

4-1-1984

The Home Videotaping Controversy: Achieving a
Delicate Balance Between Copyright Protection
and Public Access to New Entertainment
Technology *Sony Corporation of America v. Universal
City Studios, Inc*

Deborah Magid

Follow this and additional works at: <http://repository.law.miami.edu/umeslr>



Part of the [Entertainment and Sports Law Commons](#)

Recommended Citation

Deborah Magid, *The Home Videotaping Controversy: Achieving a Delicate Balance Between Copyright Protection and Public Access to New Entertainment Technology Sony Corporation of America v. Universal City Studios, Inc*, 1 U. Miami Ent. & Sports L. Rev. 123 (1984)
Available at: <http://repository.law.miami.edu/umeslr/vol1/iss1/8>

This Notes and Comments is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

RECENT DEVELOPMENTS

THE HOME VIDEOTAPING CONTROVERSY: ACHIEVING A DELICATE BALANCE BETWEEN COPYRIGHT PROTECTION AND PUBLIC ACCESS TO NEW ENTERTAINMENT TECHNOLOGY

Sony Corporation of America v. Universal City Studios, Inc.
104 S. Ct. 774 (1984)

The popular video tape recorder, known as the Betamax, enables millions of consumers to daily record copyrighted television broadcasts for later viewing on cassettes.¹ Shortly after its introduction to the public, the Betamax became the subject of a prolonged lawsuit which has become one of the most publicized and significant cases in the history of copyright law. The plaintiff copyright owners, Universal City Studios and Walt Disney productions, maintained that the corporate defendants,² by encouraging the use of home videotaping of copyrighted material, were liable for contributory infringement. The defendants contended that home videotaping for private use was not copyright infringement, and that even if it were, they could not be held liable on a theory of vicarious liability. The District Court for the Central District of California concluded that private videotaping in homes did not constitute copyright infringement.³ The district court insisted that, even if infringement had occurred, the defendants could not be held vicariously liable because the video tape recorder (VTR) was a staple

1. Before the introduction of the Sony Betamax, videotaping of televised broadcasts was a complicated procedure that was not widely used by the public. *Encyclopedia Britannica Ed. Corp. v. Crooks*, 542 F. Supp. 1156, 1161 (W.D.N.Y. 1982). Today, more than three million American homes have VTR's. 127 CONG. REC. S11,810 (daily ed. Oct. 21, 1981) (statement of Sen. DeConcini). By 1990, according to estimates by industry analysts, videotape recorders will be in 40 million homes. *Hollywood and the Home Videotapers*, 70 NATIONS BUS. 40 (1982).

2. *Universal City Studios v. Sony Corp. of America*, 480 F. Supp. 429 (1979). The defendants named in the infringement action were the manufacturers, distributors, retailers and advertisers of the Sony Betamax VTR. *Id.* at 432. The plaintiff did not seek relief against any individual home users. A consumer of the Betamax was named in the complaint against whom the plaintiffs waived any claim for damages or costs. *Id.* at 437.

3. *Id.* at 442.

article of commerce.⁴

The Court of Appeals for the Ninth Circuit unanimously reversed, holding that home videotaping for private use constituted infringement and not fair use.⁵ The court of appeals also held the defendants liable for contributory infringement.⁶ In overturning that decision, the sharply divided Supreme Court *held* that: 1) private, noncommercial home VTR time-shifting by consumers is legitimate fair use and does not violate federal copyright law; and 2) the manufacture and sale of VTR's to the general public does not constitute contributory infringement of the copyrights in televised programs. *Sony Corporation of America v. Universal City Studios, Inc.* 104 S. Ct. 774 (1984).

A motion picture or television producer is currently only paid when his work is shown in theaters, on television and when it is sold as a prerecorded videocassette. When the owner of a Betamax records a televised broadcast on a blank cassette and later shows it to a gathering of his friends, the producer receives nothing. The home videotaping controversy was born when Universal Studios and Disney Productions set out to protect their valuable copyrights from infringement by this type of use.

The district court rejected the plaintiff copyright owners' plea for protection and entered judgment for the defendants.⁷ In holding that there had been no infringement, the district court reasoned that the legislative history of the Copyright Act⁸ demonstrated an implied exemption for videotaping.⁹ The trial court also held that home videotaping constitutes fair use under section 107 of the Copyright Act.¹⁰ The court's opinion can fairly be characterized as favoring public access to technological advances in the entertainment field over the copyright owner's right to protection.

The Ninth Circuit's decision placed primary emphasis on protecting the copyright owner's right to "control the cost of and ac-

4. *Id.* at 461.

