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THE BETAMAX CASE: ANOTHER COMPULSORY LICENSE IN COPYRIGHT LAW

Marshall A. Leaffer*

I. INTRODUCTION

THE law of copyright has always been closely identified with new technology.1 In fact, copyright law traces its origins to fifteenth century new technology, the printing press, which for the first time enabled reproduction of a work in large quantities for circulation.2 With this invention, an author's ability to control the use of his work once it was published was thrown into jeopardy. From the Statute of Anne in 17103 through the Copyright Act of 1909,4 copyright legislation has been concerned with the protection of print media.5 It was not until the twentieth century and the development of the phonograph, radio, television, and other audiovisual recording techniques that the book publishing model of copyright law proved to be inadequate. To adapt to these new recording and performing technologies, a comprehensive copyright revision project was necessary.6 In 1976, after twenty tedious revisions, what is now known as the Copyright Act of 19767 was enacted. Despite the great effort expended on the revision project, and the attempt to create an all encompassing document, the challenge of new technologies continues to plague copyright owners.8

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3. Statute of Anne, 1710, 8 Anne ch. 19.


8. See D. Ladd, Private Use, Private Property and Public Policy: Home Record-
Twentieth Century technologies have presented particularly difficult problems of legal adaptation. The new media, through radio and television, provide widespread public access to copyrighted work while creating vast and valuable markets for copyright owners. At the same time, technological innovations such as photocopying machines and audio and video recorders enable private parties to copy entire copyrighted works quickly and inexpensively. These acts of copying and infringement of copyright, occur privately, diffusely with low public visibility, thereby rendering a copyright owner's efforts to police these practices impractical or impossible. The 1976 Copyright Act attempted to adjust to new technological realities, but despite the drafters' intention to produce a statute definite in its terms yet flexible enough to protect works of authorship against the instruments of technological change, the attempt was only partially successful.

Because technological progress does not stand still, a seemingly farsighted statute will soon become obsolete. Consequently, the judicial process, which must work in piecemeal fashion, can no longer harmonize the rights of copyright owners with the broad public interest in having access to the fruits of creation. This article discusses the latest attempt to adapt the copyright law to new technology—the videotape recorder (VTR) which permits a television viewer to copy programming directly from his television set.

The Ninth Circuit Court of Appeals in *Universal City Studios, Inc. v. Sony Corp. of America (Betamax)* held that private home taping of a television program by a videotape recorder VTR constituted an infringement of copyright and that The Sony Corporation, manufacturer of these machines, was liable as contributory infringer. This case, which has been granted certiorari by the Supreme Court and is the object of several proposed pieces of legislation, poses certain basic questions about the nature and purpose of copyright
law and proves, once again, that technological change can outstrip the law's ability to adapt through the judicial process. Harmonization of technological change and the rights of copyright owners will necessitate a legislative response which, unlike judicial decision, can adjust to the competing interests in a comprehensive, effective manner. A legislative response is needed to resolve the VTR dilemma because of the peculiar nature of the copyright interest and the problems the copyright owner has in its protection.

II. COPYRIGHT LAW, THE AUDIO-VISUAL WORK, AND THE NEW VIDEO INDUSTRY

A. The Nature and Purpose of Copyright

The law confers property rights on most products, physical products such as land or chattels, and intangible products, those protected under copyright and patent law. These intangible products are types of information: copyright law confers property rights on expressive information while patent law provides protection for

technological information. The Constitution of the United States recognizes these informational products as property by granting Congress the authority "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."15 The present Copyright Act, like its predecessors, implements the constitutional provision by granting an owner of an original work of authorship certain exclusive rights to the copyrighted work for the statutory duration.16 An act of infringement takes place when an individual has made an unauthorized use of a copyrighted work within the scope of the exclusive rights and is neither a fair use nor the subject of a specific exemption.17

The grant of monopoly powers to the owner of copyright, during the term of copyright, serves two unrelated and sometimes conflicting functions: protection of the author's property right to his work under a natural law theory, and promotion of public welfare by creating economic incentives through the monopoly grant of copyright to draw investment for the production of works of authorship.18 This dual function of copyright creates a constant tension in the law. Whereas the natural right theory of ownership would imply an author's absolute control over his work, the economic rationale of copyright focuses the efficient allocation of resources by providing an adequate financial return to the copyright owner as an inducement to produce works of authorship.

The copyright law reflects these general principles by creating exclusive rights while establishing exceptions to these monopoly powers when the public interest and welfare overrides the author's interest in the exclusive control over his work.

This tension in the copyright law arises because of the unusual nature of a copyrighted work as a property interest. Copyrighted works are a species of intangible property designated by economists as public or collective goods.19 Public goods differ from most real or

personal property in that the number of users can be increased at no additional cost. For public goods there is no allocation or rationing problem for the existing supply once the public good is produced. An infinite number of viewers can view a television program without depriving its amount availability to anyone else. When a user of a Betamax machine copies a television program, the program producer's costs are not increased nor is another viewers' satisfaction reduced by the Betamax user. Alternatively, for private goods, most real or personal property, one person's use of the good leaves less for someone else.

So we are faced with the dilemma that use of copyrighted work as information should be unrestricted along with the fear that if the author cannot sufficiently control the use of his work to recoup his investment costs, the work will not be produced in the first place. Through the Copyright law we wish to create incentives for the production of works of authorship on the one hand and facilitate their optimal use on the other.

Both the Congress in passing the Copyright Act and the courts in developing legal doctrine have tried to harmonize the natural right of the author to his property with the economic peculiarities of intangible property. In close cases courts will often side with the user of a copyrighted work against its creator fearing that the market place for ideas will be undermined and perhaps believing that the copyright owner has already been sufficiently remunerated. In such situations courts will fall back on a doctrine such as fair use to uphold the public's access and use of the copyrighted work. Alternatively, because the creator of information has special problems in excluding non-payers from the use of his product, the courts have adopted special rules of contributory and vicarious liability not found in the protection of real or personal property. As will be seen,
the Ninth Circuit drew the balance in favor of the creator's property interest in holding both the home video tapper as a direct infringer and Sony as a contributory infringer of copyright. Now, the Supreme Court, by granting certiorari will have a chance to struggle with some of the most difficult issues in copyright law. These particulars will be discussed in part III after a discussion of the basics of copyright law as it applies to television programs, and the dynamics of the new video industry.

B. Copyright Protection for Television Programs

Under the Copyright Act of 1976 an original work of authorship receives a copyright protection the moment it is created. A work is created when fixed in a tangible medium of expression, and embodied in a material object for more than transitory duration. The material object may be in the form of words printed on a page, sounds recorded on a phonorecord, or images placed on film. The form of the material object or media is immaterial so long as the work of authorship can be viewed by the human directly or with the aid of a machine or device. In addition, a work is fixed when it is recorded simultaneously with its transmission even though it had not been previously fixed in film media or print media, such as a screenplay.

A television program falls into the category of statutory subject matter designed as motion pictures or other audiovisual works. Although the showing of images on the television would clearly not constitute a fixation for more than a transitory duration, most programs are either prerecorded or are fixed on tape media simultaneously with their broadcast. Thus, television programs invariably meet the requirement of statutory subject matter and fixation for the purposes of federal copyright protection.

Once a work of authorship is created, the copyright owner is

26. Id. § 101.
27. Id. § 102.
28. Id. § 101.
29. Id.; See House Report, supra note 6, at 52. Live works not fixed simultaneously with transmission would have to look to state theories for protection.
31. House Report, supra note 6, at 52.
granted the exclusive right to control subsequent use of his work. Unauthorized use, within the scope of an exclusive right, unless it has been given express statutory exemption or is considered fair use, is copyright infringement. Five exclusive rights are enumerated in section 106 of the 1976 statute. These exclusive rights are the property right incentives which we hope will encourage the optimal production of works of authorship.

Copyright is infringed by unauthorized acts of reproduction, adaptation, distribution, performance and display. But infringement is not only committed by those directly violating the exclusive rights; one can infringe copyright by improperly facilitating the use of copyrighted works by knowingly causing, inducing, or providing another with the means to accomplish an infringement. This type of infringement, known as contributory infringement, was found in the Betamax case, Universal City Studios, Inc. v. Sony Corp. of America where liability was extended to Sony, the manufacture of the device used to infringe the copyrighted work.

Although the exclusive rights appear absolute in their terms, they are tempered by a series of limitations set forth in section 107 through 118 of the Act. These defenses or limitations are designed to facilitate the optimal use of copyrighted works without undermining the incentives to produce the works.

The most fundamental of these limitations is the privilege of fair

33. Id. § 107.
34. (1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.
37. 59 F.2d 963 (9th Cir. 1981), cert. granted, 50 U.S.L.W. 3982 (U.S. June 14, 1982) (No. 81-1687).
use, a judicially created defense to copyright now codified in section
107. The fair use provision lists various purposes of uses, contexts
which give rise to the defense: criticism, comment, news reporting,
research. This section had codified past judicial practice by provid-
ing an illustrative list of factors to be considered to determine fair
use. Traditionally, these criteria are applied on a case-by-case ba-
sis to determine whether the copyrighted materials were used in a
reasonable manner without the owner's consent, notwithstanding
the copyright monopoly.

