COPYRIGHT: GONE WITH THE BETAMAX?

I
INTRODUCTION

The theory that economic incentives provide the most efficient means of encouraging production of works of art and science for the public benefit underlies the constitutional grant to authors and inventors of monopolistic rights in their creations.[1] Ideally, the constitutional ends and means should work in harmony.[2] In reality, however, the copyright statute[3] is the result of an intricate process of balancing two competing interests: the author's financial interest[4] is weighted against the policy of disseminating copyrighted works for public enlightenment.[5] Public access to and use of works protected by copyright is not merely permitted but encouraged to the extent that it does not impair the author's motivation to create new works.[6] Yet the interests of authors and the public are so compelling and so interwoven that it is often difficult to maintain a balance. The case of *Universal City Studios, Inc. v. SONY Corporation of*

1. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.' " Mazer v. Stein, 347 U.S. 201, 219 (1954).

2. The end, promoting progress, and means, rewarding authors, usually are not inconsistent, and courts are flexible in balancing them when they do conflict. Continental Casualty Co. v. Beardsley, 151 F. Supp. 28, 31-32 (S.D.N.Y. 1957). *See* Needham, *Tape Recording, Photocopying and Fair Use*, 10 ASCAP COPYRIGHT L. SYMP. 75, 79 (1958).

3. The new copyright law, 17 U.S.C. app. §§ 101-810 (1976) (amending 17 U.S.C. §§ 1-216 (1976)), became effective on January 1, 1978. It is the first major revision of the old law, the Copyright Act of 1909, 17 U.S.C. §§ 1-216 (1976) (as amended 1976).

4. The financial interests of authors include the financial interests of publishers and other assignees of copyright who make works available to the public.

5. The public policy favoring the dissemination of copyrighted works is expressed throughout copyright law. For instance, the owners of copyright in certain unpublished works in which copyright would have expired on December 31, 2002, are granted up to an additional twenty-five years of copyright protection if they publish the works on or before that date. 17 U.S.C. app. § 303, at 985 (1976). This provision is an attempt to encourage publication. H.R. REP. No. 1476, 94th Cong., 2d Sess. 139, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5755 [hereinafter cited as *House Report*]. The "first sale doctrine," present under both the old and new laws, also encourages the dissemination of copyrighted works. While the copyright owner has the exclusive right to make the first sale of any copy of a work, that copy is freely alienable thereafter. 17 U.S.C. app. § 106(3), at 968 (1976); *id.* § 109(a), at 970. *See generally* Fawcett Publications, Inc. v. Elliot Publishing Co., 46 F. Supp. 717 (S.D.N.Y. 1942).

6. *See* B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 57 (1967).

America[7] (*Betamax Case*) confronts this classic dilemma of copyright policy.

The Betamax is a color videotape recorder that attaches to a television set and enables the user to record programs broadcast on television. The user can play them back at any time on a television screen. Programs can be taped while the user is viewing either the broadcast being taped or a different broadcast on another channel, or while the user is absent. The tapes may either be retained for future viewing, or erased and re-used. When the litigation concerning Betamax was initiated, only tapes with a one-hour capacity were available.[8] Tapes for the Betamax of up to three hours are now on the market. A pause control makes it possible to delete commercials, although the viewer must be present to operate it.[9]

The issues at stake in the *Betamax Case* illustrate the inherent tension between the rights of copyright owners and the public. Plaintiffs Universal City Studios and Walt Disney Productions, proprietors of copyright in motion pictures[10] broadcast on television, contend that home videotaping infringes their exclusive right to reproduce copyrighted works.[11] They feel that the technological ease of making unauthorized copies on Betamax should not be permitted to undermine this right. Defendants,[12] who manufacture,and promote the sale of Betamax, argue that enforcement of plaintiffs' right would deprive the public of the greatly enhanced "use and enjoyment of television" which

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7. No. 76-3520F (C.D. Cal., filed Sept. 15, 1977). The case arose under the old copyright law. All causes of action that arose before January 1, 1978 are governed by Title 17 as it existed when the cause of action arose. 17 U.S.C. app. § 501 note, at 992 (1976) (Causes of Action Arising Under Predecessor Provisions). Provisions of the new law may be applied to cases arising under the old law, however, if the two laws are not contradictory. *See* Rohauer v. Killiam Shows, Inc., 551 F.2d 484, 494 (2d Cir.), *cert. denied*, 431 U.S. 949 (1977); Goodis v. United Artists Television, Inc., 425 F.2d 397, 403 (2d Cir. 1970). The new law will apply directly to this case if plaintiffs amend their complaint to assert causes of action arising after January 1, 1978.

8. *See* Penchansky, *Video Outlook Bright*, BILLBOARD, Feb. 4, 1978, at 72, col. 4 [hereinafter cited as *Video Outlook*]. Numerous companies in addition to SONY are now marketing videotape recorders, some of whose videotapes now have a four-hour capacity. *See EIA/CEG for SONY in Court*, BILLBOARD, Oct. 22, 1977, at 17, col. 5 [hereinafter cited as *SONY in Court*]. Although the *Betamax Case* involves only SONY's product, the issues it raises apply to all videotape recorders and devices with similar capabilities.

9. The pause control is significant because it can be used to deprive advertisers of the benefit of commercial re-runs. Pre-Trial Memorandum for Plaintiffs at 105, Universal City Studios, Inc. v. SONY Corp. of America, No. 76-3520F (C.D. Cal., filed Sept. 15, 1977). The pause control also raises the potential problem of mutilation or distortion of the work. On the subject of distortion, *see generally* Project, *New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A. L. REV. 931, 1017-20 (1968).

10. "Motion pictures" are defined as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." 17 U.S.C. app. § 101, at 966 (1976). Under this definition, most works which are broadcast on television may be considered motion pictures.

11. 17 U.S.C. app. § 106(1), at 968 (1976) provides that, subject to the exemptions in §§ 107 to 118 of the new law, the owner of copyright has the exclusive right to reproduce the copyrighted work, and to authorize its reproduction by others. *Id.* §§ 107-118, at 968-81.

12. The commercial defendants are the SONY Corporation of America (SONAM) and the SONY Corporation (the parent organization in Tokyo), their advertising agency, and SONY retailers who make tapes for purposes of demonstrating Betamax to the public. This Note will deal only with home videotaping and the liability of the manufacturers and promoters of Betamax.