5. *Universal City Studios v. Sony Corp. of America*, 659 F.2d at 963, 969 (9th Cir. 1981).

6. *Id.* at 976.

7. 480 F. Supp. at 442.

8. Copyright Revision Act of 1976, 17 U.S.C. §§101-810 (1982).

9. 480 F. Supp. at 444-46. The trial court found that the Copyright Act's recognition of an exemption for the home taping of audio recordings was sufficiently analogous to create an implied exemption.

10. *Id.* at 456. Section 107 is a restatement of the judicial doctrine of fair use which allows others to make reasonable use of copyrighted material without the owner's consent. 17 U.S.C. §107 (1982).

cess to his novelty."¹¹ The court of appeals first focused on the constitutional philosophy underlying our copyright scheme, which is to promote public access to artistic works by offering economic incentives to creative individuals.¹² The court then proceeded to reverse the trial court's holdings on the legislative implied exemption,¹³ fair use¹⁴ and contributory infringement¹⁵ issues.

On remanding the case to the district court, the court of appeals stressed that, despite inherent difficulties, relief must be afforded plaintiffs whose copyrights have been infringed.¹⁶ The court suggested that, since great public harm would result from a permanent injunction, an acceptable resolution may be to create a compulsory licensing scheme which provides for reasonable royalty payments.¹⁷ Thus, the court of appeals sought a balanced resolution to the controversy which would protect copyright owners' rights while not standing in the way of technological advances.

The Supreme Court rejected the reasoning of the court of appeals by a narrow 5-4 margin. The closeness of the vote illustrates the evident difficulty the controversy has given the Court for more than a year.¹⁸ This difficulty may well have stemmed from the fact that the case presented a "unique" request for relief which required the Justices to apply old law to new technology.¹⁹ By focusing on public access concerns rather than copyright owners' expectations, the Court dramatically broadened the fair use doctrine to include the reproduction of copyrighted material, for the mere convenience of the ordinary user, at the copyright owner's expense.

Speaking through Justice Stevens,²⁰ the majority first noted that since its inception, the development of copyright law has re-

11. 659 F.2d at 965.

12. *Id.* The Constitution enables Congress "[t]o promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

13. 659 F.2d at 967-69, 977.

14. *Id.* at 969-74, 977. The court did affirm, however, a portion of the lower court's opinion holding the retail stores' demonstration copying to be fair use. *Id.* at 976.

15. *Id.* at 974-76, 977.

16. *Id.* at 976.

17. *Id.*

18. The Supreme Court granted certiorari, *Sony Corp. of America v. Universal Studios, Inc.*, 457 U.S. 1116 (1982), and the case was first argued in January of 1983. 51 U.S.L.W. 3549 (U.S. Jan. 18, 1983). After failing to reach a decision last term, the Court ordered reargument. 103 S. Ct. 3568 (1983).

19. Nowhere within the federal copyright statute is home videotaping specifically mentioned. 17 U.S.C. §§101-810 (1982).

20. Justice Stevens was joined by Chief Justice Burger and Justices Brennan, White and O'Connor. 104 S. Ct. 774, 777 (1984).

sponded to the many changes brought on by technological advancement.²¹ The Court recalled that Congress has fashioned the necessary rules as new technological developments have occurred in this country.²² Moreover, Justice Stevens indicated that "[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials."²³ When Congress has not plainly indicated the path in a technological controversy, the Court must remain "circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests."²⁴

Justice Stevens next examined the issue of contributory infringement, stating that there is no express provision in the Copyright Act that renders one liable for an infringement committed by another.²⁵ He acknowledged the fact that vicarious liability and the concept of contributory infringement do, however, pervade all areas of the law.²⁶ He, therefore, concluded that the absence of express statutory language in the copyright law does not prevent the imposition of liability for contributory infringements.²⁷

While addressing the contributory infringement issue, the majority separated supplying the "means" to accomplish an infringing activity from the "end" of copyright infringement. The Court's "ends" - "means" analysis served to discredit the copyright decision, *Kalem Co. v. Harper Brothers*,²⁸ on which the respondents had placed their principal reliance. In *Kalem*, the Court held a producer liable for the sale of his unauthorized film dramatization of a popular copyrighted book to jobbers, who later arranged for the commercial exhibition of the motion picture.²⁹

The majority distinguished *Kalem* by noting that the producer in that case was liable because he not only supplied the "means" to accomplish the infringing activity, but also the work itself.³⁰ In contrast, Sony does not supply its Betamax customers with the copyrighted works.³¹ The Court found it significant that the range

21. *Id.* at 782-83.

