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HOME VIDEORECORDING AND COPYRIGHT LAW: THE BETAMAX CASE

The copyright clause of the United States Constitution¹ empowers Congress to promote science and the arts by granting authors and inventors the exclusive right to their creations for a limited time.² Since 1790, Congress has implemented the copyright clause with legislation.³ Copyright protection in the United States provides a limited monopoly over subsequent use of a copyrighted work.⁴ This monopoly power extends only to those uses that Congress has protected by legislation.⁵ Changing technology has made application and effective enforcement of the copyright law difficult.⁶ The development of new techniques for reproducing and using copyrighted works has created problems for courts in ascertaining probable congressional intent regarding copyright protection. In many such instances the drafters of the copyright law never imagined the particular context of the case at hand. The advent of the home videotape recorder (VTR)⁷ represents the latest manifestation of the problem. In

¹ U.S. CONST. art. I, § 8, cl. 8.

² *Id.*

³ See Agostino, *Home Video: A Report on the Status, Projected Development and Consumer Use of Videocassette Recorders and Videodisc Players in the United States*, PRELIMINARY REPORT ON PROSPECTS FOR ADDITIONAL NETWORKS at 69 (preliminary draft of report from FCC Network Inquiry Special Staff, February 1980) [hereinafter cited as Agostino]. After passing the original copyright law, Congress subsequently enacted comprehensive revisions in 1831, 1870, 1909, and 1976. See *id.* See also S. REP. No. 473, 94th Cong., 1st Sess. 47-50 (1975); H. REP. No. 1476, 94th Cong., 2d Sess. 47-50 (1976) [hereinafter cited as H. REP.] (reviewing history of copyright statutes).

⁴ See Comment, *Home Videorecording: Fair Use or Infringement?*, 52 S. CAL. L. REV. 573, 586 (1979) [hereinafter cited as *Home Videorecording*].

⁵ See *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 443 (C.D. Cal. 1979). The limited monopoly power of a copyright owner over his work stems from 17 U.S.C. § 106 (Supp. II 1979), which gives the copyright owner the exclusive right:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based on 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.

⁶ See Comment, *The Copyright Act of 1976: Home Use of Audiovisual Recording and Presentation Systems*, 58 NEB. L. REV. 467, 467 (1979) [hereinafter cited as *Home Use*].

⁷ The VTR is a device capable of off-the-air recording and playback of material broadcast for television reception. See note 15 *infra*.

Universal City Studios, Inc. v. Sony Corp. of America,⁸ a California federal district court recently held that non-commercial videorecording of material broadcast free to television viewers is not an infringement of copyright.⁹

The plaintiffs in the *Sony* case, Universal City Studios, Inc. (Universal)¹⁰ and Walt Disney Productions, Inc. (Disney),¹¹ are producers and copyright owners of audiovisual materials, including motion pictures.¹² Universal and Disney sell some of their works for broadcast over public airwaves.¹³ In November, 1976, plaintiffs filed suit seeking an injunction¹⁴ to halt consumer use of the Betamax,¹⁵ to record plaintiffs' televised,

⁸ 480 F. Supp. 429 (C.D. Cal. 1979).

⁹ *Id.* at 432.

¹⁰ Universal, a wholly owned subsidiary of MCA, Inc., does business under its own name as well as Universal Pictures, Universal Television, Universal 16, and United World Films. 480 F. Supp. at 433. Universal produces motion pictures for theater and television. Following release to theatres, Universal sometimes licenses motion pictures for television. After exhibition on network television, Universal may license the motion picture to local television stations in syndication and will occasionally re-release the movies to theatres. *Id.* Universal also offers some motion pictures for rental to consumers, schools, and institutions. *Id.*

Universal recently began marketing motion pictures to consumers on pre-recorded videodiscs. *Id.* Universal's parent corporation, MCA, and Phillips, a Dutch electronics conglomerate, have jointly developed the Magna Vision videodisc system. See Schuyten, *The TV: More to View With Tapes and Disks*, N.Y. Times, Feb. 17, 1980, § 3 at 11, col. 4 [hereinafter cited as Schuyten]. Videodisc systems do not have the capability to record off-the-air and are incompatible with videotape systems such as the Betamax. *Id.* at 1, col. 2. By removing the Betamax from competition in the newly developing home video market, MCA would be likely to gain a greater share of the market for the company's own Magna Vision videodisc system. See *id.* (noting competition between technologies for dominance in home video marketplace); *Home Use*, *supra* note 6, at 478 n.56 (stating that many observers consider Universal's participation in *Sony* case to be motivated by MCA/Phillips' introduction of videodisc system into competitive home video market).

¹¹ Disney has produced theatrical motion pictures for over 50 years and has an extensive library of live and animated films. 480 F. Supp. at 434. Only three of Disney's feature length animated films have ever been licensed to television. Disney licenses many other motion pictures to television but at the date of the *Sony* trial had not licensed any of these films in syndication. *Id.* Disney has licensed many motion pictures as network reruns. Following network exhibition, Disney licenses some films for rental use. *Id.* In 1979, Disney began offering some theatrical motion pictures for sale on videodisc. *Id.* The only programming currently licensed by Disney to a network is the weekly "Wonderful World of Disney." *Id.*

¹² *Id.* at 432; see notes 10 & 11 *supra*.

¹³ See notes 10 & 11 *supra*.

¹⁴ See note 146 *infra* (discussing details of injunction requested by plaintiffs).

¹⁵ Introduced in 1975, the Betamax was the first successfully marketed home VTR. See Agostino, *supra* note 3, at 11. The fundamental technology required to record television broadcasts has been available for over 25 years, yet high cost was a major barrier to widespread VTR use. *Id.* at 7. Additional problems included reliability and excessive size. *Id.*

The Sony Betamax includes a pause button and fast-forward control similar to that of a conventional audio recorder. The pause button allows the operator to stop whatever function in which the machine is operating. Thus, if an individual views the broadcast while recording with Betamax, the pause button may be used to omit undesirable segments, such

copyrighted works.¹⁶ The complaint named as defendants the manufacturer, Sony Corporation,¹⁷ and the distributor of the Betamax, Sony Corporation of America (Sonam),¹⁸ as well as an individual, William Griffiths,¹⁹ who used his Betamax to record certain of plaintiffs' broadcast materials for his own home use.²⁰ Additional defendants included retail stores which sell the Betamax²¹ and the advertising agency responsible for promoting the Betamax, Doyle Dane Bernbach, Inc. (DDBI).²²

Plaintiffs contended that home use Betamax recording directly infringed their copyright²³ and that the corporate defendants were either direct or contributory infringers or were vicariously liable for the infringe-

as commercials, from the recording. The fast forward capability enables the playback viewer to pass over undesired portions although the viewer must, for the most part, guess as to when the undesired segment has passed. VTRs can record signals from an optimal video camera. *See id.* at 16.

At present, at least 19 companies market VTRs with more market entries expected in the near future. *See id.* at 41. There are currently two basic VTR tape formats—the Beta and the VHS (Video Home System). The Beta format is a Sony development while Masushita engineered the VHS format, which is incompatible with Beta machines. *See id.* at 14. Three manufacturers, Sony, Sanyo, and Toshiba, make VTRs using the Beta format. Two manufacturers, Masushita and JVC, use the VHS format. *Id.*

By the end of 1979, 1.2 million or 1.5% of the 77 million United States television households owned VTRs. *Id.* at 40. Industry analysts expect that by 1984, 5.5 to 6.8 million VTRs will be sold. Predictions indicate that VTR sales will then level off at about one million units per year until 10-14% of United States television households own VTRs. *Id.* at v; *cf. Home Videorecording, supra* note 4, at 577 (VTR sales will reach 75% of American households). Nevertheless, projected sales are very difficult to estimate, and VTR market success to date has been disappointing. *See Agostino, supra* note 3 at 42. Experts attribute the slow sales to high VTR cost, consumer confusion over the differing VTR formats, and fear of obsolescence due to rapid technological advances. *See, e.g., id.* at 44-45; *Television's Fragmented Future*, Business Week, December 17, 1979 at 64, col. 3 [hereinafter cited as Business Week].

¹⁶ Prior to the October, 1979 decision, the *Sony* court in 1977 dismissed certain counts in the plaintiffs' complaint alleging violation of the Lanham Trademark Act, 15 U.S.C. § 1125(a) (1970). *Universal City Studios v. Sony Corp. of America*, 429 F. Supp. 407 (C.D. Cal. 1977).

¹⁷ Sony is a Japanese corporation and manufactures the Betamax. 480 F. Supp. at 433.

¹⁸ Sonam is a wholly owned subsidiary of Sony and distributes the Betamax in the United States. *Id.*

¹⁹ Griffiths is an owner and user of the Betamax. *Id.* Griffiths is also a client of plaintiffs' law firm and consented to being a defendant in the lawsuit in exchange for a waiver by the plaintiffs of any claim for damages or costs. *Id.* at 437.

²⁰ The *Sony* court defined home use as operation of a Betamax or other VTR in a private home to record a program for subsequent home viewing. *Id.* at 442.

²¹ Each of the retail defendants sold the Betamax and commonly made off-the-air video recordings when demonstrating the machine to prospective customers. *Id.* at 439.

