University of Richmond Law Review

Volume 13 | Issue 2 Article 6

1979

Copyright Implications Attendant upon the Use of Home Videotape Recorders

Sandra Gross Schneider
University of Richmond

COMMENTS

COPYRIGHT IMPLICATIONS ATTENDANT UPON THE USE OF HOME VIDEOTAPE RECORDERS

> Copyright is the Cinderella of the law. Her rich older sisters, Franchises and Patents, long crowded her into the chimney-corner. Suddenly, the fairy godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of a glamorous ball.[1]

I. INTRODUCTION

The legal "Cinderella" finds herself engulfed by a broad tide of technological change as she whirls through the complex mazes of the television industry. With the advent of videotape recorders, which allow home viewers to record and playback television programs on machines attached to their television sets, "Cinderella" is faced with many unanswered questions concerning the impact of the copyright laws on these operations. We are living in an age of "Viewer Lib,"[2] a time when Americans have the technological capacity to be their own television programmers. No longer must the question be "What's on TV tonight?" The question might be stated more properly as "What would we like to *put* on TV tonight?"[3]

It has been estimated that presently there are about one million videotape recorders in the hands of consumers. Experts also believe that during the 1980's the VTR[4] will be a staple in millions of American homes.[5] With figures of this magnitude, the question of copyright infringement is now crucial, as the television and motion picture industries are threatened by the prevalence of film pirates who are costing the film industry about one hundred million dollars a year,[6] as well as the threat of a loss in the value of television reruns. By using a VTR, a home viewer can watch one television program while taping another one for viewing at a later time; by setting a timer, the VTR owner can record a show while he is away from

1. Chafee, *Reflections on the Law of Copyright: I,* 45 COLUM. L. REV. 503 (1945).
2. NEWSWEEK, July 3, 1978, at 62, col. 1.
3. *Id.*
4. The videotape recorder will be hereinafter referred to as the VTR.
5. Hickey, *The Video-Cassette Supermarket,* TV GUIDE, June 17, 1978, at 5, col. 1.
6. Monaco, *Stealing the Show: The Piracy Problem,* AMERICAN FILM, July-Aug., 1978, at 57, col. 1. *See* United States v. Atherton, 561 F.2d 747 (9th Cir. 1977); United States v. Wise, 550 F.2d 1180 (9th Cir.), *cert. denied,* 98 S.Ct. 416 (1977). Video pirates infringe copyright laws in four ways: (1) copying films, (2) selling illegally made copies, (3) selling legally made copies, and (4) illegally exhibiting copies. AMERICAN FILM, *supra* at 65, col. 1.

home and unable to view it.[7] He *can*, but whether he *may* is an open question.[8]

A case pending in Federal District Court in the Central District of California[9] should shed some light on the above question. The plaintiffs, Universal City Studios, Inc. and Walt Disney Productions, allege that the Betamax, a VTR manufactured by Sony, is designed and distributed for the sole purpose of inducing purchasers of the machine to record television shows that they, the film production companies, have produced. The defendants include Sony Corporation (the VTR manufacturer), Sony Corporation of America (the distributor), various retailers, and a purchaser of the Betamax. The plaintiffs seek an accounting, damages and injunctive and declaratory relief for copyright infringement, unfair competition under both state and federal law, and intentional interference with contractual and advantageous business relationships under state law.[10]

The answer to the question of copyright infringement is not an easy one, considering that present copyright laws were never designed with twentieth century technology in mind, and from the beginning of this century "there has been a Keystone Kops flavor to the whole effort to adapt the one to the other."[11] What makes the problem more difficult is the fact that we are dealing with *home* viewers, taping programs without intending to profit from them, but merely taping for their own home video entertainment. After considering the nature of copyright, the "fair use" exemption in copyright law, and the "home use" exception by way of analogy of home

7. After the tape has been played back and viewed, the recorded tape can be "erased" and used again to record other programs. In addition to taping programs which have been televised, a VTR owner can purchase an optional camera and produce his own home movies which can be played on the VTR.

8. Marcus, *MCA vs. Sony*, HIGH FIDELITY AND MUSICAL AMERICA, April, 1977, at 4.

9. *See* Universal City Studios, Inc. v. Sony Corp. of America, 429 F. Supp. 407 (C.D.Cal. 1977).

10. *Id.* at 408. The original complaint in the Sony case contained twelve counts. The District Court dismissed Counts VII and VIII for failure to state a claim under the particularized provisions of §43(a) of the Lanham Trade-Mark Act, 15 U.S.C. §1125(a) (1970). The court held that plaintiffs' allegation that defendants' advertising implied that the use of the Betamax was legal was not in itself actionable under this section of the Lanham Act. The court also held that defendants' failure to disclose possible legal problems arising from the use of the machine was not actionable under the Lanham Act, as the absence of a disclosure statement is neither "false" nor a "representation" as required by §1125(a). Finally, the court stated that this opinion was not intended to express any view on the viability of plaintiffs' pendent unfair competition claims.

