffs voluntary beaming of programs into private homes would make such intrusion unwarranted.¹²⁵ However, in choosing to have their materials broadcast, plaintiffs contracted only for a particular limited use—a use for which they were paid. The true issue is whether contracting with a television network to broadcast material carries a correlative right in viewers to infringe plaintiffs' copyrights by recording without any compensation to the copyright owner. A person invited to a free movie preview in a public auditorium is not granted a right to infringe the copyright of that movie. Nor should a home viewer be given a right to infringe the copyrights of material beamed into his home.

An issue relating to purpose which the *Betamax* court ignored is that the true target of the *Betamax* litigation is the

121. The greater freedom allowed home use under the copyright law rests on several interconnected rationales. One rationale is the concept of the sanctity of the home (see note 87 and accompanying text *supra*) mentioned in the *Betamax* opinion, 480 F. Supp. at 444-46. The tradition of personal use has long been assumed to be a fair use. See Cohen, *supra* note 41, at 58; Latman Study, *supra* note 11, at 11-12. Finally, a concept of "home use" has emerged in recent years. See Comment, *Betamax and Infringement of Television Copyright*, 1977 DUKE L.J. 1181, 1207-18 [hereinafter cited as 1977 Duke Comment]; Nebraska Note, *supra* note 33, at 481. However, this concept seems to coincide with the exception created by the Sound Recording Amendment. Finally, the words "public" and "publicly" permeate the 1976 Act. E.g., §§ 106(3)-(5), 110(4). The word "publicly" is defined in § 101 as "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered . . ." 17 U.S.C. § 101 (Supp. II 1978). Home use can be interpreted as the converse of public use.

122. 480 F. Supp. at 454.

123. *Id.*

124. *Id.*

125. *Id.* See note 135 and accompanying text *infra*.

corporate defendants as manufacturers-distributors.¹²⁶ The court ignored the fact that the corporate defendants do indeed have a commercial (for-profit) purpose and must be distinguished from the individual home-user who has a noncommercial purpose.

Another issue not dealt with by the *Betamax* court is how to define commercial use in the home use situation. Three possible definitions can be advanced: (1) to equate, as does the current standard, commercial use with "for profit" use; (2) to deem all nonpersonal uses as "commercial";¹²⁷ or (3) to gauge commercial use by either a saving of money by the user or a denial of money to the copyright holder.¹²⁸ Under either the current for-profit standard or the personal use standard one who copies any protected work escapes liability as long as he uses it only at home. Thus anyone is free to copy a copyrighted masterpiece as long as it is for his personal use. Surely, the copyright law was not intended to countenance such acts. Furthermore, there is a difference between someone copying a copyrighted work which he would not have otherwise bought and copying from material for which the copyright owner would have been compensated.¹²⁹ More specifically, a scholar might never buy a journal from which he copies material; he might instead choose to do without the material entirely.¹³⁰ Neither the for-profit nor the personal use standard takes this distinction into account. Thus, a more appropriate standard for "commercial" use would incorporate a saving of money to the user or denial of return to the copyright holder.

The wording of the statute indicates that the use crite-

126. The only individual defendant who recorded plaintiffs' copyrighted material after the effective date of the 1976 Act was a nominal defendant. See note 28 *supra*.

127. See Latman Study, *supra* note 11, at 11-12; Cohen, *supra* note 41, at 58. See note 121 and accompanying text *supra*. A standard of personal versus nonpersonal or public use would not solve the problem in *Betamax* or similar cases where large numbers of personal uses, when combined, have an enormous impact on the plaintiff.

128. This standard incorporates factors (3) and (5) of Cohen's fair use test. See note 115 *supra*. Perhaps the best standard for commercial use is incorporation into a new and competitively vendable product.

129. Williams & Wilkens, 487 F.2d at 1364, 1370, 1377 (Cowen, J., dissenting). See M. NIMMER, *supra* note 11, at 13-85.

130. M. NIMMER, *supra* note 11, at 13-85.

tion is but one factor to be included in the calculus.¹³¹ Where the use is commercial, fair use is not often found.¹³² While non-profit use weighs more heavily in the defendant's favor than a commercial use, the statute indicates that a "nonprofit educational purpose," counterposed to commercial use, is the most likely purpose to be considered fair use.¹³³

2. The Nature of the Copyrighted Work

In discussing the nature of the copyrighted material, the *Betamax* court conceded that the material at issue "cannot be categorized as 'scientific' or 'educational' "¹³⁴ which would more readily support a defense of fair use. The court based its discussion of the nature of the material on the fact that plaintiffs voluntarily chose to telecast the copyrighted material over public airwaves free of charge, and that plaintiffs were not paid for the material directly by the viewer but by broadcasters and indirectly by advertisers based on drawing power.¹³⁵ The court apparently reasoned that the plaintiff copyright holders made use of public airwaves to disseminate their work to a wider audience than would otherwise be feasible, and that this wider dissemination enhanced their revenues from advertisers.