In sum, the determination of infringement involves two issues:
has the user reproduced, adopted, distributed, performed or dis-
dplayed the copyrighted work and second, even so, is the particular
use sanctioned by an exemption or fair use. Because the owner of a
videotape recorder has reproduced the copyrighted television pro-
gram, the determination becomes whether he should have the right
to do so despite the copyright monopoly either under an exemption,
expressed or implied, or under the broader doctrine of fair use.

The extent of these defenses to copyright is a matter of continu-
ing debate and often depends, in close cases, on a court's fundamen-
tal attitude toward the copyright monopoly and economic function
of copyright law. To fully understand the Ninth Circuit's applica-
tion of this legal doctrine, one must be aware of the basic technology
of the industry.

C. The Industry

Within a few years time video equipment has become a major
source of income for manufacturers and distributors of consumer

39. Id. § 107. The doctrine of fair use traces its origin to the related British
document of "fair dealing". See Comment, Copyright Fair Use—Case Law and Legis-
lation, 1969 DUKE L.J. 73, 74-75. The first recognition of fair using U.S. case is attrib-

40. This illustrative but not exhaustive list of factors includes:
(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 copy-
righted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copy-
righted work.

41. For an elaboration of the application of fair use criteria see infra notes 76-106.
electronics. The Betamax case has presented a basic challenge to the new technology and whatever form the legal resolution of private home videotaping takes will necessarily affect this rapidly growing industry.

The videotape recorder (VTR), as well as video disc, video games, and the personal computer, depends on television for its operation. These devices have changed television into more than a passive device for entertainment in that the viewer can now interact with rather than simply react to his television. The VTR is one such interactive device. It is the first device allowing the viewer to rearrange the television schedule, containing a sophisticated timing mechanism which permits the viewer to tape a program even when absent. In addition, the VTR automatically records the program, requires no developing time, and can be erased and reused. Sony sold the first such VTR in 1965, but it was not until 1975 that the company introduced the VTR in basically its present form for home use and sold under the trademark Betamax. Success of the product is represented in its sales: 800,000 machines were sold in 1980, one million in 1981, and projections indicate sales as high as two million units in 1982. Sales of the Betamax for 1981 will constitute about one quarter of Sony's world-wide sales which is quite remarkable when one considers Sony's other successful products. The Sony system is not the only available VTR. Matsushita has also developed a video cassette format, the VHS system, incompatible with Sony's Beta System, and has licensed its VTR system to such major companies as General Electric, Panasonic and other major companies.

The VTR competes in many ways with the video disc player. Unlike the VTR, the videodisc is a playback system which cannot record a performance on television. Lacking the time shifting capacity and versatility of the cassette player, the videodisc would generally appeal to someone who is looking for entertainment rather than a

42. Rudell, Home-Video Issues-Cassettes and Discs, N.Y.L. J. Dec. 24, 1981, at 1, col. 1; the entire retail sales of the leading manufacturers of VTR is estimated in sales to be an eight billion-a-year business. Lohr, A Soft Video Recorder Market, N.Y. Times, April 10, 1982, at 19, col. 3.


44. Rudell, supra note 42.

45. Lagore Statement, supra note 43.

46. Rudell, supra note 42.
more active interaction with his television.  

There are two non-compatible disc formats available at this time, with a third scheduled for its debut in the summer of 1982. Videodisc players such as RCA Selectavision have retailed for as little as $300 while the Sony Betamax retails for at least $200 more. Although there may be room in the market for both tape and discs, particularly with the disc player selling for a substantially lower price, tape with its greater flexibility and multifaceted uses clearly is the wave of the future. This trend is perhaps inevitable despite drastic price cutting and extensive advertising campaigns by the videodisc makers for their products. The extent of VTR success in its competition with the videodisc may now depend more how the issue of copyright infringement and liability is resolved than on the merits of the related technologies.

III. The Betamax Case in the Court of Appeals

In *Universal City Studios, Inc. v. Sony Corp. of America*, the Ninth Circuit Court of Appeals, in reversing the district court, held that home video recording of a television program is an infringement of copyright and that Sony Corporation of America, the manufacturer of the video cassette recorder (VTR), was liable as contributory infringer. The case was remanded to the district court for appropriate relief, but the ultimate resolution may well take place in

47. Kulp, *Video Revolution*, Barrons, July 27, 1981, at 24 [hereinafter cited as *Barrons*]; there is some indication that the VTR industry's period of phenomenal growth has begun to slow down to projected growth of 15 to 25% increases per year as compared with 100% annual growth by the industry. The decline is due to the worldwide recession and the fact that the demand has been satisfied for the most eager buyers. Prices for VTR range from $400 to $1,500 depending on the various features included in the machine. Pervasive price cutting is noted in a market caught with overcapacity and mounting inventories. See Lohr, *supra* note 42.

48. Rudell, *supra* note 42: today the VHS format accounts for 65% of the market whereas the Sony's Beta System enjoys a 35% market share. See Lohr, *supra* note 42.


52. *Id.* at 975-76.
the Supreme Court, unless Congress, in the meantime, amends the Copyright Act either to exempt private home taping or establish a royalty mechanism to compensate the copyright owner by taxing the sale of recorder units, blank cassettes, or both, and distributing the proceeds to copyright owners.

The plaintiffs are Universal Studios and Walt Disney Productions, who produce various kinds of audiovisual materials often broadcast over public airwaves. Sony Corporation, the manufacturer of Betamax, along with an individual owner of Betamax who used it to tape a television program, are the defendants. In finding infringement, the Ninth Circuit decided three major issues: whether off-the-air taping of copyrighted audiovisual material by owners of a videotape recorder in their home for private non-commercial use constitutes an infringement; whether the corporate defendants are liable for direct, contributory, or vicarious infringement; and, if liability is found, the nature of the relief granted.

If the Supreme Court follows the reasoning of the court of appeals the Betamax case will be important in the development of copyright law for several reasons which transcend the immediate resolution of the VTR issue. The first is the judicial attempt to adapt copyright law to meet the challenge of the new technology through a narrowing of the doctrine of fair use. Second, the case is also important in broadening the concept of contributory infringement, the liability of persons who knowingly induce, cause, or provide the means for another to infringe copyright law. Finally, the Betamax case may well establish precedent in providing a novel form of remedy, a judicially fashioned compulsory license, to compensate copyright owners to future infringement by unknown defendants.

A. Direct Infringement: Exemption or Fair Use

The first issue the court approached was the liability of the pri-

53. The defendants have petitioned the Supreme Court for certiorari. See Petition, supra note 12.
54. Several legislative proposals have been introduced exempting home video recording and others setting up a compulsory licensing scheme. See notes 147-73 infra.
55. See Universal City Studios v. Sony Corp., 659 F.2d 963, 976 (9th Cir. 1981).
56. Id. at 964.
57. See id. at 969-74.
58. Id. at 974-76.
59. Id. at 976.
vate individual for his home taping.\textsuperscript{60} For practical reasons, the plaintiffs were not interested in suing a widely dispersed number of individual home tapers but resolution of this issue was vital to plaintiff's case because of the relationship between direct and contributory infringement.\textsuperscript{61} To hold Sony liable as contributory infringer, there must first be a finding that the user of the machine was a direct or primary infringer of copyright. The district court had found that the individual defendant was not a direct infringer\textsuperscript{62} and thus, derivatively exonerated Sony from a charge of contributory infringement for two reasons: there was an implied exemption for off-the-air taping for private use in the Copyright Act\textsuperscript{63} and, second, even without this exemption, the private tape was privileged under the doctrine of fair use.\textsuperscript{64}

\textbf{B. An Implied Exemption for Videotaping}

The Court of Appeals refused to find an implied exemption in the 1976 case for private use of off-the-air taping in the home.\textsuperscript{65} Defendants argued that legislative history of the 1971 Sound Recording Act,\textsuperscript{66} the privacy of the home, and the publicness of the air waves indicated that the implied exemption to private non-commercial off-the-air taping should be extended by analogy to the videotape domain.\textsuperscript{67} The 1971 amendment created for the first time a limited copyright for sound recordings. The legislative history indicated, however, that the amendment was not to be extended to an individual taping a sound recording off the air for his private use.\textsuperscript{68} Since that time, Congress has passed the 1976 Copyright Act which includes the express protection of sound recordings without specifically incorporating the 1971 legislative history to the 1976 Act.

\textsuperscript{61} \textit{See} 480 F. Supp. at 436-38.
\textsuperscript{62} \textit{Id.} at 456. Even if the individual defendant was liable as direct infringer, the District Court held that Sony could not be held liable as contributory infringer on the merits. \textit{Id.} at 457.
\textsuperscript{63} \textit{Id.} at 444-46.
\textsuperscript{64} \textit{Id.} at 446-56.
\textsuperscript{65} Universal City Studios v. Sony Corp., 659 F.2d 963, 968 (9th Cir. 1981).
\textsuperscript{66} \textit{Id.} at 967-68. \textit{See also} Petition supra note 12.
Should the implicit exemption for private, off-the-air audio taping be extended by analogy to private videotaping?

The Court of Appeals refused to incorporate the legislative history of the now superseded 1971 Act in the current Act in a case involving another medium and a different variety of copyrighted work. The court started with the basic assumption that the Copyright Act is designed to promote the public welfare by providing an economic incentive to creators to produce works of authorship. The Act, unambiguous on its face, grants exclusive rights to copyright owners, and nothing in the 1971 legislative history covering sound recordings suggests applicability to video works. To support this proposition, the court gave several reasons why audiovisual works should receive different judicial treatment. First, the Copyright Act places sound recordings and audiovisual works in separate categories of copyrightable subject matter. It excludes audiovisual works from exemptions set forth in sections 108(b), 110(1) and 112(a) of the Act. Thus, Congress has shown a special solicitude for audiovisual works and a concern for their unauthorized reproduction which it has not shown for sound recordings. This special statutory treatment may reflect congressional concern about the relatively large economic investment involved in creating audiovisual works and their particular vulnerability to unauthorized reproductions.