²² Since the introduction of the Betamax, DDBI, in cooperation with Sonam, created and published Betamax advertisements for magazines, newspapers, and television. *Id.* at 436. Sonam agreed to indemnify DDBI for any liability arising from the advertising campaign. Some of the Betamax ads invite viewers to record favorite shows or build a library, while others suggest recording novels for television and classic movies. None of the advertisements warn that recording copyrighted shows may be copyright infringement. *Id.*

²³ *Id.* at 432, 443; *see text* accompanying notes 28-33 *infra*.

ment.²⁴ Plaintiffs also asserted that the retail stores violated copyright law by recording portions of plaintiffs' programs to demonstrate the Betamax to prospective purchasers.²⁵ Universal and Disney petitioned the court for an injunction to prohibit future copyright infringement²⁶ on the ground that irreparable harm would result, given the economic structure of the broadcasting industry.²⁷

²⁴ 480 F. Supp. at 457; see text accompanying notes 123-45 *infra*. Plaintiffs also alleged that all of the corporate defendants were liable under California law for unfair competition and fraudulent business practices. 480 F. Supp. at 462-63. Plaintiffs maintained that Betamax diverts viewers from watching plaintiffs' shows on live television and in movie theaters and that Betamax advertisements unfairly misled the public into believing that off-the-air recording of copyrighted works is legal. The *Sony* court reasoned that the advertisements did not misrepresent any fact within the defendants' knowledge because there was no precedent holding that home use reproduction of copyrighted works constituted infringement. *Id.* at 463. The court also rejected the unfair competition claim, noting that Betamax had caused no measurable decrease in the audience for plaintiffs' works nor any loss of profits or other damage. *Id.*

²⁵ *Id.* at 432, 456; see text accompanying notes 115-22 *infra*.

²⁶ In addition to seeking an injunction against use of the Betamax to record copyrighted works, Universal also requested unspecified damages. See *Home Videorecording*, *supra* note 4, at 594. Damages available to a successful plaintiff in a copyright infringement suit include actual losses which the copyright owner has suffered and any profits which the infringer has recovered. 17 U.S.C. § 504(a)(1) (Supp. III 1979). If the plaintiff is unable to prove the amount of actual loss or infringing profits, the court may award statutory damages as an alternative. Statutory damages may, at the court's discretion, range from no less than \$250 to no more than \$10,000 for all infringements involved in the action. *Id.* § 504(c)(1). If the copyright owner can meet the burden of proving that the infringement was willful the court may increase the statutory award to a sum of not more than \$50,000. *Id.* § 504(c)(2). In addition, persons who willfully and for commercial purposes or private financial gain infringe on copyrighted works may face criminal liability, including fines and jail sentences. *Id.* § 506(a). The trial court may award reasonable attorneys' fees to the prevailing party in a copyright infringement suit. *Id.* § 505. The prospect of an award of attorneys' fees serves as an added deterrent against infringement and discourages frivolous suits. See *Home Videorecording*, *supra* note 4, at 592 n.105.

²⁷ 480 F. Supp. at 442; see notes 151-52 *infra*. The primary source of revenue to the commercial television industry is advertisers, who pay to have commercials telecast. 480 F. Supp. at 440. Network programming contains commercials, but also allows the local station to insert advertising and keep the revenue. *Id.* Advertising fees are directly proportional to the perceived rating of the program carrying the commercial. The fee for the standard length 30 second commercial in a prime time network slot can cost from \$45,000 to \$125,000. *Id.*

There are three major criteria for television audience measurement. The first criterion is ratings. One rating point equals one percent of all homes owning televisions in the relevant geographic market, *id.* at 441, and represents approximately \$36 million in additional gross revenues over the course of a season. Wall St. J., Nov. 30, 1977, at 1, col. 6. Industry analysts assume an average of two persons viewing television in each home. 480 F. Supp. at 441. The second criterion is market share. Market share is a percentage figure indicating what percent of all homes using television at a given time is tuned to a particular network or station. *Id.* The third criterion, demographics, is a measurement of audience sex, age, and income bracket. *Id.*

The two major audience measuring services are Nielsen and Arbitron. At the time of trial, the Nielsen meter services already measured videotape recording but made no measure of playback. The Arbitron service did not measure any VTR usage. *Id.*

The district court rejected each of the plaintiffs' contentions and denied the injunction.²⁸ The most important element of the court's holding was that home use recording is not a violation of copyright law.²⁹ The *Sony* court based its conclusion on statutory interpretation of both the 1909³⁰ and 1976³¹ Copyright Acts, the legislative history of the 1976 Act, and the doctrine of fair use.³²

Section 106(1) of the 1976 Act³³ gives the copyright owner, subject to certain restrictions,³⁴ the exclusive right "to reproduce derivative works based upon the copyrighted work in copies or phonorecords."³⁵ The plaintiffs argued that Betamax recording violates section 106(1) since such recording is a reproduction of their copyrighted works without permission.³⁶ The *Sony* court stated, however, that the 1976 Act must be read in conjunction with the Act's legislative history to understand fully congressional intent as to copyright coverage.³⁷ Examining the legislative history

²⁸ 480 F. Supp. at 432-33.

²⁹ *Id.* at 442; see note 20 *supra* (defining home use).

³⁰ Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075. Section I of the 1909 Act gave the copyright owner the exclusive right to "print, reprint, publish, copy, and vend the copyrighted work." *Id.* § 1(a). The broad language of section 1 would appear to characterize Betamax recording as copyright infringement. Courts, however, created the fair use doctrine to exempt some forms of copying from the 1909 Act. See text accompanying notes 59-102 *infra*. The *Sony* court held that home use copying is fair use as developed under the 1909 Act and codified in the 1976 Act. 480 F. Supp. at 442.

³¹ Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (Supp. III 1979)). The 1976 Act has been accused of creating as many problems as it solves. See *Home Use*, *supra* note 6, at 470. The 1976 Act does, however, offer solutions to many of the problems of the 1909 Act by recognizing the existence and copyrightability of audiovisual works. *Id.*

³² 480 F. Supp. at 442; see text accompanying notes 59-67 *infra*. The 1909 Act governs recordings made prior to January 1, 1978, while recordings made after that date are subject to the 1976 Act. *Id.*

³³ 17 U.S.C. § 106(1) (Supp. III 1979).

³⁴ The exclusive rights granted in 17 U.S.C. § 106 (Supp. III 1979), see note 5 *infra* (text of § 106), are subject to the limitations found in 17 U.S.C. §§ 107-118 (1976). The most important of these, the fair use doctrine, is codified at 17 U.S.C. § 107 (Supp. III 1979). See text accompanying note 63 *infra*. Other exceptions to the § 106 exclusive rights include § 108 (reproduction by libraries and archives); § 109 (transfer by owner of copy or phonorecord); § 110 (exemption of certain performances and displays); § 111 (secondary transmissions of performance or display, e.g., within hotel or apartment house); § 112 ("ephemeral recordings"); § 113 (scope of exclusive rights in pictorial, graphic, and sculptured works); § 114 (sound recordings); § 115 (non-dramatic musical works; compulsory license for making and distributing phonorecords); § 116 (coin operated phonorecord players); § 117 (computers and information systems); § 118 (use of certain works in connection with non-commercial broadcasting).

³⁵ 17 U.S.C. § 106(1) (Supp. III 1979).

³⁶ 480 F. Supp. at 443; accord, *Home Videorecording*, *supra* note 4, at 595 (unauthorized videotape reproduction of copyrighted work may violate § 106(1)).

³⁷ 480 F. Supp. at 443. The *Sony* court's reliance on legislative history in discerning the scope of copyright coverage under the 1976 Act comports with Supreme Court precedent as to statutory interpretation. See *Train v. Colorado Pub. Interest Research Group Inc.*, 426 U.S. 1, 9-10 (1976) (error for Appeals Court to exclude reference to legislative history in

of the 1976 Act, the court found that Congress did not intend to preclude home use audio recording, even though no specific exemption appeared in the statutory language.³⁸ The court reasoned by analogy to the audio exemption that Congress also intended to exclude home use videotape recording from copyright protection.³⁹

The *Sony* court's holding that a home use exemption exists is significant for two reasons. The decision represents the first express holding that a home use sound recording exception exists⁴⁰ and, more importantly, that Congress intended a general home use recording exception, encompassing home videotaping.⁴¹ The court found support for a home use audio recording exception from the legislative history to the 1971 Sound Recording Amendment,⁴² which indicated that Congress did not intend to restrain such recording when motivated by private rather than

construing federal Act); *United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44 (1940) (aid to statutory construction may be used no matter how clear words initially appear). The *Sony* court noted that Congress did not always draft statutory language to reflect congressional intent. 480 F. Supp. at 443.