It is expected that the trial on the merits in the Federal District Court for the Central District of California will commence before Judge Warren Ferguson in the early part of 1979.

This article will be concerned with the allegation of copyright infringement.

11. Lardner, *VTR's Last Tape?* NEW REPUBLIC, July 1, 1978, at 19, col. 3.

video recording to sound recording, one must conclude that home video recording should be neither an infringement of copyright nor a form of piracy. In this limited context of home video freedom, "Freedom of the press belongs to those who own one."[12]

II. The Nature of Copyright

A balance of competing claims upon the public interest is reflected by the limited scope of the copyright holder's statutory monopoly: "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[13] Certainly, the television and film industries should not be deprived of the fruits of their labors, but are we supposed to disregard modern technology and ignore progress? Macaulay's statement that copyright was "a tax on readers for the purpose of giving a bounty to writers"[14] reveals the source of conflict and tension between the television industry and the public. This conflict as seen especially in the case of the VTR must somehow be solved in order to do justice to both the industry *and* the public.

Copyright protection is statutory, whereby the Constitution empowers Congress "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."[15] Thus, it is evident that the purpose of the copyright system is a dual one for the benefit of the individual author as well as the public at large. But, under this system, as the grant of exclusive rights might be beneficial to the author, it could be detrimental, at the same time, to the public interest if it were determined that an individual could not use his own VTR in the privacy of his living room because the program being beamed directly into his home was copyrighted. This "exclusive right" that an author has exists only if Congress establishes it.[16] Congress, in deciding what type of exclusive rights it will grant

12. American Film, *supra* note 6, at 67, col. 2.

13. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). The following statement made by Lord Mansfield almost 200 years ago in Sayre v. Moore, quoted in a footnote to Cary v. Longman, 1 East * 358, 362 n.(b), 102 Eng. Rep. 138, 140 n.(b) (1801), appears to shed light on the problem we are faced with today with the advent of the VTR:

> (W)e must take care to guard against 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 the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.

14. T. Macaulay, Speeches on Copyright 25 (C. Gaston ed. 1914).

15. U.S. Const., art. I, §8, cl. 8.

16. Halley, *The Educator and the Copyright Law*, 17 ASCAP Copyright L. Symp. 24 (1969).

to authors, must bear in mind that these rights are for the purpose of promoting science and the arts. Therein lies the conflict with the VTR. If the home use of the VTR is prohibited, we are discouraging scientific pursuits and thereby frustrating technology and creativity in order to safeguard the creative rights of authors.

Under the present copyright law,[17] a person who complies with the provisions for obtaining a copyright acquires the exclusive rights to do and authorize any of the following:

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.[18]

Under section 102 of the present act, copyright protection may be secured "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[19] Statutory copyright appears to be limited for the

17. The first general revision of the United States copyright laws since the early part of this century was enacted on October 19, 1976, and took effect on January 1, 1978. Copyright Act, Pub. L. No. 94-553, 90 Stat. 2451 (1976) (codified in 17 U.S.C. §§101-810). The first United States copyright law was enacted in 1790, (Act of May 31, 1790, ch. 15, 1 Stat. 124), and has undergone three general revisions prior to the 1976 revision: in 1831 (Act of Feb. 3, 1831, ch. 16, 4 Stat. 436); in 1870, (Act of July 8, 1870, ch. 230, 16 Stat. 198); and, in 1909 (35 Stat. 1075, *as amended*, 17 U.S.C. (1964)). Ramey, *A Copyright Labyrinth: Information Storage and Retrieval Systems*, 17 ASCAP COPYRIGHT L. SYMP. 1, 5 (1969).

18. 17 U.S.C.A. §106 (West 1977). In the case of Universal City Studios, Inc. v. Sony, the allegation is that the Betamax infringes plaintiffs' copyrights under 17 U.S.C. §§1(a), 1(d):

> §1. Any person entitled thereto . . . shall have the exclusive right:
> (a) To print, reprint, publish, copy, and vend the copyrighted work;. . . .
> (d) . . . to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever. . . .

The separate §1(a) and §1(d) rights coalesce into §106(1) of the New Act. Therefore, the plaintiffs contend that use of the Betamax will constitute copyright violations under 17 U.S.C.A. §106(1)(West 1977). Pre-Trial Memorandum for Plaintiff at 15, n. 8, and at 16, n. 8, Universal City Studios, Inc. v. Sony Corp. of America, 429 F. Supp. 407 (C.D. Cal. 1977) [hereinafter cited as Pre-Trial Memorandum for Plaintiff].

19. 17 U.S.C.A. §102 (West 1977). Works of authorship in §102 include: "(6)motion pictures and other audiovisual works." In the historical note to §102 at 5, the act does not define

most part to filmed programs and movies.[20] While it thus appears that VTR users may be breaking the law through a literal reading of the copyright statutes, it may be argued that the monopoly granted by copyright is tempered by the judicial doctrine of "fair use."[21] If the equitable defenses of "fair use" and "home use" are accepted by the court in the case involving the Betamax, the court will have found a just way to adapt copyright law to modern technology without sacrificing the interests of either the public or the television and film industries.