70. Id. at 967.
71. Id.
72. Id. at 968.
73. Id. at 967.
74. For an excellent discussion of basic distinctions between audio and videotaping and the applicability of the 1979 Act to imply an exemption to videotaping see Marsh, Betamax and Fair Use: A Shotgun Marriage, 21 SANTA CLARA L. REV. 49, 61-67 (1981) [hereinafter cited as Marsh]. Her basic arguments are the following:
First, the sound recording act was passed after audio taping was widespread and too universal to control by statute, whereas videotaping is in its early stages. Second, tape recorders and blank audio tapes have many more non-infringing uses at this time than videotape whose overwhelming use is to copy television programming most of which is copyrighted. Third, visual works have always been protected under the 1909 Act, whereas sound recordings enjoyed protection only by amendment in 1971. Fourth, a distinction should be made between fair use and exemption. The latter should only be confined by Congress which it has done in sections 107-18. Fifth, the nature of the material indicates that the video audience is more easily undermined by taping than the audio audience. The audio audience often listens to a tape hundreds of times whereas the video's appetite for the work may be exhausted after a couple of showings. Sixth, the costs of producing a movie are often much greater than produc-
The Court of Appeals' rejection of an implied exemption to copyright appears justified in light of the meticulous set of exemptions specified in the current act. To engraft an implied exemption on the 1976 Act, based on the now superseded 1971 amendments and their legislative history, runs contrary to basic principles of statutory interpretation. Nowhere in the legislative history of 1976 Act is there any indication that the now superseded 1971 amendments were to be incorporated in it. Moreover, it is by no means certain that the audio exemption still stands, much less the video. In fact, one important result of the Betamax case is that it may encourage new judicial and legislative activity against off-the-air audio taping, perhaps a much more pervasive and economically significant practice than videotaping. In all the Supreme Court should have no difficulty in adopting the court of appeals' fundamentally sound reasoning on the implied exemption to copyright.

C. Fair Use

Having rejected the defendant's defense of the implied exemption for home videotaping, the Court of Appeals turned to the more basic defense of fair use. In so doing, it reexamined the fundamental nature of this doctrine, now codified in Section 107 of the Copyright Act, and described as the most troublesome in copyright law. The Supreme Court should adopt the Ninth Circuit's formulation of fair use which would bring, for the first time, proper dimensions to this difficult area of copyright law.

The scope of fair use, the privilege to use another's copyright

75. For industry estimates on the extent of their injury by home audio taping, see Warner Finds Home Tapers at 600 mil, Variety, March 31, 1982, at 1, col. 1. The industry continues to lobby for specific legislation remedying the practice. See NARM OK's Audio Tape Levy, Billboard, April 1, 1982, at 1, col. 1. See, e.g., S. 1758, 97th Cong., 2d Sess., § 120 (1982) which sets up a compulsory license for audio recording twice and media subject to a tax on recording machines and blank tapes, the proceeds of which are to be distributed to copyright owners through the Copyright Royalty Tribunal.

76. Latman, supra note 2, at 203. Fair use is regarded as a defense to copyright infringement for which the defendant has the burden of proof.

77. See 3 NIMMER ON COPYRIGHT at § 13.05.
work in a reasonable manner, is one of the great on-going debates of copyright law. Fair use at times has been regarded as a minor or de minimus invasion of the plaintiff's exclusive rights. But fair use has a larger purpose consistent with the constitutional provision: to promote science and the useful arts at the expense of the copyright owner's expectancy award. The Court of Appeals' reexamination of this equitable judge-made defense to copyright may prove to be a significant reformulation of the doctrine and a strengthening of the copyright owner's exclusive rights despite the effect on new copying technologies.

Section 107 provides no definition of fair use. Instead, it lists four factors to determine whether the defense applies. In enumerating these factors, the legislative history gives little guidance on what weight they should receive or how they interrelate. Moreover, the legislative history indicates that the statute is neither intended to narrow or enlarge the common law doctrine of fair use, but is a restatement of the past practice and will continue to develop through judicial interpretation. Because the past judicial practice involving fair use has been notoriously inconsistent and confusing, the implication is that each case raising the defense will be decided on its own facts.

The latest case before Betamax applying fair use to the problem of new technology, in a factual context similar to that of videotaping, involved library photocopying. Like videotaping the new tech-

78. House Report, supra note 6, at 65.
82. House Report, supra note 6 at 65-66.
nology has made possible the photocopying revolution by allowing low cost mass reproduction of copyrighted works and, like the VTR, it has challenged the copyright owners' ability to control the use of his written work. The full extent of this practice has not yet run its course.

In *Williams & Wilkins Co. v. United States*\(^8^4\) the Court of Claims held that the photocopying of an entire article from a specialized low circulation medical journal constituted fair use and not copyright infringement. The defendant through its National Institutes of Health (NIH) and National Library of Medicine (NLM) photocopied and distributed journal articles to those requesting them.\(^8^5\) Generally, the NIH and NLM limited requests to no more than one article per journal, no more than fifty pages, and no more than a single copy of an article per request.\(^8^6\) These restraints, however, were not satisfactory to the plaintiff, a publisher of medical and scientific journals who claimed injury from the practice because a relatively few lost subscriptions could make the difference between overall profit and loss.\(^8^7\) In determining whether the millions of pages photocopied by the NIH libraries constituted fair use, the court was persuaded that the plaintiff had failed to prove that it would be harmed in the future.

The dissent\(^8^8\) for others\(^8^9\) have criticized the opinion for failing to distinguish between the extent of injury and liability. Under their view the fair use defense is lost when the plaintiff can show harm to the potential market or value of his work. Fair use determinations should concentrate on the cumulative effect of wholesale photocopying by many persons similarly situated in the market rather than

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84. 487 F.2d 1345 (Ct. Cl. 1973), aff'd by equally divided court, 420 U.S. 376 (1975)(per curiam).
85. *Id.* at 1347.
86. *Id.* at 1349.
87. *Id.* at 1347.
88. *Id.* at 1363-86.
89. 3 M. NIMMER, COPYRIGHT § 13.05[E], at 13-84 (1981). Nimmer questions the strength of precedential value of *Williams & Wilkens* for future federal court decisions as compared with the older decision, *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962), in which the defendant school teacher, in making an arrangement of a copyrighted song and reproducing it 48 times for his class, was guilty of infringement and denied the fair use defense. Nimmer's argument is that *Williams & Wilkens*, affirmed by a 4-4 decision in the Supreme Court, does not constitute binding authority on other courts and that faced with a conflict between the Court of Claims and the Court of Appeals, "formal considerations suggest that other federal courts will follow the Court of Appeals." *Id.* at 13-89.
concentrating on the particular activities of one defendant. Fair use is generally limited to the use of one work to create another, but it is not an intrinsic use of a work, a use for which the work was intended, one which replaces the need for the original work. Despite these forceful arguments, the court in *Williams & Wilkins* favored the users of copyrighted works who were scientists and physicians, based on the view that the progress of science would otherwise be impeded.90

By contrast the Ninth Circuit in *Betamax* rejected the *Williams & Wilkins* approach to fair use in what may be a significant new direction in fair use analysis, favoring authors over users. The court began with a statement on what it believed to be the general orientation of fair use pointing to the preamble to section 107 which provides an illustrative list of examples where fair use typically arises such as: "criticism, comment, news reporting, teaching, ‘scholarship or research.’"91 Citing a work by Leon Seltzer92, it emphasized that these illustrative purposes show fair use to involve a use by second author of a first author's work to create an independent work. Videotapers, however, are not making an independent use of the work but are merely reproducing the work for its intrinsic purpose, its ordinary use, which is to view it more conveniently. Thus, a use involving an instantaneous reproduction of a work for the same purpose as the original is contrary to the rationale of fair use which is essentially limited to the "productive" use of another work for purposes such as criticism or comment and other uses involved in creating an independent work.93

The Court of Appeals' approach to fair use differs vastly from that espoused in *Williams & Wilkins* and the district court which apply fair use case-by-case, particularly when technological change has rendered literal application of the statute unworkable.94 This approach creates a presumption for wider public access when faced

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90. Section 108 of the Copyright Act specifically exempts certain types of photocopying by qualifying libraries and archives. But if the library either exceeds the scope of section 108 or does not qualify, the general fair use defense may still be available. See 17 U.S.C. § 108.

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

92. Id. at 970.

93. Seltzer, *supra* note 80 at 237.

with technological change, even though it might frustrate a copyright owner's expectation of a greater monopoly award than a more literal interpretation of the statutory language. According to the Court of Appeals, this result oriented case-by-case resolution of fair use invades the domain of the Congress, the proper institution to rearrange the expectations of copyright owners in creating statutory exemptions to copyright similar to those in sections 108 through 118 of the 1976 Act. In sum, the Ninth Circuit Court of Appeals has attempted a comprehensive definition of fair use: the productive use of one work to create another independent work.