Betamax makes possible.[13] Defendants contend that home videotaping of copyrighted broadcast works is justified by the fair use doctrine.[14]

The issues raised in the *Betamax Case* actually have existed since the advent of technology permitting home audiotaping of sound recordings.[15] Recently, the public has begun to regard home videotaping of television broadcasts as a common practice, in much the same way that home audiotaping of radio broadcasts and recordings of musical works has become commonly accepted.[16] Public acceptance apparently has resulted from the convenience afforded by current technology of making taped reproductions, and is compounded by the lack of public awareness that copyright is a form of property.

The *Betamax Case* provides an appropriate forum for resolving these issues because it involves two current, significant developments in the field of copyright: the newly revised copyright statute,[17] and the videotape recorder (Betamax), a device that has the potential to facilitate unprecedented use of copyrighted audiovisual works. This Note will discuss the legality of home videotaping, the liability of manufacturers of videotape recorders for violations resulting from their use, and the importance of developing a legislative solution to the problem of home videotaping.

II
HOME VIDEOTAPING: POTENTIAL COPYRIGHT INFRINGEMENT AND MANUFACTURER LIABILITY

The outcome of the *Betamax Case* depends on the resolution of two critical issues: first, whether unauthorized home videotaping of copyrighted broadcast works[18] constitutes infringement; and second, if it does, whether the man-

13. Pre-Trial Memorandum for Defendants at 6-7, Universal City Studios, Inc. v. SONY Corp. of America, No. 76-3520F (C.D. Cal., filed Sept. 15, 1977).

14. "Fair use" has been defined as "the privilege in others than the owner of the copyright, to use the copyrighted material in a reasonable manner without his consent." H. BALL, THE LAW OF COPYRIGHTED AND LITERARY PROPERTY 260 (1944). *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam). Pre-Trial Memorandum for Defendants, *supra* note 13, at 48-60. Judicially developed under the old law, the fair use doctrine has been codified under the new law. 17 U.S.C. app. § 107, at 968 (1976). *See* text accompanying notes 54-93 *infra*.

15. This Note will use the term "audiotaping" to refer to the reproduction of sound recordings and other performances of musical works. "Sound recordings" are "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords" in which the sounds are embodied. 17 U.S.C. app. § 101, at 967 (1976). For the problem of home audiotaping, see Needham, *supra* note 2.

16. *Hearings on S. 646 and H.R. 6927 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 92d Cong., 1st Sess. 22-23 (1971) (comment of Edward G. Biester) [hereinafter cited as *Hearings Before Subcomm. No. 3*]. During these hearings, the public view of the "innocence" of home audiotaping was personified by a description of a small boy who retrieved hit songs onto his little cassette tape recorder. *See id.*

17. 17 U.S.C. app. § 101-810 (1976) (amending 17 U.S.C. §§ 1-216 (1976)).

18. "Copyrighted works" is used to denote works that are currently protected by copyright.

ufacturer, distributors, and promoters of the means of infringement may be held liable.[19]

A. *Infringement*

1. *Home Videotaping under the Copyright Act of 1976*

It is unclear whether the terms of the copyright statute prohibit home videotaping. At first glance, home videotaping appears to be prohibited, because the statute grants the right to "copy" or "reproduce" the work exclusively to the copyright owner.[20] While the Supreme Court has suggested that non-commercial copying by others may be an exception,[21] the statutory grant itself makes no distinction between copying for commercial and non-commercial purposes.[22]

The House Report on Piracy,[23] which comprises part of the legislative history of the 1976 Copyright Act, however, provides some support for the position that home audiotaping[24] is exempt from the prohibition against copying:

> [I]t is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today . . . .[25]

Part of the rationale for permitting home audiotaping was the difficulty of enforcing a prohibition against it. At the congressional hearings that preceded the Sound Recording Amendment of 1971,[26] Barbara Ringer, presently the Register of Copyrights for the U.S. Copyright Office, discussed the widespread and presumably uncontrollable nature of home audiotaping.[27] Professor Melville Nimmer, on the other hand, has attacked this argument, observing that the difficulty of policing home audiotaping "hardly constitute[s] a principled ground for conferring a governmental imprimatur of approval upon a practice which is

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19. *See* text accompanying notes 94-135 *infra*.

20. *See* note 11 *supra*. Absent statutory exemption, any unauthorized reproduction of a copyrighted work constitutes copyright infringement. 17 U.S.C. app. § 106(1), at 968 (1976). Thus, home videotaping could be construed as a statutory violation, subject only to the fair use defense.

21. Goldstein v. California, 412 U.S. 546, 555 (1973). While the commercial element is one facet of the fair use doctrine, non-commercial use is not enough in itself to establish fair use. *House Report*, *supra* note 5, at 66.

22. 17 U.S.C. app. § 106(1), at 968 (1976).

23. H.R. REP. No. 487, 92d Cong., 1st Sess. 7, *reprinted in* 1971 U.S. Code Cong. & Ad. News 1566 [hereinafter cited as the *House Report on Piracy*].

24. Although the legislative history refers to home audiotaping, it seems to apply to home videotaping since the two activities are parallel in some respects. For a discussion of the differences, *see* text accompanying notes 32-53 *infra*.

25. *House Report on Piracy*, *supra* note 23, at 1572.

26. The Sound Recording Amendment of 1971 granted copyright protection to sound recordings. Pub. L. No. 92-140, §§ 1-3, 85 Stat. 391 (1971) (codified at 17 U.S.C. § 1(f) (1976) (amended 1976) (effective Feb. 15, 1972).

27. *Hearings Before Subcomm. No. 3*, *supra* note 16.

potentially capable of substantially undercutting the value of the sound recording copyright."[28] More recently, Nimmer contended that the new law does not grant an exemption for any home recording; therefore, any exemption for home recording that might have been implied under the House Report on Piracy[29] or the Sound Recording Amendment of 1971[30] does not continue under the new law.[31]

Yet, even if home audiotaping were exempt, it does not necessarily follow that home videotaping would be permissible. The argument against home videotaping appears stronger than the argument against home audiotaping for various reasons. First, motion pictures and other audiovisual works,[32] the subjects of home videotaping, are distinguishable from sound recordings, the usual subjects of home audiotaping, because audiovisual works and sound recordings are treated differently in the copyright statute itself. The copyright in a sound recording, distinct from the copyright in any musical composition or other underlying work embodied in the sound recording,[33] was not effectively recognized until 1972.[34] The copyright in motion pictures, however, was recognized in 1912.[35] The delay in granting protection to the owners of sound recording copyrights may provide a partial explanation for Congress' reluctance expressly to prohibit home audiotaping:[36] By the time sound recordings were granted federal copyright protection, home recordings had become a common public practice which would have been politically awkward to forbid.[37] In other instances, the law has given greater protection to motion pictures and dramatic works than to sound recordings and musical compositions. Under the 1909 Act, any unauthorized public performance of a drama was infringing,[38] but the unauthorized public performance of a musical composition constituted copyright infringement only if it were also performed for profit.[39] The law thus evinces the belief that the mere performance of a dramatic work, whether or not for profit, can injure the copyright owner. Section 110 of the 1976 Act, which exempts

28. 1 M. NIMMER, THE LAW ON COPYRIGHT § 109.212 (1976).