³⁸ 480 F. Supp. at 443-46. Although no court has held an individual liable for copyright infringement on the basis of home use audio recording, the *Sony* decision is the first case to state expressly that a home use audio recording exception exists. *Accord, Home Use, supra* note 6, at 481. *Elektra Records Co. v. Gem Elec. Distribs., Inc.*, 360 F. Supp. 821 (E.D.N.Y. 1973), has been the subject of considerable discussion in the context of a home use audio exception. In *Elektra*, the defendants loaned copyrighted sound recordings to customers purchasing blank eight-track tapes. The customers then used the high speed, coin operated "Make-A-Tape" machines in defendants' stores to reproduce the recordings onto the newly purchased blank tapes. Holding the defendants liable for copyright infringement, the *Elektra* court rejected defendants' argument that the individual and self service nature of the Make-A-Tape duplication was analogous to home recording. The court found such an interpretation unimaginable. *Id.* at 824-25. At least two commentators view *Elektra* as affirmatively establishing judicial precedent for a home use audio recording exception. *See* Comment, *Betamax and Infringement of Television Copyright*, 1977 DUKE L.J. 1181, 1207-08 (1977) [hereinafter cited as *Betamax*] (*Elektra* court implicitly recognized home use exception by arguing why exception should not apply to *Elektra* facts); Comment, *Copyright Implications Attendant Upon the Use of Home Videotape Recorders*, 13 U. RICH. L. REV. 279, 292-93 (1979) [hereinafter cited as *Copyright Implications*] (*Elektra* court recognized exception for home audio recording but found exception inapplicable). *See also Home Use, supra* note 6, at 481 n.74 (*Elektra* impliedly recognized home recording exception based on House Committee Reports); comment, *Home Videorecording, supra* note 4, at 600-01 (citing congressional acceptance of home audiotaping); Comment, *Betamax and Copyright: The Home Videorecording Controversy*, 1 WHITTIER L. REV. 229, 248 (1978) [hereinafter cited as *Betamax and Copyright*] (*Elektra dicta* implied judicially recognized home recording exemption).

³⁹ 480 F. Supp. at 447.

⁴⁰ *See Home Use, supra* note 6, at 481.

⁴¹ 480 F. Supp. at 446, 469.

⁴² Act of Oct. 15, 1971, Pub. L. No. 92-140, § 1(b), 85 Stat. 391 (superseded by 1976 Act); *see* 480 F. Supp. at 443-46 (discussion of legislative history to 1971 Sound Recording Amendment); *Betamax, supra* note 37, at 1203-06; *Home Use, supra* note 6, at 483; *Copyright Implications, supra* note 37, at 290-92; *Home Videorecording, supra* note 4, at 600-01; *Betamax and Copyright, supra* note 38, at 247-49.

commercial purposes.⁴³ Although neither the wording nor the legislative history of the 1976 Act suggests a home-use audio exemption, the *Sony* court reasoned that the 1971 Amendment and corresponding legislative history were not altered by promulgation of the 1976 Act.⁴⁴ Thus, the court interpreted recent legislative silence to mean that Congress still intended to allow a home audio recording exception.⁴⁵

The most significant aspect of the *Sony* decision is the court's finding that Congress intended a general home use recording exemption, which encompasses home use videotaping, from copyright coverage.⁴⁶ The question of a general home use exception has been widely discussed,⁴⁷ yet *Sony* is the first case to rule that such an exception exists. The court formulated its holding by making an analogy to the home use sound recording exception⁴⁸ and examining congressional committee hearings,⁴⁹ floor debates,⁵⁰ and a report from the Library of Congress' Office of Copy-

⁴³ H.R. REP. NO. 487, 92d Cong., 1st Sess. 7 (1971), reprinted in [1971] U.S. CODE CONG. & AD. NEWS 1566, 1572. The 1971 Sound Recording Amendment originally was part of the general revision to the copyright law which Congress began drafting in 1955 and eventually passed in 1976. See 480 F. Supp. at 443.

⁴⁴ In order to meet the growing problem of record piracy, Congress passed the Sound Recording Act in 1971 rather than waiting for completion of the entire Copyright Act revision. *Id.* at 443-44. In 1976, Congress incorporated the language of the 1971 Amendment into the New Act with virtually no changes. See S. REP. NO. 72, 92d Cong., 1st Sess. 7-8 (1971) (1971 Sound Recording Amendment to be merged into General Revision upon passage of General Revision); 480 F. Supp. at 444.

⁴⁵ 480 F. Supp. at 444-45. Any interpretation of legislative silence is highly speculative by nature, see *Goldstein v. California*, 412 U.S. 546, 577 (1973) (Marshall, J., dissenting) and commentators have reached varying conclusions as to whether Congress intended to carry forward any home use audio recording exemption into the 1976 Copyright Act. Cf. *Betamax*, *supra* note 38, at 1217 (home use exemption of 1971 Sound Recording Act also applicable to 1976 Act); *Home Use*, *supra* note 6, at 484 (absence of specific legislative history discussing home use sound recording exemption might indicate congressional intent to withdraw from earlier position favoring exemption); *Betamax and Copyright*, *supra* note 37, at 249 (difficult to infer affirmative conclusions from legislative failure to act).

⁴⁶ 480 F. Supp. at 446, 469.

⁴⁷ See, e.g., *Betamax*, *supra* note 38, at 1208-18; *Home Use*, *supra* note 6, at 480-85; *Copyright Implications*, *supra* note 37, at 290-94; *Home Videorecording*, *supra* note 4, at 600-01; *Betamax and Copyright*, *supra* note 38, at 245-50.

⁴⁸ 480 F. Supp. at 444-45.

⁴⁹ *Id.* During the legislative hearings on the 1971 Sound Recording Act, a member of the House of Representatives asked the Assistant Register of Copyrights whether tape recording a record was permissible under the proposed Act. The Assistant Register of Copyrights answered in the affirmative and went on to state that use of home videocassette recorders presents a similar question. The Assistant Register concluded that, like home audio recording, the activity could not be controlled. *Hearings on S. 646 Before the Subcomm. No. 3 of the House Judiciary Comm.*, 92d Cong., 1st Sess. 22 (1971)(statement of Barbara Ringer).

⁵⁰ 480 F. Supp. at 445-46. The 1971 Sound Recording Act protects material duplicated for commercial purposes only. The Act would not prohibit off-the-air recording for personal pleasure of radio or television programs since such activity is considered fair use. See 117 CONG. REC. 34, 748 (1971).

rights.⁵¹ The Register of Copyrights issued a report in 1961 urging that private performance of a copyrighted motion picture should not be an infringement of copyright.⁵² The report directly addressed home use videotape recording, stating that "new technical devices will probably make it possible in the future to reproduce televised motion pictures in the home. We do not believe that private use of such a reproduction can or should be precluded by copyright."⁵³

At least one commentator has questioned the validity of a home use analogy between videotape recording and sound recording.⁵⁴ Supporters of the analogy argue that the two activities are substantially identical and that allowing a home use audio exception while viewing home use videotaping as infringement would be inconsistent.⁵⁵ Persons questioning the analogy contend that although the activities may be similar, the financial harm to the copyright owner is not.⁵⁶ The argument continues that a person who has recorded a song off-the-air or from a phonorecord or tape and later hears the song on the radio will still listen.⁵⁷ When, however, a movie or television show which the viewer has previously taped is released at theaters or rerun on television, some commentators claim that the copyright owner will lose box office or advertising revenues as a re-

⁵¹ 480 F. Supp. at 446. The *Sony* court observed that congressional hearings, floor debates, and reports are each relevant to a determination of legislative intent. *Id.* at 445 (citing *Simpson v. United States*, 435 U.S. 6, 13 (1978)(statements by committee chairman and bill sponsors entitled to great weight); *Zuber v. Allen*, 396 U.S. 168, 192 (1969)(departmental construction of own enabling legislation carries more weight when department administrators participated in drafting and expressed views to Congress in committee hearings); *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 259-60 (1966) (statements of committee members may be considered); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 616 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963) (comments by bill's sponsor during floor debate may be considered)).

⁵² See 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).

⁵³ *Id.*

⁵⁴ See *Home Videorecording*, *supra* note 4, at 601; text accompanying notes 56-58 *infra*.

⁵⁵ See, e.g., *Copyright Implications*, *supra* note 38, at 293 (if home use sound recording exemption allowed, similar exemption for videorecording justified); *Betamax and Copyright*, *supra* note 38, at 248, 256 (no distinction in principal between unauthorized recording from radio or from television receivers; home audiotaping exemption easily could be broadened to cover home use videorecording). A major similarity between the practices of home videotaping and home audiotaping is that enforcement of a prohibition against either would be virtually impossible. 480 F. Supp. at 468; see Holland, *The Audiovisual Package: Handle With Care*, 22 BULL. COPYRIGHT SOC'Y, 104, 126 (1974); Meyer, *TV Cassettes—A New Frontier For Pioneers and Pirates*, 19 BULL. COPYRIGHT SOC'Y 16, 38 (1971); *Copyright Implications*, *supra* note 38, at 294; *Betamax and Copyright*, *supra* note 38, at 248-49.

⁵⁶ See, e.g., *Home Use*, *supra* note 6, at 484; *Copyright Implications*, *supra* note 38, at 293; *Home Videorecording*, *supra* note 4, at 601.

⁵⁷ See, e.g., *Home Use*, *supra* note 6, at 484; *Copyright Implications*, *supra* note 38, at 293; *Home Videorecording*, *supra* note 4, at 601.

sult.⁵⁸ Upon closer analysis, however, one might question whether rerun losses due to home videotaping are any more damaging to copyright owners than losses to pre-recorded tape or record sales due to home audiotaping.

