HOME RECORDING OF PAY TELEVISION: BEYOND THE BETAMAX CASE*

I. INTRODUCTION

The Copyright Act of 1976 (1976 Act)[1] was the result of many years of struggle to accommodate federal copyright law to technological change; but the ink had scarcely dried on its pages before controversy was once again created by new technology.[2] This time, the new technology was video recording.

The question whether private, noncommercial video recording of material "broadcast free to the public over public airwaves"[3] is a copyright infringement arose in *Universal City Studios v. Sony Corp. of America* (the *Betamax Case*).[4] The district court held that such video recording was not an infringement; the Ninth Circuit Court of Appeals disagreed.[5]

The legality of home video recording from cable or subscription television (also referred to as pay television) was perceived by the district court as a separate issue and was specifically reserved.[6] The Ninth Circuit found the fact that the material was broadcast over public airwaves irrelevant to its analysis.[7] However, since broadcast and pay television are technologically and economically different media with distinct legal histories, the legality of home recording from pay television is not likely to be decided in the *Betamax Case*.

This Note examines the relationship between the rights of copyright owners and those of home video recorder owners within the context of cable and subscription television. It attempts to formulate economically workable, equitable and sensible solutions to a problem that exists regardless of the ultimate disposition of the *Betamax Case*.

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* An earlier version of this Note was awarded First Prize, Benjamin N. Cardozo School of Law, in the 1982 ASCAP Nathan Burkan Memorial Competition.

[1] Copyright Revision Act of 1976, 17 U.S.C. §§ 101-810 (Supp. IV 1980) [hereinafter cited as the 1976 Act].

[2] The 1976 Act was signed into law on Oct. 19, 1976. Universal City Studios v. Sony Corp. of Am., 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd in part, aff'd in part*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, ___ U.S. ___, 102 S. Ct. 2926 (1982) [hereinafter cited as the *Betamax Case*] was filed on Nov. 11, 1976.

[3] 480 F. Supp. at 442.

[4] *See supra* note 2. In addition to Sony, which manufactures the Betamax, the named defendants included retail Betamax outlets, the advertising agency which handled the Betamax account and an individual Betamax owner. 480 F. Supp. at 432.

[5] The Ninth Circuit affirmed only the portion of the decision which held that the retail store demonstration recording was fair use. 659 F.2d at 976.

[6] 480 F. Supp. at 442.

[7] 659 F.2d at 972-73.

II. The Betamax Case

In 1976, shortly after release of the Sony Corporation's "Betamax" video recorder onto the market, Universal City Studios and Walt Disney Productions filed suit against Sony. They alleged that home use of the Betamax to record their copyrighted movies broadcast over the air constituted copyright infringement.[8]

The district court, in a pragmatic but painstakingly detailed opinion, found that video recording for home use does not violate copyright laws.[9] It based this decision on the 1909[10] and 1976 Copyright Acts, the fair use doctrine,[11] and the legislative history of the 1976 Act.

The district court discussed at length the facts which led to its conclusion that home video recording was fair use, giving particular attention to the effect of the recording on the value of the copyrighted work.[12] The court used the legislative history of the 1976 Act to interpret the language of that statute and to bolster the conclusion that an exemption was intended for home use.[13] This reasoning has been widely commented upon, both critically[14] and favorably.[15]

In a narrowly based opinion, the Court of Appeals for the Ninth Circuit reversed the district court and rejected the use of legislative history to interpret what the appellate tribunal saw as the plain meaning of an unambiguous statute.[16] The Ninth Circuit did not differentiate between gratuitous broadcasts and pay television, or between over-the-air and cable transmission. It regarded any unauthorized act of copying as an infringement, not excused by fair use and not subject to a home-use exemption. Although home-use video recording of cable transmissions was not an issue in the *Betamax Case*,

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[8] 480 F. Supp. at 432. The suit also alleged contributory infringement by Sony and its advertising agency. *Id.* at 457-62. At the Supreme Court oral argument held January 18, 1983, many of the questions posed related to the issue of contributory infringement. This suggests that the Court's decision on the legality of home-use recording may hinge upon its perception of the contributory infringement issue.

[9] *Id.* at 468-70.

[10] Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909) (current version at 17 U.S.C. §§ 101-810 (Supp. III 1978)).

[11] *See infra* note 72 and accompanying text.

[12] 480 F. Supp. at 440, 450-52. *See also infra* notes 76-91 and accompanying text.

[13] 480 F. Supp. at 442-46.

[14] *See generally* Marsh, *Betamax and Fair Use: A Shotgun Marriage*, 21 Santa Clara L. Rev. 49 (1981); Note, *Universal City Studios v. Sony Corp.: "Fair Use" Looks Different on Videotape*, 66 Va. L. Rev. 1005 (1980).