29. This implication could arise from the language of the *House Report on Piracy*, *supra* note 23. *See* text accompanying note 25 *supra*.

30. Pub. L. No. 92-140, §§ 1-3, 85 Stat. 391 (1971) (codified at 17 U.S.C. § 1(f) (1976) (amended 1976).

31. 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.05[C] (1978).

32. *See* 17 U.S.C. app. § 101, at 965, 966 (1976). "Motion pictures" are "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." "Audiovisual works" are defined as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors . . . together with accompanying sounds, if any."

33. *See* note 15 *supra* (definition of "sound recording").

34. *See* note 26 *supra* (Sound Recording Amendment).

35. *See* Townsend Amendment, ch. 356, § 5, 37 Stat. 488 (1912).

36. The experience with home audiotaping seems to indicate that home videotaping must be controlled in its early stages if at all, because Congress might be unwilling to curtail the practice once it becomes popular.

37. *See Hearings Before Subcomm. No. 3*, *supra* note 16, at 22.

38. 17 U.S.C. § 1(d) (1976) (as amended 1976).

39. *Id.* § 1(e). The distinction based on performance for profit is preserved in the 1976 Act.

certain non-profit performances, also demonstrates this belief. It allows many more exemptions for nondramatic literary or musical works than for dramatic works.[40] Motion pictures are given special protection, for example, in subsection 110(1). This provision outlines the exemption for any performance or display that is part of the classroom teaching activities of a nonprofit educational institution.[41] The performance of a motion picture or other audiovisual work is infringing if "given by means of a copy that was not lawfully made . . . and that the person responsible for the performance knew or had reason to believe was not lawfully made."[42] Sound recordings receive no comparable protection.[43] By providing greater protection for motion pictures and dramatic works than for musical works and sound recordings, the copyright statute suggests that the economic value of a dramatic work is more easily impaired through unauthorized use than is the value of a musical work.

The lower degree of concern for protecting musical works and their embodiment in sound recordings is evident in other provisions of the new law that require the owner of copyright in musical works to waive some exclusive rights. Such provisions permit the unauthorized reproduction of sound recordings in educational broadcasts,[44] the compulsory licensing of musical works,[45] and the conscious imitation of sound recordings.[46]

The second reason why the argument against home videotaping is stronger than the argument against home audiotaping lies in the potential economic injury caused by each. Significantly, the House Report on Piracy, while not expressly stating that home audiotaping does not infringe copyright, implied that it is so harmless as to fall under the doctrine of *de minimis non curat lex*.[47] While the record industry claims that it suffers great damage through home taping, the extent of injury has not been sufficient to prevent the industry from flourishing.[48]

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40. 17 U.S.C. app. § 110(1), at 970 (1976).

41. *Id.*

42. *Id.*

43. *House Report*, *supra* note 5, at 82-83. Neither section 114 of the new law, 17 U.S.C. app. § 114, at 976-77, which deals with the scope of the copyright owner's rights in sound recordings, nor section 110, *id.* § 110, at 970-71, contains any provision similar to the section 110(1) exception protecting unauthorized copies of motion pictures or other audiovisual works. This suggests that the copyright law is more concerned with preventing unauthorized reproductions of motion pictures than of sound recordings.

44. Sound recordings included in educational television and radio programs may be used, reproduced, and distributed, provided they are not distributed commercially. 17 U.S.C. app. § 114(b), at 970 (1976). *See* 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.05[B].

45. 17 U.S.C. app. § 115, at 977-78 (1976). Once a song has been recorded and released in the United States, anyone who wishes to make another recording of it must be granted a license to do so.

46. *Id.* § 114(b), at 977. Anyone may simulate any sound recording independently without violating the rights of the owner of copyright in the sound recording. A license would still have to be obtained, however, to reproduce the underlying copyrighted music.

47. *House Report on Piracy*, *supra* note 23.

48. Statement of Harvey Schein, former President of SONY Corporation of America, that "the [record] industry was never hurt. It's grown by leaps and bounds." Fong-Torres, *Freedom of Video: The Battle Begins at Home*, Rolling Stone, Sept. 8, 1977, at 61, col. 1 [hereinafter cited as *Freedom of Video*]. The record industry contends, however, that home audiotaping may diminish

The amount of damage attributable to home videotaping has not been ascertained; but certain types of damage that do not occur through home audiotaping probably will occur through home videotaping. For example, while it is rare for entire record albums to be broadcast on radio, entire motion pictures are broadcast regularly on television. A radio listener who tapes a single song off-the-air may still wish, and may even be enticed, to purchase the entire record album. In contrast, it seems unlikely that a television viewer would tape an entire movie and later purchase a pre-recorded tape of the same movie, especially because such tapes are relatively expensive.

The advent of home videotaping may also damage the emerging market for pre-recorded videotapes and videodisks[49] of movies and other audiovisual works. The argument that home videotaping damages the television programming and movie markets[50] would extend to the market for pre-recorded tapes and disks. Another effect of unauthorized home videotaping might be lost box office receipts and royalties if old movies were taped from television broadcasts. The syndication and re-run value of television shows also may suffer if the original showings are taped. Syndication of network series is a major source of income for television producers. If a substantial number of viewers tape television programs off-the-air, the producer's ability to recoup the investment may be impaired.[51] It is possible that copyright owners might withhold works from television broadcast if there would be more profit in showing them in movie theaters or marketing them in pre-recorded form. Much of the public, then, would be deprived of viewing the work. Ironically, permitting home videotaping in the name of public accessibility might work to frustrate policy.