In addition to finding a general home use recording exception which would protect private Betamax use, the *Sony* court found home use Betamax recording to be fair use⁵⁹ as initially developed under the 1909 Act and codified, unaltered in the 1976 Act.⁶⁰ The 1976 Act addresses fair use in section 107,⁶¹ noting that unauthorized reproduction of copyrighted works for such purposes as criticism, comment, news reporting, teaching, scholarship, or research is not infringement.⁶² Section 107 states that four factors to be considered in determining fair use 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.⁶³

The *Sony* court stated that the four factors are not the exclusive considerations relevant to a fair use determination and that fair use does not

⁵⁸ See, e.g., *Home Use*, *supra* note 6, at 484; *Copyright Implications*, *supra* note 38, at 293; see note 27 *supra*. Commenting on the analogy between home use audio and videotape recording, one observer has noted that the statutory difference in definitions between the two might have important consequences. *Betamax*, *supra* note 38, at 1217. The copyright law classifies audiovisual recordings with motion pictures rather than phonorecords. 17 U.S.C. § 101 (Supp. III 1979). Section 101 defines phonorecords as material objects in which sounds, perceivable directly or with a machine (other than sound accompanying an audiovisual work) are fixed. Thus, an audiovisual tape is by definition a motion picture while an audiotape is a phonorecord. The commentator observed that the definition makes a difference, since the limitations on the exclusive rights of copyrighted motion pictures are much less substantial than those on sound recordings. *Betamax*, *supra* note 38, at 1217. Compare 17 U.S.C. § 102(6) (Supp. III 1979) (motion pictures) with *id.* § 102(7) (sound recordings).

⁵⁹ The fair use exception allows reasonable use of a copyrighted work without the consent of the copyright owner. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966); see text accompanying notes 61-67 *infra*.

⁶⁰ 17 U.S.C. § 107 (Supp. III 1979) (codification of fair use doctrine); see 480 F. Supp. at 442. The 1976 Act codified fair use without amending the doctrine, characterizing fair use as noninfringement rather than excused infringement. *Id.* at 447; see text accompanying note 61 *infra*.

⁶¹ 17 U.S.C. § 107 (Supp. III 1979).

⁶² *Id.* An important distinction between the fair use exception and a home use exemption to copyright liability is that the former must be balanced on the four factor scale of § 107. See text accompanying note 63 *infra* (text of § 107). A home use exemption, however, could be of broader scope since the exemption would arise purely out of public policy considerations and would not depend on the § 107 test. See *Betamax and Copyright*, *supra* note 38, at 249.

⁶³ 17 U.S.C. § 107 (Supp. III 1979).

require that each factor support the use in question.⁶⁴ Furthermore, section 107 does not specify the relative importance of the factors and only generally defines the scope of each.⁶⁵ Fair use is a factual determination to be made on a case-by-case basis and cannot be determined exclusively by arbitrary rules or fixed criteria.⁶⁶ The doctrine is an equitable device for balancing the competing interests of encouraging creative work through copyright protection and promoting broad public availability of the arts.⁶⁷

The *Sony* court began the section 107 fair use analysis with an examination of the harm factor found in subsection four.⁶⁸ The court stated that the issue of harm was important for deciding three questions: whether a use is fair, whether an injunction is available, and the amount of damages.⁶⁹ While acknowledging that actual harm might not be essential to any of these determinations, the *Sony* court observed that without a showing of actual harm, a ruling in plaintiffs' favor would be much more difficult.⁷⁰

Plaintiffs argued that harm to their copyrights, in the form of financial loss, was an imminent effect of Betamax usage, but admitted that no actual harm had yet occurred.⁷¹ Plaintiffs also were unable to predict when the anticipated harm would occur or the number of Betamax purchases which would trigger the harm.⁷² Recognizing that plaintiffs'

⁶⁴ 480 F. Supp. at 448.

⁶⁵ See 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[A](1980) [hereinafter cited as NIMMER]. The *Sony* court noted that the fair use doctrine grants tribunals necessary flexibility in an era of rapid technological development. 480 F. Supp. at 447; see note 95 *infra*.

⁶⁶ See *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

⁶⁷ 480 F. Supp. at 447 (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1974)). Despite the policy of encouraging creative work, the primary concern of copyright law is public benefit rather than benefit to the individual author. 480 F. Supp. at 447 (citing H.R. REP. No. 2222, 60th Cong., 2d Sess. 9 (1909)).

⁶⁸ 480 F. Supp. at 450. As the *Sony* court noted, several commentators have suggested that courts should consider the harm factor first when determining fair use. *Id.*, see, e.g., 3 NIMMER, *supra* note 65, at § 13.05[A][4]; L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT at 36 (1978) [hereinafter cited as SELTZER]; *Betamax*, *supra* note 38, at 1209; *Betamax and Copyright*, *supra* note 38, at 240-41 (citing SELTZER in observing that first three factors of § 107 should be determine only after evaluating economic impact of recording on copyright holder). One commentator has suggested that the fourth factor of economic harm is a collection and restatement of the first three fair use factors found in § 107. *Home Use*, *supra* note 6, at 476.

⁶⁹ 480 F. Supp. at 451. The preliminary test under the § 107(4) harm factor is whether the copying materially tends to reduce the demand for the original work. *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (S.D.N.Y. 1914).

⁷⁰ 480 F. Supp. at 451; cf. Fried, *Fair Use and the New Act*, 22 N.Y.L.S. L. Rev. 497, 505-07 (1977) [hereinafter cited as Fried] (advocating use of a "probable effects" test for purposes of fair use harm analysis).

⁷¹ 480 F. Supp. at 451.

⁷² *Id.* The *Sony* court observed that 1978 was Disney's eleventh consecutive year of increased profit and the most profitable year in history for Universal Pictures' Theatrical Division. *Id.* at 439. Emphasis on profitability may be misleading, however, when used to

predictions were based on a rapidly changing market system and on a great number of unsubstantiated assumptions, the trial court was hesitant to identify any probable adverse effects from home use Betamax recording.⁷³ Additionally, the court reasoned that harm which merely limits profits is considerably less likely to negate a fair use defense than harm which threatens the existence of a copyrighted work.⁷⁴

The *Sony* court acknowledged that VTRs and other technological advances will change the television industry and introduce new factors into plaintiffs' marketing considerations.⁷⁵ Nevertheless, the court observed that copyright law does not protect authors from changes or new considerations in marketing their products.⁷⁶ The trial court concluded that even if the harm factor were decided in plaintiffs' favor, such a finding would be inconclusive of a fair use determination since the other three factors under section 107 must be balanced with the harm.⁷⁷

The *Sony* court next addressed the section 107(2) fair use factor concerning the nature of the copyrighted material.⁷⁸ Commenting on this factor, the Senate Report accompanying the 1976 Act observed that a major, though not necessarily determinative consideration, is the work's availability to the potential user.⁷⁹ One commentator has noted in this regard that television programming might be considered "unavailable" to those

evaluate harm to the copyright owner from an alleged infringing activity. The existence of profits still may fail to reflect losses to the potential market for a copyrighted work. *See Home Videorecording, supra* note 4, at 612.

⁷³ 480 F. Supp. at 452. In projecting harm from Betamax use, plaintiffs predicted that a large portion of the television households in the country would soon own the Betamax. *Id.* at 451. Plaintiffs assumed that a large number of these owners would have the financial ability and the desire to buy many blank tapes, costing approximately \$20 each at the time of trial. *Id.* Plaintiffs also anticipated that viewers would watch Betamax playbacks at a time when they would otherwise watch live television. *Id.* Universal and Disney predicted that even if Betamax owners did not keep their recorded tapes over a long period of time, the owners would still injure plaintiffs' copyrights by deleting commercials from the recorded material. *Id.* In addition, plaintiffs feared that Betamax recording would cause a reduction in rerun audiences. *Id.* The *Sony* court noted plaintiffs' admission that some of these assumptions were based on neither fact nor experience and were inconsistent and illogical. *Id.*

⁷⁴ 480 F. Supp. at 452; *see Fried, supra* note 70, at 509 n.53; *Betamax and Copyright, supra* note 38, at 288.

⁷⁵ 480 F. Supp. at 452; *accord, Schuyten, supra* note 10, at 3, col. 2 (video revolution will relegate once-new technologies such as radio and television to status of mere prelude); *Business Week, supra* note 15, at 60, col. 1 (television industry faces confusing future).

⁷⁶ 480 F. Supp. at 452 (citing *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394, 414 n.15 (1974) (freezing existing economic arrangements not purpose of Copyright Act)).

⁷⁷ 480 F. Supp. at 452. The *Sony* court's conclusion that resolution of the § 107(4) harm factor in plaintiffs' favor would be inconclusive of the fair use determination is somewhat questionable. Under traditional fair use analysis, the other § 107 factors to be balanced with the § 107(4) harm factor tend to weigh against a fair use defense when applied in the context of home use videorecording. *See* text accompanying notes 103-09 *infra*; *NIMMER, supra* note 65, § 13.05[4] (harm factor is central and most important factor in fair use analysis).

⁷⁸ 480 F. Supp. at 452.

⁷⁹ *See NIMMER, supra* note 65, § 13.05 [A] [2].

who are unable to view the programming at the particular time of broadcast.⁸⁰

The trial court recognized that the plaintiffs' copyrighted material which defendant Griffiths had videorecorded could not be characterized as "scientific" or "educational."⁸¹ The court reasoned, however, that the most important aspect of plaintiffs' copyrighted material was that the plaintiffs voluntarily chose to have the material broadcast over public airwaves to individual homes free of charge.⁸² The result of this practice is that the plaintiffs receive payment from the broadcasters rather than the audience. The broadcasters are in turn compensated by advertisers who use the drawing power of the copyrighted material to promote their products.⁸³ Any payment by the television viewers for the privilege of watching the copyrighted material is simply the result of higher prices paid by the general public for the advertised products.⁸⁴ The *Sony* court reasoned that since the copyright owners derive their revenues only indirectly from the alleged infringers of the work, the harm resulting from Betamax recording is more speculative than harm in other media.⁸⁵

The third fair use factor analyzed by the *Sony* court was purpose of the use.⁸⁶ Courts traditionally have applied the purpose factor to exempt copyrighted material used for criticism, research, or other independent work.⁸⁷ Under one view, the fair use defense should not be available if the defendants' works serve the same function as the original.⁸⁸ The *Sony* court agreed with plaintiffs' contention that there is no independent use

⁸⁰ *Copyright Implications*, *supra* note 38, at 286.

