All's Fair in Love and Private Video Recording – The Copyright Infringement Issues in the Sony Case

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COMMENT

ALL'S FAIR IN LOVE AND PRIVATE VIDEO RECORDING—THE COPYRIGHT INFRINGEMENT ISSUES IN THE SONY CASE

The Constitution of the United States grants to Congress the power to enact laws "To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to Their . . . writings". In the exercise of this power, Congress enacted the Copyright Act of 1976 (Act). The Act grants certain exclusive rights to copyright owners in their copyrighted works for limited times, including the exclusive right to

1. U.S. CONST. art. 1, § 8, cl. 8.
3. 17 U.S.C. § 106 (1976). This section provides:
   [T]he owner of copyright has the exclusive rights to do and to 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 . . . ; (4) . . . to perform the copyrighted work publicly; and (5) . . . to display the copyrighted work publicly.
4. 17 U.S.C. §§ 302-304 (1976). The Act provides that an author has exclusive rights in his work for the following lengths of time: (1) for works created on or after January 1, 1978, or created before January 1, 1978 but not published or copyrighted by that date, copyright protection for individual authors generally lasts from the time of the work's creation through the life of the author plus 50 years after his death, 17 U.S.C. §§ 302(a), 303 (1976); (2) for works with an existing first term copyright on January 1, 1978, copyright protection lasts for 28 years from the date the copyright was originally secured, and the proprietor of the copyright may renew the copyright for one additional term of 47 years, 17 U.S.C. § 304(a) (1976); (3) for works with an existing copyright already in its renewal term on January 1, 1978, copyright protection lasts so that the total period of copyright protection (original and renewal term) will total seventy-five years from the date that the copyright was originally secured, 17 U.S.C. § 304(b) (1976). 2 M. NIMMER, NIMMER ON COPYRIGHT § 9.01 (1980).

The copyright law assumes that the public receives a benefit by granting authors certain exclusive rights to their creative works. See notes 6-8 and accompanying text infra. Monopoly, however, is anathema to the fundamental national policy, represented in the antitrust laws, of fostering free competition and preventing restraints on trade. See United States v. Von's Grocery Co., 384 U.S. 270, 274-75 (1966); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966). See also National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978); Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1075 (9th Cir. 1970); California v. FPC, 296 F.2d 348, 353 (D.C. Cir. 1961). The time limitations serve as a resolution of this apparent conflict. The law assumes that the limitation is suffi-
make copies of the copyrighted work. 5

Implicit in both the Constitution and the Act is the idea that authors should be encouraged to create and disseminate their creative works through the promise of economic reward. 6 The purpose of the Act, implementing the constitutional directive "to promote the Progress of Science," is to bestow the benefit of the continual creation of artistic works upon the public. 7 The limited grant of exclusivity, by securing economic reward to authors, is merely the vehicle by which Congress has attempted to secure for the public the benefit of artistic creation. 8

Despite the broad public benefits intended by the Constitution and the Act, the copyright scheme's restrictions on access to copyrighted works creates a tension with the public's interest in the freest possible access to information. 9 As the principal method of balancing the interest in exclusivity of the copyright owner against the public interest in unrestricted access, courts developed the "fair use" doctrine. 10 In applying a fair use analysis, courts examine four factors: 11

1. the nature of the copyrighted work; 12

2. the extent of the copying in relation to the copyrighted work as a whole;

3. the purpose and character of the copying;

4. the effect of the copying on the potential market for the copyrighted work.


9. Seltzer, supra note 4, at 216. See Note, The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law, 31 STAN. L. REV. 243, 244 (1978). As to the possible copyright infringement of audiovisual works, the court, in Universal City Studios, Inc. v. Sony Corp. of America, stated: "Protection of the public interest requires balancing the need for wide availability of audiovisual works against the need for monetary reward to authors to assure production of these works." 480 F. Supp. at 432.


11. 17 U.S.C. § 107 (1976). Section 107 was intended by Congress merely to restate the existing fair use doctrine as it was judicially developed under the Copyright Act of 1909, and not to change, narrow, or enlarge it. Meeropol v. Nizer, 560 F.2d at 1068. Further, Congress does not consider the four statutory factors to be determinative. Rather, they are merely used by way of example. 3 M. Nimmer, supra note 4, at § 13.05. Courts have also considered factors other than the traditional four to be relevant in a fair use analysis. For instance, one court stated:

[At] least four tests are appropriate to determine whether the doctrine applies: (1) Was there a substantial taking, qualitatively or quantitatively? (2) If there was such a taking, did the taking materially reduce the demand for the original copyrighted property? (3) . . . does the distribution of the material serve the public
the purpose and character of the use;\textsuperscript{13} (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;\textsuperscript{14} and (4) the effect of the use upon the potential market for or value of the copyrighted work (the harm factor).\textsuperscript{15} If a court finds that an unauthorized use of a copyrighted work is a fair use, then there has been no infringement of the copyright.\textsuperscript{16}

The growing use of home videotape recorders (VTRs) by private individuals to record copyrighted programs broadcast on television raises the question of whether such recording infringes the copyright owners' exclusive right to make copies of the televised material. In \textit{Universal City Studios, Inc. v. Sony Corp. of America},\textsuperscript{17} the United States District Court for the Central District of California in applying the four factors of the fair use doctrine and considering the legislative history of the Act, concluded that the videotape recording of copyrighted televised programs by private individuals for their own private home viewing constituted a fair use of the copyrighted material and thus was a noninfringing use.\textsuperscript{18} The United States Court of Appeals for the Ninth Circuit, with the \textit{Sony} case presently before it on appeal,\textsuperscript{19} has now undertaken the burden of wrestling with the home videotape recording controversy.

This comment will explore the issues confronted by the \textit{Sony} court in its infringement analysis of home-use video recording of copyrighted broadcasts, first by using the four factors of the fair use doctrine as generally applied and then by applying the factors to problems peculiar to home VTR use. Finally, the article will balance the factors to reach a conclusion

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  \item[13.] interest in the free dissemination of information: \ldots (4) does the preparation of the material require the use of prior materials dealing with the same subject matter?
  \item[14.] Marvin Worth Prod. v. Superior Film Corp., 319 F. Supp. 1269, 1274 (S.D.N.Y. 1970). According to another court, the weight of authority indicates that "to constitute 'fair use' the permitted use must be for some legitimate, fair and reasonable purpose." Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F.2d 279, 284 (5th Cir. 1970).
  \item[20.] \textit{Id.} at 442, 443-47, 450-56.
  \item[21.] Universal City Studios, Inc. v. Sony Corp. of American, No. 79-3683 (9th Cir., filed Nov. 1, 1979).
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on the issue of whether private individuals engage in a noninfringing fair use when they tape copyrighted programs for their own private viewing.

I. PRIVATE VIDEO RECORDING—THE SONY ANALYSIS

William Griffiths, a citizen of California, owned a Betamax video tape recorder. The Betamax VTR, manufactured by the Sony Corporation (Sony) and distributed in the United States by the Sony Corporation of America (Sonam), can record telecasts as they are broadcast and make copies of the broadcast material for later viewing. William Griffiths recorded for his own home viewing portions of various programs broadcast over commercial public airwaves, including twenty minutes of a motion picture called "Never Give An Inch" and two episodes from the television series "Baa Baa Black Sheep" and "Holmes and Yo-Yo." All of these programs were produced by Universal City Studios, Inc. (Universal).

Universal and Walt Disney Productions, Inc. (Disney) filed suit against Sony, Sonam, several retail stores selling the Betamax, an agency retained by Sony to advertise the Betamax, and William Griffiths. Universal and Disney contended that manufacturing, distributing, advertising, and selling the Betamax caused, induced, or at the very least, encouraged Griffiths and others to make unauthorized recordings of copyrighted motion pictures, and thus made Sony, Sonam, the advertiser, and the various retailers liable for contributory infringement. The plaintiffs requested an injunction restraining further manufacturing, distributing, selling, and ad-

20. 480 F. Supp. at 433.
21. Id. at 432.
22. Id. at 436.
23. Disney demonstrated that copies of its programs, "The New Mickey Mouse Club" and "The Wonderful World of Disney," had been made by persons other than Griffiths.
24. 480 F. Supp. at 441-52, 459. Plaintiffs also brought suit under various other theories. Sony and Sonam, it argued, should be liable as direct infringers because they furnished the instrumentality for the alleged infringing activity and because they knew and expected that the major use of Betamax would be to record copyrighted material off-the-air. Id. at 457. The district court found that, because the defendants did not provide the copyrighted work themselves or manage stores in which the actual copying occurred, their involvement in the infringing activity was neither substantial nor direct and therefore they could not be held liable. Id. at 458. Plaintiffs also argued that the defendants were vicariously liable because they had both a right and an ability to supervise the infringing activity and a direct financial interest in the activity. Id. at 461. The court rejected this argument because the defendants could not control the purchasers' uses of the machines once they were bought, and because the defendants did not depend on an infringing use to derive financial benefit. Id. Finally, the retail sellers were also sued for direct infringement, as they had made copies of plaintiffs' programs for the purpose of demonstrating the Betamax to customers. Because such recording did not harm the plaintiffs, the court found it to be a noninfringing fair use. Id. at 456-57.
Copyright Infringement in Video Recording

Before a defendant can be found liable for contributory infringement, it must be demonstrated that a direct infringement has occurred. Thus, the Sony court was faced with determining whether the off-the-air recording of telecast copyrighted programs by Griffiths for private home viewing constituted a direct infringement of the copyright in the films. The court based its analysis of the home-use issue on the four fair use factors: harm, substantiality of the use, purpose of the use, and the nature of the copyrighted work.