Damage to copyright owners might be minimal if each "home taper" acted in isolation. As home videotape recorders proliferate,[52] however, the cumulative effect of mass copying may be much greater. This aggregate effect theory is a strong argument for prohibiting unauthorized reproduction of any copyrighted work. The theory has been recognized in other contexts, such as limiting the numbers of copies of a work that may be made for classroom use because of potential damage to textbook publishers.[53]

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potential earnings of record companies around the world by as much as one billion dollars annually. Farrell, *Home Taping Top Priority as IFPI Blueprints Action*, BILLBOARD, Oct. 8, 1977, at 1, col. 2.

49. *See Video Outlook*, *supra* note 8, at 68, col. 4; Traiman, *Matsushita, RCA Vidisks, Players 'Near Compatible,'* BILLBOARD, Dec. 10, 1977, at 1, col. 2.

50. Hall, *Home Copying Alarm—Copyright Owners Seek D.C. Help*, BILLBOARD, Oct. 1, 1977, at 1, col. 5 [hereinafter cited as *Home Copying Alarm*]. A market for pirated videotapes already exists. *See Freedom of Video*, *supra* note 48; *Pirate Videocassettes of Films New Home Fare*, BILLBOARD, Sept. 17, 1977, at 1, col. 4. SONY points out, however, that copyright owners might benefit from increased interest in home videotapes through an increased television audience and a new market for professional quality prerecorded tapes. Pre-Trial Memorandum for Defendants, *supra* note 13, at 59-60.

51. *Freedom of Video*, *supra* note 48, at 60, col. 4. *See* Writers Guild of America, West, Inc. v. F.C.C., 423 F. Supp. 1064, 1127-28 (C.D. Cal. 1976).

52. Videotape recorders are proliferating as more companies manufacture them and as prices decline. *See Freedom of Video*, *supra* note 48, at 60, col. 5; *SONY in Court*, *supra* note 8, at 17, col. 5.

53. *House Report*, *supra* note 5, at 69.

2. The Fair Use Defense

Damage to the copyright owner is one major element in determining whether the fair use defense applies to an unauthorized use of a work. Fair use, which developed as a judicial doctrine[54] and has been codified in the 1976 Act,[55] represents a compromise between the policies of promoting progress and of protecting authors and copyright owners. It provides that certain limited uses of copyrighted works, while not specifically authorized by the copyright owner, are nonetheless permissible. The doctrine may provide a defense[56] to claims alleging copyright infringement, depending on the equities of the particular case.[57] The factors to be weighed in each case include, but are not limited to, the following:

(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.[58]

Williams & Wilkins Co. v. United States[59] illustrates the balancing process used by courts in cases involving fair use. In that case, the National Institute of Health and the National Library of Medicine, divisions of the Department of Health, Education and Welfare, were sued by the publishers of several medical journals. The libraries had been photocopying and distributing entire articles from these journals, free of charge, to researchers who requested them.[60] Here, the subject of the alleged fair use was a scientific work that was difficult to obtain because of its esoteric nature. The libraries could not be expected to order numerous original copies of such esoteric publications. The purpose of the use was not only noncommercial but was intended for public benefit. The amount and substantiality of the portion of the work which was copied was also a factor in determining fair use. Although entire articles were copied in this case, the court noted instances in which the copying of entire works was permitted.[61]

54. *Id.* at 65.
55. 17 U.S.C. app. § 107, at 968 (1976).
56. *House Report*, *supra* note 5, at 65.
57. S. REP. No. 473, 94th Cong., 2d Sess. 62-63 (1976); *House Report*, *supra* note 5, at 63. The courts must be free to adopt the fair use doctrine on a case by case basis.
58. 17 U.S.C. app. § 107, at 968 (1976). Regarding the fourth factor, Nimmer has stated that "[a] defense of fair use may be justified only when general dissemination of an allegedly infringing work by all potential defendants, without limitation as to the number of reproductions and users, would still not adversely affect the plaintiff's potential market." Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland*, 22 U.C.L.A. L. REV. 1052, 1054 (1975). Although Nimmer refers to general dissemination of allegedly infringing works, the situation he poses is analogous to unlimited home reproductions of copyrighted works.
59. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam).
60. *Id.* at 1348.
61. *Id.* at 1350, 1353 (handwritten or typed copies of articles for personal use). The quantity of the material copied, however, is still an important element in determining fair use. *See* Zacchini v.

As for the element of damage to the copyright owner, the court observed that although the publishers may have been losing journal subscriptions and reprint sales, their business as a whole was thriving.[62] The court also noted that the authors of the articles often expected no monetary compensation for their contributions to the journals. After examining these factors, the court concluded that library photocopying of technical journals in limited numbers may be fair use.[63]

One of the critical factors in *Williams & Wilkins* seems to have been the scientific nature of the work and the intended use.[64] Loss to the publishers was small when compared to the public's gain. In the *Betamax Case*, SONY argues, similarly, that benefit to the public through home videotaping far exceeds any possible injury to authors or copyright owners.[65] It is unlikely, however, that television programs copied by home tapers are used for the public benefit to the extent that the medical research was in *Williams & Wilkins*.[66] In determining fair use, a lower premium may be placed on uses that are merely recreational, as are most uses of the Betamax.[67] One statutory example of this reasoning appears in the provisions governing performance of motion pictures or other audiovisual works in the course of the face-to-face teaching activities of nonprofit educational institutions.[68] Although a classroom performance is initially exempt from infringement, it loses its exemption, regardless of its intellectual or cultural value, if it is given for the purpose of recreation or entertainment of any part of its audience.[69]

In response, SONY raises the interesting point that Betamax, by enabling the repeated viewing of television broadcasts, increases the viewer's depth of understanding of the taped show. The Betamax also would increase the size of the original television audience, thereby aiding in the dissemination of information.[70] SONY compares taping for re-viewing purposes to passing a magazine around.[71] This analogy fails, though, because the first sale doctrine would per-

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Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977).

62. 487 F.2d at 1357.

63. *Id.* at 1362.

64. The nature of the use may determine whether it is fair use. Needham, *supra* note 2, at 86-89 (scientific works may often be copied in their entirety under the fair use doctrine because of the public policy favoring dissemination of information).

65. One of SONY's arguments is that use of the airwaves involves rights of the public that are more important than the rights of owners of copyright in broadcast works. Pre-Trial Memorandum for Defendants, *supra* note 13, at 27-31.

66. Fair use, however, does not have to be for a socially commendable purpose. Personal uses of various sorts have been viewed benignly in the past, as either fair use or *de minimis* infringement. The court noted with approval the "thousands of copies of poems, songs, or such items which have long been made by individuals, and sometimes given to lovers and others." 487 F.2d at 1353.

67. *House Report*, *supra* note 5, at 81.