Thus, starting from different premises about the nature of copyright, it is hardly surprising that the Ninth Circuit Court of Appeals came to different conclusions in applying each of the four fair use factors in section 107. As for the purpose and character of the use, it rejected a commercial, non-commercial distinction. Even though videotapers do not make commercial use of a work, their use does not constitute educational or scientific use but is merely for entertainment and convenience. Here, unlike Williams & Wilkins, there is no concern that absent a fair use defense, scientific research will be impeded.

The second factor, the nature of the copyrighted work, also mitigated against finding fair use. Unlike Williams & Wilkins, which involved the use of informational works in scientific journals, the works in Betamax were designed for entertainment, and therefore supported no valid fair use purpose. There is less need for public access to works of entertainment. The court of appeals was not persuaded that the medium of expression, the public airwaves, or method of distribution, to the private home, indicated fair use. The

95. Id. at 448.
96. 659 F.2d at 971.
97. Id. at 972. Other cases have recognized that non-commercial use does not necessarily constitute fair use. See Withol v. Crow, 309 F.2d 777 (8th Cir. 1962); 3 M. Nimmer, supra note 89, § 13.05[E], at 13-58. On the other hand, just because the use is commercial does not preclude the defense of fair use. Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977).
98. 659 F.2d at 972. Generally, courts have found commercial exploitation a significant factor in denying a fair use defense. See, e.g., Iowa State University Research Foundation, Inc. v. American Broadcasting Cos., Inc., 621 F.2d 57 (2d Cir. 1980); DC Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177 (S.D. N.Y. 1979).
99. Unavailability of out-of-print works has been a rationale for asserting the defense of fair use. Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980); but see Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977). The court was apprently unpersuaded by viewing unavailability in Betamax.
plaintiffs did not create a presumption of fair use by voluntarily transmitting their programming over the public airwaves and combining their works with those in the public domain such as news and sports.\textsuperscript{100}

The third factor in section 107, the amount and substance of the portion used in relation to the copyrighted work as a work, ran clearly in plaintiffs' favor.\textsuperscript{101} Until Williams & Wilkins, one could reject a claim of fair use if the entire work was reproduced because excessive copying would preclude a finding of fair use.\textsuperscript{102} Cleary, the more substantial the taking, the less the availability of fair use. Although copying an entire work will not per se defeat fair use because all factors must be considered, it weights heavily against the assertion of the defense.

Perhaps the most important fair use consideration is the fourth factor, the effect of use on the potential market for the work.\textsuperscript{103} It is here that the difference between the court of appeals and the district court becomes most apparent. The district court viewed this factor as a surrogate for the extent of damages, finding that harm caused by Betamax was too speculative, and may have even increased the value of plaintiff's market by enlarging the audience due to the machine's time shifting ability. The court of appeals started with a much more extensive depiction of market effect: "It is clear that home users assign economic value to their ability to have control over access to copyrighted works. The copyright laws would seem to require that the copyright owner be given the opportunity to exploit this market."\textsuperscript{104} In addition, the appellate court confronted the most difficult problem in this case, the extreme difficulty for the copyright owner to prove harm from the activities of specific defendants. Here the court was greatly influenced by Professor Nimmer's\textsuperscript{105} critique of Williams & Wilkins, that the court did not pay

\begin{itemize}
\item \textsuperscript{100} 659 F.2d at 972.
\item \textsuperscript{101} Id. at 973.
\item \textsuperscript{102} 3 M. Nimmer, supra note 89, § 13.05[D], at 13-72; see also Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978); Encyclopaedia Britannica Educ. Corp. v. Crooks, 447 F. Supp. 243 (W.D. N.Y. 1978).
\item \textsuperscript{103} One commentator has termed the fourth factor hardly more than a rhetorical flourish for the test is entirely circular. "Whether a use will affect 'the potential market for or value of the copyrighted work' necessarily turns on whether the use will be proscribed." See Goldstein, supra note 5, at 780.
\item \textsuperscript{104} 659 F.2d at 974.
\item \textsuperscript{105} "... it is a mistake to view this factor, as do some courts, as merely raising the question of the extent of damages to plaintiff caused by the particu-
proper attention to the cumulative effect of mass production of copyrighted works made possible by video recorders. Thus, the full scope of infringing activity must be considered; otherwise copyright owners would have insurmountable obstacles in proving harm to the value of their works.

In sum, the Betamax case, is perhaps the first major case dealing with the new copying technology, the court has chosen to return to a narrower more traditional standard for fair use. It has limited Williams & Wilkins to library photocopying where an article is being used for education or research. It has indicated that the illustrative list of fair use contexts in section 107 refers to the essential nature of the defense: productive use, the use of another's work to produce one's own independent creation. In so doing it has rejected a more ad hoc balancing approach in which the plaintiff's exclusive rights and expectancy of the monopoly award are weighed against the public interest in greater access to the copyrighted works.

C. Contributory Infringement

Liability for contributory infringement is imposed on those who improperly facilitate the use of copyrighted works. This principle is recognized under Section 106 of the Copyright Act, in which an owner of a copyright has the exclusive right to authorize the reproduction, adaptation, performance, and display of the copyrighted work. The phrase "to authorize" establishes the principle of contributory infringement as being material aid given to the primary infringer in the illegal activity. In Betamax, the Court found direct or primary infringement in the acts committed by the individual

lar activities of the defendant. This factor rather poses the issue of whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for or value of the plaintiff's work.”


106. Before Betamax the most significant off-the-air taping case was Encyclopaedia Britannica Educ. Corp. v. Crooks, 447 F. Supp. 243 (W.D. N.Y. 1978), where defendant corporations had videotaped a number of copyrighted films and distributed them to public school districts. The district court issued a preliminary injunction despite defendant's claim of disruption of public education if the practice was enjoined. The court refused to accept the defense of fair use, and distinguished Crooks from Williams & Wilkins on the basis of the substantiality of the copying and the harmful effect on plaintiff's market which outweighed the non-commercial educational purpose of the copying. Id. at 251.

who had taped the television program and held Sony, the manufacturer of Betamax, liable as a contributory infringer. The Ninth Circuit’s finding of liability of the Sony Corporation, the manufacturer, on a theory of contributory infringement, is a significant extension of the law in this domain. The court of appeals expansive application of the doctrine of contributory infringement is a serious flaw in an otherwise well reasoned opinion. The Supreme Court should not adopt the Ninth Circuit’s reformulation of this doctrine as retardation in the development of valuable replicative technologies might follow.

Copyright law, in perhaps less-developed form than patent law, has imposed liability for infringement to one who knowingly induces, causes, or aids another’s infringement. An individual need not directly supervise or even have an immediate financial interest in the infringing activities to be held liable as a contributory infringer if his activities aid the primary infringer in accomplishing the illegal result.

Once direct infringement is found, a contributory infringer must have knowledge of the infringing activity and he must have materially aided or induced the infringing activity. As for knowledge, the court of appeals noted that the contributory infringer need only have knowledge of the infringing activities but not that these activities as a matter of law constitute copyright infringement. Thus, uncertainty in the law cannot be used as a defense to contributory infringement. The court of appeals easily found this knowledge from Sony’s advertisements and promotion of Betamax and the fact that the machine was primarily sold to reproduce television programming. A presumption of knowledge arose from the circumstances of the sale of Betamax as well as its ordinary, intended, and predictable use—for the purpose of infringement.

The second element in finding contributory infringement is material aid or inducement of the infringing activity. Again, the court of appeals was particularly persuaded by the content of the

109. 3 M. Nimmer, supra note 89, § 12.04[A], at 12-33.
111. 659 F.2d at 975. Under copyright law, a defendant’s innocence does not absolve him of liability; it only affects the remedies available.
112. Id.
113. 3 M. Nimmer, supra note 89, § 12.04[A], at 13.
defendant's advertising which clearly encouraged the infringing activities.\textsuperscript{114} In so doing the court rejected a doctrine recognized in patent law, which limits the doctrine of contributory infringement when a staple article of commerce, an item which has substantial non-infringing uses, is involved.

In patent law, whether the staple article of commerce limitation applies in a particular case will depend on the extent of the article's noninfringing uses.\textsuperscript{115} For example, under this doctrine, one who provides a typewriter to another with the knowledge that it may be used for infringement would not be held liable for contributory infringement so long as he did not commit acts of active inducement. The rationale for this limitation is economic efficiency, a reluctance to hamper the sales of useful articles and hold manufacturers liable as contributory infringers whenever they knew that some purchasers will use the item to infringe. But even under patent law, the seller or provider of a staple article may yet be an infringer if he has actively induced an infringer by advertising instruction or directions on a label.\textsuperscript{116}

The court of appeals believed that the "staple item" limitation was inappropriate in the \textit{Betamax} case because Betamax machines are used to tape little else but copyrighted television programs and Sony's advertising clearly was directed to this use.\textsuperscript{117} Thus, Sony was held liable as a contributory infringer even though Betamax and VTR already have some non-infringing uses, such as the recording of non-copyrighted material off the air, the playback of pre-recorded tapes, and the production of one's own material in conjunction with a video camera. If the price of the video camera becomes greatly reduced, this predominant use for off-the-air taping may not prevail for very long. The current extent of those non-infringing uses is mi-

\textsuperscript{114} 659 F.2d at 975.
\textsuperscript{115} 35 U.S.C. § 271(c) states:
"Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer."
\textit{Id.}

To determine what constitutes a staple article, case law suggests the non-infringing use must be substantial and not merely speculative or experimental. See \textit{Johnson & Johnson v. W.L. Gore & Assoc., Inc.}, 436 F. Supp. 704 (D. Del. 1977).
\textsuperscript{116} \textit{See, e.g.}, Fromberg, Inc. v. Thornhill, 315 F.2d 407 (5th Cir. 1963).
\textsuperscript{117} 659 F.2d at 975.
nor when compared with the predominant use of Betamax to tape copyrighted works. In the near future, the major use of VTR may consist in making home movies and, at that time, the staple goods argument may have much more validity.