III. THE DOCTRINE OF FAIR USE

The primary purpose of any copyright statute under the Constitutional mandate of Article I, section 8, cl. 8, is the improvement of the state of knowledge in the arts and sciences for the benefit of the public. "In order to avoid unnecessary hindrances of progress in the arts and sciences, and results contrary to the purpose of the constitutional mandate, courts have relied on a concept of 'fair use' to allow reasonable uses of copyrighted materials under certain circumstances."[23] This equitable rule of reason as

---

"tangible" per se, however, but it does provide that a work is fixed in a tangible medium if it is sufficiently permanent "to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." In this context, the act would thus appear to exclude live television broadcasts from protection. Ciaglo, *Copyright Protection for Live Sports Telecasts,* 29 BAYLOR L. REV. 101, 112 (1977).

Congress groups videotape recordings with motion pictures in 17 U.S.C.A. §101 (West 1977).

> "Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied. . . . 'Motion pictures' are audiovisual works.

20. A substantial amount of television production may not be statutorily subject to copyright if live broadcasts are not included. "For example, CBS recently indicated that on the average of 53 per cent of its network broadcast time was not statutorily copyrighted." Dreher, *Community Antenna Television and Copyright Legislation,* 17 ASCAP COPYRIGHT L. SYMP. 102, 109 (1969).

21. Halley, *The Educator and the Copyright Law,* 17, ASCAP COPYRIGHT L. SYMP. 24, 26 (1969).

22. Universal City Studios, Inc. v. Sony Corp. of America, 429 F. Supp. 407 (C.D. Cal. 1977).

23. Freid, *Fair Use and the New Act,* 22 N.Y.L.S. L. REV. 205 (1977). The most widespread accepted definition of fair use is that it constitutes a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright." H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY §125 (1944).

This obscure doctrine of fair use has been defined in the following manners as: (1) "the most troublesome in the whole law of copyright." Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939); (2) " . . . so flexible as virtually to defy definition." Time, Inc. v.

to what is fair must be applied on a case-by-case basis, and, where there is "fair use," there can be no infringement.[24]

Congress has given express statutory recognition to the fair use of copyrighted works for the first time in section 107 of the New Act:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, *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, 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 work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[25]

These four factors, then, appear to be crucial in determining whether a certain use of a copyrighted work is so reasonable that it should not be an infringement.[26] Before examining the four factors in determining whether VTR users are infringing on copyright law, perhaps it will be helpful to keep in mind the followiing statement as a guideline in this determination: "Take not from others to such an extent and in such a manner that you would be resentful if they so took from you."[27]

Bernard Geis Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968); (3) a technical infringement which is excused. Holdredge v. Knight Publishing Corp., 214 F. Supp. 921, 924 (S.D. Cal. 1963); (4) a doctrine to promote the constitutional basis of the copyright laws. Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); and (5) "a *judicially* created affirmative defense of confession and avoidance." Pre-Trial Memorandum for Plaintiff, *supra* note 18, at 56, n. 14.

24. The historical note at 111 to 17 U.S.C.A. §107 (West 1977) includes the following statement: "Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." At 112, the statement is made that "the doctrine has as much application to photocopying and taping as to older forms of use."

25. 17 U.S.C.A. §107 (West 1977)(emphasis added).

26. Professor Nimmer states that even §107, strictly speaking, does not attempt to give a definition of fair use. It only lists "factors to be considered," and these factors are merely by way of example, and are not necessarily an exhaustive enumeration. He suggests that this might mean factors other than those enumerated might have a bearing upon the determination of fair use. Further, §107 does not give any guidance as to the relative weight of each listed factor. 3 M. NIMMER, NIMMER ON COPYRIGHT §13.05 (A) (1978) [hereinafter cited as NIMMER].

27. McDonald, *Non-Infringing Uses*, 9 BULL, CR. SOC'Y. 466, 467 (1962).

A. *Purpose and Character of the Use*

The preamble to section 107 lists "certain purposes which, among others, are most appropriate for a finding of fair use."[28] However, merely because a defendant has engaged in one of these activities does not necessarily dictate a finding of fair use.[29]

It has been suggested that the purpose and character of the use of a VTR "advance the important national policy of promoting widespread access to television."[30] As Justice Stewart has stated: "The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so."[31] Thus, the use of the VTR advances the public interest in increasing the use of the airwaves. On the other hand, opponents of the VTR have stated that since the use of a VTR is "strictly for amusement, entertainment, and convenience, the nature of such use is not the type which is protectible by the fair use doctrine."[32] It appears from case law, however, that the defense of fair use in the past has been granted more readily to those whose work is used for scientific, educational, or historical purposes.[33]

---

28. NIMMER, *supra* note 26, at §13.05(A)(1). The purposes are preceded by "such as," which indicates that the listing is "illustrative and not limitative." 17 U.S.C.A. §101 (West 1977). It thus appears that the absence of home video recording from the list is immaterial to a finding of fair use.