68. *Id.*

69. *Id.*

70. *See* note 5 *supra*; Needham, *supra* note 2, at 86-89 (public policy favoring dissemination of information).

71. Pre-Trial Memorandum for Defendants, *supra* note 13, at 31.

mit the owner of a magazine to dispose of it as desired,[72] while the owner of copyright in the magazine retains the exclusive right to reproduce the copyrighted work embodied in the magazine. The same theory applies to motion pictures and other audiovisual works: the owner of a lawful copy of a motion picture may sell it, but is not permitted to reproduce it or to perform it publicly.

SONY also stresses the idea that Betamax permits the viewing public to avail itself of the "full benefits" of television, by viewing programs that ordinarily would be lost to it due to conflicts between television program schedules and viewers' personal schedules.[73] The thrust of SONY's advertising campaign has been that Betamax can overcome these conflicts.[74] These uses of Betamax have led SONY to rely on the concept of "time-shifting,"[75] based on the same policy of increasing accessibility to broadcasts that provided the basis for the decisions in cases involving cable television.[76] A leading case, *Fortnightly Corp. v. United Artists Television, Inc.*,[77] involved cable television retransmission, not reproduction, of copyrighted broadcast works to a region in which television reception was blocked by mountains.[78] The Supreme Court held that cable television retransmission did not constitute infringement under the old copyright law.[79] While the public policy to facilitate television reception was stressed in the opinion, the decision was based on the narrow ground that retransmission by cable systems was not a "performance" and therefore did not violate the copyright owner's exclusive right to perform a work publicly.[80] Although both *Fortnightly* and the *Betamax Case* involve the public policy to disseminate broadcast works, the *Betamax Case* may be distinguished because of the narrow basis of the *Fortnightly* decision.

It is significant that no physical copies[81] of the works were made in *Fortnightly*. In contrast, in *Walt Disney Productions v. Alaska Television Network, Inc.*,[82] the defendant cable television system intercepted, amplified, and

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72. 17 U.S.C. app. § 109(a), at 970 (1976). *See* note 5 *supra* (discussion of first sale doctrine).

73. Pre-Trial Memorandum for Defendants, *supra* note 13, at 3.

74. SONY stresses that people who work at night, such as taxi drivers and nurses, may use Betamax to tape their favorite shows while they are working. *See* Pre-Trial Memorandum for Defendants, *supra* note 13, at 31.

75. "Time-shifting" is used to denote the videotaping of a work broadcast on television so that it may be viewed at a different time. Pre-Trial Memorandum for Defendants, *supra* note 13, at 3, 31 (time-shifting).

76. Teleprompter Corp. v. Columbia Sys., Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). *See generally* United States v. Southwestern Cable Co., 392 U.S. 157, 161-64 (1968).

77. 392 U.S. 390 (1968).

78. *Id.* at 391.

79. *Id.* at 398.

80. The opinion in *Fortnightly* states, "Broadcasters perform. Viewers do not perform." *Id.* The new law makes it explicit, however, that viewers do perform, but their performance is usually exempt. *House Report*, *supra* note 5, at 63.

81. A "copy" must be fixed in tangible form. 17 U.S.C. app. § 101, at 966 (1976). Under the old law, however, a transient projection on a screen could be considered a copy. Patterson v. Century Productions, Inc., 93 F.2d 489 (2d Cir. 1937).

82. 310 F. Supp. 1073 (W.D. Wash. 1969).

videotaped the electromagnetic signals broadcast by television stations showing plaintiff's copyrighted works, and then broadcast the videotaped copies. The court held that the videotaped reproduction was infringing.[83] The *Alaska Television* case involved a form of time-shifting as well as the "distance-shifting" that occurred in *Fortnightly*. Yet the court still was unwilling to extend the principle of *Fortnightly* to a situation in which actual copies of the work were made.

Time-shifting of television broadcasts via videotape might be viewed as "distance-shifting" translated into the dimension of time. The 1976 Act, however, does not permit such time-shifting except under very limited conditions.[84] The provisions governing videotaping of copyrighted works for the purpose of nonsimultaneous secondary transmission by cable systems[85] make it clear that such videotaping constitutes actionable infringement unless the cable system complies with the strict guidelines of the statute. The guidelines include preventing transfer and duplication of the videotapes,[86] and requiring their destruction within a specified time period.[87] The statute manifests the concern for transmission to remote areas by permitting transfer of videotapes among cable systems within remote regions such as Alaska, Hawaii, and Guam.[88] Even in those exceptional cases, however, compliance with all the other applicable restrictions of the statute, including eventual destruction of the tapes, is mandated.[89]

Injury to the value of or potential market for the copyrighted work,[90] which is one of the criteria for determining fair use, underlies the statute's strict regulation of cable television videotaping and other ephemeral recordings.[91] Although there is a technical distinction between tapes made by commercial cable systems, unauthorized tapes made and sold by commercial "pirates," and tapes made in the home for private use, there is a functional similarity between all forms of videotaping of television broadcasts, in terms of injury to the copyright owner.[92] The commercial or noncommercial purpose of the copying is not dispositive. As Barbara Ringer noted with respect to copying for educational purposes, "The argument that education should be exempt because it does not make a profit overlooks the fact that uncompensated educational uses . . . result in direct and serious loss to copyright owners, and destroy the incentives for authorship and publication."[93] Similarly, in the context of home videotaping, the free access to copyrighted works should be permitted

83. *Id.* at 1074-75.
84. 17 U.S.C. app. § 111(e), at 974 (1976). *See* text accompanying note 88 *infra*.
85. 17 U.S.C. app. § 111(e), at 974 (1976).
86. *Id.* § 111(e)(1)(C), at 974.
87. *Id.* § 111(e)(1)(C), (D), at 974.
88. *Id.* § 111(e)(2), at 974.
89. *Id.* § 111(e)(2)(B), at 974.
90. *Id.* § 107(4), at 968.
91. *House Report*, *supra* note 5, at 103.
92. *See* note 58 *supra*.
93. *Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 5 (1975).

to outweigh the pecuniary interests of copyright owners only if the constitutional goal of providing authors the incentive to produce new works and make them available to the public would not be unduly jeopardized.

