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# COPYRIGHT: OFF-THE-AIR VIDEO RECORDING IS AN INFRINGEMENT AND NOT FAIR USE\*

*Universal City Studios, Inc. v. Sony Corporation of America*<sup>1</sup>

(The *Betamax* case)

On June 14, 1982, the United States Supreme Court granted certiorari<sup>2</sup> in the *Betamax* case, to hear and decide the most hotly contested issue in the entertainment industry: is home video recording of free television programming an infringement of copyright? That question is important enough, but the case carries with it a number of other issues. If home video recording is an infringement, is there a fair use defense available to defendants? Did Congress create an implied exemption for home recording? If the consumer who records the program is liable, is the manufacturer of the videotape recorder liable as a contributory infringer?

The Court's forthcoming decision in *Betamax* will almost certainly become a landmark in American copyright law. A full understanding of that decision requires an examination of the logic and reasoning behind the conflicting district court and circuit court decisions and the reasons for the Court's grant of review.

## I. THE CASE

Universal City Studios<sup>3</sup> and Walt Disney Productions<sup>4</sup> are producers and copyright owners of audiovisual material sold for telecast over the public airwaves. Sony Corporation sells, manufactures, and distributes the "Betamax," a videotape recorder (VTR) that records telecasts off the air for later viewing.<sup>5</sup>

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\* This Casenote, in revised form, was submitted to the Nathan Burkan Memorial Competition.

1. 659 F.2d 963 (9th Cir. 1981).

2. 50 U.S.L.W. 3973 (June 15, 1982).

3. Universal produces copyrighted material for exhibition in theaters and on television. Some of the motion pictures released to theaters are licensed to television for network telecasts and syndication. Occasionally, Universal will redistribute films to theaters. In addition, Universal markets theatrical motion pictures on prerecorded videodiscs for private home use. The copyrighted work remains a valuable asset to the producer far beyond the film's theatrical release or even its initial telecast. See *Universal City Studios v. Sony Corp. of America*, 480 F. Supp. 429, 433-34 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981).

4. Disney produces motion pictures that are distributed in the same manner as Universal's, see note 3 *supra*, except that Disney has not licensed any of its motion pictures for syndication. 480 F. Supp. at 434-35.

5. The Betamax records broadcast material by use of a tuner and a radio fre-

Universal and Disney sued Sony, alleging that home recording of their copyrighted works infringed their copyrights and claiming that Sony was liable as a contributory infringer.<sup>6</sup> The plaintiffs also named an individual who had used his Betamax to record their programs at home. The individual was named only to establish the infringement, for which the corporate defendants could be held contributorily liable.<sup>7</sup>

The United States District Court for the Central District of California found (1) an implied exemption from the copyright laws existed for home video recording;<sup>8</sup> (2) even if it was an infringement, home recording was protected by the fair use doctrine;<sup>9</sup> and (3) Sony was not a contributory infringer because it did not know that home video recording was an infringement at the time it manufactured and sold its machines.<sup>10</sup>

The United States Court of Appeals for the Ninth Circuit reversed, holding that off-the-air home video recording of copyrighted materials was an infringement and was not protected by the fair use doctrine.<sup>11</sup> The court held Sony liable as a contributory infringer because it knew that the Betamax would be used to reproduce copyrighted materials and actively encouraged that use.<sup>12</sup> The decision put an end to the barrage of criticism generated by the district court's reasoning.<sup>13</sup> More importantly, it determined the status

quency adaptor. The Betamax, like other VTRs, makes it possible to videotape one program while viewing another. By using its automatic timer, the owner of a Betamax can tape a program even while the television set is off. Most models include a pause button and a fast forward/reverse control. 480 F. Supp. at 435-36. *See also* notes 57-59 *infra*.

6. Certain retail stores that sold the Betamax and the advertising agency that promoted it were also named as corporate defendants. 480 F. Supp. at 437.

7. The plaintiffs waived any claim for damages or costs against the individual defendant. *Id.*

8. The court of appeals paraphrased the district court's holding as follows:

(1) that copyright holders of audiovisual materials, some of which are sold for telecast over the public airwaves, did not have monopoly power over off-the-air copying of those materials by owners of a videotape recorder in their homes for private, non-commercial use;

. . . .

(3) even if home use copying constituted an infringement, neither manufacturers, [nor] distributors . . . were liable under theories of direct or contributory infringement, or vicarious liability . . . .