29. Furthermore, just because a use is of a commercial nature does not necessarily negate a finding of fair use. Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966). On the other hand, a nonprofit educational purpose does not necessarily require a finding of fair use. Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962).

30. Pre-Trial Memorandum for Defendant at 56, Universal City Studios, Inc. v. Sony Corp. of America, 429 F. Supp. 407 (C. D. Cal. 1977) [hereinafter cited as Pre-Trial Memorandum for Defendant].

31. Teleprompter Corp. v. CBS, Inc., 415 U.S. 394, 408 (1974).

32. Pre-Trial Memorandum for Plaintiff, *supra* note 18, at 51. Plaintiffs relied on the following statement contained in the Report of the Senate Committee on the Judiciary, S. REP. No. 94-473: "The committee does not intend to suggest that off-the-air recording for convenience would under any circumstances, be considered 'fair use'."

33. *See, e.g.*, 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), where reproduction of medical journals by researchers engaged in expanding the areas of medical and scientific knowledge was protected by the fair use doctrine; Norman v. CBS, Inc., 333 F. Supp. 788 (S.D.N.Y. 1971), where the fair use doctrine was held to protect the use of historical data gathered by the author of the original copyrighted work; and Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), where the fair use doctrine protected the use of copyrighted articles by a biographer of Howard Hughes.

With respect to use, opponents of the VTR contend that a home user does not make a *use* of the copyrighted work within the meaning of the fair use doctrine. "He does not do any independent research or add any independent creative effort to the copy made. He does not

B. *The Nature of the Copyrighted Work*

> A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user. If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case. . . . The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner.[34]

It may be argued that access to a television broadcast is momentary; the viewer must watch the broadcast at the time selected by the broadcaster. In this context, the program is "unavailable" to those who, for example, might work at night and cannot view prime time programs without a VTR, therefore, justifying the fair use defense. Whereas a book or record may be bought and enjoyed at one's convenience, this is just not so with a television program. On the other hand, as the latter part of the quoted statement suggests, this "unavailability" might be the result of a deliberate choice by the copyright owner.

When considering the nature of the copyrighted work, it is important to consider the broad range of televised programs offered to the public. In addition to programs which are primarily for entertainment value alone, the outstanding documentaries, special news reports, scientific broadcasts, and biographical programs must not be forgotten.[35] If those individuals who cannot be in front of their television sets to view these programs because of a conflict in their schedules will be deprived of the opportunity to tape them for later viewing, are we not defeating the constitutional purpose in granting copyright protection in the first instance, to wit, "To promote the Progress of Science and the Useful Arts"?[36]

---

produce a subsequent work based upon his use of his recordings of copyrighted motion pictures; he copies solely for his own convenience and entertainment." He is a *consumer*, rather than a *user*. Pre-Trial Memorandum for Plaintiff, *supra* note 18, at 44.

34. NIMMER, *supra* note 26, at §13.05(A)(2) & n.28.

35. It is not suggested that there should be a double standard favoring the taping of educational and scientific programs, in contrast with those programs taped primarily for entertainment value. However, it would appear that the television industry, as well as the copyright holders, would want their programs to be seen by the highest possible number of viewers. It would be inconsistent to hold that the public must see the telecast either at the time designated by the broadcaster or not at all. In a city like Los Angeles, for example, where there are seven available television channels, this would mean that six channels are being wasted at any given time for an individual viewer. Pre-Trial Memorandum for Defendant, *supra* note 30, at 4.

36. U.S. CONST., art. I, §8, cl. 8.

C. *The Amount and Substantiality of the Portion Used*

This factor relates to the question of substantial similarity rather than the question of the fairness of the use. When determining the scope of reproduction, it may be assumed that home viewers tape entire programs. Although the court in *Williams & Wilkins Co. v. United States*[37] held that the fair use doctrine did apply when an entire work was duplicated, generally it has been held that reproduction of an entire work may not constitute a fair use.[38]

D. *The Effect on the Potential Market*

According to Professor Nimmer, this factor emerges as the most important fair use factor.[39] Although the television and film industries contend that the use of the VTR will have a future detrimental effect on them, proof of present or future harm is unnecessary to defeat the fair use defense.[40] It appears to be enough that the use of the VTR will *tend* to diminish or prejudice the *potential* market.[41] Although the television and film industries feel threatened by loss of viewers for the re-runs and repeat movie theatre productions, promoters of the VTR contend that copyright owners will benefit from widespread use of the VTR, not only from the increase in the television audience, which in essence is the purpose for which the programs were broadcast, but also from "the market for professionally prerecorded tapes which the proliferation of those devices will create."[42]

---

37. 487 F.2d 1345 (1973), *aff'd by an equally divided court,* 420 U.S. 376 (1975).

38. NIMMER, *supra* note 26, at §13.05(A)(3). *See* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966); Leon v. Pacific Telephone & Telegraph Co., 91 F.2d 484, 486 (9th Cir. 1937).