22. *Id.* at 783.

23. *Id.*

24. *Id.*

25. *Id.* at 785.

26. *Id.*

27. *Id.*

28. 222 U.S. 55 (1911).

29. *Id.* at 63.

30. 104 S. Ct. at 786.

31. *Id.* at 786-87. "The only contact between Sony and the users of the Betamax . . .

of the potential use of the Betamax was more extensive than that of the use involved in *Kalem*.³²

If the petitioners are to be held liable for contributory infringement, Justice Stevens argued, it must rest on the theory that they sold equipment with constructive knowledge of the fact that their customers might use the Betamax to make unauthorized copies of copyrighted material.³³ While there is no copyright law precedent on such a theory of vicarious liability, the Court suggested that an analogy to the patent laws is appropriate.³⁴

The patent statute, the Court observed, prohibits the knowing sale of a component especially made for use with a particular patent.³⁵ However, the Patent Code expressly provides that the sale of a "staple article or commodity of commerce suitable for substantial noninfringing use"³⁶ is not contributory infringement.³⁷ Noting that one potential use of the Betamax is private time-shifting in the home, the majority concluded that the Betamax is capable of substantial noninfringing uses.³⁸

To bolster this conclusion, the Court discussed the findings of the district court and the fair use doctrine. The Court indicated that there are two types of time-shifting: authorized and unauthorized, neither of which copyright owners can prevent.³⁹

In addressing authorized time-shifting, the Court found it significant that district court testimony, from representatives of professional sports leagues and public broadcasting authorities, indicated no objection to private home time-shifting.⁴⁰ The majority

occurred at the moment of sale." *Id.*

32. *Id.* at 786.

33. *Id.* at 787.

34. *Id.*

35. *Id.* at 788.

36. Under the staple article of commerce doctrine, a manufacturer or retailer of an item, such as a typewriter or camera, is not liable for any infringing uses by consumers if the item is "suitable for substantial noninfringing use." Patent Act, 35 U.S.C. §271(c) (1976). Thus, the staple article of commerce doctrine has carved a significant exception in contributory infringement cases arising under patent law. *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 198 (1980). Not to permit the exception would "block the wheels of commerce." *Henry v. A. B. Dick Co.*, 224 U.S. 1, 48 (1912), *overruled on other grounds*, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917). The application of this patent law doctrine to the field of copyright law is fraught with difficulty. 104 S. Ct. at 814. (Blackmun, J., dissenting). See also 3 NIMMER ON COPYRIGHT §12.04(A) at 12-41 (1983).

37. 104 S. Ct. at 788.

38. *Id.* at 789. Time-shifting is the recording of a televised program in order to view it once at a later and more convenient time. *Id.* at 778.

39. *Id.* at 789.

40. *Id.* at 790 nn.24-27. Testimony was provided by representatives from the baseball, football, basketball and hockey leagues. Justice Blackmun, in his dissenting opinion, pointed

regarded these tenuous findings as conclusive evidence that many copyright owners authorize private time-shifting of their programs because it serves to enlarge their total viewing audience.⁴¹ The Court concluded that the respondents had no right to prevent other copyright owners from authorizing time-shifting for their programs.⁴²

Turning to the extent that home videotaping involves unauthorized time-shifting, the Court asserted that such activity is protected under the fair use doctrine.⁴³ The Court then proceeded to apply an "equitable rule of reason" analysis with an examination of the four factors set forth in section 107 of the Copyright Act.⁴⁴ The Court concluded that each factor demonstrated that home time-shifting is fair use.⁴⁵

In construing the first factor, "the purpose and character of the use," the majority focused once again on the findings of the district court to determine the commercial or nonprofit nature of Betamax use. The Court concluded that the district court findings established that time-shifting for private home viewing must be classified as a noncommercial, nonprofit activity.⁴⁶

out that the survey conducted by Sony indicates that only 7.3 percent of all videotaping use is for the recording of sports events. Justice Blackmun concluded that the amount of time-shifting that has been authorized by the various sport leagues is not substantial. *Id.* at 816 n.45 (Blackmun, J., dissenting). The only witness at trial who actually authorized the taping of his own copyrighted program was Fred Rogers. The Court gives no evidence, however, on to what extent these television programs, which are made for children, are being videotaped. In addition, testimony was offered by: the station manager of a Los Angeles educational station; broadcasting authorities from New York and New Jersey; and representatives from the National Collegiate Athletic Association and the National Religious Broadcasters Association. It is interesting to note that one of the witnesses specifically declined to approve VTR use for anything other than educational purposes. *Id.* at 790 n.26.