⁸¹ 480 F. Supp. at 452; *see* *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (fair use traditionally applied to works in fields of science, law, medicine, history, and biography). One commentator has stated that § 107(2) does not preclude a fair use defense for programming other than traditional scientific or educational material. Rather, the major question is whether entertainment programming should be viewed as serving a sufficient public interest for fair use purposes. *Betamax and Copyright*, *supra* note 38, at 237, 239. Courts thus should use a policy analysis, based on perceived societal benefit, in determining the § 107(2) fair use factor. *Id.*

⁸² 480 F. Supp. at 453.

⁸³ *Id.*

⁸⁴ *See* *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394, 411-12 (1974). A common theme in the copyright debate concerns charging users twice for a particular use of a copyrighted work. *See* *Home Videorecording*, *supra* note 4, at 629-30 n.250. Any decision requiring consumers to pay for home videorecording would result in a double charge for home entertainment, since consumers already pay higher prices for goods advertised on television. *Id.* at 629.

⁸⁵ 480 F. Supp. at 453; *see* *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394, 411-12 (payment process distinguishes copyright owner in television industry from most others); *Home Videorecording*, *supra* note 4, at 609 ("nature of the copyrighted work" factor should not be decisive of fair use defense).

⁸⁶ 480 F. Supp. at 453.

⁸⁷ *See, e.g.*, *Robert Stigwood Group, Ltd. v. O'Reilly*, 346 F. Supp. 376, 385 (D. Conn. 1972), *rev'd on other grounds*, 530 F.2d 1096 (2d Cir. 1976); *Loew's Inc. v. CBS*, 131 F. Supp. 165, 175 (S.D. Cal. 1955), *aff'd sub nom.*, *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir.), *aff'd per curiam*, 356 U.S. 43 (1956).

⁸⁸ NIMMER, *supra* note 65, § 13.05[B].

of the copyrighted material since, as with the original telecast, Betamax owners use their recordings for entertainment purposes.⁸⁹ The trial court reasoned, however, that independent use is not a prerequisite to fair use.⁹⁰ Instead, the court focused on the fact that the use of plaintiffs' copyrighted works was noncommercial and in the home.⁹¹

The *Sony* court stated that although a finding of noncommercial use will not automatically invoke the fair use exception, noncommercial use does increase the likelihood that the exception will apply to a given activity.⁹² In addition, the trial court noted that the purpose of Betamax recording is to increase access to the material plaintiffs chose to broadcast.⁹³ The court found this increase consistent with the first amendment policy of providing the fullest possible access to information through the public airwaves.⁹⁴ The trial court reasoned that the factors of noncommercial, in-home use, and increased access mitigated the fact that the case at hand involved no independent or educational use of the plaintiffs' copyrighted works.⁹⁵

Substantiality of the use was the fourth factor which the *Sony* court discussed.⁹⁶ Generally, the more substantial the taking from the copyrighted work, the less likely that the fair use defense will be available to a defendant.⁹⁷ Many cases have held that the defense of fair use is never available where the copying is virtually total.⁹⁸ One commentator has observed, however, that such cases all appear to have involved some distribution of copies which caused real or potential economic harm to the cop-

⁸⁹ 480 F. Supp. at 453-54. The *Sony* court noted that Congress did not require independent use when finding home use audio recording to be fair use. *Id.* at 453.

⁹⁰ *Id.* at 453.

⁹¹ *Id.* at 453-54; see text accompanying note 43 *infra* (noting congressional distinction between commercial and private use).

⁹² 480 F. Supp. at 453; see *Loew's Inc. v. CBS, Inc.*, 131 F. Supp. at 175.

⁹³ 480 F. Supp. at 454; see note 151 *infra* (discussing "time-shifting" Betamax capability).

⁹⁴ 480 F. Supp. at 454; see *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973) (first amendment policy favors providing fullest possible access to information through public airwaves).

⁹⁵ 480 F. Supp. at 453-54. As stated in the House Report accompanying 17 U.S.C. § 107 (Supp. III 1979), there was no congressional intent to freeze the doctrine of fair use through codification, particularly in light of rapid technological change. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976).

⁹⁶ 480 F. Supp. at 454.

⁹⁷ *Id.*

⁹⁸ See, e.g., *Walt Disney Prods. v. Air Pirates*, 481 F.2d 751, 756-57 (9th Cir. 1978), *cert. denied sub nom O'Niell v. Walt Disney Prods.*, 439 U.S. 1132, (1979) (interpreting fair use standards in parody context and interpreting *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam*, 356 U.S. 43 (1958), as setting threshold that eliminates fair use defense where copying is "virtually complete or almost verbatim"); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966) *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975); NIMMER, *supra* note 65, § 13.05[D][1]; *Betamax and Copyright*, *supra* note 38, at 239 (under traditional view, copying entire work precludes application of fair use defense).

right owner.⁹⁹ The *Sony* court found the substantiality factor to be closely related to the issue of harm, since the market effect of the infringing copy will normally depend on whether the copy can substitute for the original.¹⁰⁰ While acknowledging that home use Betamax recording usually involves copying the entire work, the court stated that this fact would not defeat the fair use defense since all factors must be taken together.¹⁰¹ Thus, the court broke with traditional analysis by refusing to adopt a threshold substantiality test barring the fair use defense in cases of near-total copying.¹⁰²

Some commentators, anticipating the *Sony* decision, have concluded that a traditional or literal analysis of the section 107 four factor test would preclude application of the fair use exception to home use Betamax recording.¹⁰³ Viewing the example provided by section 107(1),¹⁰⁴ these observers note that despite the noncommercial nature of home use recording, the purpose and character of such recording generally is not educa-

⁹⁹ *Beltamax and Copyright*, *supra* note 38, at 240.

¹⁰⁰ 480 F. Supp. at 454.

¹⁰¹ *Id.*; see *Home Videorecording*, *supra* note 4, at 608. Over-rigid application of the substantiality factor would severely limit dissemination of new technologies. The substantiality criterion should block fair use finding only where the defendant markets a copy in competition with the copyrighted work. *Id.*

¹⁰² 480 F. Supp. at 455-56. Prior to the *Sony* decision, the only case abandoning the traditional view that copying an entire copyrighted work could not be fair use was *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam*, 420 U.S. 376 (1975). The *Williams & Wilkins* court characterized the traditional view as an unwarranted and overbroad generalization. *Id.* at 1353. The Court of Claims held that the wholesale photocopying of entire articles from plaintiff's medical journals by the National Institute of Health (NIH) and the National Library of Medicine (NLM) constituted fair use under the 1909 Act. *Id.* at 1363. The NIH operated a medical research library and provided photocopies at no charge to the NIH research personnel. The NLM made hundreds of thousands of copies each year while generally relying on only one or two subscriptions to a given journal. The library distributed these copies to users upon request. *Id.* at 1348. In finding this copying to be fair use the court observed that the use was nonprofit in nature and that the copyrighted works in question were scientific in nature and warranted special access by researchers. *Id.* at 1354. The *Williams & Wilkins* court reasoned that the photocopying enabled access to articles at minimal cost and that impeding such access by a finding of infringement would injure medical research. *Id.* at 1357. *Williams & Wilkins* has been the subject of considerable discussion. See, e.g., NIMMER, *supra* note 65, § 13.05[E][1]-[4]; Goldstein, *Private Consumption of Public Goods: A Comment on Williams & Wilkins Co. v. United States*, 21 BULL. COPYRIGHT SOC'Y 204 (1973); Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland*, 22 U.C.L.A. L. REV. 1052 (1975); Comment, *Williams & Wilkins Co. v. United States: Library Photocopying of Copyrighted Materials*, 1974 UTAH L. REV. 127. The Court of Claims' decision in *Williams & Wilkins* has received substantial criticism, particularly in regard to its treatment of the harm issue. See NIMMER, *supra* note 65, § 13.05[E] (charging that court confused issues of damages and liability). Professor Nimmer has noted, however, that it is by no means clear whether the rule in *Williams & Wilkins* is limited to works which are scientific in nature, or whether the public interest in access to information should be viewed as less important outside the scientific area. *Id.* § 13.05[E][4][C].

¹⁰³ *Betamax*, *supra* note 38, at 1209; *Home Use*, *supra* note 6, at 477.

¹⁰⁴ See text accompanying note 63 *supra*.

tional.¹⁰⁵ Rather, Betamax owners usually record for entertainment purposes.¹⁰⁶ If one accepts the argument that home copying reduces the rerun market, then the second factor, nature of the work, weighs against a fair use finding since the nature of the plaintiffs' copyrighted works is such that profitability depends on successful rerun capabilities.¹⁰⁷ Traditional application of the third factor, amount and substantiality of the portion used, would weigh even heavier against home use videotape recording since the use generally involves the entire copyrighted work.¹⁰⁸ Use of the threshold substantiality test, avoided by the *Sony* court, clearly would prohibit such videotaping. Finally, if the analyst should conclude that home use Betamax recording diminishes the potential market for or value of the copyrighted work,¹⁰⁹ then the fourth factor, economic harm, would not support a fair use determination.