39. NIMMER, *supra* note 26, at §13.05(A)(4).

40. In Loew's, Inc. v. CBS, 131 F. Supp. 165, 184 (S.D. Cal. 1955), *aff'd,* 239 F.2d 532 (9th Cir. 1956), Judge Carter stated the following:

> 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.

41. Pre-Trial Memorandum for Plaintiff, *supra* note 18, at 54. Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F. Supp. 686 (S.D.N.Y.), *aff'd,* 500 F.2d 1221 (2d Cir. 1974).

42. Pre-Trial Memorandum for Defendant, *supra* note 30, at 60. Harvey Schein, President of Sony Corp. of America, argues that all the Betamax does is serve as a "time shift machine," which allows home viewers to see programs they would miss otherwise. "It enlarges the TV audience for which programs are intended in the first place," he contends. "And for MCA to say that we can't sell people something to use in their own homes is like somebody saying that General Motors can't sell cars because people drive them too fast." BUSINESS WEEK, Nov. 29, 1976, at 29, col. 3.

One way of determining whether the probable economic effect of the use of a copyrighted work will be detrimental is to look at whether the two works serve the same market or function. If the copied work serves as a substitute for the copyrighted work, then there is greater probability of economic harm to the copyright owner.[43] Where both plaintiff's work and defendant's work are used for the same purpose, under this functional test, a fair use defense should not be available.[44] It would appear, then, that under this rationale, unauthorized copying on a VTR might not be entitled to fair use protection. For, if a VTR user copies a film, it is not likely that he will pay to see it when it returns as a re-release to the theatres, or offered for sale on pre-recorded videodiscs or videotapes, or offered for lease on sixteen millimeter prints. Neither is it likely that he will watch it as a re-run on television.[45]

Perhaps a useful distinction can be made between cases where the detrimental effect imperils the existence of an enterprise (direct harm) and the somewhat less harmful occurrences in which the use merely serves to limit the profits of a still profitable business (indirect harm).[46] Thus, it may be argued in favor of a fair use defense of the VTR, that the television and film industries may well continue to remain strong and profitable, especially where home viewers are tuned in anxiously waiting for a new broadcast to add to their tape collection. Perhaps, all that may happen is that there will be fewer re-runs, which result might cause the improvement of the quality and value of broadcasts with more current, informative, and exciting programming.

Thus, it appears when the four factors are considered in concert,[47] it is a very perplexing question as to whether the VTR user is entitled to the

43. *See, e.g.*, Robert Stigwood Group, Ltd. v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972). The court held priests' production of *Jesus Christ Superstar* was not a fair use where the priests had copied substantially all of the plaintiff's work for the asserted purpose of literary (or religious) criticism.

44. NIMMER, *supra* note 26, at §13.05(1)(B). *See* Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F. Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974), where it was held that, if both works are textbooks, the fact that defendant's work (like the plaintiff's) is intended for educational purposes will not justify upholding the fair use defense. *Contra*, Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966).

45. Pre-Trial Memorandum for Plaintiff, *supra* note 18, at 55. For example, a large factor in the success of *Star Wars* was the tremendous number of repeat admissions. AMERICAN FILM, *supra* note 6, at 65, col. 3.

46. Freid, *Fair Use and the New Act*, 22 N.Y.L.S. L. REV. 205, 217 n. 53 (1977). "Under any weighing test that determines the issue of fair use, the benefit needed to outweigh direct harm would have to be greater than that needed in cases where the harmful effects are only indirect." *Id.*

47. Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977). The four factors of §107 must be evaluated in concert in determining the applicability of the fair use doctrine.

defense of fair use. Since the subject of off-the-air home videotape recording has not been treated expressly in the new copyright law, the fair use test appears to be incomplete and, perhaps, somewhat archaic when applied to the VTR. This problem is too complex to be foisted upon the courts to decide, and perhaps Congress should pass specific legislation for the VTR as it already has adopted for cable television systems and jukeboxes.[48] "Such legislation might, as a court cannot, impose appropriate conditions and sanctions to avoid the diversion of tape recordings to the bootleg market about which copyright owners express great concern."[49]

As Professor Nimmer has suggested,[50] the four factors in section 107 are merely factors which are to be considered, and they are not exhaustive. Furthermore, we are not provided with any guidance in regard to the weight of each factor. Therefore, the test is somewhat incomplete and inconclusive in trying to make a proper analysis of the copyright implications of the VTR.

Since the fair use test employs a *balancing* test whereby the exclusive rights of a copyright holder are balanced "with the public's interest in dissemination of information,"[51] it is not an area of the law which can be determined by resorting to arbitrary rules or fixed criteria.[52] The defense of fair use, which is based on a concept of reasonableness,[53] arose to encourage independent creation by allowing a reasonable use of prior copyrighted work.[54] Since a VTR owner is not "creating" anything, perhaps the fair use test is not an adequate or appropriate test to apply to his acts. But presently, it is all that is available.