While use of public airwaves is distinctive to this material, it does not justify altering the standards for copyright infringement. No one has ever claimed that it is fair use to copy material stored in public libraries or archives merely because public means have been used to widen dissemination. Nor has it been said that because the publicity generated by displaying a work of art in a public museum generated a market for secondary material which thereby enriched the copyright owner, the copyright holder has waived his rights in the work of art itself. Use of public arenas to disseminate copyrighted ma-

131. See notes 15 and 115 and accompanying text *supra*. HOUSE REPORT, *supra* note 10, at 66 states: "although the commercial or nonprofit character of a use is not necessarily conclusive with respect to fair use, in combination with other factors it can and should weigh heavily in fair use decisions."

132. See note 118 and accompanying text *supra*. See Latman Study, *supra* note 11, at 16.

133. The statute, it should be noted, refers to "nonprofit educational purpose." 17 U.S.C. § 107(1) (Supp. II 1978). "Nonprofit educational use" is not synonymous with "home use."

134. 480 F. Supp. at 452.

135. *Id.* at 453.

terial and enrich the copyright holder has never been a form of abandonment of copyright ownership. That copyright holders and viewers have no direct economic relationship does not imply that viewers have any greater right to infringe plaintiffs' copyrights. Furthermore, that plaintiffs derive revenues only indirectly from the alleged infringers of their work, rendering harm more speculative, relates to the issue of harm and not to the nature of the material.

3. The Amount and Substantiality of the Portion Used

The court in *Betamax* accurately observed that "the more substantial the taking from the copyrighted work, the less likely it is that the fair use defense will be available."¹³⁶ However, the court mistakenly states that copying an entire work does not defeat a fair use defense¹³⁷ because fair use is determined by a calculus of all factors.

Similarly, in *Williams & Wilkins Co. v. United States*,¹³⁸ the Court of Claims stated: "It has sometimes been suggested that the copying of an entire copyrighted work, any such work, cannot ever be 'fair use,' but this is an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice."¹³⁹ The court cited specific cases¹⁴⁰ and observed that the handwritten or typed copy of an entire article for personal use as well as individual copies of poems or songs have long been held to be fair use.¹⁴¹ Similarly, newspaper articles and court decisions are often copied in their entirety and yet are considered fair use.¹⁴² The court thus concluded that copying of entire copyrighted works does not preclude fair use.¹⁴³

136. *Id.* at 454.

137. *Id.*

138. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

139. *Id.* at 1353.

140. 487 F.2d at 1353 n.12. *See, e.g.,* New York Tribune, Inc. v. Otis & Co., 39 F. Supp. 67 (S.D.N.Y. 1941) (supporting the proposition that copying an entire work can be fair use).

141. 487 F.2d at 1353. *See also* Latman Study, *supra* note 11, at 11-12. The *Williams & Wilkins* court seems to be confusing customary use with fair use here. *See* note 67 and accompanying text *supra* and notes 144-45 and accompanying text *infra*.

142. 487 F.2d at 1353.

143. *Id.*

However, the *Williams & Wilkins* court here seemed to confuse customary use with fair use.¹⁴⁴ The fact that suits have never been brought to oppose such actions as copying an entire poem does not establish fair use.¹⁴⁵ Furthermore, many cases hold that copying an entire work can never be fair use,¹⁴⁶ and prior cases seemingly endorsing such copying as fair use were affirmed by equally divided Supreme Courts and are therefore not binding.¹⁴⁷ Another group of commentators argues that copying of an entire work is a fair use only where the copied work performs a different function than the origi-

144. See notes 67 and 141 and accompanying text *supra*. Care must also be taken not to confuse fair use with exemptions. See note 7 *supra*. Thus use of entire works is permitted by § 110(1) (entire movies or other materials for teaching); § 111 (relay of entire programs); § 114 (entire songs recorded). However, these are examples of exemptions and not of fair use.

145. The areas cited by the *Williams & Wilkins* court as examples of copying an entire work have not been the subject of litigation. Thus there is no case law supporting the claim that the copying was fair use. See Latman Study, *supra* note 11, at 11-12; M. NIMMER, *supra* note 11, at 13-80, 13-81. The mere "existence of a custom . . . is not a reason for the existence of the fair use doctrine." Cohen, *supra* note 41, at 52. But see Rosenfield I, *supra* note 48, at 219.

146. *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962); *Public Affairs Assocs., Inc. v. Rickover*, 284 F.2d 262, 272 (D.C. Cir. 1960), *vacated and remanded*, 369 U.S. 111 (1962) *on remand*, 268 F. Supp. 444 (D.D.C. 1967); *Benny v. Loew's Inc.*, 239 F.2d 532, 536-37 (9th Cir. 1956); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Robert Stigwood Group, Ltd. v. O'Reilly*, 346 F. Supp. 376, 384-85 (D. Conn. 1972). The latter cases involved distribution of numerous copies of an entire work, not merely the making of one copy for personal use.