The district court first considered whether home recording caused harm to the television market for the copyrighted films. Noting that the test requires an examination of the probable detrimental effect of the use on the potential market for a copyrighted work, rather than an assessment of the actual economic detriment experienced by the copyright owner, the court declared that it was hesitant to identify the probable harmful effects of home-use copying. The court gave two reasons for this hesitancy: the number of doubtful assumptions upon which a finding of harm must be based and the rapidly changing marketing system upon which a prediction of harm would have been based.

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25. Id. at 463.
26. Id. at 459 (discussing Gershwin Publishing Corp., v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).
27. 480 F. Supp. at 441. It appeared that the suit against Griffiths was brought merely to ease the problems of demonstrating direct infringement. Griffiths, a client of the plaintiffs' attorneys, consented to be sued, and had claims for damages or costs against him waived. Id. at 437.
28. Id. at 450-56. For a discussion of these four fair use factors, see notes 10-15 and accompanying text supra.
29. 480 F. Supp. at 451-52, 466. Home-recording of televised programs could affect other markets, such as the market for prerecorded video cassettes. See Note, Home Video Recording: Fair Use or Infringement?, 52 S. CAL. L. REV. 573, 616-17 (1979).
30. 480 F. Supp. at 452. For a discussion of the "potential market diminishment" test as the proper test for assessing harm, see id. at 451; Comment, Copyright Implications Attendant Upon the Use of Home Video Tape Recorders, 13 U. RICH. L. REV. 279, 286 (1979); Meepol v. Nizer, 560 F.2d 1061, 1070 (2d Cir. 1977), cert. denied 434 U.S. 1013 (1978); Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F. Supp. 686, 689 (S.D.N.Y. 1974). The court in Williams & Wilkins Co. v. United States suggested that the harm which must be proven is actual economic detriment, 487 F.2d 1345, 1359 (Ct. Cl. 1973), aff'd mem., 420 U.S. 376 (1975). This approach, however, has not been widely followed; see Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 450-51. Another test for harm which is similar to the "potential market diminishment" test is whether the copying tends materially to reduce demand for the original work. See Note, supra note 29, at 612.
31. 480 F. Supp. at 452. These assumptions are discussed in detail in the harm factor analysis. See notes 52-71 and accompanying text infra.
32. 480 F. Supp. at 452. For a discussion of the change in the marketing system, see notes 61-66 and accompanying text infra.
In addressing the substantiality factor of the fair use doctrine, the court acknowledged that "[h]ome use recording off-the-air usually involves copying the entire work" and that, "in the normal case of copying, the effect that the infringing copy has on the market for the original will depend to a large extent on whether the copy can substitute for the original." The court, however, attempted to discount the apparent substantiality of the taping by noting that "[l]ike other variables in the fair use analysis, the substantiality factor is inextricably bound with the issue of harm." Because no harm accompanied the substantial use, the taping of the whole was still considered a fair use.

The Sony court also found that the nature of the copyrighted material indicated fair use. The court found that the salient feature of the copied films was that they were "voluntarily . . . telecast over public airwaves to individual homes free of charge." The court emphasized that the opportunity to use public airwaves allows copyright owners to disseminate their works more widely than would be possible through their own efforts.

The court found that the final fair use factor, the purpose of the copying, also indicated a fair use. Characterizing the copying of the films as "non-commercial" and noting that the copying increased "access to the materials plaintiffs choose to broadcast," the court indicated that, because the use occurs within private homes, enforcement of a prohibition would be highly intrusive and practically impossible. The court deemed the increase of access purpose of home-use video taping to be "consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves."

Thus, the district court found that the home-use copying of copyrighted

33. 480 F. Supp. at 454.
34. Id.
35. Id. For a discussion of the substantiality analysis as applied to home VTR use, see notes 72-82 and accompanying text infra.
36. 480 F. Supp. at 453. For a discussion of the effect of the voluntary nature of broadcast films on the fair use analysis, see notes 115-26 and accompanying text infra.
37. 480 F. Supp. at 453. The court declined to base its analysis on the more traditional fair use characterization of the nature of the work, e.g., scientific or educational. Id. at 452. For a discussion of a traditional fair use analysis of the nature of broadcast films which are copied on VTRs, see notes 83-93 and accompanying text infra.
38. 480 F. Supp. at 453-54.
39. Id. at 454.
40. Id. Aside from its noncommercial argument, the bulk of the court's reasoning is based on first amendment grounds rather than a more traditional analysis. Id. For a discussion of a traditional fair use analysis of the private, noncommercial character of the copying of broadcast films, see notes 94-107 and accompanying text infra. For a discussion of the first amendment arguments, see notes 127-54 and accompanying text infra.
films constituted a fair use. To buttress its conclusion, the court argued that the legislative history pertaining to a 1971 amendment to the Copyright Act of 1909 indicated a congressional intent to permit recording of televised programs for the limited purpose of private viewing.

II. FAIR USE AND PRIVATE VIDEO RECORDING—A GENERAL APPROACH

The *Sony* court, as most courts do when applying the fair use doctrine, applied the four traditional fair use factors in an *ad hoc* fashion, with little suggestion of a principled basis founded in the Constitution from which the copyright scheme arises. A principled, constitutional basis for decisionmaking is present nonetheless whenever the following two circumstances exist: (1) a "greater public interest" in allowing the specific use outweighs the general public benefits derived from restricted access; and

41. 480 F. Supp. at 456.
42. *Id.* at 443-47. For a discussion of congressional intent regarding an exemption for VTR recording for private purposes, see notes 164-81 and accompanying text infra.

With the court's finding of no direct infringement by Griffiths, the plaintiffs' arguments against the business defendants for contributory infringement became untenable. See note 26 and accompanying text *supra*. The district court stated that, even if it held that VTR recording for private use was a direct infringement, the suit for contributory infringement would still fail because the business defendants lacked the requisite knowledge of the infringing activity. 480 F. Supp. at 459. Finally, the court noted that, even if the business defendants were liable for contributory infringement, the drastic injunctive relief sought would not be granted due to an insufficient showing of the requisite harm. *Id.* at 468-69.

43. The process of applying the fair use doctrine has been characterized as the most troublesome process in all of copyright law. Encyclopedia Britannica Educational Corp. v. Crooks, 447 F. Supp. 243, 250 (W.D.N.Y. 1978) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939)). Neither the courts nor the statute have provided clear guidance as to the relative weight to be accorded the four factors. See Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 448. The doctrine's boundaries are exceptionally elusive. *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269, 1273 (S.D.N.Y. 1970). Its application "belong[es] to . . . the metaphysics of the law, where the distinctions are . . . very subtle and refined, and sometimes, almost evanescent." Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (quoting *Folsom v. March*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901)). Thus, analysis under the fair use doctrine consists essentially of an *ad hoc* application of the four broad fair use factors to the facts of the individual case. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1352 (Cl. Cl. 1973), *aff’d mem.*, 420 U.S. 376 (1975).


The *raison d’etre* for copyright protection is to benefit the public. Insofar as the public interest is best served in a particular case by allowing the use of the copyrighted work, the *raison d’etre* for the protection vanishes. See Note, *supra* note 6, at 95, n.60-61.
(2) the use does not lead to a reduction in the incentive to create and disclose the creations. Application of the fair use doctrine reaches this constitutionally sound result because the four factor test neatly subsumes these two circumstances. The exploration of the "nature" and "purpose" factors in the fair use analysis promotes an inquiry into the existence of some "greater public interest;" courts use the "substantiality" and "harm" factors to facilitate an understanding of possible reductions in incentive to create.

A. No Harm, No Foul—The Reduction In Incentive Prong

1. The Harm Factor

In determining the possible harm to the television market resulting from the home-use recording of televised programs, an understanding of the economics of television is essential. The owners of copyrights in broadcast films derive their revenue not directly from payments by the viewer, but rather from royalties paid by the broadcasters to the owners for the right to show the copyrighted films on television. Broadcasters, in turn, are compensated by advertisers who use the televised works as a vehicle to reach potential consumers of their products. Thus, the royalties negotiated between the copyright owner and the broadcasters depend to a great extent on the amount advertisers are willing to pay broadcasters.