[15] *See generally* Hipsh, *The* Betamax *Case and the Breakdown of the Traditional Concept of Fair Use*, 2 Com. and the L. 39 (1980); Note, *Home Videorecording and Copyright Law: The* Betamax *Case*, 37 Wash. & Lee L. Rev. 1277 (1980).

[16] 659 F.2d at 966. *But see infra* note 93.

the tenor of the Ninth Circuit's opinion leaves little doubt that that court would regard such recording with disfavor.

It is questionable, however, whether the reasoning used by either court in the *Betamax Case* is applicable to pay television. The economics, and hence the equities, of free and pay broadcasting are different, and their technological dissimilarities are relevant to legal analysis. An understanding of the technology of pay broadcasting must precede application of the copyright laws to it. While many of the same principles of law apply to both free and pay broadcasting, the technological differences of pay television systems make it necessary to consider sections of the 1976 Act which need not be examined when only free broadcasts are involved.

III. Technological Background

A. *Pay Television*

A cable television system is composed of an antenna to receive, a master control station to process, and a distribution network to deliver broadcast signals by coaxial cables[17] to home television sets of paying subscribers.

Cable television is a recently expanded technology. It began as a service to improve television reception of local over-the-air signals.[18] Later, to attract additional subscribers, cable companies made available extra channels of programming. These added channels carry programs originated by the cable operators, import over-the-air signals of television stations in other markets (distant signal carriage), and provide nationally distributed programs, including movies and sporting events.[19]

Subscription television (STV) uses a different method of transmitting programs to paying viewers.[20] The signal is transmitted over the

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[17] A coaxial cable is a metal conductor which is surrounded by a second metal conductor. The two conductors are insulated from each other. Coaxial cable is more resistant to interference from other sources of electromagnetic radiation than most other transmission mechanisms. Gross, See/Hear: An Introduction to Broadcasting 336 (1979).

[18] Cable television was invented in the late 1940's as a means of improving reception where conventionally broadcast signals were too faint or interrupted by mountains. R. Coll & M. Botein, Cable Television—Tapping the Potential 15-16 (1972).

[19] Cable operator programming began with "automated services" such as a television camera fixed on a clock, thermometer or ticker tape. Now, some cablecasters have built or leased studio facilities to provide their own programming, called "cablecasting." W. Boer & M. Botein, Cable Television: Franchising Considerations 9 (1974). For a comprehensive listing of recently available cablecast programming, see Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 S. Cal. L. Rev. 1001, 1007 nn.42-48 (1981).

[20] For a description of subscription television (STV) see Note, *The Development of Video Technology*, 25 N.Y.L. Sch. L. Rev. 789, 796-801 (1980).

air, just as in conventional television. However, STV operators encode, or "scramble," their transmissions and lease decoders, or "descramblers," to subscribers, so that STV programs will be intelligible only to paying customers. In addition, some systems transmit their audio and video signals separately. The video portion is scrambled and can only be received by a television equipped with a descrambler. The audio portion is not scrambled; it is, however, transmitted on a subcarrier frequency which can be received by devices leased or sold by the STV operator.[21] The leased receiver unit contains a speaker from which the program's soundtrack plays.[22]

There are a variety of ways to subscribe to pay television services. "Basic cable" is the minimum service provided, generally for a monthly fee. It always includes local over-the-air broadcast signals[23] and often includes nationally distributed cable-oriented programming such as all-news or all-sports formats.[24] Additional channels are offered by operators[25] for an extra fee.[26] This is "premium" programming, with a variety of channels offered either individually or as a package.[27] The additional channels, often called "pay-TV," distribute their programs via communications satellites to cable system "head-ends"[28] and directly to STV subscribers.

In some systems, subscribers may also choose individual programs for which they are charged. It is expected that this form of pay-TV, known as "pay-per-view," will gain widespread popularity in the

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[21] Originally the Federal Communications Commission permitted STV companies only to lease the receivers that are necessary to see or hear their transmissions. 47 C.F.R. § 73.642(f)(3) (1981). This regulation was repealed. *In re* Amendment of Part 73 of the Commission's Rules and Regulations in Regard to Section 73.642(a)(3) and Other Aspects of the Subscription Television Serv., 90 F.C.C. 2d 341 (1982). However, devices that allow reception of STV transmissions without a subscription have always been available on the "black market." It has been estimated that from 2–50% of persons who receive STV signals do so illicity. Rosenthal, *Important Battles Won Against Theft of Service*, CABLE AGE, Sept. 21, 1981, at 8. *See also Tuning in Pay TV Paylessly*, NEWSWEEK, Feb. 11, 1980, at 93. *See infra* note 75.

[22] *See, e.g.*, Chartwell Communications Group v. Westbrook, 637 F.2d 459, 461 (6th Cir. 1980). For a description of how one STV station uses a scrambler to discourage home videotapers see Chiarkas, *Foul Airplay: Are TV Stations Out to Stop You From Taping?*, VIDEO REVIEW, Sept. 1981, at 39.