659 F.2d at 964.

9. Fair use is a privilege "in others than the owner of a copyright to use copyrighted material in a reasonable manner without his consent." H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944). *See generally* notes 29-35 and accompanying text *infra*.

10. 480 F. Supp. at 460.

11. 659 F.2d at 974.

12. *Id.* at 975-76. *See also* notes 66-74 and accompanying text *infra*.

13. 659 F.2d at 966 n.1. *See also* M. NIMMER, *NIMMER ON COPYRIGHT* § 13.05[F][5], at 96-97 n.159 (1981); Marsh, *Betamax and Fair Use: A Shotgun Mar-*

of home video recording, an activity that Congress had apparently ignored.<sup>14</sup>

## II. THE ISSUES

The Constitution grants Congress the authority 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.”<sup>15</sup> Congress has devised a scheme<sup>16</sup> that grants the copyright holder the exclusive right to reproduce, adapt, publish, perform, and display his work.<sup>17</sup> The economic incentives in this system encourage the author by giving him a monopoly over his creation.<sup>18</sup>

### A. Infringement

A copyright infringement occurs when the right to exclusive control of the property is violated. New technology, however, has always created new problems in detecting and defining infringement. Although Congress designed the Copyright Act of 1976<sup>19</sup> in response to new technology,<sup>20</sup> the Act does not specifically address home video recording.

In the *Betamax* case, the plaintiffs’ protected programs were being reproduced without authorization. This normally is infringement, unless there is an express exemption. The district court, however, found an *implied* exemption for VTRs in the legislative history of the 1971 Sound Record-

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*riage*, 21 SANTA CLARA L. REV. 49, 61-67 (1981); Note, Universal City Studios, Inc. v. Sony Corp.: ‘Fair Use’ Looks Different on Videotape, 66 VA. L. REV. 1005, 1011-12 (1980); *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 STAN. L. REV. 243, 247 n.18 (1979).

14. The first progenitors of the Betamax were manufactured in 1965. 480 F. Supp. at 435. In 1976, Congress enacted a new copyright statute but did not address home video recording in the new act. See generally 17 U.S.C. §§ 101-810 (Supp. II 1978).

15. U.S. CONST. art. I, § 8, cl. 8.

16. See Copyright Act of 1909, ch. 320, 35 Stat. 1075 (codified at 17 U.S.C. §§ 1-216 (1976)) (repealed 1976). See generally Copyright Law Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (Supp. II 1978)); L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968). Rapid technological change had rendered the 1909 Act obsolete. In 1976, Congress passed the new Act, which retained the old Act’s basic purpose but redefined the elements of copyright to meet both new and unforeseen technology.

17. 17 U.S.C. § 106 (Supp. II 1978).

18. 659 F.2d at 965. See also *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“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 useful Arts.’”).

19. Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (Supp. II 1978)).

20. See, e.g., 17 U.S.C. § 108 (Supp. II 1978) (photocopying); *id.* § 111 (cable television).

ing Amendment,<sup>21</sup> which dealt solely with *audio* recording. The court of appeals found that the district court's conclusion was erroneous and "inadvertently bypassed the statutory framework of the 1976 legislation."<sup>22</sup>

The 1976 Copyright Act gives copyright owners monopoly power over their works,<sup>23</sup> but it also limits that control in certain areas.<sup>24</sup> Congress incorporated the language of the 1971 Sound Recording Amendment into the 1976 Copyright Act to exempt home audio recording from the copyright laws. The exemption does *not* expressly cover video recording. The court of appeals believed that a statute granting clear and unambiguous monopoly control is limited only by express statutory exemptions, not by those implied from other statutes or legislative histories.<sup>25</sup> The court concluded that the district court's finding of an implied exemption was unfounded.<sup>26</sup>

21. Pub. L. No. 92-140, 85 Stat. 391 (1971). Congress incorporated the 1971 Sound Recording Amendment into the 1976 Copyright Law Revision Act. *See* Pub. L. No. 94-553, § 114, 90 Stat. 2541, 2560 (1976) (codified at 17 U.S.C. § 114 (Supp. II 1978)). Section 114 reads in part:

The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords, or of copies of motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording.

22. 659 F.2d at 966.