When viewed from another perspective, however, the *Sony* court made a commendable effort to re-evaluate the traditional fair use analysis in light of a problem which neither the courts nor Congress had heretofore considered. One observer has noted that the traditional fair use analysis is incomplete and archaic when applied to home use videotape recording.¹¹⁰ Both the House and Senate reports accompanying the 1976 Act state an intent to avoid freezing the fair use doctrine, given the state of rapid technological development.¹¹¹ Many, if not most commentators who have addressed the issue have concluded that the fair use exemption, in either the traditional or an updated form, should encompass home use videotaping.¹¹² Each of these commentators,¹¹³ like the *Sony* court,¹¹⁴ has recognized that a finding of infringement would generate seemingly insurmountable enforcement problems.

After ruling that home use Betamax recording does not violate copyright law, the trial court also held that the fair use doctrine extended to demonstration recording by the retail defendants.¹¹⁵ The *Sony* court reasoned that such use does not compete with plaintiffs' products and does not involve the taping of entire shows.¹¹⁶ The court also observed that the

¹⁰⁵ *Betamax*, *supra* note 38, at 1209; *Home Use*, *supra* note 6, at 476.

¹⁰⁶ See Agostino, *supra* note 3, at 62 (majority of programs recorded are regular TV series; second most common recording is of movies).

¹⁰⁷ See *Home Videorecording*, *supra* note 4, at 580 (copyright owners depend on rerun market for substantial portion of overall profits).

¹⁰⁸ *Copyright Implications*, *supra* note 38, at 289.

¹⁰⁹ See notes 151-52 *infra* (discussing plaintiffs' contentions regarding harm as result of Betamax recording).

¹¹⁰ *Copyright Implications*, *supra* note 38, at 289.

¹¹¹ H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5680; S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975).

¹¹² See, e.g., *Betamax*, *supra* note 38, at 1218; *Copyright Implications*, *supra* note 38, at 289.

¹¹³ *Betamax*, *supra* note 38, at 1192; *Copyright Implications*, *supra* note 38, at 294.

¹¹⁴ 480 F. Supp. at 468.

¹¹⁵ *Id.* at 457.

¹¹⁶ *Id.*

evidence failed to indicate any librarying¹¹⁷ by the retail stores of recorded Betamax tapes or any intent to use or profit from the copyrighted works.¹¹⁸ Universal admitted at trial that demonstration copying had caused no harm to the company's copyright in the materials recorded.¹¹⁹ Furthermore, the company predicted no future harm from the copying itself.¹²⁰ Rather, the plaintiffs feared that demonstration copying led customers to believe that off-the-air recording of copyrighted materials was acceptable.¹²¹ The court easily disposed of this argument, however, on the basis of its holding that such recording was, in fact, acceptable.¹²²

The third issue addressed by the *Sony* court was liability of the corporate defendants, Sony, Sonam, DDBI, and the retail stores, for home use recording by individual Betamax owners.¹²³ The plaintiffs asserted that the corporate defendants were liable on the basis of three theories: direct, contributory, and vicarious liability.¹²⁴ The court's ruling that home use Betamax recording is not copyright infringement was dispositive of the corporate liability issue, since each of plaintiffs' theories was premised on a conclusion that home VTR use violates copyright law. The trial court went further, however, and decided that even if home use copying were infringement, the corporate defendants would not be directly, contributory, or vicariously liable.¹²⁵

Plaintiffs first argued that the corporate defendants were direct infringers because the defendants furnished the instrumentality for the allegedly infringing activity and because they knew and expected that the major use of Betamax would be the recording of copyrighted material.¹²⁶ The trial court recognized that actual participation in the infringing activity is not a prerequisite for direct infringement.¹²⁷ The court reasoned, however, that cases finding direct liability under such circumstances involved a much more substantial and direct connection with the infringe-

¹¹⁷ "Librarying" is the storing of VTR tapes for repeated future viewings. *Id.* at 465.

¹¹⁸ *Id.* at 457.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* The *Sony* court stated that, in any event, any indication of acceptability given by the retail defendants was insufficient to render demonstration copying unfair. *Id.*

¹²³ *Id.* One commentator has observed that fashioning an adequate remedy for home videorecording might be impossible unless VTR manufacturers are also held liable, given the problem of civil prosecution where such large numbers of people are involved. *Home Videorecording*, *supra* note 4, at 605.

¹²⁴ 480 F. Supp. at 457.

¹²⁵ *Id.*

¹²⁶ *Id.* To support the contention that the corporate defendants fulfilled the requirements for direct infringement, plaintiffs relied on testimony of Sonam executives as well as DDBI memos and advertisements. Plaintiffs claimed that this evidence showed that the corporate defendants expected and encouraged Betamax purchasers to record copyrighted material. Plaintiffs also emphasized that DDBI was aware of the potential for copyright infringement and consequently sought an indemnity agreement from Sony. *Id.*

¹²⁷ *Id.* at 458.

ment than could be attributed to the corporate defendants in the present case.¹²⁸ While Sony and Sonam manufacture and market the Betamax and blank cassette tapes, they do not supply the copyrighted work to be recorded.¹²⁹ Furthermore, even if home videorecording of copyrighted works were infringement, the sale of Betamax units and blank tapes easily could lead to noninfringing uses.¹³⁰ Such uses include taping non-copyrighted works, taping copyrighted works with permission from the copyright owner, playing prerecorded tapes,¹³¹ or making home movies with Betamax' optional video camera attachment.¹³² The court found no precedent for extending liability for direct infringement under such circumstances.¹³³

Liability under the second theory, contributory infringement, requires that the defendant have knowledge of and materially contribute to the infringing activity.¹³⁴ The court found neither of these elements present in the *Sony* case.¹³⁵ The corporate defendants did not have the requisite knowledge because before the *Sony* decision, the issue of infringement through home use VTR recording was undetermined.¹³⁶ In addition, the court found the material contribution element lacking since there was no evidence to indicate that Betamax advertisements encouraged any of the Betamax owners testifying as witnesses to reproduce copyrighted works.¹³⁷

¹²⁸ *Id.*; see *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911); *Elektra Records Co. v. General Elec. Distribs., Inc.*, 360 F. Supp. 821 (E.D.N.Y. 1973). In *Kalem*, the Supreme Court affirmed a finding of copyright infringement against a film producer on the basis of public exhibition of an infringing film by third persons. The defendant had both produced and advertised the film which contained scenes from a copyrighted book. 222 U.S. at 61, 63.

¹²⁹ 480 F. Supp. at 458.

¹³⁰ *Id.*

¹³¹ 480 F. Supp. at 465; see *Agostino, supra*, note 3, at 51. A recently released videoprogramming catalogue contains over 16,000 entires, including three to four thousand representing movies and entertainment. Nine of the ten major movie producers now have formal arrangements for distribution of films on prerecorded videocassettes. *Id.*

¹³² See *Agostino, supra* note 3, at 16.

¹³³ 480 F. Supp. at 459.

¹³⁴ See *Gershwin Publishing Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Plaintiffs alleged that unauthorized recording of copyrighted motion pictures is the primary purpose for which the Betamax is designed and marketed and which defendants encourage through advertisements and brochures. 480 F. Supp. at 459.

¹³⁵ 480 F. Supp. at 459-60.

¹³⁶ *Id.* at 460. The *Sony* court reasoned that even if the probability that Betamax owners would record copyrighted works was sufficient to create constructive knowledge of such recording by the defendants, these defendants could not have known that the recording was an infringing activity. *Id.* Thus, the court stated that even if home use recording had been found to be infringement, the court would not attribute retroactive knowledge of that fact to the defendants. *Id.*

¹³⁷ *Id.* A better organized case by the *Sony* plaintiffs might have yielded a different result on the material contribution issue. Many national ads for the Betamax have encouraged the public to record "novels for television" and "classic movies." *Id.* at 436. Had plaintiffs engaged in more diligent witness selection they might have produced testimony indicating that Betamax advertisements did provide the incentive to record copyrighted

The basis of vicarious liability is in the doctrine of *respondeat superior*, under which an employer is liable for the actions of his employees.¹³⁸ Nevertheless, vicarious liability for copyright infringement does not require an employer-employee relationship.¹³⁹ To meet the requirements for vicarious liability, a defendant must have the right and ability to supervise the infringing activity and a direct financial interest in the practice.¹⁴⁰ The *Sony* court found the supervision element absent,¹⁴¹ since the defendants would practically have to stop selling Betamax units in order to control the recording of copyrighted material.¹⁴² The court also ques-

programs.