B. Manufacturer's Liability

1. Liability as a Direct Infringer

If the court decides that home videotaping via Betamax has infringed plaintiffs' copyrights, SONY may be held liable for providing the instrumentality of infringement.[94] There are a number of theories under which the manufacturer may be held liable. First, SONY might be jointly and severally liable as a direct infringer.[95] *Elektra Records Co. v. Gem Electronic Distributors, Inc.*,[96] (the *Make-a-Tape Case*), illustrates this theory of liability. The defendant in the *Make-a-Tape Case*, a retail distributor, permitted customers to purchase a blank audiocassette tape, rent a prerecorded tape, and produce a copy of the tape on defendant's tape duplicating machine. The court held that although the defendant retailer did not physically perform the infringing act, the store was still liable because it provided the means for acts that were foreseeably infringing.[97]

The element of foreseeability of the infringing act is crucial in the *Betamax Case* in determining whether SONY may be held liable. By analogy, it is arguable that the manufacturer of cameras or photocopy machines should not be held liable for infringing photographs or photocopies made by means of those machines. The most common uses of cameras and photocopiers are not likely to infringe copyright,[98] and the manufacturer therefore cannot be expected to foresee and prevent any infringing acts. The primary use of Betamax, however, is to make unauthorized reproductions of entire copyrighted works. The reasonable manufacturer should foresee that this use of Betamax may be an infringing act.

The greater the number of legal uses of Betamax, however, the less foreseeable it is that Betamax is an infringing instrumentality. Betamax does have a number of noninfringing uses, such as the reproduction of works that are not protected by copyright. These include: works produced and owned by the United States Government;[99] works in the public domain due to expiration

94. *See* Pre-Trial Memorandum for Plaintiffs, *supra* note 9, at 21.

95. All those who perform acts toward the commission of the tort of copyright infringement are jointly and severally liable. Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp., 453 F.2d 552, 554 (2d Cir. 1972); MCA, Inc. v. Wilson, 425 F. Supp. 443, 456 n.23 (S.D.N.Y. 1976). A party furnishing an instrumentality capable of infringing with the expectation that it will be used to infringe is liable as a direct infringer. Kalem Co. v. Harper Brothers, 222 U.S. 55, 62-63 (1911); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 365-66 (9th Cir. 1947); Elektra Records Co., v. Gem Electronic Distributors, Inc., 360 F. Supp. 821 (E.D.N.Y. 1973).

96. 360 F. Supp. 821 (E.D.N.Y. 1973).

97. *See* note 95 *supra*.

98. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam), makes it clear that many foreseeable uses of photocopiers will now be considered fair use. *See* 17 U.S.C. app. § 108, at 968-70 (1976) (reproductions by libraries and archives).

99. 17 U.S.C. app. § 105, at 968 (1976).

of the statutory term of protection,[100] faulty notice,[101] or improper renewal;[102] works which have not been fixed in a tangible medium of expression, such as live broadcasts that are not simultaneously taped;[103] works of foreign authors who are not nationals of a Universal Copyright Convention member nation, if the work was not first published in any member nation;[104] works such as news broadcasts, which are informational;[105] any fair use of a work, such as reproduction of a portion of a broadcast by a scholar;[106] and obscene works.[107]

Another noninfringing use of Betamax is as a home-movie or playback device. The mechanism that permits taping of broadcasts off-the-air, however, is independent of these other functions. Merely camouflaging the off-the-air function by combining it with capabilities that are noninfringing does not increase the permissible uses of the off-the-air component of the Betamax unit.

Despite its potential legal uses, Betamax was designed primarily, and is advertised, as a machine that enables television viewers to copy works broadcast on television. As such, Betamax is a machine that is inherently capable of infringement. SONY was advised by legal counsel long ago that some uses of these machines were likely to be infringing.[108] Despite SONY's awareness, it has continued to facilitate off-the-air taping of copyrighted works. If the act of home videotaping is determined to constitute infringement in this case, SONY's intentional or reckless disregard of the rights of copyright holders, by providing the vehicle for a foreseeably infringing act, might render it culpable as a primary or direct infringer.[109] An analogous situation is that in which the seller of a gun is held liable for injury to a third party because of the foreseeability that the gun would be misused.[110]

2. *Liability as a Contributory Infringer*

SONY's knowledge of infringing activities committed via Betamax also might render it liable as a contributory infringer.[111] Constructive knowledge of

100. *Id.* §§ 302-305, at 984-87.

101. *Id.* §§ 401, 405, 506, at 987-88.

102. *Id.* § 304(a), at 985-86.

103. *Id.* § 102(a), at 967. A work is "fixed in a tangible medium of expression" when its lawful embodiment in a copy or phonorecord is sufficiently permanent to permit it to be perceived, reproduced, or otherwise communicated for more than a transitory period. *Id.* § 101, at 966.

104. *Id.* § 104(b), at 968.

105. *Id.* § 107, at 968. It is likely that taping a news broadcast would constitute fair use, considering the four criteria discussed at text accompanying note 58 *supra*.

106. *Id.*

107. Mitchell Brothers Film Group v. Cinema Adult Theater, 192 U.S.P.Q. 138 (N.D. Tex. 1976).

108. Pre-Trial Memorandum for Plaintiffs, *supra* note 9, at 4-6. For a concrete example, the day before "Gone With the Wind" was broadcast on television for the first time, it was reported that Betamax dealers sold out their supplies of blank videotapes. *Id.* at 38.

109. *See* note 95 *supra*.

110. *See, e.g.*, Sickles v. Montgomery Ward & Co., 6 Misc. 2d 1000, 167 N.Y.S.2d 977 (Sup. Ct. 1957) (defendant sold gun to parent but it was foreseeable that it would be used improperly by child).

111. For example, "[O]ne who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162

the infringing conduct may be sufficient to find contributory infringement.[112] SONY has at least constructive if not actual knowledge of the potentially infringing uses of Betamax.[113] Yet it encourages and provides the means for such uses by advertising and selling Betamax.

3. Liability as a Vicarious Infringer

If SONY is able to demonstrate that it lacks the requisite knowledge to be classified as a direct or contributory infringer, plaintiffs are likely to argue that SONY is a vicarious infringer. Liability for vicarious infringement does not require that the alleged infringer have knowledge of the infringing activity. The plaintiff must show only that the vicarious infringer had (1) the right and the ability to police the activities of the direct infringer, and (2) a financial interest in the infringing activity.[114] This theory of liability is defined in *Shapiro, Bernstein & Co. v. H. L. Green Co., Inc.*,[115] in which infringing records were sold by a record department that operated as an independent concession within the defendant department store. Although the store did not actively participate in the infringing sales, it profited from them and had control over the operation of the concession and its employees.[116] The store was held liable for the concessionaire's infringing conduct.