23. Section 106 of the 1976 Act provides:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies . . . ;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies . . . to the public by sale or . . . rental . . . ;
- (4) in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of . . . the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (Supp. II 1978).

24. *See generally* 17 U.S.C. §§ 107-18 (Supp. II 1978). Congress explained:

The approach of the . . . [statute] is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made "subject to sections 107 through 118," and must be read in conjunction with those provisions.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 61, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5674.

25. 659 F.2d at 966-67. *See also* *Southeastern Community College v. Davis*, 442 U.S. 397, 414 (1979); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 619-20 (1979); *Commissioner v. Bilder*, 369 U.S. 499, 504 (1962); *Church of Scientology v. United States Dep't of Justice*, 612 F.2d 417, 422-23 (9th Cir. 1979).

26. 659 F.2d at 966-67.

The court of appeals also felt that the difference between audio and video recording justified different judicial treatment.<sup>27</sup> Because the 1976 Copyright Act contains no express exemption for off-the-air home video recording, the court found that programs remain under the exclusive control of the copyright owner even after broadcast over the public airwaves.<sup>28</sup> The court found that home video recording infringed the plaintiffs' copyrights.

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27. *Id.* at 966-68. The court of appeals heavily criticized the district court's finding of an implied exemption for home video recording. The court based its criticism on the distinction between sound recording and audiovisual recording. First, said the court, Congress intended that the areas be separate and distinct. 17 U.S.C. § 102 (Supp. II 1978) lists seven categories of "works of authorship" that are copyrightable. *Id.* § 102(a)(6) lists "motion pictures and other audiovisual works," and *id.* § 102(a)(7) lists "sound recordings." Therefore, *id.* § 114, which grants an exemption for sound recording only, does not imply an exemption for off-the-air recording because the statute makes audiovisual works and sound recordings separate categories of protected material.

Second, audiovisual recording has not become the commonplace practice that sound recording had at the time Congress enacted the 1971 Sound Recording Amendment. 659 F.2d at 967. *See also* H.R. REP. NO. 487, 92d Cong., 1st Sess. 7, reprinted in 1971 U.S. CODE CONG. & AD. NEWS 1566, 1572; M. NIMMER, *supra* note 13, § 13.05[F][5], at 96 n.159.

Third, the 1971 Sound Recording Amendment specifically excluded motion picture soundtracks from the scope of the exemption. In other words, the amendment allowed the home recording of sound broadcast over the public airwaves but did not allow home recording if a motion picture soundtrack was the subject of the broadcast. Therefore, it would be illogical to argue that a motion picture telecast over the public airwaves can be recorded legally at home when the same statute on which the implication is based expressly forbids the home recording of that motion picture's soundtrack. *See generally* H.R. REP. NO. 487, 92d Cong., 1st Sess. 7, reprinted in 1971 U.S. CODE CONG. & AD. NEWS 1566, 1570-71; note 21 *supra*.

Fourth, sound recordings and audiovisual recordings often have a different effect on their audiences. A viewer's "appetite" may be exhausted after only a few viewings of the videotaped material while sound recordings can be enjoyed many times. *See* Marsh, *supra* note 13, at 64-65.

Fifth, the production costs of a motion picture or television program far exceed the production costs of an album. The average cost of a motion picture in 1981 was \$9,750,000. Variety, Dec. 30, 1981, at 1, col. 3. The risk accompanying such a large investment may justify greater copyright protection than that accorded sound recordings. *See* Holland, *The Audiovisual Package: Handle With Care*, 22 BULL. COPYRIGHT SOC'Y 104, 132 (1974); "Disk Television": *Some Recurring Copyright Problems in the Reproduction and Performance of Motion Pictures*, 34 U. CHI. L. REV. 686, 694-99 (1967).

Finally, the court of appeals found it significant that Congress simply did not address the problem of home video recording in the 1971 Sound Recording Amendment. Consequently, any analogy the district court attempted to draw between sound recording and audiovisual recording was "simply without foundation." 659 F.2d at 968.

28. 659 F.2d at 969.