147. *Loew's Inc. v. Columbia Broadcasting Sys., Inc.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.*, *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). While an affirmation by an equally divided Supreme Court is binding on the immediate parties, it has no precedential value for other cases. *Neil v. Biggers*, 409 U.S. 188, 191-92 (1972); A. LATMAN, *supra* note 11, at 208; M. NIMMER, *supra* note 11, at 13-88, 13-89. While such an affirmation is not binding on subsequent litigants, that four Supreme Court justices agreed on the issue is of some weight. Nevertheless, it can be argued that Congress, by enacting § 108, has tacitly overruled *Williams & Wilkins*.

Commentators have speculated on how Justice Blackmun, who did not participate in the decision, might have voted. Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland*, 22 U.C.L.A. L. Rev. 1052 (1975) [hereinafter cited as *Record Piracy*]. In *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962), while sitting on the Eighth Circuit, Blackmun had voted with the majority that copying of an entire work is not fair use in a case where 48 copies of a song were made by a teacher. Furthermore, the tenor of questions asked by Justice Blackmun during oral argument in *Williams & Wilkins* indicates he would not have decided in favor of fair use. See M. NIMMER, *supra*, note 11, at 13-87, 13-88 n.122 (quoting a portion of oral argument in the case).

nal.¹⁴⁸ By any of the standards, VTR copying of entire works is not fair use.

4. The Effect upon the Potential Market for or Value of the Copyrighted Work

The *Betamax* opinion begins by discussing harm to plaintiffs as the key factor in determining fair use.¹⁴⁹ It asserts that the harm alleged by plaintiffs is based on too many assumptions to preclude a fair use defense.¹⁵⁰ The court's analysis of harm to plaintiffs is inadequate, as was the *Williams & Wilkins* opinion on the issue of harm to plaintiff. After citing Nimmer's criticism of the *Williams & Wilkins* opinion that the issue of harm in relation to fair use depends on whether the cumulative effect of the alleged infringement by *all* potential defendants would injure plaintiff's potential market and not on whether the particular activity of the defendant in the suit resulted in damages to the plaintiff,¹⁵¹ the court proceeds to ignore Nimmer's caveat.

Harm to a copyright infringement plaintiff is difficult to prove,¹⁵² and this difficulty led to the introduction of statutory damages.¹⁵³ The court cites plaintiffs' admission that no actual harm had occurred to date and that their profits had increased yearly.¹⁵⁴ However, that admission does not determine the cumulative year-to-year effect *Betamax* will have on the value of plaintiffs' copyrights. The court failed to recognize that harm to copyright plaintiffs need not be statistically established harm,¹⁵⁵ but can be inferred where potential sale or value of plaintiffs' copyrighted materials is likely to be diminished.

148. M. NIMMER, *supra* note 11, at 13-71. Nimmer cites the example of "incidental use" of an entire work which has been held to be a fair use where the plaintiff's material is not supplanted. *Id.* at 13-72. Similarly, Braille reproductions of copyrighted works are a fair use because the two do not compete. See 1969 Duke Note, *supra* note 50, at 102; *Home Videorecording*, *supra* note 49, at 608.

149. 480 F. Supp. at 450. See note 116 and accompanying text *supra*.

150. 480 F. Supp. at 451-52.

151. *Id.* at 451.

152. Freid, *supra* note 37, at 504-05, 518.

153. 17 U.S.C. § 504(c) (Supp. II 1978). Freid, *supra* note 37, at 506-07 n.46, 518; *Record Piracy*, *supra* note 147, at 1053. See note 174 and accompanying text *infra*.

154. 480 F. Supp. at 439, 452.

155. See Freid, *supra* note 37, at 504-09, 517-19. See notes 173-82 and accompanying text *infra*.

However, irrespective of whether Betamax does any of the things alleged—reduce the quantity of time a viewer watches television, create recorded tapes to be stored for library purposes, permit deletion of commercials,¹⁵⁶ reduce re-run audiences¹⁵⁷—if advertisers *believed* Betamax caused any reduced audience they would be unwilling to pay the same high advertising rates and harm to plaintiffs would result.

The court's distinction between harm to profits and harm which imperils the existence of the copyrighted material¹⁵⁸ is artificial. The issue is harm to plaintiffs. When a work has already been published, the inevitable harm is harm to its value. Only rarely is the very existence of a work at issue.¹⁵⁹ The fact remains that substantial financial harm to a plaintiff can be as injurious as suppression of a work which might not have been financially successful.