The Supreme Court should not adopt the Ninth Circuit’s expansive application of contributory infringement. Such an expansion of this doctrine, which would have wide ranging and perhaps adverse effects on competition, is not reflected in precedent. In other leading contributory infringement cases, as compared with Betamax, the defendant provided non-inherently infringing equipment but actively induced the infringing activity short of actually committing the physical acts of infringement himself.118 The level of culpability in these cases is quite high: a person in defendant’s position would have easily recognized the illegal nature of his activities, and unlike Sony the defendants produced nothing of value to society in the form of new technology. In these cases illegality imposed no penalties on the consumer and the contributory infringers were basically scoundrels.

Betamax is unique in its finding of contributory infringement by a manufacturer who provides equipment to the general public with the knowledge that it will be used by some to reproduce copyrighted works even though the manufacturer did not know the particular defendants or that these acts of reproduction would constitute infringement as a matter of law. Clearly, liability to contributory infringement should apply where a manufacturer specially constructs a device for a particular defendant with knowledge about the intended use of the device. But liability under this doctrine should not be extended to manufacturers of new and useful replicative technologies which have a variety of non infringing uses, even though an indeterminate class of unknown defendants may use this same technology to infringe copyright. Far reaching regulation of new technologies should be left to the legislative process.

What should be done while the legislative process takes place?

118. For example, in Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc., 256 F. Supp. 399 (S.D. N.Y. 1966), an advertising agency, whose client made unauthorized recordings of plaintiff’s songs, by preparing advertisements, answering telephones, filling orders, was held liable as a contributory infringer. Here, the defendant had a close connection with the music piracy business, participating in and furthering this endeavor. Similarly, the court found contributory infringement in Elektra Records Co. v. Gem Elec. Distrib., 360 F. Supp. 821 (E.D. N.Y. 1973), where defendant’s stores sold blank tapes and for a fee loaned shoppers copyrighted musical works on phonorecords so that their clients could record the tapes. See also Universal Pictures Co., Inc. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947).
The Supreme Court should enjoin the active inducement of infringement by advertisement. Accordingly, Betamax machines should prominently carry a warning against the use of the machines for infringement purposes. The court should stop at this point because major adjustments of the forces of competition is the domain of Congress not the courts. Currently, Congress is considering several Betamax bills, the most important of which involves a complex regulatory format to solve the videotaping problem. Whatever remedy is eventually provided either by the judiciary or Congress, must be based on the nature and extent of harm to video markets posed by VTRs.

IV. THE PROBLEM OF REMEDY: Nature of Harm Posed by the Continuing Use of VTR

In applying the proper remedy, whether damages or the novel continuing royalty the district court or ultimately Congress, must determine the nature and extent of the actual harm to the market for the copyrighted work caused by the use of the VTR.119 In general, the origin of the harm, which will evolve almost exclusively from the recording capacity of the VTR, is easy to pinpoint, but the extent of this harm, if any, is highly speculative and indeterminate.120

Paradoxically, the VTR recording capacity may actually increase the value of the copyrighted work by allowing a group of individuals to view television programming who would not otherwise have the opportunity to do so. The reason for this paradox lies in the nature of television which is a medium of advertising whereby broadcasters sell audience to advertisers who pay according to the size of the audience delivered. To determine audience size, rating agencies conduct surveys periodically. Thus, a popular program with an extensive mass audience commands a high rate from the advertiser. VTRs allow time shifting the ability to watch a program at a time other than when it is transmitted, and may offer a means to increase audience size, providing copyright owners with a new source for advertising revenue. By its capacity to provide short term convenience, the VTR enhances the market for the copyright owner.121

Balanced against these market enhancing attributes is the librarying of programs, the principal threat posed by VTR to video markets. Librarying is the making and retaining of copies for future viewing, damaging rerun audiences and the subsidiary rental and sale markets for prerecorded tapes. Copyright owners fear that a multitude of videotapers would dissipate a rerun audience, the after theater market, for a show like "Gone With the Wind" by perform-

Rating services include VTR use in their survey data. Advertisers pay for these extra viewers. The increased audience is directly related to the amount of VTR use which can do nothing but increase the value of the copyrighted work. See The Home Recording Act of 1982: Hearings on Amendment 1333 to S. 1758 Before the Senate Judiciary Comm., 97th Cong., 2d Sess. (1982) (statement of Charles Ferris at 2) [hereinafter cited as Ferris Statement].

Both meters and diaries are used by rating services to determine audience size. A sample number of television households is chosen who either have meters attached to their television tuners counting the exact television programs watched or are interviewed afterward by the diary method. In any event, a programs rating is based on the number of viewers watching the program and takes into account time shifting. See The Home Recording Act of 1982: Hearings on Amendment 1333 to S. 1758 Before the Senate Judiciary Comm., 97th Cong., 2d Sess. (1982) (statement of Nina Cornell, president, Cornell, Pelcovits and Brenner Economists, Inc.) [hereinafter cited as Cornell Statement].

Others have argued that VTR use will not raise the number of viewers watching television but only redistributes the viewing because there is only so much time in the day to watch television. Advertisers will pay less for VTR viewers because statistics on replays, which cannot be measured by automatic metering devices, are less accurate. Even more fundamental, advertisers are interested in reaching a particular audience at a particular time. For example, a florist will not be as interested in a replay audience viewing his advertisement after Mother's Day. In addition, there is always the threat that the advertisement will be deleted by pause devices. See The Home Recording Act of 1982: Hearings on Amendment 1333 to S. 1758 Before the Senate Judiciary Comm., 97th Cong., 2d Sess. (1982)(statement of Jay Eliasberg, former vice president, Research, CBS Broadcast Group) [hereinafter cited as Eliasberg Statement].

The Copyright Office has compiled a chart comparing studies done on the type of practices performed by owners of VTR which could affect video markets. The studies commissioned by the movie industry indicated that most VTR owners' time shift (75.4% time shift, 75% library 15 tapes or less and 23% substantial libraries, Fields Research Corp. for MCA, July, 1978; 52% time shift,31.2% library, 16.8% both, Mediastat for MPAA, May, 1980; 96% time shift, Crossley for Sony, August, 1978; 68% time shifting of public T.V. programs with little evidence of librarying of public T.V. shows, Public Broadcasting Survey, Spring, 1979). But there is a certain amount of librarying performed. But one must keep in mind that the results vary according to which industry group commissioned the survey. See The Home Recording Act of 1982: Hearings on Amendment 1333 to S. 1758 Before the Senate Judiciary Comm., 97th Cong., 2d Sess. (1982)(statement of David Ladd, Register of Copyrights, at Appendix I [hereinafter cited as Ladd Statement].
ing the work over and over to family and friends. With the size of the rerun audience diminished, the advertiser would naturally pay less for such programming. In addition, librarying of works may damage the valuable rental and sale subsidiary markets to the degree that audio taping has.

Despite this fear, the extent of damage due to librarying is probably not that great. Currently, with the cost of tape at a minimum of $12.9 for one hour, the extent of librarying, although the practice may exist to some degree, is economically prohibitive for most people. Even if tape prices decline somewhat, the cost advantage of the rental market will compete with individual librarying, not to men-

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123. Even though the rating services take into account VTR taping to determine audience size for which advertisers will pay, such is not the case when subscriber (pay TV) is involved. Here the copyright owner is directly injured in rental and rerun markets because subscriber TV is primarily interested in the number of subscribers, not the size of the audience. In this context, home taping clearly devalues the copyrighted work. See 3 M. Nimmer, supra note 89, § 13.15[F], at 13-96. The Chairman of the Executive Committee of Walt Disney Productions testified:

... the phenomenal sales of blank cassettes convinces us that people do build archives of our films. Take for instance when "Gone With the Wind" was first televised after introduction of the home video recorder by Sony in 1976. There was a virtual black market of blank videotapes before the showing of that classic picture. The news media reported that VCRs and blank tapes had been sold out. Those tapes were purchased for archival retention, not mere "time shifting."


124. Industry estimates of the market value of audio taping using a median price of 6.27 dollars per album is approximately 2.85 billion dollars. See Warner Communications Inc., A Consumer Home Taping 24 (1982). Companion legislation has also been introduced to remedy the practice of audio taping paralleling the legislation designed to provide copyright owner's compensation for videotaping. See, e.g., S. 1758, 97th Cong., 2d Sess. § 120 (1982). Because of the particular vulnerability of the audiovisual work, off-the-air taping may present in the long run a greater threat to their production than audio taping. For example, the industry has testified that "[t]he average total investment in a motion picture is some $20 million. Eight out of ten films do not recoup their investment from theatrical exhibition. Six out of ten films never recoup their investment, period." The Home Recording Legislation of 1982: Hearings Before the Senate Judiciary Comm., 97th Cong., 2d Sess. (1982) (statement of Jack Valenti, President, Motion Picture Association of America, Inc., at 11) [hereinafter cited as Valenti Testimony] See also supra note 74. Does the consumer really want to library movies as the audio tape, builds up a library to listen over and over to his favorite pieces of music? Or is the desire to see a movie exhausted after a few showings? Supporters of VTR argue that it is unrealistic that videotapers will accommodate large quantities of tapes for future viewing. See Ferris Statement, supra note 121, at 14.
tion competition with videodiscs which sell and rent at lower prices than cassette tapes.\textsuperscript{125} The potential librarying threat, however, is substantial and may become a tangible problem in the future, which calls for close monitoring.