### B. Fair Use Doctrine

The analysis did not end when a copyright infringement was found, because Sony raised a defense of "fair use."<sup>29</sup> Generally, the fair use doctrine allows an unauthorized reproduction of a copyrighted work if there is some societal benefit in permitting the copy.<sup>30</sup> Traditionally, courts have excused infringement if the copied material was used for education and research, or incorporated into a second work,<sup>31</sup> because society's interest in the productive use of the copied material outweighs the copyright owner's financial interest.<sup>32</sup> Congress codified the judicially created fair use doctrine<sup>33</sup> in section 107 of the 1976 Copyright Act:

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted

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29. *Id.* See note 9 and accompanying text *supra*. There has been much debate over whether fair use is a defense to an infringement, with the burden of proof on the defendant, or whether fair use indicates no infringement has occurred, thus placing the burden of proof on the plaintiff to prove that the defendant's actions were not fair use. Prior to 1976, courts viewed fair use as a defense that excused an infringing use. When Congress codified the fair use doctrine in 1976, however, the statute read, "Fair use . . . is not an infringement of copyright." 17 U.S.C. § 107 (Supp. II 1978). Although this construction would seem to place the burden of proof on the plaintiff, the legislative history states, "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 61, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5680. Therefore, relying on the pre-existing case law, the plaintiff must first establish that his copyright has been infringed. Then, the defendant must prove the infringing activity is excused by the doctrine of fair use. Most commentators believe that fair use is a defense. See 2 A. LATMAN, *STUDIES ON COPYRIGHT* 5, 7 (1963); M. NIMMER, *supra* note 13, § 13.05, at 56; Cohen, *Fair Use in the Law of Copyright*, 6 *COPYRIGHT L. SYMP. (ASCAP)* 43, 47 n.23 (1955); Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 *COPYRIGHT L. SYMP. (ASCAP)* 43, 50 (1971). Even Congress has referred to fair use as a defense. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5678.

30. See Note, *supra* note 13, at 1012-14.

31. The doctrine distinguishes between "a true scholar and a chiseler who infringes a work for personal profit." *Wainwright Securities v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

32. *Id.*

33. The fair use concept was introduced by Mr. Justice Story in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). See also note 29 *supra*.

work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>34</sup>

The first sentence of this section lists the types of use that qualify as fair use. They are intended, however, merely as examples, since an endless variety of circumstances could constitute a fair use.<sup>35</sup> The second sentence lists four factors that courts must consider in deciding whether there is a fair use. In *Betamax*, the court of appeals determined that none of these factors supported a claim of fair use. To examine that conclusion, the factors must be analyzed individually.

### 1. Character of the Use

Courts apply the first factor, the character of the use, to determine whether there is a *productive* use.<sup>36</sup> The VTR records television programs for the owner's convenience and entertainment. This is not a productive use because the owner tapes the copyrighted material for its "intrinsic purpose," in the identical form and for the identical purpose as the original production.<sup>37</sup> There is no second work, no research or scholarship, and "no countervailing societal benefit to 'weigh' against the copyright interest of the author."<sup>38</sup>

While the district court had emphasized the noncommercial,<sup>39</sup> i.e., non-

34. 17 U.S.C. § 107 (Supp. II 1978).

35. 659 F.2d at 969. See generally M. NIMMER, *supra* note 13, § 13.05[A][1], at 53.

36. See notes 30-32 and accompanying text *supra*.

37. See, e.g., L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 18, 24 (1978), in which the author notes that fair use has always had to do with the use by a second author of a first author's work. Fair use has not heretofore had to do with the mere reproduction of a work in order to use it for its intrinsic purpose, to make what might be called the "ordinary" use of it. When copies are made for the work's "ordinary" purposes, ordinary infringement has customarily been triggered, not notions of fair use.

See also Note, *supra* note 13, at 1014.

38. 659 F.2d at 971. The district court relied heavily on *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), in finding a fair use defense for home video recording. *Williams & Wilkins* is the only case in recent years that has not adhered to the productive use guideline, and a dissenting judge in that case called it the "Dred Scott decision of copyright law." *Id.* at 1387 (Nichols, J., dissenting). In *Betamax*, the court of appeals criticized *Williams & Wilkins*' distortion of the fair use rationale as well as the district court's application of that distortion to home video recording, which "*stretches fair use beyond recognition.*" 659 F.2d at 970 (emphasis in original).