The court states that any reduced revenues from lower ratings and advertising fees can be recouped by manufacture of videodiscs to compete with the VTR industry.¹⁶⁰ However, no one has ever required that the owner of a copyright make up losses he incurs from infringement of his copyright in one area of business by increased output of a second product. Furthermore, Betamax home recording competes with the videodisc line of plaintiffs' products as well,¹⁶¹ without rewarding plaintiffs for the use of their copyrighted material.

Finally, it should be noted that effect on the potential market or value of plaintiff's copyrighted work is grounded on the idea that a work which competes with the original or fills the same demand as the first work necessarily injures the po-

156. Statistical proof supports the conclusion that advertisements are not usually deleted. 480 F. Supp. at 439.

157. See Nebraska Note, *supra* note 33, at 469 n.10; note 100 and accompanying text *supra*.

158. 480 F. Supp. at 452.

159. A case in which the very existence of the work was at issue was *Rosemont Enterprises v. Random House*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), which involved publication of a biography of Howard Hughes against his wishes.

160. 480 F. Supp. at 452.

161. See *id.* at 433, 435-36. Prerecorded videodiscs manufactured by plaintiff and prerecorded videocassettes manufactured by defendant for use only on their respective machines do provide a reward to copyright owners. It is the home recording done on blank tapes by VTR machines such as Betamax which deprives the copyright owner of his income.

tential market for or value of a copyrighted work.¹⁶² Because Betamax copies supplant the need for the original works without rewarding the copyright owners, the value of the copyright must inevitably be reduced.

On the other hand, an argument not developed in the opinion is that Betamax *enhances* the value of plaintiffs' copyrighted material. Much of Betamax use is recording of programs a viewer would not otherwise be able to see either because of network counter-programming or because the viewer was unable to be physically present to view a show when aired. The recorded shows would then reach a larger audience than would otherwise be possible. Because the rating services have the capability of measuring this "Betamax audience"¹⁶³ and because statistics show commercials are usually included,¹⁶⁴ advertising rates would be positively affected. In fact, since most commercials are not deleted, any "librarying" of Betamax tapes only serves to increase the audience of the commercials. Even if viewers are limited to a certain number of hours of television viewing a week, and screening Betamax recordings will diminish the audience and ratings of other shows, these particular plaintiffs would not be the injured parties. The reduced viewing would affect less popular shows, not plaintiffs' programs. Thus a valid argument could be made that Betamax enhances the value of plaintiffs' copyrighted material.

An argument raised elsewhere is that Betamax enhances the value of plaintiffs' copyrights because Betamax pre-recorded software or videocassettes provide copyright holders with *direct* compensation.¹⁶⁵ However, this argument overlooks the fact that copyright holders would receive greater direct compensation from videodiscs with which videocassettes compete if not for the existence of Betamax. Thus any direct

162. *Rosemont Enterprises v. Random House*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Hill v. Whalen and Martell*, 220 F. 359, 360 (S.D.N.Y. 1914); *Lawrence v. Dana*, 15 F. Cas. 60 (C.C. Mass. 1869); *Robert Stigwood Group, Ltd. v. O'Reilly*, 346 F. Supp. 376 (D. Conn. 1972); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938); A. LATMAN, *supra* note 11, at 215; M. NIMMER, *supra* note 11, at 13-62 to 13-66; Freid, *supra* note 37, at 504; Latman Study, *supra* note 11, at 15-16; Cohen, *supra* note 41, at 63. See note 182 and accompanying text *infra*.

163. 480 F. Supp. at 441.

164. *Id.* at 439.

165. *VTR Implications*, *supra* note 58, at 287.

payments to copyright holders for videocassettes which are in competition with videodiscs merely compensate the copyright holder for revenues he would have received from videodiscs. However, Betamax recording from television denies the copyright owner *any* direct revenue. Thus the net result of Betamax use is a loss of revenue to the copyright holder.¹⁶⁶

Defendants could also argue that the "author's" incentive to create may not be substantially reduced by failure to grant him copyright protection in this area.¹⁶⁷ His financial incentives are already substantial, since his existing financial returns from television broadcasters and indirectly from advertisers are large.¹⁶⁸ Thus, it cannot be said that denial of copyright protection operates as a disincentive.

D. *Summary of "Fair Use" Analysis of Betamax*

The court concluded that home copying of audiovisual material, broadcast free of charge to Betamax owners over the airwaves, is fair use of plaintiffs' works because such copying is noncommercial and does not reduce the market for plaintiffs' works.¹⁶⁹ Not only did the court misconstrue the legislative history of the Copyright Acts but it also failed to treat the doctrine of fair use as an equitable rule of reasonableness. The court completely ignored the fact that no countervailing societal interest attending Betamax use overrides the copyright holder's exclusive rights to protection and thus failed to balance the equities in the case. Such failure should preclude application of the fair use doctrine.