SONY may satisfy the financial interest requirement of the vicarious liability test through its stake in the growing practice of home videotaping and the accompanying sales of blank tapes.[117] It appears to be more difficult, however, for plaintiffs to demonstrate that SONY has the right and the ability to police the activities of the direct infringer. SONY's right to control the activities of users of the Betamax is questionable. Lack of the right to control, however, may not be conclusive. In *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*,[118] the court referred to the Second Circuit opinion in *H. L. Green*.[119] The *Gershwin* court stated that in determining the liability of the department store in *H. L. Green*, the Second Circuit "attached no special significance" to the store-concessionaire relationship of the vicarious and direct

(2d Cir. 1971) (footnotes omitted). The concept of contributory infringement is accepted in patent law. *See* Aro Mfg. Co. v. Convertible Top Replacement Co., 337 U.S. 476, 485 n.6 (1964).

112. Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399, 403-04 (S.D.N.Y. 1966).

113. *See* text accompanying note 108 *supra*.

114. This is the definition adopted in Shapiro, Bernstein & Co. v. H. L. Green Co., Inc., 316 F.2d 304, 307 (2d Cir. 1963). *See also* De Acosta v. Brown, 146 F.2d 408, 411 (2d Cir. 1944), *cert. denied sub nom.* Hearst Magazines v. De Acosta, 325 U.S. 862 (1945); MCA, Inc. v. Wilson, 425 F. Supp. 443, 456 (S.D.N.Y. 1976); Pre-Trial Memorandum for Plaintiffs, *supra* note 9, at 29-32. The court in Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971), cited *H. L. Green* for the slightly different principle that a person who has "promoted or induced" the infringing acts may be held liable as a vicarious infringer, even without knowledge that copyright has been impaired. 443 F.2d at 1162.

115. 316 F.2d 304 (2d Cir. 1963).

116. *Id.* at 305-06.

117. *Freedom of Video*, *supra* note 48; *Home Copying Alarm*, *supra* note 50.

118. 443 F.2d 1159 (2d Cir. 1971).

119. 316 F.2d 304 (2d Cir. 1963).

infringers.[120] Rather, the decision was based on the theory that holding the store liable was simply the most effective way to enforce the copyright law.[121] Therefore, the right and ability to police the acts of the infringer may not be crucial to a determination of vicarious infringement. If SONY is in the most effective position to prevent infringing acts, it may be held liable.

SONY could police the use of Betamax by withdrawing it from the market, or selling it without its off-the-air taping mechanism. Withdrawal, however, is so extreme that it may make vicarious liability a weak theory for holding defendants liable for infringement by users of Betamax. There may be some less burdensome courses of action to avoid copyright infringement, however, such as: modifying the machine so that it could not record copyrighted works off-the-air;[122] posting a warning on the machine to the effect that taping of copyrighted works is prohibited,[123] coupled with announcements at the beginning of each broadcast to notify the viewer whether or not the broadcast may be lawfully reproduced;[124] requiring signed statements by buyers stating that they will not use Betamax to tape copyrighted works;[125] limiting sales of Betamax to individuals or institutions that are demonstrably "fair users," such as nonprofit educational institutions and libraries. One can only speculate, however, on the effectiveness of policing methods that rely on voluntary enforcement schemes, whether promulgated by government or private industry.[126]

On the other hand, considering Betamax's legal uses and possible benefits to society,[127] withdrawal of Betamax from the market seems like an unduly repressive remedy. Forbidding mass sales of products such as Betamax, furthermore, might diminish economic incentives for the telecommunications industry, thus inhibiting research and experimentation and frustrating the progress of technology.[128]

The difficulty of policing home use of Betamax is related to first and fourth amendment concerns. Defendant argues that even though the copyright statute

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120. 443 F.2d at 1162.

121. *Id.*

122. *See* Pre-Trial Memorandum for Plaintiffs, *supra* note 9, at 30-31. Defendants contend, however, that "[t]here is no conceivable way of selling Betamax and the tapes for use in recording certain performances and not others." Pre-Trial Memorandum for Defendants, *supra* note 13, at 81.

123. Pre-Trial Memorandum for Plaintiffs, *supra* note 9, at 4-6.

124. Such announcements would also implement the provision in the new law that requires that works of the United States government, which may be copied freely by anyone, be identified as government works so that people will be encouraged to use them. *See* 17 U.S.C. app. § 403, at 987 (1976).

125. Pre-Trial Memorandum for Plaintiffs, *supra* note 9, at 31. Note that while such a provision might exculpate SONY, it would not eliminate the infringing activity.

126. For example, requesting home tapers to mail royalty checks voluntarily to a collecting society probably would be ineffective.

127. Time-shifting might yield social benefits, *see* text accompanying notes 75-84 *supra*, such as entertainment and educational uses not specifically exempted by statute.

128. *See* Pre-Trial Memorandum for Defendants, *supra* note 13, at 6-7. SONY might lose its initiative to experiment with new communications devices if it were constantly in fear of infringement suits.

might be construed to find home videotaping a violation,[129] constitutional considerations such as the right to privacy in the home[130] and the right to receive information in the home[131] would make any attempt to police home videotaping far too intrusive.[132] *Stanley v. Georgia*,[133] for instance, established the individual's right to read obscene materials in the home, free from state interference.[134] The right to receive information that *Stanley* protected is readily distinguishable, however, from the home videotaping of works on Betamax. *Stanley* involved possession of pornographic material for personal use,[135] a "victimless" crime; but copyright owners will be the victims of economic injury from home reproduction of their work. The public will be the ultimate victim if the damage to copyright owners is great enough to discourage the production of new works. Yet if the solution is to remove Betamax from the market, the public will also suffer the loss of beneficial, noninfringing uses.

III
POSSIBLE SOLUTIONS TO THE PROBLEM OF HOME VIDEOTAPING

There is a need for a remedy which would enable the public to maximize use of Betamax while preserving the rights and economic incentives of copyright owners. A legislative solution is the most desirable,[136] although it would not obviate the need for judicial disposition of the legal issues presented by the *Betamax Case*.[137]

The copyright law of the Federal Republic of Germany provides an excellent model for legislation.[138] The German statute permits reproduction of single copies of copyrighted works for noncommercial personal use. In return, the

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129. *See* note 20 *supra*.