39. 659 F.2d at 972. Noncommercial motives for copying a protected work do not automatically cure an infringement. See *Encyclopedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243, 251 (W.D.N.Y. 1978) (absence of commercial motive does not conclusively determine fair use); *Chappell & Co. v. Costa*, 45 F. Supp.

profit, home<sup>40</sup> use of the Betamax, the first factor in section 107 does *not* make a simple commercial/noncommercial distinction. Instead, it provides analytical extremes. If the character of the use is commercial, courts normally do not find fair use.<sup>41</sup> The probability of a reproduction qualifying as fair use, however, is greater if the character is nonprofit *and* educational.<sup>42</sup> The character of the use must not only pass the commercial test but must also confer a social benefit. Copying the plaintiffs' works, though nonprofit,<sup>43</sup> was not "educational."<sup>44</sup> As a result, the court of appeals found no productive purpose, which weighed against a finding of fair use.<sup>45</sup>

## 2. Nature of the Original Work

The second factor, the nature of the original copyrighted work,<sup>46</sup> did not support a finding of fair use.<sup>47</sup> The courts here examine the copied material, not the purpose for which it is copied. The scope of fair use is more narrow when the work is creative or entertaining, broader when the work is informative.<sup>48</sup> The plaintiffs' televised programs were creative and enter-

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554, 556 (S.D.N.Y. 1942) (infringement does not require a sale or profit). On the other hand, proof of a commercial motive for recording or copying weighs against a finding of fair use. *See generally* Elektra Records Co. v. Gem Elec. Distribs., 360 F. Supp. 821 (E.D.N.Y. 1973); Loew's, Inc. v. Columbia Broadcasting System, 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).

40. 659 F.2d 972. A defense based on first amendment protection of home privacy does not justify an infringement. "The first amendment is not a license to trammel on legally recognized rights in intellectual property." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979). *See also* Walt Disney Productions v. Air Pirates, 581 F.2d 751, 759 (9th Cir. 1978), *cert. denied sub nom* O'Neil v. Walt Disney Productions, 439 U.S. 1132 (1979); Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1160 (9th Cir. 1977); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1200 (1970).

41. *See* note 39 *supra*. *See also* Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1175 (5th Cir. 1980).

42. *See* 17 U.S.C. § 107(1) (Supp. II 1978).

43. Although the motive of the VTR owner was nonprofit, the court of appeals questioned whether the same was true of the corporate defendants who "are obviously not in the business of promoting home videorecording for strictly altruistic reasons." 659 F.2d at 972 n.9.

44. *Id.* at 972.

45. *Id.*

46. *See* 17 U.S.C. § 107(2) (Supp. II 1978).

47. 659 F.2d at 972.

48. *See* M. NIMMER, *supra* note 13, § 13.05[A][2], at 63; L. SELTZER, *supra* note 37, at 33-34. *See also* Rohauer v. Killiam Shows, Inc., 379 F. Supp. 723, 733 (S.D.N.Y. 1974) (public interest in Rudolph Valentino or *The Son of the Sheik* insufficient to support fair use doctrine), *rev'd on other grounds*, 551 F.2d 484 (2d Cir. 1977), *cert. denied*, 431 U.S. 949 (1977); Loew's, Inc. v. Columbia Broadcasting

taining, which did not weigh in favor of fair use. Courts also consider whether the nature of the work is such that increased access would benefit the public interest,<sup>49</sup> but the plaintiffs' works did not fall into this category.

In view of this, the court of appeals stated that the district court had confused " 'the real issue at stake: whether the public interest in promoting the development of art and science dictates disregarding a copyright holder's interest in controlling the use of his product. In . . . [the *Betamax* case] the copyright owner's interest should have taken precedence.' " <sup>50</sup>

### 3. Amount of the Work Used

The third factor, the amount and substantiality of the portions used,<sup>51</sup> also did not support a fair use defense. Home video recorders normally are used to copy an entire work. Under the traditional American rule, excessive copying alone precludes fair use.<sup>52</sup> As a result, the more a user copies, the less likely a court will find fair use.<sup>53</sup> The court of appeals rejected the district court's finding that "this taking of the whole still constituted fair use,"<sup>54</sup>

System, 131 F. Supp. 165, 175 (S.D. Cal. 1955) (parody of motion picture *Gaslight*), *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).

49. See, e.g., *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (8-line paraphrase from protected magazine was fair use because public interest in biographical information requires authors to consult earlier works), *cert. denied*, 385 U.S. 1009 (1967); *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (reproduction of part of copyrighted film of President Kennedy's assassination was fair use because of public interest in having fullest information available); L. SELTZER, *supra* note 37, at 33-34.