Advertisers' decisions as to the times and prices of advertisements are based on the size and demographics of the audiences for broadcast shows. The size and demographics of audiences for various programs are measured by rating services, such as the A. C. Nielsen Company and Arbitron. Two methods are commonly used by the rating services to measure audiences: (1) rating meters which measure only the size of audiences by recording when a set is turned on and to what channel it is tuned; and (2)

46. Since the very purpose for granting exclusive rights to copyright owners is to provide the economic reward that will act as an incentive for the creative process, a use which reduces the reward and thus the incentive to create is anathema to the copyright scheme. See Note, supra note 6, at 120. To the contrary, a use which does not affect the market for the work and the consequent monetary reward will not affect the incentive to create; copyright owners will be indifferent to such a use. Thus, allowing such use serves both interests of the copyright scheme by granting the public access to creative works without lessening the economic incentives to the creators of the work.

47. For discussion of the "greater public interest" prong as it relates to the VTR home use issue, see notes 83-154 and accompanying text infra.

48. For a discussion of the reduction in incentive prong regarding home use of VTRs, see notes 49-82 and accompanying text infra.

49. For a discussion of the rudiments of television economics, see Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 440; Note, supra note 29, at 578-83.
diaries in which both the program being viewed and extensive demographic information are recorded. The rating services traditionally deliver to advertisers the size and demographic information derived from these two methods correlated to the time at which a particular program was broadcast.

The plaintiffs in *Sony* argued that the video recording of televised films would harm the owners of the films' copyrights by reducing the audiences for original broadcasts and increasing the number of persons watching videotape playbacks as an alternative. One assumption inherent in this argument is that large numbers of households will own VTRs in the near future. This assumption is supported by recent data showing increasing sales of VTRs. Another underlying assumption is that a large number of these VTR owners will buy blank tapes for taping off-the-air. It appears that this assumption also appears to be valid. A third inherent assumption is that people view tapes only when they would otherwise be watching

50. For a general discussion of audience profiles and ratings methods, see Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 440-41; Note, *supra* note 29, at 578-83. Demographics are a statistical profile of group characteristics including such important variables as age, sex, and income bracket. 480 F. Supp. at 441.


52. See Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 466. A reduction in audience size will cause broadcasters to receive lower fees from advertisers. This decrease in advertising revenue, in turn, will lower royalties to copyright owners.

In finding that the nature of broadcast films was indicative of fair use, the *Sony* court stated that "[b]ecause [owners of copyrights in broadcast films] derive their revenues only indirectly from the alleged infringer of their work, the harm resulting from the infringement is more speculative." *Id.* at 453. The complexity of television economics, however, would not make the harm any less real if television audiences were actually reduced.

53. *Id.* at 451.

54. See Forkan, *Movie makers may add rental to tape sales*, ADVERTISING AGE, Nov. 3, 1980, at 75. ("Many industry experts . . . seemed to think that [VTR] homes could pass the 2,000,000 plateau by year end, given 800,000 or so units sold during 1980. Sales through October 3 [1980] were just over 507,500 units, . . . up 65%.").


56. See Mayer, *Home Video Fever: High Tech in the Living Room*, HIGH FIDELITY & MUSICAL AMERICA, June, 1980, at 103 ("blank videotapes typically outsell prerecorded ones 20 to 1. . ., that's a fairly clear indication that most [VTRs] are used for taping off-the-air"); Cavanicus, *The Video Imperative*, SATURDAY REVIEW, Sept., 1980, at 95 ("most [VTRs] are used simply to record off-the-air TV programs"). However, the growing interest and sales of video cassettes with films prerecorded on them, see Note, *supra* note 29, at 616-17, may indicate a trend away from the VTR use of VTRs for off-the-air taping toward their use to play prepackaged cassettes. See generally Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 467-68.
a live broadcast.\textsuperscript{57} This assumption is unjustified. Tape watching is probably part of a wider “entertainment” market which involves consumers who wish to be entertained and not just to “watch T.V.”\textsuperscript{58}

Even if tape watching diminishes the size of live television audiences, the conclusion that harm results rests on the dubious premise that the amounts advertisers will pay to broadcasters depend solely upon the size of audiences for live television broadcasts.\textsuperscript{59} If ratings are able to reflect VTR playback viewing as well as live television viewing, the audiences for these playbacks will be reflected in the ratings for the original broadcast and will constitute an additional factor to determine advertising revenues for a particular broadcast.\textsuperscript{60} Rating methods are rapidly changing to reflect the new playback audience of previously recorded programs.\textsuperscript{61} Although rating meters are unable to record playbacks of prerecorded tapes on VTRs, diaries are capable of recording these playbacks as well as

\textsuperscript{57} Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 451.

\textsuperscript{58} See id. at 466. Recent indications are that in reality there exists little threat to television audiences from VTR use, supporting the view that VTR viewing is not harmful to live audience ratings. See Public TV study says VCR's don't detract from viewing levels, Broadcasting, July 21, 1980, at 46 (“[a] new study of video cassette recorders concludes there is little danger that the use of VCR tapes could have a negative effect on broadcast audience sizes”); Forkan, supra note 55 (quoting Herb Granath, vice-president in charge of ABC Video Enterprises as saying that one of the early findings from their ongoing study indicated that “video will not substantially affect [television] audiences for the foreseeable future”); New media mean new ad strategies, supra note 51, at 28-29. Cf. Not to worry, Broadcasting, May 12, 1980, at 48 (“in the eighties, . . . ‘all the new technologies combined will probably reduce our audience only by about 10%.' That decline in audience share, however, will be offset by at least a 10% increase in total television homes.”).

\textsuperscript{59} See Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 466.

\textsuperscript{60} See Ratings expert sees home VTR reshaping U.S. television, Broadcasting, Nov. 14, 1977, at 22. (“Home video tape recording holds the promise of significantly increasing commercial television's audience . . . and requiring changes in T.V. audience measurement.”).

In \textit{Universal City Studios, Inc. v. Sony Corp. of America}, plaintiff copyright owners argued that the ability of many VTRs to automatically “turn on” to record programs at preselected time periods on preselected stations, enabling viewers to tape shows which they are not watching in person, see Marich, supra note 52, at 68, would lead to a decrease in ratings and thus revenue. 480 F. Supp. 429, 466 (C.D. Cal. 1979). The assumption is that rating services are incapable of measuring this recording by an “absent” viewer and consequently that the viewing of advertising will not be measured. \textit{Id}. If playbacks are part of the overall audience for a television program, however, the fact that this videotape recording of the live program may not be recorded by the meter rating services is irrelevant, since the subsequent viewing of the advertising during playback \textit{will} be recorded by the diary method. Even if the recording by an absent viewer were relevant, the argument fails because Nielsen rating meters already credit videotape recording. \textit{Id}; Note, supra note 29, at 614; Ratings expert sees home VTR reshaping U.S. television, at 22.

\textsuperscript{61} See Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 466.
demographics and the actual program being viewed. Nonetheless, advertisers may balk at paying for the new market of playback viewers because ratings traditionally are reported as a function of the time of broadcast. Since playbacks may be made at any time, the disruption of traditional audience measurement techniques could render ratings for playback audiences meaningless. This potential problem, essentially one of accurately determining the demographics of a particular program’s audience, can be solved, however, through more extensive use of diary services and development of more sophisticated techniques, enabling the rating services to devise demographics based on program content rather than only on “time-slot.” Indeed, both Nielsen and Arbitron are in the process of developing frameworks for additional survey work to lead ultimately to the measurement of videotape recorder usage. Thus, advertising revenues need not depend only upon viewers of original broadcasts; new rating techniques will allow advertisers to take into account the playback of videotape recordings in computing their fees.

Another assumption essential to the argument that VTR use will cause harm is that those who record and view tapes never view the commer-

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62. Note, supra note 29, at 614. Cf. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 441 (“At the time of trial, the Nielsen diary surveys made no specific reference to videotape recorder usage, and the only playback information obtained was what people volunteered in the diary.”).

63. See generally note 51 and accompanying text supra.

64. The “time shift” capability of VTRs, see note 60 supra, enables a VTR owner to watch a recorded program at a different time than the program’s network “time-slot,” see Marich, supra note 51, at 68; Chew, Innovations in video—nightmare for networks?, ADVERTISING AGE, May 30, 1977, at 70.