[23] The Federal Communications Commission requires cable systems to carry the signals of certain local television stations without any deletions or alterations. 47 C.F.R. § 76.55(b), .57(a), .59(a), .61(a), .63(a) (1981).

[24] *A Glossary of Cablespeak*, HOME VIDEO, Oct. 1981, at 48 [hereinafter cited as *Glossary*].

[25] An "operator" is the individual or company owning a cable system.

[26] *Glossary*, *supra* note 24, at 48.

[27] *Id.* The well-known channels Home Box Office (HBO), Showtime and The Movie Channel are "premium" channels.

[28] The "head-end" is the technical operating center of a cable system. It receives and processes signals and then sends them over the cable to the individual home television. *Id.*

next few years.[29] The pay-per-view system involves two-way communication between head-end and subscriber, using "addressable control systems" which are activated in one of several ways. The subscriber can telephone a request for a program to the head-end, or can enter an individually assigned code on a two-way communications system. The selected program is then unscrambled for viewing and the billing is simultaneously entered by a central computer. In addition to a monthly basic service charge, the subscriber is billed for each viewing he requests.

B. *The Video Recorder*

The first successful home videocassette recorder (VCR),[30] introduced by Sony in 1976,[31] was called Betamax. The next year Matsushita Electric Industrial, Ltd. introduced a competing recorder, known as a Video Home Delivery System (VHS). These two types of machine—the Betamax format and the VHS format—are incompatible: material taped on a machine of one format cannot be played on the other. In principle, however, all VCRs operate in the same way.[32]

All VCRs have controls which enable them to play, record, pause, fast-forward, rewind, stop the tape and select a channel. These controls are analogous to those on an audio tape recorder. Another control, generally labeled VCR/TV, is used to select the antenna/cable or the recorder as the source of what appears on the television screen.

In most cases, the VCR is connected between the antenna and the television set. The wire from the home antenna or the coaxial cable from the pay television system is plugged into the VCR. A second connection is made from the output of the VCR to the television set's antenna input, generally with a short length of coaxial cable. A television set need not be connected to the external antenna because the television functions only as a monitor screen for the VCR.[33]

VCRs have fast-forward capability, which makes it possible to avoid watching a segment that has been recorded. With basic "no-

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[29] *See generally* Shepard, *The Case for Pay-Per-View*, VIEW, Mar. 1981, at 72; *Pushing Hard for Pay-for-View*, VIEW, Oct. 1981, at 40.

[30] The VCR is the home-use equivalent of the open-reel professional VTR (videotape recorder) introduced in the 1950's. Lachenbruch, *Your Complete Guide to VCRs*, PANORAMA, Feb. 1980, at 68.

[31] *Id.*

[32] *See generally* Hoffman, *How to Buy a VCR—A Definitive 8 Page Manual*, HOME VIDEO, Apr. 1981, at 48 [hereinafter cited as *Manual*].

[33] *Id.* at 49-50. *See also* 480 F. Supp. at 435 (the Betamax tuner and reception capability are not dependent on a TV set, which is needed only for playback).

frills" VCRs, the television screen is blank in fast-forward mode,[34] but more sophisticated machines allow the viewer to scan the tape five to ten times faster than at normal speed.[35]

The VCR/TV switch and the VCR's channel selector allow the viewer a number of options. He may view normal broadcasts without the VCR running, tape a broadcast while watching that program, tape one broadcast while watching another or none at all, or play back a prerecorded tape.[36]

Another control on all VCRs is a timer. Setting the timer automatically turns the machine on and off in the record mode at preselected times. This recording ability, along with the ability to tape one broadcast while watching another, is the reason the VCR is referred to as a "time-shift" machine: it allows the viewer to view a program at a time different from when it was broadcast.

Home tapers use their recorders for time-shifting more than for any other purpose.[37] Time-shifting is resorted to when it is impossible or inconvenient to watch a program at the time it is broadcast. The would-be viewer may be away from his television set or watching another program which is being broadcast at the same time. After the recorded program has been viewed it can be erased. The tape can be reused repeatedly in the same manner.[38]

Some VCR owners keep their tapes as a private library.[39] They may view a tape once, twice, repeatedly, or may never watch it

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[34] 480 F. Supp. at 435-36.

[35] *Manual, supra* note 32, at 52-55.

VCRs can also record signals from a video camera. When the camera is plugged into the VCR, the videocassette captures audio and video signals, creating a "home movie." The tape can be played back on a television set or monitor. 480 F. Supp. at 436.

[36] *Manual, supra* note 32, at 49-50.

[37] 480 F. Supp. at 438-39.