The *Sony* court observed that selling a staple article of commerce such as a typewriter, camera, or photocopying machine technically contributes to any subsequent infringing use made thereof. 480 F. Supp. at 461; see *Home Use*, *supra* note 6, at 478 n.58 (noting analogy to photocopying industry); *Betamax and Copyright*, *supra* note 38, at 254. The court reasoned, however, that a decision making the sale of a staple article of commerce a sufficient basis for contributory liability would expand the theory beyond judicial management. 480 F. Supp. at 461. The trial court alluded to the patent law rule which protects manufacturers of staple items of commerce suitable for substantial noninfringing use from liability of contributory infringers. *Id.* The court found the underlying rationale for the patent law rule significant as a means to avoid any impediment to commerce. *Id.*

¹³⁸ *Gershwin Publishing Corp. v. Columbia Artists Mgmt. Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). In a case decided prior to *Gershwin*, the Second Circuit found a chain store operator liable for the sale of infringing record albums by a concessionaire within the defendant's store. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963). The *Shapiro* court discussed both "vicarious liability" and *respondeat superior* in the context of copyright infringement. The court observed that the store owner retained the ultimate right of supervision over the record concession and received a proportionate share of the sale of the infringing records. *Id.* at 308. There is an important distinction, however, between the retailer in *Shapiro* and the corporate defendants in the *Sony* case. The *Shapiro* retailer sold an item which was itself infringing. The *Sony* Betamax, however, is simply an article of commerce capable of noninfringing as well as infringing uses. While defendant Green in the *Shapiro* case served as a direct link in the distribution of pirated products, the Betamax user and not the manufacturer controls the extent of any "infringing" use of the product. See *Home Videorecording*, *supra* note 4, at 604.

¹³⁹ 480 F. Supp. at 461.

¹⁴⁰ *Id.*; see *Gershwin Publishing Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d at 1162; *accord*, *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 402 (S.D.N.Y. 1966). In *Chess Music Co. v. Sipe*, 442 F. Supp. 1184, 1185 (D. Minn. 1977), the Minnesota district court held a tavern owner vicariously liable for the infringing performance of live bands he hired. The court found the owner to have acquiesced in the infringing activity since he gave the musicians the discretion to select the music performed. *Id.* at 1185.

¹⁴¹ 480 F. Supp. at 462; *accord*, *Betamax and Copyright*, *supra* note 38, at 253.

¹⁴² 480 F. Supp. at 462. The *Sony* court found no authority which indicated that a defendant's power to supervise the allegedly infringing activity was based on the ability to terminate the business. *Id.* Plaintiffs suggested that the defendants could invent a "jamming system" to prevent recording of copyrighted telecasts. *Id.* The court responded that the plaintiffs' suggestion would not be within the defendants' power since development of a jamming system would probably require the cooperation of many others beyond the defendants' control, including broadcasters, producers, and the FCC. *Id.* Plaintiffs also asserted that the defendants could modify the Betamax by removing the tuner and therefore make any off-the-air recording impossible. *Id.* The court dismissed this argument as well, observ-

tioned whether the defendants met the financial benefit test, noting that the defendants benefit directly from the infringing use only if they sell more products because that use is available.¹⁴³ This assumption certainly appears valid,¹⁴⁴ however, given recent survey data which indicate that eighty percent of off-the-air VTR recording is of copyrighted material.¹⁴⁵

After ruling that the corporate defendants were not liable for any infringing home use of Betamax, the *Sony* court denied the requested injunctive relief.¹⁴⁶ The court went a step further than was necessary, however, and stated that even if home use Betamax recording were infringement and the corporate defendants were secondarily liable, an injunction would be improper.¹⁴⁷ The trial court acknowledged that actual harm from copyright infringement is very difficult to prove and that in the ordinary case, courts will presume the irreparable harm necessary for an injunction once infringement is shown.¹⁴⁸ The court reasoned, however, that the equitable considerations were different from those in the ordinary copyright infringement case, since plaintiffs were not seeking an injunction against a direct infringer or the party controlling the infringing activity.¹⁴⁹ Thus, the court concluded that a harm analysis was necessary

ing that consumers could still purchase a tuner separately and accomplish the same result. *Id.*

One commentator viewed manufacturers as powerless to prevent misuse of their products, given the inability to police each purchaser's intent. *Home Videorecording, supra* note 4, at 605. The commentator reasoned that imposing such liability could indicate that manufacturers were liable solely because the infringement might not have occurred without their facilities. *Id.* at 605-06. The author concluded that judicial precedent indicates infringement does not extend that far. *Id.* (citing *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723 (S.D.N.Y. 1974), *rev'd* 551 F.2d 484 (2d Cir.), *cert. denied*, 431 U.S. 949 (1977) (corporate officer with no control over infringing activity held not liable; insufficient to argue that corporate officer must have controlled infringing activity by virtue of position as officer)).

¹⁴³ 480 F. Supp. at 462.

¹⁴⁴ *Accord, Betamax and Copyright, supra* note 38, at 253 (finding financial benefit element present).

¹⁴⁵ *See Agostino, supra* note 3, at 66.

¹⁴⁶ 480 F. Supp. at 468-69. Plaintiffs asked for an injunction restraining defendants from manufacturing or selling the Betamax or blank Betamax tapes and from advertising that purchasers may use these products to record copyrighted materials off-the-air. *Id.* at 463. Universal and Disney also suggested that the injunction prohibit the playing of all videotapes which the individual and retail defendants recorded of plaintiffs' copyrighted motion pictures or television shows. *Id.* Alternatively, plaintiffs petitioned that the court require Sony to modify the Betamax so as to be incapable of recording copyrighted works off-the-air. *Id.*; *see* note 142 *supra*.

¹⁴⁷ 480 F. Supp. at 464.

¹⁴⁸ *Id.*; *see American Metropolitan Enterprises of New York, Inc. v. Warner Bros. Records, Inc.*, 389 F.2d 903, 905 (2d Cir. 1968).

¹⁴⁹ 480 F. Supp. at 464. The *Sony* court noted plaintiffs' citations in support of the assertion that no court had ever refused to grant an injunction once infringement had been proven. *Id.* (citing *Chappell & Co. v. Middletown Farmers Market & Auction Co.*, 334 F.2d 303 (3d Cir. 1964) (direct infringer permanently enjoined); *Big Sky Music v. Todd*, 388 F. Supp. 498 (S.D. Ga. 1974) (injunction against owner and operator of nightclub for copyright infringement by live bands performing in the club); *Fisher-Price Toys v. My-Toy Co., Inc.*, 385 F. Supp. 218 (S.D.N.Y. 1974) (direct infringer permanently enjoined); *Shapiro, Bernstein*

since the corporate defendants' role in the infringement was indirect and since Betamax is also capable of non-infringing uses.¹⁵⁰ Plaintiffs claimed that they would suffer loss to the value of their copyrights as a result of home use Betamax recording.¹⁵¹ After a detailed analysis, however, the trial court dismissed plaintiffs' fears of future harm as groundless in light of available evidence.¹⁵²

& Co., Inc. v. "Log Cabin Club Association," 365 F. Supp. 325, 328 (N.D. W. Va. 1973)(injunction against president and manager of association for musical copyright infringements occurring in club operated by association); Peter Pan Fabrics, Inc. v. Dixon Textile Corp., 188 F. Supp. 235, 238 (S.D.N.Y. 1960)(direct infringer permanently enjoined); Adviser's Inc. v. Wiesen-Hart, Inc., 161 F. Supp. 831 (S.D. Ohio 1958) (direct infringer permanently enjoined); Gordon v. Weir, 111 F. Supp. 117, 124 (E.D. Mich. 1953), *aff'd*, 216 F.2d 508 (6th Cir. 1954) (direct infringer permanently enjoined)). Given the court's *arguendo* assumption that home use Betamax recording was infringement and that the corporate defendants could be held liable for the infringement, the decision contains some logical flaws which bear mentioning. First, under the court's assumption, the equitable considerations of the case would not, as the court stated, be different from the ordinary copyright infringement case since the case at hand could involve a direct infringer or party controlling the infringing activity. The Sony court's professed inability to locate a case finding liability on the part of the manufacturers, distributors, retailers, or advertiser of the instrument enabling the infringement also exhibits flawed reasoning. If the court followed its own hypothetical, such defendants would by definition be liable as direct, contributory, or vicarious infringers and the above-cited cases granting injunctions would appear controlling. *But cf.* text accompanying notes 150-54 *infra* (additional considerations relevant in denying injunction).

¹⁵⁰ 480 F.2d at 465.

¹⁵¹ Plaintiffs predicted harm to the value of their copyrights from three Betamax uses. The first is known as time-shifting, which involves recording off-the-air while not watching the program, viewing the copy within a short period of time, and shortly thereafter, erasing the copy. *Id.* at 465. The Betamax is capable of recording material from one channel while the television is tuned to another channel. Some models offer a timing device which allows off-the-air taping while the viewer is absent. *Id.* at 435. In this manner, Betamax time-shifting capability increases the viewer's access to broadcasts which he otherwise might have missed. Plaintiffs secondly predicted harm from librarying, which involves the retention of an off-the-air recording for repeated subsequent viewings. *Id.* at 465. Plaintiffs' third concern with Betamax use stemmed from the home user's likelihood of avoiding commercials, either through use of the pause button while recording or by fast forwarding during playback. *Id.*

¹⁵² 480 F. Supp. at 465-69. The Sony court considered four harms which plaintiffs predicted would result from time-shifting. First, plaintiffs feared that Betamax viewers would not be measured by the ratings, resulting in decreased advertising revenue. *Id.* at 466. The court responded that since the Nielsen Ratings had already developed the ability to measure Betamax recording and subsequent playback, the plaintiffs' fears were groundless. *Id.* Since the date of the Sony decision, both major rating services have begun to routinely measure VTR use in their audience surveys. See Callahan, *FCC Deplores Vidisk Units' Incompatibility*, *Billboard*, Feb. 23, 1980, at 44, col. 3.