Perhaps, Congress should draft legislation which would attempt to define "(t)he nature of the ultimate viewer."[55] In this way, the limits of the use could be more clearly defined by restricting the right of home videotaping to in-home viewing, done with no intent for commercial gain. Until Congress passes legislation which relates specifically to the VTR, perhaps the fair use doctrine should be viewed from the standpoint of "reasonableness." By so doing, it would appear that the home videotape user might be entitled to the privilege of the fair use defense.[56] Even though

48. 17 U.S.C.A. §§111, 116 (West 1977).

49. Pre-Trial Memorandum for Defendant, *supra* note 30, at 84.

50. *See* NIMMER, *supra* note 26.

51. Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977).

52. Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F.2d 279 (5th Cir.), *cert. denied*, 398 U.S. 928 (1970).

53. Meeropol v. Nizer, 560 F.2d 1061, 1070 (2d Cir. 1977).

54. Pre-Trial Memorandum for Plaintiff, *supra* note 18, at 38-39.

55. E. PERLE & J. GARON, PRACTICING UNDER THE COPYRIGHT LAW OF 1976, at 164 (1978).

56. Perhaps the problem in speculating on the outcome of *Sony* comes in trying to apply

he appears to have violated some of the factors of the test, such as copying the entire work, and perhaps lessening the economic potential of the copyright holder, the purpose and character of the use seem to be "reasonable," as they advance the important public policy of promoting widespread access to information and knowledge by way of the airwaves. Therefore home videotape recording for purposes of a "time shift" allowing wider exposure to a variety of programs should not be an infringing use, but should be a use "to be encouraged."[57] It just might be that the following statement sums up the situation:

> Perhaps all that can be said with any confidence, as a guide to persons making photocopies of copyrighted material, is that it is more likely that "fair use" will not be available when all or almost all of the work is copied, and when multiple copies are being made, and when the photocopying person is doing it in pursuit of a business purpose, and when the photocopying is substituting for what realistically would be a purchase of one or more copies of the copyrighted work from trade sources.[58]

IV. Home Use and the Sound Recording Act

Congress has grouped videotape recordings with motion pictures in the new copyright act;[59] however, it may prove helpful to analogize home recording of televised shows with home recording of records and radio programs in order to determine liability for copyright infringement by VTR users.

The enactment of the Sound Recording Act of 1971[60] recognized sound recordings as copyrightable works for the first time in American copyright law.[61] Congress' purpose in passing the Sound Recording Act was to under-

---

the fair use standard to "pirates" and home viewers at the same time. By extending the fair use doctrine to a standard of reasonableness, each case could then be judged on an individual basis and could be limited to its own facts. According to a test of reasonableness, the home viewer would be entitled to the fair use defense as his conduct is reasonable, whereas the pirate would not be entitled to the defense of fair use for his "unreasonable" acts. The following statement in the historical note of 17 U.S.C.A. §107, at 112 (West 1977) recognizes that "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. . . . the courts must be free to adapt the doctrine to particular situations on a case-by-case basis."

57. Pre-Trial Memorandum for Defendant, *supra* note 30, at 60.

58. Gorman, *Essay—An Overview of the Copyright Act of 1976,* 126 U.Pa. L. Rev. 856, 880 (1978).

59. 17 U.S.C.A. §101 (West 1977).

60. Pub. L. No. 92-140, §1(a), 85 Stat. 391 (codified at 17 U.S.C. §1(f) (Supp. V 1975).

61. "A phonorecord is not a work of authorship, but merely the material object in which such work is embodied. A sound recording is a work of authorship, embodied in a phonorecord." 2 Nimmer §7.06(b). Under the Copyright Act of 1909, a right of copyright was not conferred in the sound recording per se, but only in the musicial composition which was the

cut the privileged position of record and tape pirates, who would buy an album, record copies of it, pay compulsory license fees, and undersell the legitimate record manufacturer whose costs included paying the musicians and the technicians for creating the original sound recording.[62] The legislative history behind the Sound Recording Act "clearly recognizes a 'home use' exception to the anti-copying provisions of the statute:"[63]

> Specifically, it is not the intention of the Committee, to restrain the *home recordings,* from broadcasts or from tapes or records, of recorded performances, where the home recording is *for private use and with no purpose of reproducing or otherwise capitalizing commercially on it.* This practice is *common and unrestrained today,* and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.[64]

The strong congressional attitude against any form of piracy was reflected in the following statement of Senator Hart with reference to the Sound Recording Act: "Its purpose is to prevent record 'piracy,' both the illegal form of piracy, where statutory copyright is not paid and legal piracy where all statutory liabilities are met."[65] Thus, it is obvious that Congress' intent

---

subject of the recording. After the enactment of the Sound Recording Act, the performers and producers of sound recordings first recorded on or after February 15, 1972, may now claim Federal copyright protection. Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland,* 22 U.C.L.A. L. REV. 1052, 1060-61 (1975). The scope of the exclusive rights in sound recordings is continued in 17 U.S.C.A. §114 (West 1977), which grants copyright owners the exclusive right to (1) reproduce the work in phonorecords, (2) make derivative works, and (3) distribute phonorecords. It expressly denied the right of public performance under §106 (4) to sound recordings. 17 U.S.C.A. §114 (West 1977), historical note at 188.