[38] *See id.* at 436-38. Both Universal and Sony conducted "surveys of usage" during the litigation of the *Betamax Case*. The court reported some of the findings:

> According to plaintiffs' survey, 75.4% of the VTR [videotape recorder] owners use their machines to record for time-shifting purposes half or most of the time. Defendants' survey showed that 96% of the Betamax owners had used the machine to record programs they otherwise would have missed . . . . According to plaintiffs' survey, 58.3% of the owners eliminate commercials from the recording either "sometimes," "rarely," or "never"; 56.1% use the fast-forward to pass commercials either "sometimes," "rarely," or "never."
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> Defendants found that 82.4% of the recording done by Betamax owners in the past month was done while they were gone or viewing another channel (and therefore could not use the pause button to eliminate the commercials). 17.6% of the recording was done while viewing, with the pause button being used 8.1% of the time. While viewing playbacks in the past month, defendants' interviewees fast-forwarded through commercials in 24.6% of them.

Id. at 438-39.

[39] *See, e.g.*, 480 F. Supp. at 437-38.

again.[40] This practice, however, is far less prevalent than time-shifting.[41]

The rights of the copyright owner, the programmer and the home viewer in the electronic signals of a program after its transmission under any system are not clear. In particular, the historical development of copyright law with respect to cable television is confusing and inconsistent, reflecting a general lack of comprehension of the technology involved. To apply copyright law to problems arising in the field of pay television correctly, it is necessary to understand the technology of cable broadcasting.

IV. Cable Television And Copyright

Early cable systems simply enhanced local television reception and were initially welcomed by broadcasters. Because cable merely enlarged the potential viewing audience, it was difficult at that time to conceive of negative aspects of local retransmission of a program originally televised by a local station. The larger audience reached by cable allowed the original broadcaster to charge the program's sponsors higher advertising rates. The copyright owner, too, was able to obtain increased royalty payments to reflect the enhanced value of his property to the broadcaster.[42]

Cable operators at first paid no fees for the right to receive or retransmit broadcast signals.[43] Because they benefited from cable systems, broadcasters did not initially object to being the only ones to pay copyright royalties. It was not until the 1960's, when cable operators routinely began to offer distant as well as local signals to subscribers,[44] that the cable industry's claim of exemption from copyright liability was challenged. Broadcasters[45] and copyright owners[46] asserted that, unlike local signal retransmissions, imported signals harmed them. In addition, distant signal carriage gave cable operators a competitive

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[40] *See* 480 F. Supp. at 437-38.

[41] *Id.*

[42] *See Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., at 849-56 (1975).

[43] *See supra* note 18.

[44] National Telecom. and Information Admin., Dept. of Commerce, *Staff Rep. of the Office of Policy Analysis and Dev. on Cable Copyright: Alternatives to the Compulsory License* 1 (Dec. 1981) [hereinafter cited as *Policy Staff Rep.*].

[45] The earliest suits against cable operators were brought by the broadcasters whose signals were retransmitted. *See, e.g.*, InterMountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., 196 F. Supp. 315 (S.D. Idaho 1961).

[46] *See infra* notes 48-51 and accompanying text.

edge since they were not obliged to pay for their product.[47] Broadcasters feared that if local television audiences were fragmented by the increased competition of the imported signals, the rates which advertisers would be willing to pay to the stations would decline. Furthermore, a copyright owner would be unable to guarantee that a local broadcaster had an exclusive right to a market, since the same program licensed to another broadcaster in a different market could be competitively imported by a cable operator. Therefore, the price which the copyright owner could demand from a local station would decline.

Efforts to establish copyright liability for the cable industry were, however, unsuccessful. In two cases, *Fortnightly Corp. v. United Artists Television, Inc.*[48] and *Teleprompter Corp. v. Columbia Broadcasting System*,[49] the Supreme Court was asked to decide whether cable carriage is a "performance," which incurs copyright liability.[50] In both cases, the Court held that a cable system is in form and function more like a viewer's home antenna reception than a broadcaster's performance. This applies regardless of whether the system is limited to retransmission of local signals, as in *Fortnightly*,[51] or whether it also imports distant signals and originates some of its own programming, as in *Teleprompter*.[52] Copyright owners and broadcasters were thus denied a cause of action under the 1909 Copyright Act.

The decisions in *Fortnightly* and *Teleprompter* forced copyright owners to seek other means to deal with the cable industry. Before the 1976 Act's cable television provisions were enacted,[53] the Federal Communications Commission (FCC) tried to protect broadcasters and producers from competition by restricting retransmission. The FCC rules have been ineffective. They have proved to be virtually impossible to enforce and, when followed, have had the effect of restricting viewer choices rather than solving the problems at which they were aimed.[54]

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[47] *See generally* Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632 (1979) (discussion of factors affecting the growth of cable television). *See also* Cable Television Syndicated Program Exclusivity Rules, 71 F.C.C.2d 951, 957 & n.17 (1979).

[48] 392 U.S. 390 (1967), *reh'g denied*, 393 U.S. 902 (1968).

[49] 415 U.S. 394 (1974).

[50] *See* Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909), 17 U.S.C. § 1(e) (1970) (current version at 17 U.S.C. §§ 106, 110, 115, 116, 504 (1976 & Supp. IV 1980)).

[51] 392 U.S. at 400-01.