Plaintiffs' second fear from time-shifting was that live television and movie audiences would decrease as more people watch Betamax tapes as an alternative. 480 F. Supp. at 466. The court felt that an equally likely presumption was that Betamax owners would play their tapes when there was nothing on television or at the movies which they wished to see. *Id.* Plaintiffs relied on the concept that "viewing time is relatively inelastic" since people will supposedly spend only a limited amount of time watching any kind of television, whether pre-recorded tapes or live telecasts. *Id.* The court responded that even if this proposition were true, time-shifting might simply rearrange these hours. *Id.*; *cf.* Agostino, *supra* note 3,

In denying the plaintiffs' requests, the *Sony* court reasoned that an injunction which sought to deprive the public of a new technology capable of non-infringing use would be an extremely harsh remedy, unprecedented in copyright law.¹⁵³ The court further noted that enforcement of an injunction against the Betamax would be nearly impossible and highly intrusive, as the machines are in private homes.¹⁵⁴

The *Sony* court's lengthy opinion culminating in the denial of injunctive relief seems to reflect the court's anticipation of an immediate appeal. The court's dual findings of a home use exemption and a fair use exception provide a wide basis for sanctioning home use videotaping. Further, the trial court appears to have calculated its additional discussion of the alternative premises of home use as copyright infringement and liabil-

at 66 (44% of VTR owners surveyed stated that they watch more television since purchasing the machine, only 15% watch less); *Business Week*, *supra* note 15, at 61, col. 1 (NBC planning studies indicate that new video technologies will cause viewers to watch more television).

Plaintiffs' third concern over time-shifting was that the practice would reduce revenues for rerun telecasts. 480 F. Supp. at 466. The court found this fear to be unfounded since the larger the audience for the original telecast, the higher the price that the copyright holder can demand from broadcasters for rerun rights. *Id.* Given that ratings reflect Betamax recording, original audiences could only increase due to time-shifting, thus aiding the plaintiffs rather than harming them. *Id.*

Plaintiffs' fourth fear from time-shifting was that subsequent theater or film rental exhibition would suffer because of time-shifting. *Id.* at 467. The court responded that since time-shifting involves viewing and then erasing, the program would no longer be on tape when the later theatrical run begins. *Id.* The court also observed that no evidence suggested that public interest in later theatrical exhibitions would be reduced any more by Betamax recording than by television broadcast of the film. *Id.*

Plaintiffs' major fear from the practice of librarying was that the Betamax owner who has kept a copy of a program will not watch the same program when rerun on television or re-released for theater exhibition. *Id.* The *Sony* Court found that the plaintiffs' prediction was based on too many unsubstantiated presumptions to warrant an injunction. *Id.* The court reasoned that blank tape prices of approximately \$20 each would make extensive library building very expensive. The trial court concluded that even if theater audiences did decrease, the decrease would be offset by the corresponding increase in audience size for the original telecast. *Id.* at 468. The court also noted that theater-going is usually a social event which affords a larger viewing screen, better sound, and an unedited version of the film. *Id.*

Plaintiffs' final fear from Betamax use concerned the potential that home users would avoid advertisements. *Id.* Plaintiffs speculated that advertisers would react adversely to Betamax. *Id.* Universal and Disney argued that if Betamax owners use the pause button to delete commercials or the fast-forward to bypass them, advertisers would pay less to the networks and the networks would pay less to the copyright owners. *Id.* The court properly responded, however, that Betamax owners must view the commercials in order to eliminate them with the pause button. *Id.* To avoid commercials by fast-forwarding during playback, the viewer must usually guess as to when the commercial has passed. *Id.* The trial court noted that, according to survey results introduced at trial, 92% of Betamax owners recorded the commercials and only 25% of the owners fast-forwarded through them on playback. *Id.* The court found no substantial likelihood of harm from the prospect of commercial avoidance, stating that advertisers will have to make the same kinds of judgments they do now as to whether persons watching television actually watch interrupting advertisements. *Id.*

¹⁵³ 480 F. Supp. at 468; accord, *Home Videorecording*, *supra* note 4, at 625.

¹⁵⁴ 480 F. Supp. at 468; accord, *Home Videorecording*, *supra* note 4, at 625.

ity of the corporate defendants as a means to reinforce the denial of injunctive relief against attack on appeal.

The *Sony* court's finding of a general home use copyright exemption is the most striking aspect of the decision, since no direct judicial precedent existed for such a holding.¹⁵⁵ While the court may have engaged in "judicial legislation," the opinion makes a convincing argument based on legislative history and a rational evaluation of the policies underlying copyright protection.¹⁵⁶ There is strong support for judicial recognition of a home audiotaping exemption and the better reasoned analysis would appear to favor extending this exemption to home videorecording by analogy.¹⁵⁷ The fair use doctrine, now accepted by statute, was developed judicially on no more substantial a basis.

The trial court's additional holding that home use videorecording is fair use represents a non-traditional analysis of the section 107 four factor test.¹⁵⁸ The court's approach is commendable in light of the equally novel issue posed by a technology unknown during development of the fair use doctrine.¹⁵⁹ Furthermore, the *Sony* analysis is consistent with Congress' intention to allow flexibility of the doctrine in light of technological change.¹⁶⁰

Given the court's ruling that home use videorecording is not an infringement of copyright,¹⁶¹ the conclusion that the corporate defendants were not liable¹⁶² followed automatically. The trial court's secondary finding of non-liability even if home Betamax recording were infringement was a response to another issue of first impression. The court's response appears to be valid, however, since the corporate defendants failed to meet the requirements for direct, contributory, or vicarious liability.¹⁶³

The *Sony* court's sanctioning of home use videorecording also dictated the denial of injunctive relief. The secondary conclusion that an injunction would be improper, even assuming individual and corporate liability, is the more questionable element of the opinion.¹⁶⁴ Although the court's reasoning is inconsistent at times,¹⁶⁵ the basic emphasis on the absence of

¹⁵⁵ See notes 46-58 *infra*.

¹⁵⁶ *Accord, Betamax and Copyright, supra* note 38, at 256 (precedent for judicial recognition of home use exemption already exists in *Elektra* case and this exemption easily could be broadened to cover home videorecording).

¹⁵⁷ *Id. Contra, Home Use, supra* note 6, at 481 (only legislative history of 1971 Sound Recording Act supports home use exemption and it is unlikely that courts would find such an exception absent greater legislative mandate).

¹⁵⁸ Compare notes 59-102 *supra* with notes 103-07 *supra*.

¹⁵⁹ See *Copyright Implications, supra* note 38, at 280 (noting "Keystone Kops" appearance of efforts to adopt copyright laws, not designed with 20th century technology in mind, to new home video advances).

¹⁶⁰ See note 95 *infra*.

¹⁶¹ See text accompanying notes 29-32 *supra*.

¹⁶² See text accompanying notes 123-45 *supra*.

¹⁶³ See text accompanying notes 125-45 *supra*.

¹⁶⁴ See text accompanying notes 147-54 *supra*.

¹⁶⁵ See note 149 *supra*.

harm, the indirect role of the corporate defendants in the alleged infringement, and the impediment to a new technology capable of non-infringing uses,¹⁶⁶ is the correct approach.

When viewed as a whole, the *Sony* decision evinces a realistic evaluation of the equities of the case in light of existing circumstances. Home use of the Betamax and other videotape recorders is already widespread.¹⁶⁷ Enforcement of a ban on home videotaping would be difficult if not impossible. Despite plaintiffs' fears, the new videotape technology is likely to benefit rather than harm producers of audiovisual works by providing new channels of distribution for these works.¹⁶⁸ In addition, since national television ratings now reflect increased audience size due to videotape recording, broadcasters can demand higher advertising rates for copyrighted telecasts.¹⁶⁹

As the *Sony* court states, the decision addresses only one part of the home video controversy—home use recording from free television broadcasts. Unresolved issues include videotaping from pay or cable television, tape swapping, tape duplication, and off-the-air recording for classroom or business purposes.¹⁷⁰ Clearly, Congress should act quickly to provide guidance for the rapidly expanding home video field¹⁷¹ before potential judicial conflict increases the confusion. In the meantime, courts should be hesitant to take action limiting consumer access to new technologies. The *Sony* court's straightforward decision is a commendable,¹⁷² initial step towards resolution of the home video controversy.¹⁷³

JEFFREY H. GRAY

¹⁶⁶ See text accompanying notes 153-54 *supra*.

¹⁶⁷ See Lewin, *Video Craze Signals New Legal Static*, National Law Journal, Mar. 24, 1980, at 1, col. 4 (noting proliferation of video magazines and newsletters; Billboard magazine's "Top 40" videocassette listing).

¹⁶⁸ See *Home Videorecording*, *supra* note 4, at 618 (VTR may enhance dissemination of existing copyrighted works through pre-recorded tape software market).

¹⁶⁹ See note 152 *supra*.

¹⁷⁰ 480 F. Supp. at 442.

¹⁷¹ *Accord, Betamax and Copyright*, *supra* note 38, at 256-57.

¹⁷² *Accord, Betamax*, *supra* note 38, at 1218; *Home Videorecording*, *supra* note 4, at 633; *Copyright Implications*, *supra* note 38, at 295; *Betamax and Copyright*, *supra* note 38, at 256-57.

¹⁷³ Plaintiffs in the *Sony* case have filed an appeal to the Ninth Circuit. *Universal City Studios, Inc. v. Sony Corp.*, 79-3603.