67. Id. at 466. Another of the assumptions inherent in the argument that tape viewing will cut into the audience for original television broadcasts is that those who taped programs would keep tapes for repeat viewing over a long period of time. Id. at 451. Since playback audiences are an additive component to television ratings, the building of tape libraries and repeat viewing would tend to increase revenues rather than lead to their reduction. Even if the assumption were valid, the most recent indications are that VTR users are in fact not recording television programs with a view toward creating libraries for long term viewing. See Mayer, supra note 56, at 103 (“A recent Gallup poll tells us that, with the exception of teenagers, most people watch the program they record only once.”); Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 438 (C.D. Cal. 1979) (discussing surveys showing 70.4% of programs viewed by tape playback were viewed only once; 57.9% of viewers had no further plans for viewing; and 55.8% of VTR owners had 10 or fewer tapes in their library). Certainly the type of program taped by Griffiths, e.g., Baa-Baa Black Sheep and Holmes and Yo-Yo, indicated VTR use for mere “time shift” purposes, i.e., to watch a program the owner would otherwise have missed. They were not of the “classic” variety which one might expect would be saved for repeat viewing.
Commercial avoidance may be accomplished in two ways: fast-forwarding through commercials as the playback is viewed, or deleting them at the recording stage by depressing the pause button to halt the recording temporarily. A tape viewer using the fast-forwarding technique will still be effectively exposed to the advertising message, albeit at a quickened pace. Deletion of commercials during recording similarly poses little threat to advertisers; few viewers presently delete commercials while taping original broadcasts.

68. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 451. The argument that playbacks will increase the potential audience and thus increase the potential value of the films, see note 67 and accompanying text supra, in turn assumes that commercials are viewed by playback audiences. See Note, supra note 9, at 245.


70. Since the great majority of products sold are indistinguishable from their competing brands, advertising which merely informs consumers is not likely to motivate a consumer to buy the advertised product. Reed, The Psychological Impact of TV Advertising and the Need For FTC Regulation, 13 AM. BUS. L.J. 171, 173-74 (1975). Rather, the vast majority of advertising is designed to influence the consumer to buy the product by creating an unconscious association between the advertised product and fulfillment of some basic human need or desire, such as love, sex, and approval. Id. at 173-78. The effectiveness of this unconscious message of advertising in influencing consumer behavior increases as the critical attention the viewer pays to the advertisement, the conscious involvement he has with the commercial, decreases. Id. at 178-80. It is the passivity with which television audiences approach television commercials which makes television such an effective advertising medium. Id. See also Reed and Coalson, Eighteenth-Century Legal Doctrines Meets Twentieth Century Marketing Techniques: FTC Regulation of Emotionally Conditioning Advertising, 11 GA. L. REV. 733, 748-51 (1977); W. Key, Subliminal Seduction 158 (1973). The passivity with which a viewer would regard a fast-forwarded commercial suggests that his susceptibility to the subliminal message would be increased.

The above argument assumes that fast-forwarding will not destroy the ability of the viewer to perceive the advertising message. While the speed of the forwarding may destroy the conscious perception of the commercial, the subconscious, which the advertising is designed to reach, instantly perceives and records all meaning. See W. Key, at 53, 163 (information flashed at 1/3000 of a second has been experimentally shown to be implanted in subconscious). The symbols and words which advertisers specifically place in commercials are intended to be subliminally perceived even at normal speeds and will still reach the viewer's unconscious at fast-forward speeds. Reed and Coalson, at 740; W. Key, at 156-70; see also Concerning the Broadcast of Information by Means of “Subliminal Perception” Techniques, 44 F.C.C.2d 1016 (1974).

The fear of fast-forwarding in any case appears to be of little importance in actuality. A survey by defendants in Universal City Studios, Inc. v. Sony Corp. of America showed that only 25% of playback viewers were fast-forwarding through the commercials. 480 F. Supp. at 439, 468.

71. A survey by the manufacturers of Sony's Betamax VTR showed that 92% of programs were recorded with commercials. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 468. One reason that viewers do not delete commercials is that the practice may be too tedious. Id. Thus, a real concern for advertisers might occur if future VTRs came equipped with “automatically controlled . . . in-home microcomputers that are ‘assigned the task of editing out T.V. commercials,’” in that a VTR so equipped could edit out commercials without the presence of the owner. Chew, supra note 64, at 70. The as-
2. The Substantiality Factor

In addition to the harm factor, it is also necessary to consider whether
the use in question consists of a substantial portion of a copyrighted work,
in relation to the copyrighted work as a whole, in order to determine
whether the use will lead to a reduction in incentive to create.72 The tradi-
tional approach is to examine the significance of the copying73 both in
qualitative and quantitative terms.74 One must consider not only the sheer
amount of the work appropriated, but also whether the portion copied
contains the essence, central premise, or main idea of the copyrighted
work;75 whether there is similarity in style or form of expression between
the original and the copied material;76 and whether the copier needs to use
the appropriated material in the production of the new work.77 Nonethe-

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less, while these several qualitative factors are considered in examining the substantiality factor, as a rule of thumb, the greater the amount of quantitative work appropriated by the user, the more likely it is that the substantiality factor will not indicate a fair use.\textsuperscript{78} When an entire film is reproduced, there is likely to be not only substantial quantitative copying but also substantial qualitative appropriation.\textsuperscript{79}

Home-use recording of copyrighted films off-the-air usually involves the copying of the entire work,\textsuperscript{80} militating against a finding of fair use. Indeed, the United States District Court for the Western District of New York, in \textit{Encyclopedia Britannica Educational Corp. v. Crooks} granted a preliminary injunction against institutions that copied programs off-the-air for school classroom use, emphasizing that videotaping of an entire broadcast film was a substantial copying.\textsuperscript{81} The videotape recording of telecast countenanced). Congress has indicated that one circumstance in which the need for the underlying material is especially strong is where a published work is unavailable to the potential user through normal channels because the work is out of print. \textit{See} S. Rep. 94-473, 94th Cong., 2d Sess., 64 (1976); \textit{Student Note, The Home Video Recording Controversy, 81 W. VA. L. REV. 231, 240 (1979)}.


\textsuperscript{79} One qualitative factor, whether the copy contains the essence of the original work, \textit{see} note 75 and accompanying text \textit{supra}, is satisfied when the copy is identical to the original work, as is the case in copying an entire film. Another qualitative factor, the similarity in style between the two works, \textit{see} note 76 and accompanying text \textit{supra}, is satisfied when the reproduction of a film is a verbatim copy, \textit{see} note 76 \textit{supra}. The final qualitative factor, the "need" to use the copyrighted work to produce the copier's work, is satisfied if the copyrighted work is unavailable to the user. \textit{See} note 77 and accompanying text \textit{supra}. The work which is broadcast over the airwaves may be unavailable to the average viewer under ordinary circumstances since networks generally maintain sole possession of the videotapes of the broadcast work; thus arguably a special need may exist to allow the making of copies on VTRs. \textit{See Student Note, supra}, note 77, at 241. However, as the number and diversity of programming available on prerecorded cassettes increases, \textit{see} note 56 \textit{supra}, the need for taping of broadcast shows will diminish.

In any case, the "unavailability" exception, sanctioned by Congress, was intended only to apply to published works which have gone out of print. \textit{See} note 77 \textit{supra}. If a work is unavailable because it is unpublished, this represents a deliberate choice of the copyright owner and will be respected by keeping the prohibition against copying in force. \textit{See} H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61-65, \textit{reprinted in} [1976] \textit{U.S. CODE CONG. & AD. NEWS} 5659, 5674-78. Since under the definition of "publication" in the Act the broadcast of a work is not a publication, \textit{see} 17 \textit{U.S.C.} § 101 (1976), the copying of a broadcast work would not be permitted under the unavailability exception. \textit{See} Student Note, \textit{supra}, note 77, at 241.

\textsuperscript{80} \textit{Universal City Studios, Inc. v. Sony Corp. of America}, 480 F. Supp. at 454 (C.D. Cal. 1979).

copyrighted programs by owners of VTRs thus appears to be a substantial taking within the meaning of the fair use doctrine and, at least in this respect, appears to fall outside the scope of the fair use doctrine.82

B. For The Greater Good—The Public Interest Prong

1. The Nature Factor

Traditionally, courts have found copyrighted works in the fields of science, law, medicine, history, and biography to be within the fair use doctrine.83 Courts treat the copying of works in these fields with leniency because these works "serve the public interest in the full dissemination of information"84 in two ways. First, these works consist essentially of fac-

82. The court, in Universal City Studios v. Sony Corp. of America, never expressly stated that the substantiality factor was indicative of fair use, but attempted to mitigate its impact by invoking the lack of harm caused by the videotaping of programs for home viewing. 480 F. Supp. at 454. However correct the court's final conclusion may be, the fact remains that home video recording of copyrighted broadcasts is substantial and thus indicative of an infringing use.


tual information affecting areas of universal concern. Second, since uninhibited access to works in these fields is often essential to ensure the continuing progress and vitality of research, allowing public access will encourage the progress and advancement of science, industry, and other scholarly endeavors. Courts have usually determined that the public interest in the uninhibited use of factual scholarly works outweighs the benefits gained through granting exclusivity to authors of such works.