[52] 415 U.S. at 405.

[53] 17 U.S.C. § 111 (1976).

[54] Prior to the Supreme Court's decision in *Fortnightly*, a number of different regulatory approaches were tried and abandoned. *See, e.g.*, Amendment of Parts 21, 74, and 91 to Adopt

Congressional review of the 1909 Copyright Act, which began in 1955, was prompted by the realization that technological development had made much of the 1909 Act obsolete.[55] The first extensive discussion of copyright liability for the cable television industry occurred in 1965,[56] at which time several bills were introduced that sought to subject cable operators to full liability for material retransmitted over their equipment.[57] The question of copyright liability for cable television was one of the most controversial issues raised in the copyright revision debates.[58]

The controversy was resolved by the adoption of section 111 of the 1976 Act,[59] which represents Congress' political reconciliation of the demands of copyright owners, the then-fledgling cable industry and the well-established broadcasting industry. Under section 111, cable operators are exempt from full copyright liability for retransmission of non-network programs. Section 111 lists exemptions from copyright liability[60] and sets forth infringing acts and omissions,[61] fees[62] and reporting requirements.[63] Secondary transmissions are divided into three categories: those exempted from copyright liability,[64] those granted a compulsory license,[65] and those subject to full copyright liability.[66]

The history of copyright liability for cable television systems is confusing and inconsistent; but the following sections attempt to analyze and suggest solutions to problems encountered in the application of copyright law to home video recording of pay television.

Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, 2 F.C.C.2d 725, 782 (1966) (restrictions on retransmission); 47 C.F.R. § 74.111 (1969), *upheld*, United States v. Midwest Video Corp., 406 U.S. 649 (1972) (plurality opinion) (program origination requirement); 47 C.F.R. § 76.59(b)(1), .59(b)(2), .61(b)(1), .61(b)(2), .63 (1981), *deleted*, 57 F.C.C.2d 625 (1975) (geographic limits on distant signal importation, also called "anti-leapfrogging" regulations); 47 C.F.R. § 76.61 (1976) (mandating signals that a cable operator must carry). *See also* 47 C.F.R. § 76.57, .59, .63 (1981).

[55] 101 CONG. REC. 9425 (1955).

[56] HOUSE COMM. ON THE JUDICIARY, 89th CONG., 2d SESS., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1965).

[57] *Policy Staff Rep.*, *supra* note 44, at 10.

[58] *Id.* at 1.

[59] 17 U.S.C. § 111 (1976 & Supp. IV 1980).

[60] *Id.* § 111(a).

[61] *Id.* § 111(b), (c), (e).

[62] *Id.* § 111(d)(2)-(5).

[63] *Id.*

[64] *Id.* § 111(a).

[65] *Id.* § 111(d).

[66] *Id.* § 111(a)-(e). Primary transmission by a cable system, i.e., original programming, or programming licensed to it by the copyright owner, does not come under the rubric of section 111 and is subject to full copyright liability.

V. Home-Use Video Recording From Pay Television—The Betamax Case Analysis Applied

There are two types of programming to which the following analysis can be applied: cable-originated programming, and movies and other special features which have been licensed exclusively to cable systems.[67] In each case the cable system has full copyright liability.[68]

Under the 1976 Act's definition of "copies" in section 101[69] and grant of exclusive rights in section 106,[70] the act of videotaping a

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[67] In this Note, "pay" and "cable" are used interchangeably and include both cable and over-the-air subscription television (STV) systems. For the purposes of this analysis, the two technologies can be treated in the same way.

There appears to be no meaningful distinction between over-the-air broadcasts by network or local television stations and the retransmission of those same signals by local pay systems. The rules that ultimately come to control recording over-the-air broadcasts ought also to apply to recording retransmissions. A distinction should be drawn, however, between programs available only on a pay-per-view basis and those that are available as part of a subscription agreement. *See supra* note 29 and accompanying text.

A copyright owner may license a work to a pay television station expressly for pay-per-view distribution. Royalties are then calculated on the basis of the number of times the subscriber requests that the program be descrambled. Since the copyright owner's licensing agreement entitles him to payment each time a subscriber of the licensee station views his work, the viewer who records the program to see it again deprives the copyright owner of his royalty. *See* Shepard, *The Case for Pay-Per-View*, View, Mar. 1981, at 72.

Under the subscriber's contract with the pay television station, he agrees to pay a fee each time he requests that programs be descrambled. Recording a pay-per-view program avoids this charge and thus breaches the subscription contract. *See generally id.*

In contrast, the commercial over-the-air broadcast viewer is not a party to any contract whereby he pays to view programs. Actually, the viewer is the "product" which the broadcast station "sells" to the advertising sponsors. For purposes of the contract between sponsor and broadcaster, the television programs are given away as inducements to watch the commercials they surround.