62. Kallal, *Betamax and Infringement of Television Copyright,* 1977 DUKE L.J. 1181, 1203 (1977).

63. Pre-Trial Memorandum for Defendant, *supra* note 30, at 23.

64. H.R. REP. No. 92-487, 92d Cong., 1st Sess. 7, *reprinted in* (1971) U.S. CODE CONG. & AD. NEWS 1572. (emphasis added).

65. 117 CONG. REC. 12764 (1971). The following discussion of the bill on the House floor between Rep. Kastenmeier (D. Wisc.), Chairman of the Subcommitte on Copyrights, and Rep. Kazen (D. Tex.) recognized that the sound recording provisions were *not* to extend to home tape recording for private use:

> Mr. Kazen: Am I correct in assuming that the bill protects material that is duplicated for commercial purposes only?
>
> Mr. Kastenmeier: Yes.
>
> Mr. Kazen: In other words, if your child were to record off a program which comes through the air on the radio or *television,* and then used it for her own personal pleasure, for listening pleasure, this use would not be included under the penalties of this bill?
>
> Mr. Kastenmeier: This is not included in the bill. . . . On page 7 of the report, under "Home Recordings," Members will note that under the bill the same practice which prevails today is called for; namely, this is considered both presently and under the proposed law to be *fair use.* The child does not do this for commercial purposes. This

was to provide safeguards against piracy; but, just how far this right extends beyond exclusion of pirates is not completely clear. "In a field of rapid technological change we should be careful not to erect barriers to the evolution of technology."[66] Extension of copyright protection should not be taken lightly since it leads to the creation of a monopoly over expression.[67]

In spite of the legislative history, there is no exception for home recording on the face of the Sound Recording Act. Furthermore, the new act does not explicitly recognize an exception for home recording, whereas it does provide for a certain amount of limited copying by archives and libraries in section 107.[68] One court,[69] however, has recognized a home recording exception in section 1(f) of the Sound Recording Act. In that case, the defendants, Gem Electronics, installed in their stores high-speed, coin-operated duplicating machines (called "Make-A-Tape"), which were capable of reproducing on a blank eight-track cartridge in two minutes an entire recorded selection that would normally take thirty-five to forty minutes to play. The following procedure was used in defendants' stores: (1) defendants sold blank tapes to customers, (2) the customers would then chose a copyrighted sound recording from defendants' catalog, (3) the customer would borrow the recording, and (4) the "Make-A-Tape" machine would then duplicate the copyrighted sound recording on the blank tape for the customer. The plaintiff's (Elektra's) copyrighted sound recordings were among those included in Gem's "library catalog." The retail value of plaintiff's recordings were about $6.00 per tape, and exact copies reproduced on the "Make-A-Tape" cost the customers from $1.49 to $1.99 each. The court held defendants liable for copyright infringement. The defendants argued that the copying was: (1) individual rather than mass-duplication and (2) that it was self-service similar to a photocopy machine in a public library.[70] The court recognized the "home use" exception as a defense to copyright infringement but stated that it did not apply here because "defendants are engaging in mass piracy on a custom basis. To view this activity as a form of 'home recording' would stretch imagination to the snapping point."[71] It

---

is made clear in the report.

117 CONG. REC. 34748-49 (1971) (emphasis added).

66. 117 CONG. REC. 12764 (1971) (remarks of Sen. Hart).

67. 117 CONG. REC. 12765 (1971) (remarks of Sen. Hart). There are some people who think that abolishing some forms of copyright protection might serve the best interests of society. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

68. 17 U.S.C.A. §107 (West 1977).

69. Elektra Records Co. v. Gem Electronic Distribs., Inc., 360 F. Supp. 821 (E.D.N.Y. 1973).

70. *Id.* at 824.

71. *Id.* at 825.

is clear why the court rejected the "home use" exception. In *Elektra,* the defendants were operating purely for commercial motives, whereas a home listener who tapes a record from the radio or from a friend has recorded for personal use without any intent for commercial gain. "It is possible to have fair use and large amounts of copying,[72] but the 'mass piracy' holding in *Elektra* precludes the idea of grand scale copying under the home use exception."[73]

Is it possible, however, to consider home videotape recording in isolation and thus allow the "home use" exception for sound recording to apply? When viewed in the aggregate, does the practice of home recording become a public, not a private, practice?[74] Congress was aware of the possibility of home videotape recording as early as 1961, when revision of copyright law was being considered. The fact that Congress considered private use as a "fair, home use" is reflected by the following statement: "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright."[75] It, thus, appears that, if a home use for sound recording is allowed, a home use for videotape recording would or should be justified.