41. *Id.* at 791.

42. *Id.* at 789.

43. *Id.* Fair use of a copyrighted work can be obtained "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. §107 (1982). Traditionally, the fair use doctrine has never ventured beyond the realm of these productive uses. The Court, in stretching the doctrine to include an unproductive use, departs from this tradition.

44. 17 U.S.C. §107 (1982). The Act provides that the determination, of whether or not the use of a work is fair, must include an examination of the following four factors:

- 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.

45. 104 S. Ct. at 795.

46. *Id.* at 792.

The next two statutory factors were only given a cursory examination by the Court. In its discussion of the second factor, "the nature of the copyrighted work," the Court found it relevant that the nature of a televised copyrighted program is one that is presented to the public free of charge.⁴⁷ With regard to the third factor, "the amount and substantiality of the portion used," the majority did acknowledge that copyrighted works are being reproduced in their entirety by VTR owners.⁴⁸ The Court, however, maintained that the third factor does not have its usual effect of precluding a finding of fair use because of the distinctive nature of the free television broadcasts.⁴⁹

The Court was more thorough in its analysis of the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work." The Court observed that there must be a showing "by a preponderance of the evidence that *some* meaningful likelihood of future harm exists."⁵⁰ Thus, the majority placed the difficult burden of proving harm on the copyright owners. The Court, looking to the district court's opinion for support, concluded that the respondents had failed to carry their burden with regard to demonstrating the likelihood of harm from the home time-shifting of their programs.⁵¹ Moreover, the Court asserted that home time-shifting benefits society because it expands public access to free television programs.⁵² The Court viewed this public access argument as supportive of its finding that home time-shifting, although unauthorized, is still fair use.⁵³

The majority concluded by acknowledging that Congress must ultimately decide whether changes are to be made in the copyright statute to deal with new technology.⁵⁴ The Court insisted that "it is not our job to apply laws that have not yet been written."⁵⁵

Four Justices dissented in an opinion, written by Justice Blackmun,⁵⁶ which accused the majority of evading the difficult

47. *Id.*

48. *Id.*

49. *Id.* at 792-93.

50. *Id.* at 793.

51. *Id.*

52. *Id.* at 795.

53. *Id.* at 789.

54. *Id.* at 796.

55. *Id.*

56. *Id.* (Blackmun, J., dissenting). The opinion was joined by Justices Marshall, Powell and Rehnquist. The organization and length of the dissenting opinion suggested to some commentators that it had originally been the majority opinion. N.Y. Times, Jan. 18, 1984, at 42, col. 2.

new issues that are arising in the area of copyright law by taking refuge in the Court's "consistent deference to Congress."⁵⁷ Justice Blackmun maintained that an examination of the legislative history of the 1976 Copyright Act indicated that Congress intended to cover all new technologies, even though they had not been specifically mentioned within the four corners of the statute.⁵⁸ The dissenting opinion next examined the explicit references to private use in the Copyright Act, noting that these limitations would be meaningless if a copy of an entire work could be made for any individual's private use.⁵⁹ Moreover, Justice Blackmun made it clear that he deemed inappropriate the district court's reliance on the legislative history of a 1971 amendment to the Copyright Act in creating an implied exemption for private home recording.⁶⁰ Thus, Justice Blackmun concluded that home videotaping constituted an infringement for which there was no express or implied exemption under the Copyright Act.

Justice Blackmun then turned to a consideration of the fair use doctrine, "the most troublesome in the whole law of copyright."⁶¹ In their examination of the fair use doctrine, the dissenters engaged in a "productive" versus "ordinary" use analysis.⁶² Justice Blackmun pointed out the critical difference between the scholar, who makes use of a copyrighted work to ultimately benefit society, and the ordinary user, who only benefits himself at the expense of the copyright owner.⁶³ Justice Blackmun found it significant that he could cite "no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use."⁶⁴ In the dissenters' view, a video tape recording is an

57. 104 S. Ct. at 797.

58. *Id.* at 805 n.26.

59. *Id.* at 800-03. Justice Blackmun focused on the detailed library photocopying provisions of §108 to demonstrate that Congress has made explicit special exemptions for private use. *Id.* at 803.

60. *Id.* The 1971 Amendment to the 1909 Copyright Act did not create an implied exemption for VTR use, according to Justice Blackmun, because it was addressed to the different problem posed by the commercial piracy of sound recordings. *Id.*

61. *Id.* at 806.