Regardless of whether the copyright law is ultimately construed as creating liability for recording pay television generally, taping a program for which an individual viewing fee is charged should be impermissible. While such recording is not necessarily a copyright infringement, it directly deprives the copyright owner of the royalty payment provided for each viewing and breaches the contract that exists between the subscriber and the programmer.

[68] Since these are not secondary transmissions, they do not fall under 17 U.S.C. § 111 (1976). *See supra* note 66. Imported distant signals, the third possible type of cable transmission, are excluded from this analysis.

[69] Section 101 defines "copies" as:

> material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'copies' includes the material object, other than a phonorecord, in which the work is first fixed.

17 U.S.C. § 101 (1976).

[70] Section 106 provides:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

copyrighted work is clearly a technical infringement. This makes it necessary to consider whether an exemption is applicable to home recording which would free it from copyright liability. Whether one agrees with the district court in the *Betamax Case* that there is a fair use exemption applicable to home recording of over-the-air broadcasting which can be implied from the 1976 Copyright Act's legislative history,[71] or with the Ninth Circuit that there is no such exemption, a separate analysis is required to determine whether the doctrine of fair use should apply to cable or STV transmissions.

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(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.

17 U.S.C. § 106 (1976).

[71] The district court analogized home-use video recording to home-use sound recording, which is not a copyright infringement. 480 F. Supp. at 444-46. In principle, there appears to be no distinction between unauthorized recording from radio or from television receivers, and the home audiotaping exemption could easily be construed as broad enough to cover home-use video recording. The main purpose of the Sound Recording Amendment of 1971, Pub. L. No. 92-140, 85 Stat. 391 (amending 17 U.S.C. § 1 (1970) (current version at 17 U.S.C. § 114(b) (Supp. II 1978)), was to make the combination of duplication with commercial exploitation illegal. 117 CONG. REC. 12,763 (1971) (remarks of Sen. McClellan). The district court quoted the Assistant Register of Copyrights as stating that noncommercial home recording was not the kind of conduct that Congress had intended to control by this legislation. 480 F. Supp. at 445 (quoting *Hearings on S.646 Before the Subcomm. No. 3 of the House Judiciary Comm.*, 92d Cong., 1st Sess. 22-23 (1971) (statement of Barbara Ringer)). *See also* 117 CONG. REC. 34,748 (1971) (remarks of the Chairman of the House Subcommittee, Rep. Kastenmeier, stating that home recording for personal use should not be treated as an infringement).

The district court concluded that the intention to provide an exemption for home recording in the 1971 amendment was continued in the similar language codified in the 1976 Act. Although no comments of intent accompanied the 1976 codification, the court relied on the absence of words contrary to the documented intent of the 1971 amendment to support its finding. 480 F. Supp. at 444-45. This reasoning has been criticized. *See* 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.05[C] at 8-89 (1979); 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[F][5] at 13-96 n.159 (1979). It was rejected by the Ninth Circuit in part because the 1971 Committee Report referred to home audiotaping as a "practice [which] is common and unrestrained today," H.R. REP. No. 92-487, 92d Cong., 1st Sess. (1971), and in 1971 "home video recording did not present Congress with a 'common and unrestrained practice.' " 659 F.2d at 968. It may be, however, that the home recording exemption should not be frozen in terms of the technology of 1971, but should follow advancing technology and changing "common practice." *Cf. infra* note 74.

Many foreign countries have express or implied home-use exemptions in their copyright laws. *See* Glover, *Emerging International Copyright Laws on Off-the-Air Home and Educational Video Recording: An Analysis*, 28 BULL. COPR. SOC'Y 475, 488-98 (1981).

Section 107 of the 1976 Act[72] specifies four factors which must be considered in determining whether a particular use is a "fair use":

> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
> 2. the nature of the copyrighted work;
> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4. the effect of the use upon the potential market for or value of the copyrighted work.[73]

These four factors must be considered; other factors may be considered depending upon the equities involved.[74]

The purpose and character of home recording is not affected by whether the program is taped from a broadcast or a cable transmission; in either case the use is by its nature noncommercial.[75] In addition, similar programming is transmitted by free and pay systems, and therefore, the nature of the work copied would usually be the same. The relative portion of the work copied would also be the same, regardless of whether the taping is done from free or pay television.

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[72] 17 U.S.C. § 107 (1976).

[73] *Id.*

[74] The factors listed in section 107 are to be "included" in determining whether the use made of a work in a particular case is "fair use." In considering the "purpose and character of the use," the commercial or noncommercial nature is "included" as a mandatory part of that consideration. Section 101 defines "including" as "illustrative and not limitative." 17 U.S.C. § 101 (1976). Therefore, it is permissible and might be appropriate to consider additional factors to decide whether a specific use is a "fair use." It has been said, however, that "normally these four factors would govern the analysis." Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 n.10 (5th Cir. 1980).