Although the court made an analysis based on the four factors enumerated in section 107, the key to its conclusion was its opinion that no harm to plaintiffs would result. Yet harm to plaintiff is always difficult to establish in copyright cases.¹⁷⁰ In *Williams & Wilkins* a factor in the court's decision

166. Not only does sale of prerecorded cassettes for use on a Betamax merely compensate for income copyright owners would otherwise derive from videodiscs which use copyrighted material with license from the owner, but increased advertising revenues from larger viewing audiences may not fully compensate copyright owners for other losses. Increased revenues from enlarged viewing audiences must offset losses from reduced rerun income, fewer movie rentals by the public, and diminishing box office receipts.

167. See note 56 and accompanying text *supra*.

168. See 480 F. Supp. at 440.

169. *Id.* at 456.

170. See note 152 and accompanying text *supra*.

to find fair use was a desire to give the benefit of the doubt to science and the libraries rather than to the commercial plaintiffs.¹⁷¹ In the *Betamax* situation there is no charitable or research or scholarly interest to balance against a commercial plaintiff. The significant defendants here are themselves commercial entities. The court thus misconstrued the proper analysis of harm to plaintiffs' copyright.¹⁷² If left uncorrected, the misconstruction will set a precedent that will likely be applied in future cases to grant fair use protection to any new technology.

V. THE DAMAGE ISSUE: THE NEED FOR A CORRECT STANDARD

The *Williams & Wilkins* and *Betamax* cases demonstrated that the issue of harm to the plaintiff's copyright is so critical in a fair use case that erroneous criteria for measuring damage to the value of the copyrighted work can predetermine the outcome of the case. A correct standard is thus necessary.

A. *Probable Effect and Not Actual Proof of Injury Is the Appropriate Standard*

The first issue is whether evidence of actual economic harm must always be proved or whether probable detrimental effect is sufficient. Both the *Williams & Wilkins* and *Betamax* courts erroneously required proof of actual harm.¹⁷³ However, the Copyright Act of 1976 does not require that evidence of specific damage must always be established. Indeed, the "statutory damages" provision of the Act¹⁷⁴ was enacted to fill a void created by the difficulty of proving actual injury to copyright.¹⁷⁵ Furthermore, the statute itself speaks of "the effect of the use upon the *potential* market for . . . the copyrighted work."¹⁷⁶

Although the statute speaks of potential markets and not

171. 487 F.2d at 1354. See note 18 and accompanying text *supra*.

172. See notes 173-92 and accompanying text *infra*.

173. See M. NIMMER, *supra* note 11, at 13-84; Freid, *supra* note 37, at 506-07.

174. 17 U.S.C. § 504(c) (Supp. II 1978).

175. See note 153 and accompanying text *supra*.

176. 17 U.S.C. § 107(4) (Supp. II 1978) (emphasis added). "[T]he central question in the determination of fair use is whether the infringing work tends to diminish or prejudice the potential sale of the plaintiff's work." M. NIMMER, *supra* note 11, at 13-84.

of potential effect on markets, a less stringent standard of proof is nevertheless indicated.¹⁷⁷ Actual proof of "potential" markets is far more difficult to establish than proof to present markets. Furthermore, were actual damages always necessary, the injunction remedy would be useless.¹⁷⁸

Indeed where a new industry is involved, as will inevitably be so in *Betamax* or any other case involving new technology left to fair use by the 1976 Act, proof of damages must inevitably be speculative. Since new technologies are left to fair use consideration by the 1976 Copyright Act,¹⁷⁹ fair use in turn must contemplate damages not dependent on concrete example. Otherwise, no damages would be provable and section 107(4) would effectively be eliminated as a factor.¹⁸⁰ The outcome of the suit would then be predetermined.

This "probable effects" test is one based on logic rather than on demonstrable evidence.¹⁸¹ One method of determining the probable effect of an alleged infringement is to demonstrate that a use of the copyrighted work is likely to be supplanted by defendant's work.¹⁸²

177. Cases in which potential injury was held sufficient were *Meredith Corp. v. Harper & Row, Inc.*, 378 F. Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938). In *Loew's Inc. v. Columbia Broadcasting Sys., Inc.*, 131 F. Supp. 165, 184 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958), it was said:

The mere absence of competition or injurious effect upon the copyrighted work will not make a use fair. The 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.

Similarly, in *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), the court looked to the potential future market for republication or sale of movie rights of plaintiff's book (which had been out of print for 20 years). See *Record Piracy*, *supra* note 147, at 1054; *Freid*, *supra* note 37, at 504-09, 517-19.

178. See 1969 Duke Note, *supra* note 50, at 90.

179. See notes 8-10 and accompanying text *supra*.

180. See *Freid*, *supra* note 37, at 504-05.

181. *Id.* at 505.

182. *Id.* at 505 n.39. See, e.g., *Meredith Corp. v. Harper & Row, Inc.*, 378 F. Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974); *Robert Stigwood Group, Ltd. v. O'Reilly*, 346 F. Supp. 376 (D. Conn. 1972); *Addison-Wesley Publishing Co., Inc. v. Brown*, 223 F. Supp. 219 (E.D.N.Y. 1963); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938).