62. *Id.* at 806-09. A productive use can be defined as a use that serves a function other than the one that the copyright owner originally intended for copies of his work. Since it does not hinder the owner's expectations of profits, a productive use of a work invokes the fair use doctrine. 3 NIMMER ON COPYRIGHT §13.05(A) at 13-59, 13-67 (1983). In contrast, an ordinary or intrinsic use is one that serves the same function as the owner intended for the work and constitutes infringement because it upsets the copyright owner's proper expectations of economic reward. L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 24 (1978).

63. 104 S. Ct. at 807. The crucial difference between a scholar and the ordinary user is that the scholar's work "produces external benefits from which everyone profits." *Id.*

64. *Id.* at 808.

ordinary rather than productive use of copyrighted material which creates no public benefit sufficient to justify the limitation of a copyright owner's exclusive "bundle of rights" under section 106 of the Copyright Act.⁶⁵

The dissent also parted company with the Court over the issue of contributory infringement. Justice Blackmun makes two basic objections to the majority's reasoning that the respondents are not liable for contributory infringement. His first objection is that the doctrine of contributory infringement can be imposed even when there is no direct contact between the defendant and the infringer.⁶⁶ This objection draws analogies to *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*,⁶⁷ the "dance hall" cases,⁶⁸ and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*⁶⁹ Relying on these precedents, Justice Blackmun argued that Sony should be held accountable for contributory infringement because of its knowledge that the Betamax was intended for infringing uses.⁷⁰

Justice Blackmun's second objection was to the Court's willingness to absolve Sony from liability based on a finding that the Betamax was capable of substantial noninfringing use. He questioned the wisdom of applying the staple article of commerce doctrine, from patent law, to copyright cases.⁷¹ Although Justice Blackmun conceded that the concerns addressed by the staple article of commerce doctrine are similar to those found in the area of

65. *Id.* "Section 106 enumerates five fundamental and exclusive rights - the present-day expression of the traditional 'bundle of rights' comprising copyright." Ladd, *Home Recording and Reproduction of Protected Works*, 68 A.B.A. J. 42, 43 (1982). The copyright owner, under section 106, is granted the exclusive rights of reproduction, adaptation, distribution of copies and phonorecords, performance and display. 17 U.S.C. §106 (1982).

66. 104 S. Ct. at 812.

67. 443 F.2d 1159 (3rd Cir. 1971). The *Gershwin* case involved a concert promoter who was held liable for contributory infringement even though he had no direct contact with the infringing performers. The court held that the promoter's "knowledge of the infringing activity was sufficient to render him liable for contributory infringement." *Id.* at 1162.

68. In a series of judicial opinions, often referred to as the "dance hall" cases, owners of entertainment establishments have been held liable for unauthorized performances on their premises on the theory that they had constructive knowledge of the infringing activity. See, e.g., *Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assn., Inc.*, 554 F.2d 1213 (1st Cir. 1977); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929); *M. Whitmark & Sons v. Tremont Social and Athletic Club*, 188 F. Supp. 787 (D. Mass. 1960).

69. 456 U.S. 844 (1982). Addressing the question of contributory trademark infringement, the *Inwood* Court concluded that liability could be imposed on a manufacturer who "suggested, even by implication" that a retailer engage in infringing activity. *Id.* at 851.

70. 104 S. Ct. at 813.

71. *Id.* at 814.

copyright law,⁷² he argued that a significant portion of the product's use must be noninfringing in order to preclude the imposition of contributory liability.⁷³ If all of a product's use is infringing, Justice Blackmun pointed out, then there is no public benefit sufficient to warrant releasing the manufacturers and sellers of the product from liability.⁷⁴ Justice Blackmun observed that the case should have been remanded to the district court for the resolution of the factual question regarding the precise proportion of VTR use that is to be deemed infringing.⁷⁵

The dissent concluded by taking the Court to task for its holding that unauthorized time-shifting is fair use. Justice Blackmun accused the majority of ignoring the plain language of section 107, which addresses itself only to the productive uses of copyrighted material.⁷⁶ The dissent then criticized the Court's confident characterization of time-shifting as a noncommercial, nonprofit activity under section 107(1).⁷⁷ Again, Justice Blackmun emphasized the productive use distinction by noting that "time-shifting is noncommercial in the same sense that stealing jewelry and wearing it — instead of reselling it — is noncommercial."⁷⁸

This logical deduction completed, the dissent went on to analyze the remaining three factors of section 107. As for the second factor, Justice Blackmun reasoned that since informational programs contribute more towards furthering productive uses by others, they deserve a higher degree of protection than entertainment programs.⁷⁹ He viewed the third factor as intended only to allow individuals to copy small portions of a copyrighted work for productive use.⁸⁰ Since VTR owners record the entire copyrighted work, Justice Blackmun concluded that the third factor alone may in this instance be sufficient to prevent a finding of fair use.⁸¹

In addressing the harm criterion of section 107, the dissent

72. *Id.*

73. *Id.*

74. *Id.* "[T]he manufacturer of such a product contributes to the infringing activities of others and profits directly thereby, while providing no benefit to the public sufficient to justify the infringement." *Id.*

75. *Id.* at 815.