Film works primarily for entertainment are generally not of the scholarly, factual nature which courts usually allow to be copied. In *Rohauer v. Killiam Shows, Inc.*, for example, the court found no discernible public interest in the dissemination of a fictional motion picture work that would endow a copier with the fair use privilege. Similarly, the court in *Loew's Inc. v. CBS, Inc.* held that the fair use allowance of the copying of works in the field of science or art should not be extended "to include a T.V. program allegedly taken from a motion picture." Congress has also indicated that the fair use doctrine should rarely apply to films or other works

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85. The importance of this factual nature of the work is shown in *New York Times Co. v. Roxbury Data Interface, Inc.* where the court stated that in copying a work, "rather in the nature of a collection of facts than in the nature of creative or imaginative work . . ., defendants have greater license to use portions [thereof] under the fair use doctrine then they would have if a creative work had been involved." 434 F. Supp. 217, 221 (D.N.J. 1977).

86. See *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (1977), *cert. denied*, 434 U.S. 1014 (1978). *Rosenfield, supra* note 45 at 791 (stating that the "constitutional dimension of fair use protects the right of reasonable access to our cultural, educational, scientific, historical, technical, and intellectual heritage").

In *New York Times Co. v. Roxbury Data Interface, Inc.*, the court found an index to a newspaper, including data grouped by "personal name," to be a "factual work," *see* note 85 and accompanying text, *supra*, and thus indicative of a fair use. 434 F. Supp. 217, 221 (D.N.J. 1977). Such a work, however, is not intrinsically of "universal concern" in the same sense as historical, scientific, and medical works. Thus, perhaps the *Roxbury Data* court erred in holding that a factual index is of a nature suggesting fair use.

87. *Note, supra* note 29, at 608. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1245, 1354 (Ct. Cl. 12973), *aff'd mem.*, 420 U.S. 376 (1975) (stating that "medical researchers who have asked for photocopies [of articles in copyrighted medical journals] are . . . ordinarily . . . scientific researchers and practitioners who need the articles for personal use in their scientific work." *See also* *Rosemont Enterprises, Inc. v. Random House, Inc.*, 336 F.2d 303, 307 (2d Cir. 1966) ("it is both reasonable and customary for biographers to refer to and utilize earlier [biographical] works dealing with the subject of [their] work and occasionally to quote directly from such works").

88. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (use of the copyrighted work "is permitted because of the public benefit in encouraging the development of historical and biographical works and their public distribution . . . so that the world may not be deprived of improvements, or the progress of the arts be retarded").

89. *Id.*


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of entertainment. While television broadcasts may include some factual, scholarly programming which may fall within the traditional nature category, programs which the public records are generally entertainment works rather than factual, scholarly works. Thus, the nature of video recorded television programs does not indicate that their VTR recording is a fair use.

2. The Purpose Factor

The use of copyrighted material for the purposes of research, education, and criticism has been held indicative of a fair use. Each of these uses is designed to confer a benefit upon the public at large by disseminating information of universal concern. In contrast, recording

92. See Note, supra note 19, at 609 (discussing S. Rep. No. 473, 94th Cong., 1st Sess. 50-51 (1975)).

93. See Public T.V. study says VCRs don't detract from viewing levels, Broadcasting, July 21, 1980, at 46 (discussing a recent survey which shows that "over 90% of the material videorecorded by [VTR] owners was regular T.V. series, movies and specials"). See also Student Note, supra note 77, at 239. But cf. Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 452-53 (declining to categorize television programming as "entertainment" or "educational," because "[t]he line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all").

94. See Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1354 (Ct. Cl. 1973), aff'd mem., 420 U.S. 376 (1975), where the Court described the purpose for which photocopies of copyrighted articles in medical journals were made: "Scientific progress... is the hallmark of the whole enterprise of duplication... [therefore] the law gives copying for scientific purposes a wide scope." See also Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978), stating, "[f]or a determination whether the fair use defense is applicable...it is relevant whether or not the [copyrighted material] was used primarily for scholarly, historical reasons."

95. Most relevant to our situation is Encyclopedia Britannica Educational Corp. v. Crooks, 447 F. Supp. 243 (W.D.N.Y. 1978), in which the defendant organization videotaped television broadcasts of plaintiffs' copyrighted educational films off-the-air without plaintiffs' permission. Defendants distributed the tapes to schools for use in classrooms as teaching aids. In discussing the purpose factor of the fair use doctrine, the court characterized the use as being provided "on a strictly noncommercial basis to a limited class of requesters for the purpose of promoting two traditionally favored areas of endeavor: science and education." Id. at 251.

96. In addition to more traditional forms of criticism, courts are lenient in allowing use of copyrighted materials in parodies and burlesque. See MCA, Inc. v. Wilson, 425 F. Supp. 443, 452 (S.D.N.Y. 1976).


98. See Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966). The "information of universal concern" generally contemplated by courts is that
copyrighted films off-the-air for private use merely benefits the individual. Thus, such copying lacks the traditional fair use purpose of benefiting the general public by dissemination of the copied works.

Another aspect of purely private use of tape recorded films, however, may indicate a fair use—the noncommercial character.\textsuperscript{99} Courts have explicitly stated that a use of a copyrighted work which is predominantly for commercial exploitation is almost never a fair use.\textsuperscript{100} Some commentators have argued that the inverse is true, that persons who make personal, non-commercial use of copyrighted works rarely infringe the copyright.\textsuperscript{101} The Court of Claims in Williams & Wilkins Co. v. United States,\textsuperscript{102} for example, arguably indicated that the photocopying of copyrighted articles in medical journals for private purposes is a fair use.\textsuperscript{103} Similarly, in Encyclopedia Britannica Educational Corp. v. Crooks,\textsuperscript{104} the court, in the course of its fair use analysis concerning the videotaping of copyrighted programs by educational institutions, noted that the taping was made “on a strictly non-commercial basis.”\textsuperscript{105} Both Williams & Wilkins and Encyclopedia Britannica, however, involved uses that embodied traditional public benefit purposes\textsuperscript{106} as well as noncommercial aspects, and thus provide weak support for the proposition that a noncommercial use, which is also purely private, is a fair use. Videotaping by private individuals for noncommercial, personal use, since it is performed without an intent to benefit the general public by contributing to the dissemination of information of universal concern, provides the public no countervailing interest superior to

\textsuperscript{99} Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 453-54.

\textsuperscript{100} Note, supra note 29, at 610. See Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977), \textit{cert. denied}, 434 U.S. 1014 (1978) (stating that the fair use doctrine essentially “distinguishes between a true scholar and a chiseler who infringes a work for personal profit”). Even if the nature of the work is such that normally its use would be a fair one, \textit{e.g.}, an historical work, if the material from the work is to be used for commercial exploitation, the use of the material is not fair. Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977).

\textsuperscript{101} See Note, supra note 29, at 610-11.

\textsuperscript{102} 487 F.2d 1345 (Ct. Cl. 1973), \textit{aff’d mem.}, 420 U.S. 376 (1975).

\textsuperscript{103} \textit{Id.} at 1355. (“[t]he reader who himself makes a copy does so for his own personal work needs, and individual work needs are likewise dominant in the reproduction program of the two medical libraries”).

\textsuperscript{104} 447 F. Supp. 243 (W.D.N.Y. 1978).

\textsuperscript{105} \textit{Id.} at 251.

\textsuperscript{106} Specifically, scientific and medical research in Williams & Wilkins, see note 94 supra, and educational purposes in Encyclopedia Britannica, note 95 supra.
that of the copyright owner in exclusivity; the use is not a fair one.\textsuperscript{107}

III. \textbf{Is The Medium The Message?—The Public Interest Prong in Light of the Unique Characteristics of Private Taping of Public Broadcasts}

Under traditional fair use analysis, only the harm factor supports the finding that VTR recording of televised films for purely private viewing is a fair use.\textsuperscript{108} Nonetheless, the court in \textit{Sony} could have reached the decision that VTR home-use recording is a fair use without further analysis.\textsuperscript{109} Instead, noting that the traditional fair use analysis indicates the nature of copyrighted films and the private purpose of copying them are not supportive of a finding of fair use,\textsuperscript{110} the court based its holding on two novel features peculiar to the taping of broadcast television shows. The court first found that the nature of the copyrighted films as voluntarily telecast over public airwaves to individual homes free of charge indicated a fair use.\textsuperscript{111} The court then held that the use of the taped films in private homes

\textsuperscript{107} Some courts have held that, since the essential inquiry in a fair use determination is whether a use leads to a public benefit by contributing to the flow of information of universal concern, see notes 85-89 and 94-98 and accompanying text \textit{supra}, the fact that a use is made for commercial or non-commercial purposes is irrelevant. Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966). \textit{But cf.} Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977), \textit{cert. denied}, 434 U.S. 1013 (1978) (a predominantly commercial motive is relevant, although not determinative of fair use). As long as a public benefit is conferred, it is immaterial to the underlying copyright purposes that the user reaps economic profits or that expectation of profit is part of his motivation. See Rosemont, 366 F.2d at 307. Likewise, as in our case, if the use does \textit{not} lead to a further benefit for the public, the fact that no commercial profits are intended should not make an otherwise infringing use a fair use. \textit{See Note, Copyright: The Betamax Case}, 10 U. Tol. L. Rev. 203, 229 (1978).