The fair use doctrine was developed at common law and later accorded express statutory recognition. This codification was "intended to restate the present [i.e., pre-1976] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5683. It is important to remember that this should not be construed to freeze the fair use doctrine as of 1976 nor to restrict its application to situations which existed pre-1976. The essential nature of the fair use doctrine is its changeability. "The [fair use] doctrine is entirely equitable and is so flexible as virtually to defy definition." Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968).

[75] Taping done at home for commercial purposes is not considered part of this question. In cases of unauthorized commercial copying, whatever the locus of the act, state and federal piracy laws would apply. *See, e.g.*, 47 U.S.C. § 605 (1976); N.Y. Penal Law § 165.15(4) (McKinney 1975).

It is clearly an act of copyright infringement to reproduce a copyrighted work off the air for commercial purposes. Walt Disney Prods. v. Alaska Television Network, Inc., 310 F. Supp. 1073 (W.D. Wash. 1969); New Boston Television, Inc. v. Entertainment Sports Programming, 1981 COPYRIGHT L. DEC. (CCH) ¶ 25,293 (D. Mass. 1981).

There is a significant difference, however, with respect to the fourth factor—the effect of the use upon the potential market for the copyrighted work. Neither court which considered the *Betamax Case* judged the harm caused to Universal City Studios by off-the-air video taping to be substantial. The district court, after citing Universal's admission that no actual harm had occurred and that none could be predicted with certainty,[76] and after describing the high cost of video recorders and video tapes, determined that any harm to Universal was too remote to merit alleviation by the law.[77] The court noted that Universal's profits had grown continually during the years when video technology was growing.[78] It discussed the copyright owners' resilience to other changes in technology, including pay television, and concluded that the marketing alternatives available—such as making their movies available on video cassettes—were sufficient to allow recoupment of any loss.[79] Copyright law, it concluded, "does not protect authors from change or new considerations in the marketing of their products."[80] The Ninth Circuit's position, however, was that, since videotaping tended to prejudice the potential sale of plaintiffs' work,[81] sufficient harm had been shown to sustain a ruling for the plaintiffs.[82]

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[76] 480 F. Supp. at 451, 465-68.

[77] Plaintiffs first assume that a large proportion of the 75 million television households in this country will in the near future own the Betamax machine which today costs approximately $875; then they assume that a significantly large number of these Betamax owners will have both the financial ability and the desire to buy many Betamax tapes (today costing approximately $20 each) to record movies and episodes from TV series.

Id. at 451.

The court's reasoning may no longer hold true. As of June 1982, 3.5 million video recorders had been sold in this country, and another 1.5 million were expected to be sold by the end of that year. *Supreme Court to Rule on Home Video Dispute,* N.Y. Times, June 15, 1982, at D1, col. 6. Sales are expected to continue to increase geometrically in the next several years. Hartley & Moore, *New Video Technology Poses Perils For Some Advertisers,* HARV. BUS. REV., Sept.-Oct. 1981, at 24. Furthermore, both video recorders and cassettes have been heavily discounted, so that a relatively sophisticated VCR can be bought for $600-700, and a tape with five (Beta format) or six (VHS format) hours of recording time—enough for perhaps three full-length feature movies—sells for $10-13. *See, e.g.*, Stern, *RCA's VideoDisc Blues,* FORBES, Oct. 26, 1981, at 43.

[78] 480 F. Supp. at 452.

[79] *Id.*

[80] *Id.*

[81] 659 F.2d at 974 (emphasis omitted) (relying on 3 M. NIMMER, *supra* note 71, § 13.05 [E][4][c], at 13-84 (1979)).

[82] The Ninth Circuit's treatment of the harm factor has been criticized as the weakest part of its opinion in the *Betamax Case.* 3 M. NIMMER, *supra* note 71, § 13.05 [F][5] at 13-99 (1979).

The Second Circuit has said that this factor represents a balance "between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if

Surveys of usage[83] conducted by both Universal and Sony were heavily relied upon by the district court to determine the issue of harm. Neither survey particularly supported Universal's claim of irreparable harm, and Universal itself admitted that it had no evidence of harm as of the trial date.[84] It may be, however, that these statistics are not relevant to recording from pay television.

In a medium supported by sponsor advertising, availability of time-shift recording is a selling point because more viewers will ultimately be reached. Since the two television ratings services, Nielsen and Arbitron, are capable of monitoring video recording for inclusion in their statistics,[85] programmers and copyright owners stand to gain from increased ratings. Though nearly one-fourth of the viewers surveyed by Sony Corporation speed through commercials during playback,[86] it is not unreasonable to assume that many of them would also have left the room or been inattentive to their television sets during the commercial breaks in the original broadcast. Therefore, it is not conclusive that fewer viewers would be exposed to advertising if there were no video recorders.