130. *See* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

131. *See* Stanley v. Georgia, 394 U.S. 557, 566 (1969); Winters v. New York, 333 U.S. 507, 510 (1948). The first amendment right to receive information, however, is not absolute. It is limited by the copyright clause itself, U.S. CONST. art. I, § 8, cl. 8. In addition, the taping of informational broadcasts, such as news or scientific programs, might be fair use, so that the right to receive this type of factual information would not be impaired. *See* 17 U.S.C. app. § 107, at 968 (1976).

132. *See* Pre-Trial Memorandum for Defendants, *supra* note 13, at 61-64.

133. 394 U.S. 557 (1969).

134. *Id.* at 568.

135. *Id.* at 559.

136. A letter from the late Senator John McClellan, directing the Copyright Royalty Tribunal to conduct a study on home taping, noted that courts do not always provide the best answers and that legislative solutions may be necessary, as in the case of regulation of cable television. Hall, *Copyright Tribunal Sets Home Taping Probe*, BILLBOARD, Dec. 10, 1977, at 77, col. 1-2. *See* 17 U.S.C. app. § 111, at 971-75 (1976).

137. It is possible that a judicial determination of infringement would spur legislative action. In addition, primary infringement must be determined before any further issue of imposing costs may be settled. *See* Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 485 (1964).

138. Law of Sept. 9, 1965, BGBl I 1273 art. 53, as amended by Law of Aug. 17, 1973, BGBl II 1069 (W. Ger.), English translation *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD (UNESCO and BNA), at Germany (Federal Republic of): Item 1, Copyright Statute (as amended up to Mar. 2, 1974).

author of the work has the right to "demand from the manufacturer of equipment suitable for making such reproductions a remuneration for the opportunity provided to make such reproductions.[139] The remuneration takes the form of "an equitable participation in the proceeds realized by the manufacturer from the sale of such equipment."[140] It is carried out through collecting societies whose basic function is to receive the proceeds and distribute them to copyright owners.[141]

Although this high level of protection accorded the author under the German system is not present in American copyright law,[142] the United States' approach to copyright is becoming increasingly attuned to the standards of the rest of the world.[143] In light of the trend toward internationalism, it might be appropriate for the United States to adopt a system comparable to that of West Germany. Such a system could be administered in the United States with relative ease. A collecting society similar to ASCAP or BMI[144] or the new Copyright Royalty Tribunal[145] could distribute royalties to the owners of copyright in works broadcast on television. An existing television rating organization could compute estimates of the numbers of reproductions made of each work.

As part of the solution, either Congress or the courts will have to decide which entity should bear the costs of compensating copyright owners. The German provision that the manufacturer must share its proceeds with the author is consistent with the views of American socio-economic theorists that the costs or burdens of activities should be borne by the entities most effectively able to control them.[146] Under this reasoning, SONY rightfully should bear at least some of the costs of infringement because it derives profit from the activity of home videotaping.[147]

In all fairness, the home taper should share in paying the cost of infringe-

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139. *Id.* art. 53(5).

140. *Id.*

141. *Id.* For details on the function and operation of performing rights collecting societies, *see* R. BROWN, KAPLAN AND BROWN'S CASES ON COPYRIGHT 509-11 (2d ed. 1974) [hereinafter cited as KAPLAN AND BROWN].

142. "We are not so anxiously concerned with protecting the author to such an extent as are the Continental courts." Needham, *supra* note 2, at 101.

143. Many provisions of the new copyright law indicate that the American approach is beginning to reflect the international trend. For example, the "life plus fifty" term of copyright duration, 17 U.S.C. app. § 302(a), at 984 (1976), based on the European system, replaces the American dual system of statutory copyright of twenty-eight years with a twenty-eight year renewal, and unlimited common law copyright for unpublished works. *See House Report*, *supra* note 5, at 135. The new law also phases out the requirement that books be manufactured in the United States. *See* 17 U.S.C. app. § 601, at 994-95 (1976).

144. *See* BROWN, *supra* note 141, at 503-19 (collecting societies in general).

145. The Tribunal was established to distribute royalties from cable television compulsory licensees, 17 U.S.C. app. § 111(d), at 972-74 (1976), and from jukeboxes, *id.* at § 116(c), at 978-79. The purposes and functions of the Tribunal are set out at *id.* at §§ 801-810, at 999-1002.

146. Calabresi, *Views and Overviews*, 1967 U. ILL. L.F. 600-07. This theory is also consistent with the approach of the court in Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 309 (2d Cir. 1963). *See* text accompanying notes 118-21 *supra*.

147. Note that advertisers might not benefit from home videotaping because commercials may be deleted. *See* note 9 *supra*.

ment as well. The home taper commits the infringing act directly, enjoys the benefit of owning the infringing reproduction, and avoids the expense of purchasing an authorized copy of the infringed work. The Betamax owner could pay the copyright owner through a tax or royalty fee imposed on videotape hardware[148] (the machine itself) or software (the tapes). Collecting societies could then distribute these fees to the copyright owners. Such a tax or fee would impose a direct cost on the Betamax owner. In Germany, for example, the manufacturer of the hardware, not the individual machine owner, pays the copyright holder.[149] The consumer indirectly pays for the luxury of making personal videotapes of copyrighted works, however, through increased prices of videotape recorders or software.

IV
CONCLUSION

The Copyright Revision Act of 1976 reflects a spirit of compromise between the rights of copyright owners and the public,[150] and a goal of promoting progress by maximizing use of copyrighted works. In this era of telecommunications, the dissemination and potential uses of copyrighted works, nationally and internationally, are growing continually. They will be increased further by devices such as Betamax. On a national level, authors should receive adequate compensation for their efforts. On an international level, for the United States to refuse to adopt a solution, while other nations provide for royalties on home videotaping, would be "short-sighted and nationalistic."[151] Despite political pressures and organizational complexities, the United States must develop a solution that recognizes the needs of both authors and the public. To maintain this balance of interests is to respect the purpose and spirit of copyright law set forth in the Constitution.†

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148. Steup, *The Rule of National Treatment for Foreigners and Its Application to New Benefits for Authors*, 25 BULL. COPYRIGHT SOC'Y 279, 280 (1978). For example, French law imposes a tax on photocopy machines.

149. *See* note 138 *supra*.

150. 17 U.S.C. app. §§ 107-18, at 968-81 (1976) (limitations on the copyright owner's exclusive rights).

151. Steup, *supra* note 148, at 290.

† As this Note went to press, the United States District Court for the Central District of California decided that "noncommercial home-use recording of material broadcast over the public airwaves doesn't constitute copyright infringement." Universal City Studios, Inc. v. SONY Corporation of America, No. 76-3520F (C.D. Cal., Oct. 2, 1979).