Another type of harm undermining the advertising audience is also related to librarying. This is presented by pause devices which could permit a viewer to delete advertising or use the fast forward device to speed up the commercial. Again, whether significant harm has resulted from the practice of advertising deletion is doubtful. No machine has been devised to automatically delete advertising without viewer participation. The viewer must see the advertising at least once—even at the faster speed. Erasure of advertising, however, cannot be regarded a major problem because of the time and inconvenience it takes to accomplish the task, particularly when coupled with the basic cost of the tape to be kept for librarying purposes.\textsuperscript{126}

A third variety of future harm associated with the VTR involves the interference with a rating service ability to determine the size of the viewing audience.\textsuperscript{127} If the rating service cannot take into ac-

\textsuperscript{125} The price depends on whether it is for a VHS or Beta format. The VHS is somewhat more expensive: $12 per hour for VHS, $9 for Beta. For a 4-\textfrac{1}{2} hour cassette the prices are $23 and $22 respectively. \textit{Consumer Rep.} May 10, 1982, at 232. These prices are list prices and an informal survey in the Toledo, Ohio area reveals considerably lower prices for videotapes. The price of a prerecorded videodisc at about $20 is less than $22 for a 4-\textfrac{1}{2} hour video cassette and the disc contains a prerecorded movie whereas the cassette buyer will have to tape his own off the television set. Videodisc makers are currently expanding their catalog to 400 titles. See Lachenbruch, \textit{A Buyer’s Guide to Videodisc Players}, T.V. Guide, March 6, 1982, at 40.

The question remains whether the product taped from the television will be considered a good library item. These movies are edited for television, riddled with advertisements, and are often of poor quality. This combined with the high price of videotape will not doubt deter many from retaining their copies any length of time before the tape is erased and used for something else. Ferris Statement, supra note 121 at 12. But the ultimate amount of librarying will depend on the future price of tape.

\textsuperscript{126} The extent of advertisement erasure is even more speculative than that of librarying. The Copyright Office has compiled results of various studies on the practice. Studies commissioned by the motion picture industry show a degree of advertisement deletion: 58.3 eliminate sometimes rarely or never, 56.1 pass sometimes rarely or never (Field’s Research Corp. for MCA, June, 1978); 83.1% while recording or playback delete or avoid, (Media Stat for MPAA, May, 1980). The Sony Study Conducted by Crossley, August, 1978 showed that 25% use fast forward through commercials. Ladd Statement, supra note 122 at Appendix II.

\textsuperscript{127} Statistics lend themselves to differing interpretations. For example, the Media Stat Survey indicated that when asked the question, “Do you delete commer-
count the extended audience provided by VTR time-shifting capacity, the VTR has hurt the copyright owner in that he is not compensated for this audience.\textsuperscript{128} Both Arbitron and Neilson, the two majors rating agencies, take into account the use of VTR. The use of VTR may complicate audience measurement but there is no reason to believe that it will significantly distort the ratings.\textsuperscript{129}

In sum, due to the ambiguous nature of the harm presented by VTR, the Supreme Court or the district court will have great difficulty in determining an appropriate remedy to compensate the copyright owner for the infringement.

V. THE INADEQUACY OF TRADITIONAL REMEDIES

Once infringement is proved, the Copyright Act generously provides the copyright plaintiff with a choice of remedies.\textsuperscript{130} The copyright owner may recover actual damages resulting from the infringement and the infringer’s profits attributable to the infringement that are not taken into account in computing the actual damages.\textsuperscript{131} Instead of actual damages and profits, the copyright owner may also choose statutory damages which provide a range of minimum and maximum awards, assessed at the discretion of the court.\textsuperscript{132} 

\begin{footnotesize}
\begin{enumerate}
\item See Eliasberg Statement, \textit{supra} note 121.
\item See Cornell Statement, \textit{supra} note 121; Ferris Statement, \textit{supra} note 121.
\item 17 U.S.C. § 504(c) (Supp. III 1979). The range of recovery is limited from $250 to $10,000 except for willful infringement where the court may increase the award to not more than $50,000. The range is decided at the broad discretion of the court without requiring extensive evidence of actual damages or profits. Generally statutory damages are provided because actual damages earned through infringement may be too difficult to determine, and infringers often do not make profits from their infringing activities. The statutory damage remedy has always been extended to past infringement and the remedy is usually coupled with an injunction against the infringer to cease the infringing activities.

In \textit{Betamax} statutory damage would not constitute an appropriate measure of relief for much the same reasons that actual damages and profits are not appropriate.
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mally, a recovery of damages and profits or statutory damages is accompanied by a permanent injunction, enjoining the defendants from future infringing activities.

Clearly, a permanent injunction\textsuperscript{133} issued against Sony would cause great public injury and destroy a valuable new technology in the name of copyright infringement.\textsuperscript{134} In addition, the damage remedy is completely inadequate in the context of Betamax: both actual damages and profits or statutory damages, if limited to the activities of the specific direct infringer, are trivial. On the other hand the damage to future markets caused by the Betamax are speculative and indeterminate.

Recognizing these difficulties, the court of appeals suggested that a continuing royalty may be appropriate where a permanent injunction would cause great public injury.\textsuperscript{135} No court has yet applied this novel remedy to a copyright case.\textsuperscript{136} The method of determining the amount of royalty and the way in which royalty proceeds would be distributed to copyright owners would involve great difficulties perhaps taking years to accomplish. But the possibility a judicially fashioned compulsory license may prove to be the most remarkable result of the Betamax case.

If the traditional remedies of damages and permanent injunction are inadequate, the Supreme Court or on remand the district court

Because the case involved only one infringement, even if the statutory maximum were assessed, this would constitute a trivial sum compared with what the plaintiffs would deem an adequate measure of recovery. This, of course, would not preclude future litigation involving other infringements. Such litigation would be an unfortunate result of the Betamax, involving enormous policing and administrative costs in which copyright owners would see perhaps very little of recoveries won. As a by-product it would also force the copyright owners in their policing efforts to invade the privacy of homes in pursuit of infringers.

\textsuperscript{133} 17 U.S.C. § 502(a) (Supp. III 1979) provides for the granting of temporary and final injunctions as the court deems necessary to restrain infringement of copyright.

\textsuperscript{134} Lagore Testimony, supra note 43 at 11-12.

\textsuperscript{135} Universal Studios v. Sony Corp. of America, 659 F.2d 964, 976 (9th Cir. 1981).

\textsuperscript{136} The closest provision in the Copyright Act of 1976 involves the effect of omission of notice on innocent infringers, 17 U.S.C. § 405(b) (Supp. III 1979), which provides for a reasonable license fee fixed at the discretion of the court in the case where an infringer proves that he was innocently mislead by lack of copyright notice. Section 405, however, is of dubious applicability to the Betamax case. This section is aimed at an infringement of a single work and not a future infringement, which would hardly be termed innocent infringement, in which the infringer relied on a copy for which notice had been omitted.
might consider ordering modification of the VTR to avoid its most objectionable feature, namely, its recording capacity to create a simple playback machine.\textsuperscript{137} This solution creates the worst of all possible worlds. Such a decree would be economically inefficient, penalizing the public by depriving it of a valuable new technology which because of its playback capacity may become increasingly more useful. Even if these technological modifications were feasible, they would seriously damage the market for the VTR, placing it at a disadvantage against the lower priced videodisc. In addition, they would destroy the flexibility of the VTR and the possibility of its future development for non-infringing activities which rely on replay, pause, and permanent recordation capacity. The popularity of VTR indicates that people will buy the machines with these features from a bootlegging source that would develop to meet the demand. Turning back the technological clock would suppress the development of a valuable new technology and perhaps dedicate society's resources to policing illegal bootlegging activities.

None of the above remedies, traditional or novel,\textsuperscript{138} constitutes an adequate response to the challenge of VTR. A legislative solution is mandated.

\textbf{VI. THE NEED FOR A LEGISLATIVE SOLUTION}

\textbf{A. A \textit{Judicially Crafted Compulsory License}}

Resolution of the problem of home videotaping calls for a legislative solution rather than an adjudicated one. As the district court


\textsuperscript{138} Another even more drastic form of non-monetary relief is the impoundment remedy. The Copyright Act specifically provides for the impounding and ultimate destruction of infringing articles and of all means of making them, 17 U.S.C. § 503 (Supp. III 1979). Within the scope of this provision are included blank tape and recording equipment. The decision to issue an impounding order is discretionary with the court. Impounding orders, however, have been denied absent extraordinary circumstances.