The analogy of home videotape recording to sound recording is helpful in some areas, but there are special problems and characteristics attaching to the use of each which render the analogy unsatisfactory in all cases. For example, if an individual has taped a country-and-western song, and later hears it on his radio, it is not likely that he will turn off his radio or switch to another station. However, when a *movie* previously taped by the viewer is aired, the viewer *will* switch to another station or turn off the set.[76] Another distinct difference is the fact that records do not rely on advertisers' buying, whereas television shows do,[77] thus making the economic impact on sound recordings not quite as serious.

---

72. *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973).

73. Kallal, *Betamax and Infringement of Television Copyright,* 1977 DUKE L.J. 1181, 1213 (1977).

74. Pre-Trial Memorandum for Plaintiff, *supra* note 18, at 35. In Pre-Trial Memorandum for Plaintiff, *supra* note 18, at 37, it is argued that if one million people gathered in several large stadiums and simultaneously recorded one million copies of the same movie, that this would not constitute "home copying" subject to a "home use" exemption. Why then, they contend, should the result be different just because one million viewers cannot see or communicate with each other when they simultaneously videotape in their own homes. *See also* Jerome H. Remick & Co. v. American Auto. Accessories Co., 5 F.2d 411 (6th Cir. 1925).

75. U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. 30 (House Comm. Print. 1961).

76. TIME, April 11, 1977, at 64, col. 2.

77. Brill, *Will Betamax be Busted?,* Esquire, June 20, 1978, at 19, col. 2. Many of the VTR's have speed-up switches which allow viewers to by-pass commercials. This might make

Strangely, one can tape the soundtrack of a television program, but, unless the home use or fair use law is extended to the VTR, one will not legally be able to tape what appears on the screen. The reasoning behind this result appears to be that songs can be purchased inexpensively or heard frequently on the radio, plus the fact that records play only for a few minutes. Thus, taping a record is not as beneficial as taping a television program. However, most television movies are sold to the broadcast systems for repeated airings, and, if the movies have already been recorded by VTR owners, the result will be a diminished home-viewing audience.[78]

The above differences between sound recording and video recording point out several reasons for not extending the "home use" exception of the Sound Recording Act to the VTR. However, it appears to be the intent of Congress that recording for private use by home listeners *and* viewers does not infringe upon copyright protection, and even if it might, "this is something you cannot control."[79] Even though the economic effect on the industry might be more substantial for home videotape recordings than for sound recordings, the act of the individual who is taping is the same. He is making a tape of a copyrighted work to be played at his leisure and for his pleasure. If sound recording for private use is exempt, so too should videotape recording be exempt.

V. CONCLUSION

The conflict between increasing technology and copyright law naturally presents a multitude of questions and too few answers. It is important to recognize the emergence of a new and expanding era which offers video

---

advertisers leary of sponsoring programs, and so might the fact that they would not even know what time of day, or week, or month that they would be reaching their potential customers. Consider the fact that the advertisers may be promoting a one-day only sale. *Id.* at col. 3. Prime time which is a foundation for present network economics will no longer have meaning. No longer will time slots have any relevance. Advertisers will not want to pay premiums for prime time slots if the programs they are paying for might not be viewed until the following morning or afternoon. AMERICAN FILM, *supra* note 6, at 62.

78. ESQUIRE, June 20, 1978, at 19, col. 2. It was reported that Betamax sales surged the week before *Gone With the Wind* was aired in a five-hour telecast. Also, Betamax owners cleared dealers' shelves of cassettes prior to the telecast. BUSINESS WEEK, Nov. 29, 1976, at 29, col. 3. Thus, the future showings of *Gone With the Wind* will have smaller audiences, since the film was recorded by so many viewers who now have the opportunity to view it whenever they wish.

79. HOUSE COMM. ON THE JUDICIARY, SUBCOMMITTEE No. 3, H.R. Doc. No. 6927, 92d Cong., 1st Sess. 22, 23 (1971). Miss Barbara Ringer, then Assistant Register of Copyrights, made the following statements during the hearings:

"I have spoken at a couple of seminars on video cassettes lately, and this question is usually asked: 'What about the home recorders?'

"The answer I have given and will give again is that this is something you cannot control."

options "which will transform not only the face of broadcasting but the lives of Americans as profoundly as the Industrial Revolution of the nineteenth century."[80] The potential of television is enormous, and the advent of the VTR serves the public interest by allowing the public to have increased exposure to a wide variety of programming. The government's role should be to remove the roadblocks and let the public be served. Although under traditional analysis the VTR user seems to be infringing upon the copyright law, under an extended application of the fair use doctrine applying a standard of reasonableness and the home use analysis, an opposite result seems to be suggested. The following words of Justice Brandeis spoken sixty years ago suggest the conclusion that home videotape recording for personal use does not violate copyright law: "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."[81]

Sandra Gross Schneider

80. *TV of Tomorrow*, NEWSWEEK, July 3, 1978, at 62, col. 1.

81. International News Service v. Associated Press, 248 U.S. 215, 250 (1918) (dissenting opinion).