50. 659 F.2d at 973 (quoting Note, *supra* note 13, at 1021). In discussing the "nature of the work" factor, the district court found it significant that the plaintiffs voluntarily chose to telecast over the public airwaves without charge to the viewer. 480 F. Supp. at 453. The court of appeals, however, did not believe the method of distribution was relevant. 659 F.2d at 972.

51. See 17 U.S.C. § 107(3) (Supp. II 1978).

52. See *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied sub nom* O'Neil v. Walt Disney Productions, 439 U.S. 1132 (1979). The legislative history of section 107 indicates that the "doctrine of fair use would be applied strictly to the . . . reproduction of *entire* works, such as . . . *audiovisual* [works]." S. REP. NO. 473, 94th Cong., 1st Sess. 64 (1975) (emphasis added).

53. 480 F. Supp. at 454. See also *Whitol v. Grow*, 309 F.2d 777, 780 (8th Cir. 1962); *Public Affairs Associates v. Rickover*, 284 F.2d 262, 272 (D.C. Cir. 1960); *Benny v. Loew's, Inc.*, 239 F.2d 532, 536 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1956); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486-87 (9th Cir. 1937); *Walt Disney Productions v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975); M. NIMMER, *supra* note 13, § 13.05[A][3], at 64.

54. 480 F. Supp. at 454. The district court concluded that the taking was not substantial because the plaintiffs failed to show that their market for the original work was harmed. *Id.* The court of appeals said, "[t]he right of a copyright proprietor to exclude others is absolute and if it has been violated the fact that the in-

and weighed this factor against a finding of fair use.<sup>55</sup>

#### 4. Effect on the Original Work's Value

The fourth factor, the effect of the use on the potential market or value,<sup>56</sup> also weighed against the defendants. The plaintiffs alleged that the effects of time-shifting,<sup>57</sup> librarying,<sup>58</sup> and commercial-skipping<sup>59</sup> would harm their markets for several reasons. First, the live audience of the original and rerun telecasts would decrease because viewers would be watching recorded programs. This decrease affects the telecast's ratings, which in turn lowers its value to the sponsor.<sup>60</sup> Second, if the sponsor's commercials are edited from the recorded program, its value to the sponsor again is decreased.<sup>61</sup> In each case, the advertiser will pay less to the broadcaster, who in turn will pay less to the plaintiffs.

The plaintiffs also contended that recorded movies would compete with theater reruns of those films, as well as new theatrical releases.<sup>62</sup> Consequently, recorded movies would reduce the plaintiffs' revenues from the theater portion of their market.

The court of appeals considered these allegations in conjunction with the cumulative effect that mass reproduction of copyrighted works would have on the plaintiffs' market<sup>63</sup> and concluded that off-the-air recording *tends*

fringement will not . . . pecuniarily damage him is immaterial.' ' 659 F.2d at 973 (quoting *Loew's, Inc. v. Columbia Broadcasting System*, 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)). *See also Chappel & Co. v. Costa*, 45 F. Supp. 554, 556 (S.D.N.Y. 1942).

55. 659 F.2d at 973.

56. *See* 17 U.S.C. § 107(4) (Supp. II 1978).

57. Timeshifting occurs when a viewer records a program without seeing the original telecast, watches the copy within a short period of time, and then erases the tape. 480 F. Supp. at 465.

58. Librarying is recording a program and saving the tape for several subsequent viewings. *Id.*

59. The viewer can avoid commercials either by using the VTR's pause button, which suspends the recording until the commercial is completed, or by using the fast forward switch, which allows the viewer to skip a prerecorded commercial. *Id.* at 468.

60. *Id.* at 466.

61. *Id.* at 465-67.

62. *Id.* at 467.

63. 659 F.2d at 974. In 1981, 1,360,988 VTR units were sold to retailers, an increase of 69.1% from the 804,663 units sold in 1980. These sales figures, provided by Electronic Industries Association's Consumer Electronics Group, indicate not only the VTR's growing popularity but also the staggering potential for mass reproduction of copyrighted works. The video camera allows the VTR to be used in a noninfringing manner by recording live action, uncopyrighted events. While camera sales to retailers in 1981 increased 65.8% over the previous year, only 13.9% of the VTRs sold were accompanied by a camera. Therefore, although the VTR

to diminish the potential market for the plaintiffs' work.<sup>64</sup> The court criticized the district court's requirement that the plaintiffs establish the degree of harm they suffered, noting that it is simply "too great a burden to impose on copyright plaintiffs"<sup>65</sup> because the fourth factor applies to an issue that is purely speculative. Like the other factors, this one did not support the claims of fair use.