B. *The Measure Should Include Harm from All Potential Infringers and Not Merely the Immediate Defendant*

The *Williams & Wilkins* and *Betamax* courts erroneously confined evidence of diminution in value of the copyrighted work to that caused by the immediate defendant.¹⁸³ The appropriate measure of damage is that caused by *all* potential "infringers" collectively. "[T]he loss through 'fair use' of [a] work cannot be measured in terms of any individual use, but only in terms of the total use and total copying."¹⁸⁴ For if a use of a copyrighted work is sanctioned with respect to the immediate defendant, not only does the immediate defendant feel free to take advantage of the copyrighted work, but all others who wish to make the same appropriation without any compensation to the copyright owner may feel free to do so.

C. *Plaintiff's Continuing Profitability Does Not Prove a Lack of Damage to the Value of the Copyrighted Work*

A third commonplace mistake made in infringement analysis is the assumption that plaintiff's continued profitability negates the possibility of injury to his copyright.¹⁸⁵ The fact that a plaintiff has experienced increased profitability despite the introduction of the allegedly infringing activity (e.g., use of *Betamax*), should not be determinative: plaintiff might have experienced even greater profitability without the alleged infringement. "The use may tend to decrease the sales, but other factors not related to the use may be simultaneously working to increase the sales."¹⁸⁶ Furthermore, where a corporate plaintiff is involved, it is insufficient to merely look, as did the *Betamax* court, at plaintiff's overall profitability in recent years. In large corporations profitability is the sum of divisional results. Evidence of harm should be sought in the ap-

183. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1368 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (Cowen, C.J., dissenting). See M. NIMMER, *supra* note 11, at 13-73 and 13-84; *Record Piracy*, *supra* note 147; *Home Videorecording*, *supra* note 49, at 612.

184. *Copyright Law Revision: Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyright, Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 109 (1967) (statement of Howard A. Meyerhoff).

185. See Freid, *supra* note 37, at 505 n.38; *Home Videorecording*, *supra* note 49, at 612-13. This error is related to the "probable effect" error. See notes 173-82 and accompanying text *supra*.

186. Freid, *supra* note 37, at 505 n.38.

propriate unit of plaintiff corporation and not in results of overall operations. In particular, improved profits from a second area of endeavor can conceal lower profits from the division immediately affected by the copyright infringement.

D. Total Destruction of the Value of Plaintiff's Copyright Is Unnecessary; Mere Harm Can Be Sufficient to Preclude a Finding of Fair Use

Some commentators have drawn a distinction between harm which threatens the very existence of a work and mere harm to economic profit.¹⁸⁷ The former is viewed as more serious because publication ceases and valuable information becomes unavailable.¹⁸⁸ Where mere economic harm results, the economic incentive to create is diminished but publication continues. Since fair use is an equitable doctrine which involves a balancing process, total destruction would require a greater outweighing benefit than does mere economic harm.¹⁸⁹

The *Betamax* court made this distinction between economic injury and harm which threatens the very existence of the copyrighted work.¹⁹⁰ In actuality, severe financial harm to a plaintiff can be even more injurious than suppression of a work which might not have enjoyed any financial success. While the public suffers a more direct injury when a work ceases to exist because the public is denied access to the information contained within, the public also suffers indirectly when economic harm befalls a copyright-holder.¹⁹¹ Since, in theory, economic reward encourages intellectual creativity, a reduced financial incentive will diminish creative output, and the public will suffer an even longer-term harm.¹⁹² A court is thus ill-advised to require destruction of the copyrighted work to find injury. Mere harm should be sufficient.

187. Freid, *supra* note 37, at 509 n.53; *VTR Implications*, *supra* note 58, at 288. See notes 158-59 and accompanying text *supra*.

188. Freid, *supra* note 37, at 509 n.53.

189. *Id.*

190. 480 F. Supp. at 452.

191. Freid, *supra* note 37, at 509 n.53.

192. See notes 56-60 and accompanying text *supra*.

E. *New Forms of Technology Make Accurate Measurement of Injury to Plaintiff's Copyright More Difficult*

In considering what standard should be used to measure injury to plaintiff's copyright, one must bear in mind the purposes of both the copyright scheme and the fair use doctrine. Both were introduced primarily to protect the public interest in creation and broad dissemination of works of the intellect, and in conjunction therewith to reward "authors" a *sufficient* return for their efforts to encourage their creativity.¹⁹³ The "fair use" doctrine was judicially created to deal with the situation where societal interest in the progress of science and useful arts dictates that a second work should be encouraged, at the sacrifice of awarding financial return to another copyright holder.¹⁹⁴