Although a possible option, the district court should in its discretion not adopt the impounding remedy. The economic impact on the same 25,000 retail outlets selling VTRs and blank tape would be disastrous. The order would apply to Sony as the only defendant manufacturer in the suit while the other brands of VTR would continue to be used. Further problems would involve the three million American homes already using VTR. The court should reject the impoundment remedy when faced with its practical difficulties, fundamental unfairness, and its eventual result of total suppression of a useful new technology. See Lagore Statement, \textit{supra} note 43.
stated, "[t]he ramifications of this new technology are greater than the boundaries of this lawsuit. A court reviewing the limited claims of specified parties in a particular factual setting cannot and should not undertake the role of a government commission or legislative body exploring and evaluating all the uses and consequences of the videotape recorder." A system of compulsory license, a royalty tax on the hardware and software of videotape and its manner of distribution can only be determined after the many factors, economic and social, are considered and adjusted according to the needs of consumers, the producers of machines, and the copyright owners. A broad policy approach by a legislature fitting all the pieces of the puzzle into an organized whole is vastly superior to the piecemeal approach of adjudication, particularly when the harm evolving from even massive use of VTR is at best speculative.

Professor Nimmer, whose advocacy for a continuing royalty was persuasive to the court, analogized the remedy to the real property domain where courts, to avoid public harm, have issued a judicially crafted compulsory license. But the analogy fails because the problem could not be resolved in one lawsuit covering one piece of property owned by an individual person. The harm by public use of real property is less speculative, the trespassing easier to determine.

Unlike a parcel of land, however, the variety of copyrighted works broadcast over public airwaves is infinitely greater, the actual harm to the copyright owner is not clear, and the amount of infringement is difficult to determine and impossible to police. If a continuing royalty were assessed, an elaborate distribution system would have to be constructed involving continuous supervision by regulatory decree which the courts are ill-suited to enforce. To re-

140. See infra text accompanying notes 119-28.
141. 3 M. Nimmer, supra note 89, § 13.05[F], at 13-91.
142. To support his analogy Nimmer cites several real property cases, e.g., Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334 (1933); Quality Excelsior Coal Co. v. Reeves, 206 Ark. 713, 177 S.W.2d 729 (1944).
143. For example, in Cox v. City of New York, 265 N.Y. 411, 193 N.E. 251 (1934), the court awarded damages instead of an injunction where a railroad had improperly constructed bridges, but honestly believed it had obtained an easement to the land. Here, the cost of restoration would greatly exceed the value of the rights invaded.
144. For the peculiar nature of copyrighted works and the protection of public goods see infra text accompanying notes 15-24.
duce transaction costs copyright owners would probably devise a clearinghouse method of distribution as in the performance rights for sound recordings.\textsuperscript{146} Such combinations have raised serious antitrust problems which seem to persist despite efforts of resolution.\textsuperscript{146}

In sum, the complexity of the interests, the multitude of the parties, the elaborate distributional machinery, and legal uncertainty will necessitate a regulatory decree calling for continuing court supervision. Such decrees have been proven to be unsatisfactory and should only be considered as a method of last resort. All this indicates a particular need for a legislative solution. Accordingly, breathing space is needed whereby Congress may implement a mechanism flexible enough to adjust the needs of copyright owners while protecting the consumer interest in enjoying the benefits of valuable new technology.

In the meantime, the Supreme Court should enjoin the active inducement of infringement by advertisement\textsuperscript{147} or during all Betamax machines to carry a warning to all users against the use of machines for infringement purposes. Hopefully, Congress will soon provide a proper legislative remedy to resolve the threat posed by VTR to the healthy output of copyrighted works.

\section*{B. Legislative Proposals}

Congress is considering several legislative proposals to remedy the problem of off-the-air taping for private purposes.\textsuperscript{148} One legislative solution would simply exempt the practice from copyright infringement.\textsuperscript{149} The other would establish a compulsory license for

\begin{itemize}
  \item \textsuperscript{145} \textit{See Information Industry Association, Essential Elements of a Copyright Clearinghouse} (1977).
  \item \textsuperscript{147} Suggested also by Field, \textit{Reflections on the Betamax Decisions}, 22 IDEA 265 (1981).
  \item \textsuperscript{148} For a summary of the legislative proposals and industry arguments see Holsendolph, \textit{Tax Plan for Video Recording Gear}, N.Y. Times, March 12, 1982, at 24, col. 4.
  \item \textsuperscript{149} S. 1758, 97th Cong., 1st Sess. (1982) states:
  \begin{quote}
    § 119. Limitation on exclusive rights:
    Exemption for certain video recordings notwithstanding the provisions of section 106, it is not an infringement of copyright for an individual to record copyrighted works on a video recorder if—
  \end{quote}
\end{itemize}
home taping while imposing a royalty on the sale of each VTR machine and tape. Compared to the total exemption, the administra-

(1) the recording is made for a private use; and
(2) the recording is not used in a commercial nature.

150. Amend. 1333 to S. 1758, 97th Cong., 2d Sess. (1982) states as follows:
§ 119. Limitation on liability: Video recording
(a) HOME VIDEO RECORDING.—Notwithstanding the provisions of section 106(1), an individual who makes a single video recording of a motion picture or other audiovisual work in his or her private home is exempt from any liability for infringement of copyright if the video recording is for the private use of that individual or members of his or her immediate household.
(b) COMPULSORY LICENSE FOR VIDEO RECORDING DEVICES AND MEDIA.—
(1) Notwithstanding the provisions of section 106(1), the importation into and distribution in the United States, and the manufacture and distribution in the United States, of any video recording device or video recording medium shall be subject of compulsory licensing if the importer or manufacturer of the device or medium records the notice, and deposits the statement of account and royalties, specified by this clause.

(A) The importer or manufacturer shall, at least one month before the distribution in the United States of any video recording device or any video recording medium or within sixty days after the effective date of this Act, whichever is later, record with the Register of Copyrights (hereinafter ‘the Register’) a notice including a statement of its identity and address and a description of any trade or business names, trademarks, or like indicia that it uses in connection with the importation, manufacture or distribution of video recording devices and video recording media in the United States, and thereafter, from time to time, such further information as the Register, after consultation with the Copyright royalty Tribunal (hereinafter the ‘Tribunal’), shall prescribe by regulation to carry out the purpose of this clause.

(B) The importer or manufacturer shall deposit with the Register, at such times, for such periods, and in accordance with such requirements that the Register shall, after consultation with the Tribunal, prescribe by regulation, a statement of account, covering the pertinent period next preceding, specifying the number of video recording devices and amount of video recording media imported into or manufactured in the United States during such period, and the number and distributed in the United States during such period, together with such other information, and in such form, content and manner, as the Register shall, after consultation with the Tribunal, from time to time prescribe by regulation.

(2) Notwithstanding the provisions of clause (1) of this subsection, the importation into and distribution in the United States, or the manufacture and distribution in the United States, of any video recording device or video recording medium is actionable as an act of infringement under section 501, and fully subject to the remedies provided by sections 502 through 506, 509, and 511, if the notice, statement of account, or royalty specified by clause (1) of this subsection has not been recorded
tion of a compulsory license and the collection and distribution of royalties will involve great expense and complications, but it is preferable to total exemption, because of the substantial potential threat which VTR poses for the copyright owner.151

The argument for total exemption has a short-run appeal. Supporters of a complete exemption for videotaping point to the more than adequate remuneration copyright owners already obtain from the sale of their audiovisual works. These include the showing of the

or deposited and such failure was willful or repeated, or if the statement of account or royalty does not materially comply with the requirements of clause (1) or any regulations prescribed thereunder.

(3) The Register shall receive all fees deposited under this section and, after deducting reasonable administrative costs, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs.

(4) The Royalty fees thus deposited in connection with video recording devices and media shall, in accordance with the procedures provided by clause (5), be distributed to the owners of copyright in motion pictures and other audiovisual works that were included in television transmissions . . .

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During such month that the Tribunal shall establish in each year following the year in which this Act takes effect, every person claiming to be entitled to compulsory license fees under clause (4) shall file a claim with the Tribunal for fees covered by all statements of account for periods during the preceding year in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(c) Determination of Royalty Fees.—

(1) Not later than thirty days after the effective date of this Act, the Chairman of the Tribunal shall cause notice to be published in the Federal Register of the initiation of proceedings for the purpose of determining appropriate and reasonable royalty fees to be paid by manufacturers and importers for the distribution of video recording devices and video recording media in the United States. Such proceedings shall be initiated and concluded in accordance with section 804(e) of this title.

(2) Such fees shall be calculated to afford to copyright owners of motion pictures and other audiovisual works a fair compensation for use of their creative works.

151. See infra text and accompanying notes 119-29.
movie in first run theatres, sale of prerecorded tapes, and negotiated royalties on television. They view the royalty tax as a fourth bite in the commercial exploitation of a work, overcompensating the copyright owner even though the major use of VTR, for time shifting, causes no tangible harm. Moreover, the copyright owner has exploited the public airwaves whose stations are licensed to serve the public convenience and necessity and whose broadcasts are for the use of the general public. Some of the material broadcast over public airwaves is not protected by copyright. Finally, supporters of the exemption believe that anything but a complete exemption will have an undue negative impact on the retailers of VTR and the development of this new technology.

The major thrust of the argument for total exemption relates to the economics of public goods. In effect, supporters of total exemption claim that it is wasteful to reduce the utility of consumers and users of VTR when sufficient compensation induces the copyright owner to continue investment in the protection of works of authorship. At present, there is perhaps some justification for this position if viewed strictly in the short run. Today the relatively high price of videotape may preclude librarying, but if the price for tape continues to fall, the production of audiovisual works for television may become endangered to a perhaps greater degree than in the


153. *Id.* at 10-11. *See, also, Ferris Statement, supra* note 121.