\textsuperscript{108} See text accompanying notes 156-62 \textit{infra}.

\textsuperscript{109} The harm factor is often considered the most important and central factor in reaching decisions under the fair use doctrine. See 3 M. Nimmer, \textit{supra} note 4, at § 13.05[A][4] (1980). See also Comment, \textit{Copyright Implications Attendant Upon the Uses of Home Videotape Recorders}, 13 U. Rich. L. Rev. 279, 286 (1979); Student Note, \textit{supra} note 77, at 243 (stating that “the importance of the harm factor has been used to explain decisions which would otherwise be quite puzzling”). Indeed, one commentator has suggested that “although the \textit{Sony} court purported to apply all of the fair use factors, the central and moving factor was the absence . . . of harm.” 3 M. Nimmer at § 13.05[F][5].

\textsuperscript{110} Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 452-53.

\textsuperscript{111} \textit{Id.} at 450. The phrase, “voluntarily telecasted over public airwaves free of charge,” is pregnant with issues. The fact that the telecast is made “free of charge” is merely symptomatic of the complexities of television economics. To the extent that this reflects the absence of harm, it is a telling point, but it is more relevant in a discussion of the harm factor rather than the nature factor. See 3 M. Nimmer, \textit{supra} note 4, at § 13.05[F][5]. For a discussion of the inappropriateness of discussing the “free of charge” aspect with the nature factor, see notes 115-16 and accompanying text \textit{infra}. The fact that programs are “telecast” raises first amendment problems dealing with the “right to access” which are more relevant to the purpose of the use, see 480 F. Supp. at 454 and are discussed at notes 140-54 and accompany-
for purely private purposes suggested a fair use. These two issues—the voluntary nature of broadcasts and the purely private purpose of copying—are the factors which distinguish the home-use video taping controversy from other fair use controversies, the resolution of these issues was what made the Sony opinion "the most significant of the off-the-air taping cases."114

A. The Voluntariness of Broadcasts

The Sony court supported its finding that voluntary broadcasts over public airwaves are indicative of fair use by reiterating its reasoning about the lack of harm. Lack of harm arguments, no matter how persuasive, only create confusion when used to discuss the nature of a copyrighted work. The nature factor of the fair use analysis should be assessed independently from the harm factor and weighted with the harm factor only after independent assessment.116

The only plausible argument for the Sony court's holding that voluntary broadcasts over public airwaves are, standing alone, of a nature indicative of fair use, is one raised by some commentators in anticipation of the Supreme Court decision in Twentieth Century Music Corp. v. Aiken. These commentators reasoned that the voluntary licensing of stations by copyright owners to broadcast the copyrighted works was equivalent to the dedication of their works to the public, implying a public privilege to use the broadcast signals without inhibition. The holding in Aiken, however, that the playing of radio broadcasts in a restaurant by the restaurant owner did not infringe the copyright in the broadcast songs, failed to support the proposition that broadcasting signals are dedicated to the public.

To be discussed in the following section, see notes 115-26 and accompanying text infra, is the fact that the broadcast is made "voluntarily over public airwaves."

112. See Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 450. The court suggested two problems arising from the private home-use purpose of the copying. The novel suggestion is that the use makes enforcement of a prohibition "highly intrusive," an argument apparently based on the first amendment. See id. at 454. For a discussion of this "right to privacy" argument, see notes 131-39 and accompanying text infra. The court also mentioned the impracticality of enforcing a prohibition on in-home use, see id., an issue also faced by Congress and discussed in that context at note 179 infra.

113. See Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 450.

114. 3 M. Nimmer, supra note 4 at § 13.05[F][5].


116. See generally 3 M. Nimmer, supra note 4, at § 13.05[A],[F][5].

117. 422 U.S. 151 (1975). See Note, Twentieth Century Music Corp. v. Aiken: Are Broadcasting Signals Dedicated to the Public?, 36 U. Pitt. L. Rev. 994 (1975) (discussing the Aiken case before the Supreme Court decision was rendered).

118. Note, supra note 117, at 1003.

lic. The Supreme Court based its decision solely on the "functional test" it had developed in cases concerning cable television. The functional test involves ascertaining whether the activities of the user of broadcast signals are more akin to those of a viewer who does not perform or a broadcaster, who does perform, and determining whether the user infringes the copyright owners' right to perform accordingly. In *Aiken*, the Court determined that one who merely activates a radio in a restaurant is functionally more akin to a viewer/nonperformer than a broadcaster/performer.

The Court never suggested that the basis for its decision was an implied consent by the copyright owner to the unrestricted public use of their copyrighted works. Even if *Aiken* implies that copyright owners dedicate their work to the public by licensing them to be broadcast over public airwaves, the holding was limited to the effect of broadcast on a copyright owner's exclusive right to perform his work. Thus, at most, the *Aiken* case only supports the conclusion that copyright owners who allow the public broadcast of their works surrender only the exclusive right to perform, retaining the remainder of their exclusive rights, including the right to make copies.

An examination of the Act supports the proposition that the voluntary nature of broadcasting films over public airwaves does not create an implied license for public copying. The Act contains a limited number of explicit exemptions from copyright sanctions for off-the-air taping of broadcasted programs. For example, the Act expressly exempts from copyright sanctions videotaping of news programs by libraries for non-commercial distribution to scholars and researchers. The Act further states that the off-the-air taping of audiovisual works not falling within the express exemptions can only be noninfringing if they fall within the fair use privilege.

Thus, not all broadcasts over public airwaves are considered, by their nature, exempt from copyright limitations on use. The fact that the copyrighted programs are voluntarily broadcast does not indicate, by itself, that the copying of the program is a fair use.

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126. See Comment, supra note 123, at 1198. The case of Walt Disney Productions v. Alaska Television Network, Inc., 310 F. Supp. 1073 (W.D. Wash. 1969), also supports the conclusion that the nature of the copyrighted works at issue as voluntarily telecast over public airwaves is not indicative of fair use. The case involved the videotaping off-the-air of
B. First Amendment Issues

The paramount inquiry in copyright infringement cases is whether the first amendment creates a public interest in allowing dissemination of the copyrighted work. The fair use doctrine has been contoured by courts to balance the public interest in uninhibited access to knowledge against the copyright owner's interest in restricting that access. Courts have thus used the doctrine to resolve conflicts between the copyright laws' right to exclusivity and first amendment interests in access. Where the first amendment interest in unrestricted access outweighs the copyright owner's right to limited exclusivity, the first amendment will have primacy.

The *Sony* court indirectly utilized this constitutional argument, reasoning that the private video recording of copyrighted programs by individuals in their private homes should be a fair use because a prohibition against such activity would be highly intrusive. This argument is rooted in the first amendment right of privacy. The Supreme Court discussed this right in support of its holding in *Stanley v. Georgia* that a statute prohibiting mere possession of filmed or printed obscene matter in the privacy of the home violated the first amendment.

The *Stanley* court considered it beyond the power of the state to "reach into the privacy of one's own home. . . . [and tell] a man. . . . what books plaintiffs' broadcast programs for the purpose of broadcasting the taped programs over an Alaskan cable television network. *Id.* at 1074. The court held that the preparation of the videotapes infringed the copyright owners rights. *Id.* at 1075. The precise holding of the case has been overruled by legislative fiat. 17 U.S.C. § 111(1)(2), 1(f) (1976). The *Disney* case neither discussed the video recording issue within a fair use framework, Encyclopedia Britannica Educational Corp. v. Crooks, 447 F. Supp. 243, 248 n.1 (W.D.N.Y. 1978), nor dealt with copying for a commercial purpose. It held, however, that off-the-air taping of voluntarily broadcast films constituted an infringement, which suggests that the fact of voluntary broadcasting does not itself limit the scope of copyright protection. See Comment, *supra* note 123, at 1198.

127. *See* Note, *supra* note 6, at 119.

128. *See* notes 9-10 and accompanying text *supra*.


133. *Id.* at 564.
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Thus, prohibiting possession of such films prevents an individual from viewing what he pleases in the privacy of his home, the Court’s primary first amendment concern. The home VTR recording situation is clearly distinguishable in that prohibiting the copying of televised programs (and thus arguably the private possession of the resulting tapes) does not prevent an individual from viewing the programs that are broadcast in the privacy of the home. No regulation of private thought ensues, since the homeowner may watch what he pleases. The mere prohibition against making copies of a broadcast program thus does not violate an individual's right to privacy in the *Stanley* sense.

The Court also distinguished between statutory schemes that further the public interest by prohibiting the dissemination of obscene materials, from statutory schemes, such as in *Stanley*, that prohibit on their face the mere possession of obscene materials, albeit in furtherance of an otherwise valid anti-dissemination purpose.