Thus a fair use calculus must measure the merits of the allegedly infringing work against the possibility that the denial to a copyright owner of award for his efforts will discourage creativity. Where the protected original author receives compensation beyond that involved in the immediate litigation it is possible that his recompense will be sufficient to maintain his incentive to create. In the Betamax situation, plaintiff copyright holders do receive a return from television broadcasters who display their work, from movie theaters, movie rentals, and videodiscs.¹⁹⁵ However, the concern underlying plaintiffs' suit is that Betamax will supplant these other media to such a degree that their reward will eventually no longer be sufficient to cover the enormous costs and risks of producing movies and other copyrighted works.¹⁹⁶ This problem will commonly arise with other forms of new technology which gradually supplant traditional forms of copyrighted works,¹⁹⁷ for even where seemingly sufficient reward presently exists without protection against the immediate use, as the new use supplants the traditional, that adequate reward may disappear.

193. See notes 56-59 and accompanying text *supra*.

194. See notes 57-58 and accompanying text *supra*.

195. See notes 100 & 157 and accompanying text *supra*.

196. See notes 103-05 and accompanying text *supra*. See generally *Home Videorecording*, *supra* note 49, at 574-83.

197. See notes 212-14 and accompanying text *infra*.

VI. FINDING OF INFRINGEMENT WILL NOT FORECLOSE VTR
DEVICES FROM THE MARKET, AS MODIFICATIONS COULD SOLVE
THE COPYRIGHT PROBLEMS

In making a determination of whether or not VTR recording for home use is fair use, the court is not forced to decide between only two alternatives— continued use of VTR machines in their present form or a total ban on their use. A finding of infringement will not foreclose VTR devices from the market. By finding present use of VTR devices not to be fair use and issuing an injunction against the present form of VTR use, the court nevertheless leaves defendants free to adapt their technology to conform with copyright law.

While defendants have argued that a Betamax machine is merely a “time shift” machine,¹⁹⁸ as presently used it is not. However, with limited modification the machines and tapes can be adapted to minimize injury to copyright-holders and at the same time permit the broadest possible dissemination of televised material.

A distinction must be drawn between temporary taping for one-time use and “librarying” of tapes recorded by the consumer. “Librarying,” achieved by retention for multiple replays of consumer-recorded videotaped programs, competes with the copyrighted work in the videodisc, movie rental, box office, and television rerun markets. Temporary taping, on the other hand, truly serves as a “time shift” machine and broadens the viewing audience reached by “authors” and, as long as advertisements are not deleted, by advertisers. Temporary taping thus not only provides broader dissemination of material to the public, but could raise the fees advertisers will pay for the increased audience.¹⁹⁹ The copyright owner could in turn receive an increased reward which would be an incentive for further productivity.

Because prerecorded videocassettes are sold for use on Betamax machines,²⁰⁰ the machines themselves should not be adapted to erase all tapes as they play. However, if the blank tapes manufactured for consumer recording were made to

198. Defendant's Memorandum of Contentions of Fact and Law (Trial Memorandum) at 3, *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429 (C.D. Cal. 1979).

199. See 1977 Duke Comment, *supra* note 121, at 1201; *Home Videorecording*, *supra* note 49, at 616-17; notes 162-64 and accompanying text *supra*.

200. 480 F. Supp. at 435.

self-erase as they are played, the "librarying" problem is eliminated.

If modification of the blank tapes proves impossible, an alternate solution is to tax blank tapes as they are sold. Copyright holders already receive a return on the prerecorded cassettes sold for use on VTR machines. By directly taxing the blank tapes, a user pays in proportion to the amount of "librarying" he is doing.²⁰¹ Taxing the machine itself, on the other hand, does not allocate the tax according to the amount of consumer recording done.²⁰² Such a system has been instituted in West Germany.²⁰³ The tax collected can be put in a fund similar to the one presently operated by BMI for records,²⁰⁴ from which allocations would be made to copyright owners.

In addition to self-erasing tapes or a tax on blank tapes, VTR machines should be manufactured to remove the ability to eliminate commercials. When no "pause switch" is included, the advertiser can be certain his messages are reaching an enlarged audience, and the copyright owner will in turn receive greater compensation. While the advertiser will no longer be able to know at precisely what time his message will reach each member of his audience, he will know he is reaching the live audience at the given time, and the VTR audience at some future time. Because rating services have the capability of measuring the live audience as well as the VTR audience,²⁰⁵ these statistics will be available to advertisers. The advertiser may still ascertain who and how many are in a live "prime time" audience from various market surveys. Any displacement in "prime time" advertising rates will be compensated by enlarged audiences reachable by "slack hour"

201. Holland, *supra* note 99, at 126.

202. Cf. *Home Videorecording*, *supra* note 49, at 626-27 (proposal to tax the videotape machine at the time of purchase).