76. *Id.* at 816. *See supra* note 43.

77. 104 S. Ct. at 816-17.

78. *Id.* (quoting Home Recording of Copyrighted Works: Hearing before Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 1250 (1982) (memorandum of Prof. Laurence H. Tribe)).

79. *Id.* at 817.

80. *Id.*

81. *Id.*

shifted the burden of proof from the copyright owner to the infringer. In order to avoid liability, according to Justice Blackmun, the infringer must demonstrate that he has not impaired the copyright owner's ability to receive compensation for his work.⁸² Justice Blackmun stressed that the statute calls for an examination of the harm to the potential market, as opposed to the present market, for the copyrighted work.⁸³ The dissenting Justices concluded that "time-shifting does have a substantial adverse effect upon the 'potential market' for the Studios' copyrighted works."⁸⁴

The Supreme Court's analysis of the home videotaping controversy sought a resolution that would not stand in the way of technological advancement. In that respect, the majority's opinion can be characterized as favoring increased public access to copyrighted works over the copyright owner's rights of control and compensation.⁸⁵ The court of appeals, by contrast, adopted a more literal interpretation of the Copyright Act by placing primary emphasis on protecting copyright owners' rights rather than on public access concerns.⁸⁶ The most equitable balance between copyright protection and increased public access can be achieved with the creation of a compulsory licensing scheme which provides for reasonable royalty payments.⁸⁷ Other countries have already imposed such royalty systems.⁸⁸ Such a licensing scheme, entitled the "Home Recording Act of 1983," received consideration by Congress, but was placed on a "back burner."⁸⁹

82. *Id.* at 811.

83. *Id.* at 817-18.

84. *Id.* at 811.

85. *Id.* at 795. "[T]o the extent that time-shifting expands public access to freely broadcast television programs, it yields societal benefits." The Court conceded that "the public interest in making television broadcasting more available . . . is not unlimited. But it supports an interpretation of the concept of 'fair use' that requires the copyright holder to demonstrate some likelihood of harm" before he may receive protection under the federal copyright law. *Id.*

86. 659 F.2d at 976. "The difficulty of fashioning relief cannot . . . dissuade the federal courts from affording appropriate relief to those whose rights have been infringed." *Id.*

87. The court of appeals noted that "when great public injury would result from an injunction, a court could award damages or a continuing royalty." *Id.* See also 3 NIMMER ON COPYRIGHT §13.05(E)(4)(e) at 13-91 (1982).

88. Federal Act on Copyright in Works of Literature and Art and on Related Rights (Austria), §42(5)-(7) and An Act dealing with Copyright and Related Rights (Germany), art. 53(5), reprinted in COPYRIGHT LAWS AND TREATIES OF THE WORLD (UNESCO/BNA 1982) (English translation). Under the German law, a copyright owner does not need to demonstrate significant economic harm before receiving protection under the copyright law. Ladd, *Home Recording and Reproduction of Protected Works*, 68 A.B.A. J. 42, 45 (1982).

89. S.31, 98th Cong., 1st Sess., 129 CONG. REC. S254-61 (daily ed. Jan. 26, 1983) and H.R. 1030, 98th Cong., 1st Sess., 129 CONG. REC. H197-200 (daily ed. Jan. 27, 1983). Under the Home Recording Act of 1983, manufacturers and importers of video and audio recorders

The most fundamental question raised by the home videotaping controversy is whether copyright owners must now demonstrate economic harm in order to receive copyright protection for their creative works. The analytical framework for answering that question was set forth in two recent speeches by David Ladd, the Register of Copyrights.⁹⁰ Mr. Ladd maintained that there is presently no requirement under our copyright system that the copyright owner must prove economic harm in order to demonstrate infringement.⁹¹ He asserts that underlying the concept of harm theory "is a more sinister point of view: the idea that copyright is mere privilege."⁹² The limitation, triggered by the concept of harm,

and blank tapes would be required to pay a royalty fee to copyright owners under a compulsory licensing scheme. The royalty fees would be set by voluntary negotiation of the affected parties or, if that fails, by means of binding arbitration under the guidance of the Register of Copyrights. Individuals who make an audio or video recording of a copyrighted work would be exempt from liability provided that the recorded tape is for the private use of that individual or members of his family.