### C. Contributory Infringement by Manufacturers

The court of appeals also rejected the district court's finding that the corporate defendants could not be held liable for contributory infringement. In reaching its conclusion, the lower court had found that the Betamax was a "staple item of commerce."<sup>66</sup> A finding that a product is a staple item of commerce provides a defense to contributory infringement in a patent context if the item in question, e.g., a typewriter or camera, has a substantial noninfringing use in addition to its infringing use. The court of appeals found this theory inapplicable. VTRs, said the court, are not "suitable for substantial noninfringing use" because virtually all television programming is copyrighted.<sup>67</sup>

Both courts found that Sony's involvement in home recording was not substantial enough to hold them liable for direct infringement.<sup>68</sup> But Sony could be held liable even though it did not directly cause the infringement. The court of appeals defined a contributory infringer as "[o]ne who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct."<sup>69</sup> Sony argued that it did not meet the knowledge requirement, because (1) it had no way of knowing that home video recording was an infringement, and (2) even if home recording was an infringement, it did not know that fair use would be inapplicable.<sup>70</sup> The

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can be used without infringement, its primary purpose and source of consumer appeal is its ability to record off the air. *Variety*, Jan. 27, 1982, at 1, col. 1.

64. 659 F.2d at 974 (adopting the standard suggested by *M. NIMMER*, *supra* note 13, § 13.05[E][4][c], at 84).

65. 659 F.2d at 973-74. In essence, the district court was requiring proof of actual damage to what was only a potential market at the time of the infringement. Even if a copyright plaintiff fails to establish actual damages, the defendant will ordinarily be liable for minimum statutory damages. *See M. NIMMER*, *supra* note 13, § 13.05[E][4][c], at 84.

66. 480 F. Supp. at 461.

67. 659 F.2d at 975. *See generally* 35 U.S.C. § 271(c) (Supp. V 1981); *M. NIMMER*, *supra* note 13, § 12.04[A], at 39-40.

68. 659 F.2d at 975; 480 F. Supp. at 457. *See generally* *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 60-63 (1911); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 358-74 (9th Cir. 1947); *Elektra Records Co. v. Gem Elec. Distribs.*, 360 F. Supp. 821, 821-23 (E.D.N.Y. 1973).

69. 659 F.2d at 975 (quoting *Gershwin Publishing Co. v. Columbia Management*, 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted)).

70. 480 F. Supp. at 460.

court of appeals, however, held that the contributory infringer need not have actual knowledge that the activity he makes possible is a violation. "It is only necessary that the copyright defendant have knowledge of the infringing activity."<sup>71</sup>

In the *Betamax* case, the defendants knew that the primary use of their VTR would be to record copyrighted works. That use was "intended, expected, encouraged, and the source of the product's consumer appeal."<sup>72</sup> In addition, the defendants "induced" home video recording through advertisements that encouraged "the use of the Betamax for recording favorite shows and compiling a library."<sup>73</sup> The court held Sony contributorily liable for the infringement because it knew of and encouraged it.<sup>74</sup>

### III. THE NEED FOR LEGISLATION

While the Supreme Court is addressing what Congress intended in 1976, Congress in 1982 is contemplating how to resolve the VTR problem for the future. Regardless of the outcome of the Court's decision, some feel that "eventually, if not in the meantime, the issue will have to be resolved by Congress."<sup>75</sup>

Other nations have faced the same problem and have come up with some solutions. The Federal Republic of Germany was the first to enact legislation addressing the home VTR problem,<sup>76</sup> and other countries have followed with similar statutes.<sup>77</sup> Although an American Congress could approach the problem in a number of ways,<sup>78</sup> the proposed legislation that has received

71. 659 F.2d at 975 (emphasis in original). See also 17 U.S.C. § 504(c)(2) (Supp. II 1978). This section of the 1976 Copyright Act allows the courts to reduce statutory damages if an infringer proves that he either "was not aware and had no reason to believe" his acts were an infringement or that he had reasonable grounds to believe his infringement was excused by fair use. This provision does not alter the status of the infringement simply because of the defendant's mental state; it only limits damages. Therefore, the defendants' belief in the applicability of fair use, regardless of their good faith, does not change the infringing character of their activity.