The Court held that the latter could not be justified even as a “necessary incident . . . to ease the administration of otherwise valid criminal laws.” Statutes designed to control the distribution of materials against the public interest, however, have been upheld. The Act’s prohibition against reproducing copyrighted material, a statutory scheme deemed to be in the public interest, does not on its face prohibit the mere possession of copies of original works. Possession in the home of videotapes produced by recordings of television programs may be protected by the first amendment right to privacy; the making of those tapes, however, even in the home, is legitimately prohibited by the Act.

134. *Id.* at 565.
135. Indeed, the copyright prohibition, by encouraging the creation and disclosure of artistic works, in its broadest sense, furthers the first amendment right to receive information and ideas. See *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 882 (S.D. Fla. 1978). See also Note, *supra* note 6, at 119.
137. *Id.*
139. The statute involved in *Kaplan v. California*, 413 U.S. 115 (1973), broadly made “[e]very person who knowingly . . . prepares . . . any obscene matter . . . guilty of a misdemeanor” without qualification as to an intent to distribute. *Kaplan*, 413 U.S. at 116 n.2. In *Kaplan*, however, the creation of obscene material in the house was not at issue.

It may be argued that since the copying of copyrighted programs itself occurs in the home and since there is no intent to further distribute the tapes, *Stanley v. Georgia*’s right to privacy extends to protect such copying. Since the *Stanley* decision was rendered, however, numerous Supreme Court cases indicate an extreme reluctance to extend the holding beyond the precise factual setting in *Stanley*. See, e.g., *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 128 (1973); *Paris Adult Theater*, 413 U.S. 49 (1973) (viewing in
Although the right to privacy recognized in Stanley does not support a finding that the video recording of copyrighted programs for private viewing is a fair use, the Sony court determined that the video recording of broadcast programs is consistent with the first amendment policy of providing the fullest possible access to information through public airwaves.\(^{140}\) The Sony court based this finding upon Supreme Court cases which have balanced the competing interests of broadcasters and the viewing public.\(^{141}\) The Supreme Court has stated that the first amendment protects "the public[s'] . . . [right] to receive suitable access to social, political, esthetic, moral, and other ideas" over the television medium.\(^{142}\) This right is part of the public's "right to have the medium function consistently with the ends and purposes of the First Amendment [since] . . . [it] is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas."\(^{143}\) The Court, however, has also recognized the need imposed by the inherent scarcity of broadcast frequencies to apportion these frequencies among a finite number of licensees.\(^{144}\) Since not all persons who seek to communicate via broadcast media can be accommodated, access to the ideas which can be broadcast is necessarily limited.\(^{145}\) Nonetheless, the public interest in preserving the television medium as an "uninhibited marketplace of ideas" was held to be the paramount consideration over the right of individual licensees to broadcast what they choose in matters of public importance.\(^{146}\) The fairness doctrine, which requires broadcasters to provide an adequate and balanced coverage of issues of public importance,\(^{147}\) requires broadcast licensees to implement the public interest in

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\(^{140}\) See Universal City Studios v. Sony Corp. of America, 480 F. Supp. at 454. For discussion of the way the Supreme Court has delineated the first amendment right to access as applied to the broadcast medium, see notes 142-48 and accompanying text infra.


\(^{142}\) Id.


\(^{144}\) See Comment, supra note 123, at 1200-01.


the widest range of vital information.\footnote{148}

The public's right to receive suitable access to broadcast ideas is thus not a general right of access to the maximum possible amount of programming, as suggested in the \textit{Sony} opinion.\footnote{149} Rather, it is a right to be exposed to "opposing views" in order to counterbalance the limitations in the expression of ideas inherent in the allocation of a small number of broadcast frequencies to a large number of people with diverse ideas.\footnote{150} As the Supreme Court has stated, the right is "the right of the public to be informed, \textit{rather than} any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter."\footnote{151} (emphasis supplied).

Indeed, the purpose of the public's first amendment right to access to broadcast materials, to ensure that the public receives the fullest range of ideas over the broadcast medium, is enhanced if the Act prohibits copying of broadcast programs. The copyright protection ensures that artistic works are created and disclosed, which in turn leads to a greater variety of works available to be broadcast, which finally leads to full range of ideas being received by the public.\footnote{152} Further, the copyright scheme restrains only the copying of broadcast materials; it clearly does not inhibit the use of concepts or ideas underlying the broadcast programs.\footnote{153} Therefore, like the right to privacy, the first amendment right to suitable access to ideas broadcast over the television medium does not provide an overriding public interest that outweighs the copyright owners' interest in restricting the copying of broadcast programs.\footnote{154}

\section{IV. With a Little Help From Our (Legislative) Friends—Weighing The Fair Use Factors}

After an examination of the impact of VTR recording of broadcasts for home use on each of the fair use factors, the fair use doctrine requires a
balancing of its four factors to determine whether the VTR recording is a noninfringing use. The weighing involves first assessing the "harm" and "substantiality" factors to ascertain whether the recording will reduce the incentive of film-makers to create films, and then assessing the "nature" and "purpose" factors to determine if a greater public interest in unrestricted access exists to outweigh the copyright owners' interest in exclusivity.\textsuperscript{155}

As to the reduction in incentive to create films, the substantiality analysis shows that VTR users usually copy the entire work, a fact often indicative of substantial harm to the market for the work.\textsuperscript{156} The more detailed harm analysis, however, shows that home VTR use in actuality does not tend to harm the market for the broadcast films.\textsuperscript{157} Since the harm factor usually is considered the most important factor,\textsuperscript{158} and because it involves analyzing actual effects whereas the substantiality factor merely presupposes that an entire taking usually indicates a reduction in incentive, the conflict between the results of analyzing the two factors should be resolved in favor of the harm factor's result. Thus, on balance, the off-the-air videotaping of copyrighted films by individuals for home-use should not significantly reduce the incentive of film-makers to create films.

Regarding the greater public interest, the traditional fair use analysis indicates that videotaped programs are not of the scholarly, factual nature that courts traditionally have found indicative of a public interest in unrestricted access. Rather, the taped programs are of the entertainment variety which are rarely indicative of a fair use.\textsuperscript{159} Further, the voluntary broadcasting of films over public airwaves does not create an implied license to copy the films and thus alter the conclusion that the nature factor does not indicate fair use.\textsuperscript{160} An analysis of the purposes of the copyrighted films' use suggest that copying is not a fair use. The noncommercial use is not protected, absent an intent by the appropriator to disseminate his work,\textsuperscript{161} and the first amendment rights to privacy and access to ideas are not violated by enforcing a prohibition against copying television shows.\textsuperscript{162} Thus, neither the nature factor nor the purpose factor appear indicative of a fair use.

One additional fact raised in the \textit{Sony} opinion, involving legislative in-
tent to permit home-use recording of copyrighted programs, must be considered before reaching a conclusion as to the weight of the public's interest in the unrestricted videotaping of broadcast films for home-use. The House Report accompanying a 1971 statute establishing copyright protection for owners of sound recordings stated: "[I]t is not the intention of the Committee to restrain the home recording . . . of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it." The intent of Congress not to restrain home-sound for private, noncommercial use in the 1971 statute seems clear. Two arguments exist, however, opposing the proposition that Congress intended to except the video recording of films for home-use from copyright protection. First, the express language and legislative history of the Act, a total revision of the Copyright Act of 1909 in response to the massive technological changes which had occurred since 1909, provide no support for a continuation of the home-sound recording exception created in the 1971 amendment. Second, even if the sound recording exception is continued in the Act, its extension to the recording of television programs is inappropriate.

Support for the first argument rests on the absence of any reference to home use exceptions of any kind in either the statutory language or legislative history of the Act. Further, while the Act expressly limits certain

166. Professor Nimmer suggests that the absence of an explicit exception in the language of the 1971 statute, see Pub. L. No. 92-140, 85 Stat. 391 (1971), indicates that no home-use exception was intended. See 2 M. NIMMER, supra note 4, at § 8.05[C] n.20. However, courts have held that legislative intent as expressed in the statutory history can prevail over the absence of statutory language on a particular issue. See Comment, supra note 123, at 1207 n.139. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 700 n.28 (1979) (discussing floor debates which indicated a private right of action exists to enforce Title VI in the context of elementary and secondary education despite its absence in the statutory language).
167. See Comment, supra note 123, at 1216.
168. See id. at 1217.
169. See Student Note, supra note 77, at 247; 2 M. NIMMER, supra note 4, at § 8.05 [C]. Professor Nimmer suggests that affirmative support for the position that the 1971 home-use exception is not continued in the Act rests in the Act's legislative history, which states that the fair use doctrine "is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use." H.R. REP. NO. 1476, 94th Cong., 2d Sess., 66 (1976). This statement, however, is merely meant to explain the limits of § 107's explicit inclusion of "reproduction . . . in phonorecords" within the ambit of fair use analysis. It does not purport to limit congressional exemptions arising from other than the explicit language of § 107.
exclusive rights, the Act does not expressly limit a copyright owner’s exclusive right to copy phonorecords. The 1971 statute, however, was incorporated nearly verbatim into the Act. The close identity of the language in the two acts suggests that the legislative history of the 1971 statute pertains equally to the Act. Thus, any exception to copyright protection granted to home tapers of sound recordings in the 1971 statute would seem to be incorporated unchanged into the Act.