It is important to recognize that the Home Recording Act would also be applicable to sound recordings. This is in response to reports from the record industry of losses in record sales amounting to about 900 million dollars each year because of home taping. 129 CONG. REC. H198 (daily ed. Jan. 27, 1983) (statement by Rep. Edwards). Almost three-fifths of American households own a tape recorder with approximately 20 million new purchases each year. Recent survey results reveal that Americans tape the equivalent of 564 million albums of music each year and at least 84 percent of blank tapes are used for this purpose. *Need for Home Recording Legislation Debated before Senate Subcommittee*, 27 PAT. TRADEMARK & COPYRIGHT J. (BNA) 8 (1983).

The imposition of royalty fees should not seriously affect prices for consumers because the pressures of competition in the booming audio and video recording industries have brought the market prices to new lows. For example, when the trial court first considered the Betamax controversy the cost of a video tape recorder was in the \$875 to \$1000 range. 480 F. Supp. at 435. Today, units can be purchased for under \$400. *Even Sony Can't Avoid the Price War in VCR's*, 2755 BUS. WK. 33, 34 (1982).

Another bill, the Consumer Video Sales/Rental Amendment of 1983, was introduced to establish a commercial lending right for copyright owners which would enable them to share in the revenues produced in the prerecorded videocassette rental market. Under this Amendment, prerecorded videocassettes may not be rented without the prior authorization of the copyright owner. S.33, 98th Cong., 1st Sess., 129 CONG. REC. S254-61 (daily ed. Jan. 26, 1983). A similar bill, the Record Rental Amendment of 1983, establishes a commercial lending right for the copyright owners of sound recordings. S.32, 98th Cong., 1st Sess., 129 CONG. REC. S254-61 (daily ed. Jan. 26, 1983).

90. Ladd, *The Harm of the Concept of Harm in Copyright*, The Thirteenth Donald C. Brace Memorial Lecture (Apr. 13, 1983), reprinted in 30 J. COPYRIGHT SOC'Y 421 (1983) [hereinafter cited as *Brace Memorial Lecture*], and Ladd, *Economic Harm: A Trojan Horse in Copyright*, Remarks before the American Bar Association (Aug. 10, 1982), reprinted in 24 PAT. TRADEMARK & COPYRIGHT J. (BNA) 421 (1982) [hereinafter cited as *Economic Harm*].

91. *Economic Harm*, *supra* note 90, at 421. "Harm is not a separate element of the tort of copyright infringement; to establish a copyright infringement case, one need only prove ownership and copying. . . . Nonetheless, 'harm,' particularly palpable monetary damage, has wrongfully intruded itself into the calculus of liability." *Id.*

92. *Id.* at 422. "The notion that 'economic harm' should serve as a basis for copyright

on the copyright owner's opportunity to benefit fairly from the use of their works will inevitably result in a society where creative endeavors involving high risk will not be pursued.⁹³

The dissenting Justices were correct in questioning the Court's approach to the doctrines of fair use and contributory infringement. The majority expanded the doctrine of fair use to include, for the first time, an unproductive use. The Court then placed the difficult and unnecessary burden of proving economic harm on the copyright owner without indicating precisely how much harm is now necessary in order to maintain an infringement action. With regard to the issue of contributory infringement, the Court failed to address the specific amount of noninfringing use that future manufacturers must show in order to absolve themselves from liability. The Justices' reasoning regarding these doctrines undermines the philosophical rationale of the Copyright Act — to promote public access to numerous creative achievements by justly rewarding the endeavors of copyright owners. The hope remains, however, that Congress will soon re-examine these doctrines and remove the uncertainty that now surrounds the protections afforded a copyright owner.⁹⁴

is bizarre: its application demands that creators demonstrate economic losses in order to justify copyright." *Id.* at 421.