72. 659 F.2d at 975.

73. 480 F. Supp. at 460.

74. 659 F.2d at 976.

75. Statement by William M. Borchard, Chairman of the Copyright Division of the American Bar Association's Patent, Trademark, and Copyright Section in Variety, June 16, 1982, at 37, col. 5.

76. See Klaver, *The Legal Problems of Video Cassettes and Audio-Visual Discs*, 23 BULL. COPYRIGHT SOC'Y 152, 173-74 (1976).

77. Austria and Sweden have similar legislation. The Swedish government has imposed a tax of \$2.54 on a one-hour blank tape and \$7.64 on a three-hour blank tape. Variety, June 23, 1982, at 1, col. 1.

78. See M. NIMMER, *supra* note 13, § 14.06[B], at 53-54; Marsh, *supra* note 13, at 83-85; Note, *Home Videorecording: Fair Use or Infringement?*, 52 S. CAL. L. REV. 573, 625-33 (1979).

the most attention is substantially similar to the twenty-year-old German system.

The proposed legislation is actually an amendment offered by Senator Charles Mathias to Senate Bill 1758.<sup>79</sup> The bill was originally designed to exempt all private noncommercial video recordings of television programs from copyright protection, but the Mathias amendment would require compulsory licenses for VTRs and their recording media, such as blank tapes.<sup>80</sup> The bill would require that manufacturers, importers, or distributors pay a license fee on every VTR and blank tape sold. The amount would be set and distributed by the Copyright Royalty Tribunal, based on its determination of what constitutes fair compensation to the copyright owner.<sup>81</sup>

The Mathias amendment is an intelligent solution that balances the competing interests. It obviously eliminates the overwhelming difficulties of enforcing the present law in private homes, yet avoids the alternative of prohibiting the manufacture, sale, and use of home VTRs. At the same time, Senate Bill 1758 provides fair compensation to the copyright owners and protects their interests. The levy or fee need be only a small amount; while the incremental cost of the VTR or blank tape would be slight, the cumulative revenue should be enough to protect copyright owners and encourage production of audiovisual works—which is what the copyright scheme is all about. In essence, Senate Bill 1758 would reinstate the box office that modern technology seemingly has eliminated.

#### IV. CONCLUSION

If the Supreme Court reverses the court of appeals' decision, copyright owners in the entertainment industry will have to depend solely on the legislature for their protection and compensation. On the other hand, if the Court affirms, it will in essence affirm a system that benefits both the creators of intellectual property and the consuming public—"the creators by providing fair compensation [and protection] and thereby the incentive to create new works, and the consumer by assuring a rich and ever-increasing variety of works from which to choose."<sup>82</sup> Regardless of the outcome, *Betamax* will be a landmark, either for the precedent it sets or for the legislation it prompts.

Under the current law, the court of appeals' decision is logical and cor-

79. See Amendment 1333 to S. 1758, 97th Cong., 2d Sess. (1982), *reprinted in* 2 COPYRIGHT L. REP. (CCH) ¶ 20,164 (Apr. 1982).

80. The amendment adds yet another interesting aspect to the proposed bill. It exempts not only home video recording but home audio recording as well. See Amendment 1333 to S. 1758, note 79 *supra*.

81. See S. 1758, 97th Cong., 2d Sess. (1982). S. 1758 is presently before the Senate Judiciary Committee.

82. Remarks by David Ladd, Register of Copyrights, to the National Council of Patent Law Association, Washington, D.C. (Oct. 31, 1981). See also Marsh, *supra* note 13, at 83-85; Note, *supra* note 78, at 625-33.

rect, for creative property is nothing less than private property. Producers do not want to deny the public access to that property; they want only a guarantee that they will be justly compensated according to the use and enjoyment of the copyrighted work. If the VTR expands access to creative property, the copyright owner's right should be expanded accordingly.

The Supreme Court will decide in *Betamax* whether off-the-air recording is an infringement for which manufacturers of VTRs are liable. More importantly, the decision will demonstrate whether the Court will continue to promote the monopoly that the copyright scheme was designed to afford.

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