Strong support exists for the second proposition that the extension of such an exception to recording of television programs is inappropriate. The strongest authority lies in the language of the Act expressly including television programs in the statutory definition of “audiovisual works.”

170. The exclusive right to publicly perform a work, for example, is limited to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.” 17 U.S.C. § 106(4) (1976). The right to publicly display a work is similarly limited to “literary, musical, dramatic, and choreographic works, pantomimes, and sculptural works.” 17 U.S.C. § 106(5) (1976).

171. 17 U.S.C. § 106(1) (1976). The argument is that if Congress had intended to allow home use copying, it would have expressly qualified the right to copy as it had other rights. See Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 443. The basis of this argument is the canon of statutory construction that the express presence of limitations in one statutory section usually negatively implies the absence of limitations in other similar provisions containing no limitations. See Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11, 19, 20 (1979). However, this interpretation can yield to persuasive evidence of a contrary legislative intent. Id.

The legislative history is silent as to why limitations are placed on some exclusive rights but not others. See H.R. REP. No. 1476, 94th Cong., 2d Sess. 61-65 (1976). The limitations refer, however, only to the nature or type of the copyrighted work, see note 170 supra; the limitations shed no light at all on congressional intent regarding the purpose for which a work is being appropriated. For a discussion of affirmative evidence of a legislative intent concerning the continuation of the home-sound recording exception, see notes 173-76 and accompanying text infra.


173. See Comment, supra note 123, at 1217. In Cannon v. University of Chicago, 441 U.S. 667 (1979), the Court reasoned that where a statute was enacted after an earlier statute and patterned after the earlier statute (except for a substitution of words defining the group to be affected by the statute, the two statutes used identical language), Congress would have been aware of the way the prior statute was interpreted and would have intended the later statute to be interpreted the same way. 441 U.S. at 694-703. In that case, the Court held that the private right of action implied in Title VI was also to be implied in Title IX, even though both statutes were not only silent on their faces regarding the implication, but also had legislative histories silent on the matter. In our situation, the later statute is not only patterned on the prior statute but in fact incorporates bodily the language of the earlier statute. Further, the prior statute in this case has a legislative history which is not silent but expressly provides the implied right in the statute. The Cannon holding thus applies with at least equal vigor to the situation of attempting to find a continuation in the Act of the implied right to record sound recordings in the home.

174. But see 3 M. NIMMER, supra note 4, at § 13.05[F][5] n.159.
Audiovisual works are separate definitional entities from "sound recordings" or "phonorecords" in the Act. The implication is that making video tapes of broadcast programs differs from making audio tapes of sound recordings under the statute, and therefore that the former is not subject to the copyright exception reserved for the latter. The two separate definitions, however, probably reflect nothing more than the fact that in the Act Congress addressed the problems of the new technology that had arisen since passage of the Copyright Act of 1909. Separate sections of the Act deal with separate problems as they had arisen, and thus separate definitions were needed. The definitional section was not intended to imply substantive differences between audiovisual works and sound recordings.

The acts of making recordings of sounds and making recordings of images seem indistinguishable for infringement purposes. Testimony at legislative hearings and floor debates pertaining to the 1971 statute recognize the similarity between copying sounds and copying television programs by indicating specifically that VTR recording was subject to the same private, noncommercial use exception as sound recording. Since

175. See 17 U.S.C. § 101 (1976). See also Comment, supra note 123, at 1217. One commentator has argued that the express limited exemption in the Act for copying daily newscasts of television networks by libraries or archives, see 17 U.S.C. § 108(f)(3) (1976), by negative implication precludes an exception for general video taping. See Student Note, supra note 77, at 247. While the Act was being considered, however, home VTRs were not widely available; only public institutions had access to the VTR technology. See id. at 246 n.100 (Sony first offered home VTR for sale in the U.S. in late 1975). Thus, the absence of an express provision in the Act dealing with home VTR recording merely indicates that such recording was not an issue before Congress at the time of passage of the Act, not that Congress consciously chose not to address it.


177. The House Report accompanying the Act states that the only reasons for providing separate definitions for various categories of works were to clarify the unsettled meanings of the terms and to distinguish between a copyrightable work and the material object embodying the work. Id. at 54.

The Act itself accords identical treatment in at least one instance to phonorecords and certain audiovisual works, see 17 U.S.C. § 108(b), (c), (h) (1976), undercutting the proposition that such works are intended to be treated separately for all purposes.

178. See Comment, supra note 123, at 1218.

179. Ms. Barbara Ringer, then Assistant Registrar of Copyrights, indicated in a committee hearing on the 1971 statute that recording of television programs on VTRs was a problem that Congress would face in the future, but that the problem was primarily with private copying for later public distribution, not copying for private viewing. She stated that enforcement of copyrights on broadcast programs could not reasonably be extended into the home, and that the problem was something that could not practically be controlled. See Prohibiting Piracy of Sound Recordings: Hearings on S.646 Before the Subcomm. No. 3 of the House Judiciary Comm., 92d Cong., 1st Sess. 22-23 (1971). Further, Representative Kas-tenmeier, chairman of the House Judiciary Subcommittee responsible for the Act, implied in
at the time of passage of both the 1971 statute and the Act, VTR technology was not at a stage where its use in the home required an explicit congressional response. These sources are especially relevant in determining congressional intent. Thus it appears that Congress intended the private use exception to apply broadly to noncommercial, private recording of television programs as well as sound recordings.

In effect Congress has indicated that a strong public interest exists in allowing private videotaping of broadcast films, which outweighs the copyright owners' interest in prohibiting the private use. Since manifestations of congressional intent are entitled to great weight in situations involving complex technology, the requisite public interest exists, despite indications to the contrary by the nature and purpose factor analysis. Both the major fair use considerations—the lack of any significant reduction in the incentive for filmmakers to create and the public interest in unrestricted access to broadcast films for private use—support a conclusion that the VTR recording of broadcast programs for private viewing is a noninfringing fair use.

floor debates on the 1971 statute that recording for personal pleasure of a program coming into the home on television airwaves was not to be prohibited by the copyright provisions. 117 Cong. Rec. 34,748 (1971).

See note 175 supra.


See Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1363 (Ct. Cl. 1973), aff'd mem. 420 U.S. 376 (1975) (citing "the need for Congressional treatment of the problems of photocopying"); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 401 (1968) (in deciding whether cable television operators infringed the copyright's exclusive right to perform, the ultimate accommodation between the many competing interests is a "job . . . for Congress"); Parker v. Flook, 437 U.S. 584, 595-96 (1978) (in deciding whether a mathematical formula for computer programs should be patentable, "difficult questions of policy concerning [technological issues] can be answered by Congress on the basis of current empirical data not equally available to the tribunal. . . . [w]e would require a clear and certain signal from Congress before approving the position of a litigant who [sought to widen the scope of the patent laws by widening the range of patentable objects]"). Although the courts in these cases were calling for specific legislation to provide an "ultimate resolution of the many sensitive and important problems" in the technological fields, Teleprompter Corp. v. CBS, Inc., 415 U.S. 394, 414 (1974), indication of legislative preference short of actual legislation may still provide the basis to bring about a more principled decision.

See notes 44-46 and accompanying text supra.

Since both prongs are present, there is no need to decide the difficult question of whether both prongs must be present before fair use can be found. In his article Exemptions and Fair Use in Copyright: The "Exclusive Rights" Tension in the New Copyright Act, supra note 4, Professor Seltzer argues a dichotomy arising from the normal expectations of the
V. CONCLUSION

The booming and expanding home VTR industry has generated the possibility of widespread copyright infringement by private individuals who record programs, originally telecast over public airwaves, for their own private viewing. Under a constitutionally sound fair use analysis, such an infringement would occur only if the homeowners' video recording reduced the incentive of film producers to produce films for the television market, and the public had no special interest in copying programs for private use which outweighed the copyright owners' interest in prohibiting the copying. Far from reducing the incentive to create, VTR recording for subsequent private playbacks holds the potential to increase film producers revenues, since the playback audience represents an additional element to television ratings together with the audience for live broadcasts. Although a fair use examination of the peculiar features of VTR recording of publicly broadcast shows for private viewing reveals no special public interest permitting such copying, Congress has manifested an intent to allow such private recording free from copyright restrictions, carving out a special public interest. Since private video recording does not damage the constitutional basis of the Act, it is a noninfringing fair use under the Copyright Act of 1976.

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