93. Brace Memorial Lecture, *supra* note 90, at 431. "By limiting potential rewards in the copyright market . . . the entrepreneurial calculus which precedes risk-taking in authorship and publishing is shifted in the direction of not taking a chance, i.e., not writing or publishing a 'risky' work, whether ideologically or economically risky." *Id.*

Today's motion picture industry is fraught with high risks. The average production budget of a new feature film is over 8 million dollars and the distribution expenses can add millions more to the total cost. Bloeser, *Film and Video Tape Piracy: A Growing Epidemic*, reprinted in 1 SOFTWARE PROTECTION AND MARKETING (PLI) 547, 552 (1983). Currently, 6 out of 10 films do not break even on their investment. Only 2 out of 10 films are able to recoup their investment from theatrical exhibitions alone. It is to the additional markets of prerecorded cassettes and discs along with cable, network and syndicated television, to which the filmmakers must look for survival. These markets are all highly susceptible to VTR abuse. 129 CONG. REC. H198 (daily ed. Jan. 27, 1983) (statement of Rep. Edwards). The revenues diverted through VTR use will eventually result in losses to production companies and it could also adversely affect the future employment of the many individuals involved in the production and distribution of motion pictures. The ultimate loss, however, will be imposed on society in the form of a restraint on future creative achievements.

94. The present administration has urged Congress in the past to adopt a wait-and-see policy with regard to the home videotaping controversy. Schwartz, *Reagan Administration to Congress: Go Slowly on VTR Legislation*, 28 ELECTRONIC NEWS supp I (July 12, 1982). The imposition of an additional tax on consumers of VCR's and blank tapes is not an attractive issue in an election year. Representatives Don Edwards, the main sponsor of legislation to create a licensing scheme, and Robert W. Kastenmeier, whose panel has jurisdiction over copyright law, both agree that Congress will not enact legislation to reverse the Court's decision in the near future. N.Y. Times, Jan. 18, 1984, at 42, col. 5.

The new technology in home entertainment is advancing at such a rapid pace that it is difficult for the courts and Congress to keep on top of the situation. After eight years of litigation, the final determination of the issues presented by the Betamax controversy was long overdue. It is important to note that video tape technology raises several significant issues that were not addressed in the Betamax suit.⁹⁵ In addition, it is feared that as home videotaping increases it will have detrimental effects on the motion picture and television industries which are not yet evident.⁹⁶

The Supreme Court's opinion correctly noted that "a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries . . . and society's competing interest in the free flow of ideas, information, and commerce" must be achieved.⁹⁷ The majority, however, proceeded in its opinion to tip the scales towards favoring public access at the expense of the copyright owner's right to protection. The opinion is of great significance because it illustrates a departure from established legal doctrines and the plain language of the Constitutional mandate for copyright protection.⁹⁸ The Court's unwillingness to protect copyright owners' rights, despite the presence of

95. The Court's decision did not specifically deal with the issue of librarying in which the VTR user records a program to be saved for repeated viewings. Among the other issues not addressed by the Betamax suit are: the later trading, rental, or sale of recorded cassettes by a home user; the taping of programs from a cable television service; and, videotaping for use outside of the home.

96. It has been suggested that advertisers may eventually lose interest in advertising on television because the VTR's allow users to skip the commercials at a later viewing. In addition, rating and viewing patterns may be disrupted by an increased use of the machines. For example, commercials for holiday gift items broadcast in the winter will retain little impact when viewed the following spring. *Hollywood and the Home Videotapers*, 70 *NATIONS BUS.* 40 (1982).

The Court relied heavily on the district court's findings, that only 25 percent of VTR owners fast forward through commercials, to conclude that practice of skipping commercials is "too tedious" to present a threat to the commercial attractiveness of television. 104 S. Ct. 794 n.36. The most recent study of the taping habits of VTR users indicates that now 86.6 percent either skip or erase commercials. 129 *CONG. REC. H198* (daily ed. Jan. 27, 1983) (statement of Rep. Edwards). Thus, apparently the practice of skipping commercials is no longer the tedious task considered by the district court back in 1979.

Moreover, as the cost of VTR's continue to drop, it will soon be feasible for an individual to own two machines so that he can tape a friend's prerecorded tape to make an additional tape for himself. Speech by Bernard Sorkin of Warner Communications, University of Miami Entertainment and Sports Law Society Symposium on The Making of a Motion Picture (Feb. 11, 1984).

97. 104 S. Ct. at 782.

98. *THE FEDERALIST* No. 43, at 294 (J. Madison) (Dunne ed. 1901). "The copyright of authors has been solemnly adjudged . . . to be a right of common law. . . . The public good fully coincides . . . with the claims of individuals." *Id.* See *supra* note 12.

1984]

HOME VIDEOTAPING

137

new technologies, suggests that our creative community is now to be deprived of control over their works and, consequently, of their incentive to pursue further achievements.

Deborah Magid