203. Copyright Statute of the German Federal Republic, Art. 53(5), Act of September 9, 1965. UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1972). A five percent tax is collected and is payable to the authors through GEMA, the authors' society. See Klaver, *The Legal Problems of VideoCassettes and Audio-Visual Discs*, 23 BULL. COPYRIGHT Soc'y 152, 168, 173-74 (1976).

204. Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors, and Publishers (ASCAP) have experience in redistribution of royalty fees to the proper recipient. A formula for redistribution would have to be set, but this is not an insurmountable barrier.

205. 480 F. Supp. at 441.

programming via VTR.²⁰⁶ Since there is merely time displacement and not geographical displacement,²⁰⁷ advertisers would be willing to pay greater overall fees.

Under the system proposed—elimination of the pause control mechanism from the machine and either self-erasing blank tapes or a tax on the sale of blank tapes—the problems of enforcement with which the *Betamax* court was concerned would no longer be an issue. The solution ensures a return to copyright holders, while encouraging a broad dissemination of televised programming, yet does not involve any invasion of the sanctity of the private home. The systems outlined above provide a solution to the VTR problem without abandoning copyrighted works to the public domain. The proposal balances the rights of copyright holders and the needs of consumers and thus resolves the current problem without abrogating the rights of those involved. It thus hopefully achieves a more just solution than was indicated in the *Williams & Wilkins* and *Betamax* cases.

VII. CONCLUSION

Both the *Williams & Wilkins* and *Betamax* courts misapprehended the burden of proof and damage issues in their analyses of home VTR use.²⁰⁸ Since the decisions are the most recent and prominent fair use cases involving new forms of technology, there is a danger that their pronouncements will establish a precedent²⁰⁹ for interpreting the fair use of such technology. Since harm to plaintiff's copyright will never be easy to demonstrate where a new technology or new industry is involved,²¹⁰ the decisions sanction as fair use virtually any

206. See *Home Videorecording*, *supra* note 49, at 616. Cf. *VTR Implications*, *supra* note 58, at 293-94 n.77 (advertisers unwilling to pay premiums for prime time slots, if time slots no longer have any relevance to network economics).

207. Where a geographic displacement occurs, an advertiser cannot be sure his audience is within his marketing zone. An advertiser would be willing to pay for an enlarged VTR audience within his market because they are his potential customers. The fact that no advertiser will increase his rates for distant viewers was the rationale for providing compensation for distant transmissions in § 111 of the new Act, 17 U.S.C. § 111 (Supp. II 1978).

208. See notes 44-55 & 173-92 and accompanying text *supra*. In fact, the analyses are so similar that one wonders if the *Betamax* decision was patterned on the *Williams & Wilkins* decision.

209. See note 147 and accompanying text *supra*.

210. See notes 173-82 and accompanying text *supra*.

new form of technology adapted for home use. If, in addition, plaintiff is deemed to have the burden of proving absence of fair use,²¹¹ the outcome of any fair use case is largely predetermined.

The mere fact of home use by the user and independent compensation to the copyright holder from other sources should not inevitably establish "fair use" and therefore noninfringement since copyright holders may ultimately be denied all revenues from new technological adaptations of their work while older forms of use of the copyrighted works are simultaneously replaced by the technological advances.²¹² The return to copyright holders might diminish to the point where incentive to create is seriously eroded. For instance, in the future the majority of households may have computer terminals which may be linked to the local library to get a print-out of a book.²¹³ While under the present system any given book can be read by only one user at a time, a computerized system will enable simultaneous use of one book by any number of readers. The author would recover a reward only from the one book purchased. Not only would libraries need to acquire fewer books than the several they now do for circulation purposes, but the reading public would be less inclined to buy their own editions²¹⁴ because there would no longer be a waiting period for books and readers would in fact receive their own print-out of the book on their terminal. Under the analyses presented by the *Williams & Wilkins* and *Betamax* courts, such home use would be held to be a fair use.

The boundaries of technology are unforeseeable. It is clear, however, that the present analysis of fair use, if left uncorrected, will render all uses confined to the home to be non-infringing fair uses. Ultimately, copyright owners will lose

211. See notes 44-55 and accompanying text *supra*.

212. See note 197 and accompanying text *supra*.

213. See PRESIDENT'S SCIENCE ADVISORY COMMITTEE, SCIENCE, GOVERNMENT AND INFORMATION 20-21 (Jan. 10, 1963), quoted in Crossland, *supra* note 41, at 234; *Home Videorecording*, *supra* note 49, at 630 (citing *Copyright Law Revision: Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, Copyrights, Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 1066 (1966) (statement of Irwin Karp, Authors League of America)).

214. However, an argument can be made that there is a tradition of buying books which will not readily be displaced by availability of computer print-outs. See *Disk-Television*, *supra* note 99, at 698-99. While libraries might buy fewer books, the reading public who purchase books for collection at present might continue to do so.

their economic reward and the incentive to create will be destroyed; and the public, for whose benefit the copyright laws exist, will be denied "Progress of Science and useful Arts."