154. As Sony’s petition for certiorari states: “[this case] involves works which plaintiffs voluntarily choose to have teletcast over public airwaves to individual homes free of charge . . . voluntarily exploit their works by commingling them with all the other programs on free off-the-air T.V.” *Petition, supra* note 12, at D-7. Representatives of the VTR industry argue similarly. Copyright owners are making use of the public domain of the broadcast airwaves to achieve the maximum dissemination of their product. They have chosen this route to disseminate their works but if they want total control they need not use television as their medium but can either sell or rent their works directly to the public. *Ferris Statement, supra* note 121, at 22. The movie industry counters this argument as follows: “Property rights are not transitory, nor do they lose their privacy when they leave one environment and enter another.” *Valenti Statement, supra* note 124, at 36. Nimmer argues that the compulsory license legitimates home taping and would render unnecessary an attempt to invade the privacy of the home and allow the home taper to make full use of public airwaves with impunity. *See* 3 M. *Nimmer, supra* note 89, § 13.05(F) at 13-96.


156. *See supra* text accompanying notes 119-29.
case of audio taping.\textsuperscript{157} Although the degree of harm at this time is indeterminate, the history of new replicative technologies suggest the possibility of almost universal access to VTR.\textsuperscript{158}

The particular vulnerability of the audiovisual work dictates the establishment of a mechanism proposed by Senator Mathias and Representative Edwards (Betamax Bill) which would balance the rights of creators and users.\textsuperscript{159} This bill would exempt home taping for private purposes from copyright infringement\textsuperscript{160} while creating a compulsory license for audiovisual works.\textsuperscript{161} Manufacturers would pay a royalty, determined by the copyright royalty tribunal, on each VTR machine and videotape sold.\textsuperscript{162} The Copyright Royalty Tribunal (CRT) would distribute the proceeds of the royalty to copyright owners after deducting administrative costs.\textsuperscript{163}

The Betamax Bill confers great discretionary authority on a governmental administrative agency, the CRT, which has been criticized for typical bureaucratic inefficiency.\textsuperscript{164} Nonetheless, a compulsory license administered by the CRT is preferable to a private marketplace solution implemented under court supervision.\textsuperscript{165} Unlike

\textsuperscript{157} For the great expense and risk involved in the production of movies see Valenti Statement, supra note 124, at 11. See also supra note 74.

\textsuperscript{158} As for example in photocopying, where costs have continued to decline and the quality continues to improve.

\textsuperscript{159} S. 1758, supra note 150.

\textsuperscript{160} \textit{Id.} at § 119(a).

\textsuperscript{161} \textit{Id.} at § 119(b).

\textsuperscript{162} \textit{Id.} at § 119(c).

\textsuperscript{163} \textit{Id.} at § 119(b)(5)(B).

\textsuperscript{164} Clarence James, former chairman of the CRT, has complained that the CRT does not have enough to do. Nevertheless, there is a two-year lag in the distribution of cable royalties. Shenon, \textit{Cable TV's Benefactor Comes under Fire}, N.Y. Times, Aug. 9, 1981, at 6, col. 1. Cable T.V. royalties involve several levels of governmental regulation, pricing, and distributional problems. This has lead some experts to argue for a return to a free market system to avoid wasteful complexities, needless bureaucracy, and unfairness to copyright owners. See Geller, \textit{REGULATION} (May/June 1981) at 35. Unlike cable royalty (17 U.S.C. § 111), the assessment and distribution of VTR royalties do not present the same great degree of pricing and distributional complexities. For example, compare the computation of royalties for cable T.V. retransmission (17 U.S.C. § 111(d)(2)) with the VTR royalty. For an explanation of the cable royalty see A. LATMAN, \textit{COPYRIGHT FOR THE EIGHTIES}, 450-54 (1981).

\textsuperscript{165} Besen, Manning and Mitchel have summarized general objections to compulsory licenses in the context of cable T.V. as follows. First, the fixed fee has no relation to prices that the market place would produce if transactions were costless. Second, compulsory license formulas are inflexible to changing economic developments. Third, compulsory license royalties require a mechanism for distribution.
a court of law, the CRT is well situated, as an expert body currently administering other statutory compulsory licenses under the Copyright Act,\textsuperscript{166} to adjust the terms of a royalty on VTR to changing conditions in the industry.\textsuperscript{167}

One modification of the CRT's current royalty discretion under the bill should be reconsidered. As the legislation reads, the CRT must decide, according to the principles of fair compensation, the initial royalty fee to be reconsidered in 1985 and in five-year intervals thereafter.\textsuperscript{168} Instead, Congress should specify the royalty for the first five-year interval, allowing a period of reflection to determine the extent, if any, that VTR harms video markets. This would also enable the parties involved in the administrative process to concentrate on other aspects of the distributional mechanism rather than be diverted into extent-of-royalty considerations.

How much should the initial royalty be? The Motion Picture Association of America has used for illustrative purposes, $50.00 per machine and $1.00 per tape.\textsuperscript{169} These figures seem somewhat high at this time, particularly in a price-sensitive home electronics industry. Manufacturers will pass on the surcharge to consumers unless they are willing to sustain a tighter profit margin.\textsuperscript{170} Since the nature of the harm to video markets is ambiguous, for the initial royalty Congress should err on the low side to study the effect the surcharge has

\footnotesize

Fourth, a too-low compulsory license royalty has an adverse effect on program supply market. See Besen, supra note 19, at 88-92. Do these arguments carry the same force in the VTR context? It appears not. First, VTR would not be costless because of the number of parties and interests involved. Second, the VTR formula in the Betamax Bill provides for flexibility by specifying periodic review of the royalty fees. Third, the VTR specifies that CRT will distribute the fees which will be the most complicated aspect of the Betamax Bill, but it is hard to see how these complexities could otherwise be avoided by a private market solution. Fourth, the VTR does not present the same free rider effect as does cable T.V. and even if the royalty is set too low for VTR, there is no indication that program supply markets would be curtailed.

\textsuperscript{166} CRT's distributions of the 1978 cable royalties have been sustained in National Assoc. of Broadcasters v. Copyright Royalty Tribunal, No. 80-2273, slip op. (D.C. Cir. Apr. 9, 1982). Much of the delay in the distribution of royalties is due to the appealability of CRT decisions to the United States Court of Appeals for the District of Columbia. 17 U.S.C. § 810. 3 M. Nimmer, supra note 89, § 14.11 at 140-73.

\textsuperscript{167} S. 1758 § 119(c)(4).

\textsuperscript{168} Id.

\textsuperscript{169} See Valenti Statement, supra note 74, at 41.

\textsuperscript{170} The evidence is conflicting about how much, if any, of such a royalty would be absorbed by the Japanese manufacturer or U.S. retailer. Cf. Valenti Statement, supra note 74, at 37; But see Ferris Statement, supra note 121, at 37. It would appear that all things being equal, much of the royalty fee will be passed on to consumers.
on the operation of the market over a five-year interval.

The royalty provisions of the bill are an imperfect solution in an imperfect world. Only two other countries have enacted similar provisions: Germany,\textsuperscript{171} which imposes a royalty on the sale of recording devices, and Austria,\textsuperscript{172} on blank tapes. Both apply the tax to audio as well as video recording devices and tapes. Unlike the German system, the Betamax Bill properly imposes the royalty on videotape as well as the VTR.\textsuperscript{173} The royalty on the tape acts as a metering device placing the greatest burden of the tax on those who are engaging in librarying, the most objectionable practice from the copyright owner's standpoint.\textsuperscript{174} The non-librarying user who uses the same tape over and over for time shifting will be penalized less. Unfortunately, the royalty will affect the non-infringing consumer who uses the VTR along with a video camera to make his own movies or play prerecorded tapes. This drawback to the royalty is probably unavoidable because there is, of course, no feasible method of determining the eventual use of a VTR or tape.

VII. Conclusion

New and useful replicative technologies allowing universal access to copyrighted works continue to strain the law's ability to protect the output of the creative artist. The Ninth Circuit Court of Appeals in Betamax in a well reasoned opinion struggled admirably in trying to apply traditional copyright principles to the latest threat from the new technology—the VTR. The Court found off-the-air taping for private purposes to constitute infringement but the difficult question of remedy remains: how to meet both the needs of the copyright owner and the consumer without impeding the production of artistic works or the development of new technologies. The answer lies in a legislative rather than a judicial solution which would establish a compulsory license for home taping while taxng the sale of VTR devices and tapes and distributing the royalty proceeds to copyright owners. A compulsory license, which deprives a copyright


\textsuperscript{172} Art. 42(5) Austrian Copyright Law, summarized in Ladd Statement, \textit{supra} note 122 at 50.

\textsuperscript{173} S. 1758 § 119(c).

\textsuperscript{174} See Ladd Statement, \textit{supra} note 122, at 32.
owner of control over his work, is to be used sparingly, but because of the nature of the interest, the numerous parties, and the public interest, such a remedy provides the best feasible solution to a difficult problem.

The American motion picture industry, the world's largest, is a bright spot in the American economy contributing significantly to our balance of trade. Other nations, buyers of American movies, which are considering the question of home video taping will be influenced by the resolution of this issue in the United States. The Betamax Bill may ultimately benefit our economy as well as protect the output of our creative artists.

175. Industry estimates indicate that the U.S. movie industry contributes one billion dollars in a surplus balance of payments. See Valenti Statement, supra note 74, at p. 5.