Time-shifting, then, seems relatively harmless in the context of ordinary commercial broadcast television, and would be likely to be accorded protection as fair use. However, recording from cable television is far less likely to spring from that innocent motive. Most movies and special programs shown on pay television are transmitted up to twenty or so times during a given month, at virtually all times of the day or night.[87] Furthermore, whereas programs, and particularly movies, shown on commercial broadcast television are generally edited, either for content or to fit a time slot, and are periodically interrupted for commercials, programs on pay television are generally not edited and are almost always shown uninterrupted. Since it is more appealing to own a copy of an unedited, uninterrupted program than of one which is fragmented, and since cable television programming affords multiple opportunities to see a show, it seems more likely that someone who records from cable television intends to keep the

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the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use." MCA, Inc. v. Wilson, 211 U.S.P.Q. 577, 579 (2d Cir. 1981).

[83] *See supra* note 38.

[84] 480 F. Supp. at 451.

[85] *Id.* at 441.

[86] *Id.* at 439.

[87] Perusal of listings in any television schedule which includes cable or STV programs will indicate multiple show times.

tape for his library rather than to use it for future viewing and then erase it.[88]

The difference in intended uses compels a reconsideration of section 107's harm factor.[89] The owner of a copyright in a movie, for example, sells the right to show that movie in a sequential distribution pattern. A movie shown on network television is likely to have already been available on cable television, and even to have been released by the studio as a prerecorded cassette. If the movie is shown on an independent broadcast station, the chances are that it has already been shown on a network station.[90] Since the film has had substantial exposure, its future market is already reduced considerably and therefore copying it has only minimal effect. But a movie has not yet had such exposure when it reaches cable television. Generally, cable is the first medium to which the film is licensed after—or in some cases when—it opens in the theaters. The people who saw a movie as often as they wanted to on their pay television channel are not likely to watch it again on the network at a later date. However, if they recorded the movie and kept it, they were probably at one time in the market for a prerecorded cassette. The copyright owner may thus have lost sales that could have been made to these customers.[91] Since there is a larger potential market to be harmed by home taping from cable than by home taping from broadcast commercial television, and less chance of the former's being an innocent act of time-shifting, the fair use doctrine may well be less appropriate with respect to cable television.

However, even if home-use video recording from cable television is not fair use, it is not necessarily a copyright infringement. While the

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[88] Although it is less likely to occur, time-shifting of programs on pay television should be considered fair use if it is considered fair use with respect to free television. It has been argued that since there is no advertising sponsor who pays in relation to the size of the viewing audience, and since the copyright owner's payment is based on the number of subscribers to the pay service and not upon the number who actually see a particular program, the subscribers who do not view a pay transmission are potential viewers of a rebroadcast on free television. Time-shifting of cable transmissions is thus said to exploit the copyright owner, because the initial payment does not reflect delayed viewing. 3 M. NIMMER, *supra* note 71, § 13.05 [F][5], at 13-99 (1979). However, if the royalty is predicated on the number of subscribers, i.e., the potential audience, the delayed tape viewer is accounted for in the initial base for payment. Assessing an increased fee to a subscriber who happens to be a delayed videotape viewer can be interpreted as requiring double payment. For an example of a double payment argument in a related context, see 2 NIMMER, *supra* note 71, § 8.18 [E][4][a].

[89] *See supra* notes 72-74 and accompanying text.

[90] *Roundtable: Richard Frank - Paramount's Pay Chief on Pay in the 80's,* VIEW, Mar. 1981, at 49.

[91] The copyright owner has customarily collected a royalty of fifteen to twenty dollars for each prerecorded cassette sold. *Id.* at 48-49.

Ninth Circuit dismissed the district court's reliance on legislative history as "entirely beside the point,"[92] the arguments based upon legislative intent seem particularly apposite in this case.[93] The day after the Ninth Circuit handed down its ruling that off-the-air taping of copyrighted television programming constituted copyright infringement, bills were introduced in the Senate[94] and the House of Representatives[95] to strip the court's decision of its effect. This immediate Congressional reaction strongly indicates that the district court was not mistaken in its assessment of legislative intent.

While the Congressional intent may well have been to protect the home taper from copyright liability, it should not be inferred that Congress meant to do this at unfair expense to copyright owners. The most detailed and best thought-out legislative approach to this problem was proposed by Senator Mathias of Maryland as an amendment to the bill pending in the Senate.[96] The Mathias Amendment would not only relieve home tapers from copyright infringement liability for their noncommercial activities, but would also afford compensation, in the form of a royalty on blank tape or recording equipment,[97] for

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[92] 659 F.2d at 968.

[93] *See supra* note 71. *But see* 1 M. NIMMER ON COPYRIGHT vii (1978) (Preface to the 1978 Comprehensive Treatise Revision) ("[The Report of the House Committee on the 1976 Act] contains much material vital to an understanding of the new law . . . . In some instances 'interpretations' of the law are contained in the House Report which one would have preferred to be stated in the statutory text. *At times it almost seems that it was intended to reverse the conventional canon of construction, so that reference is to be made to the terms of the statute only when the legislative report is ambiguous.* Presumably it was thought easier to deal with some controversial matters in the Report rather than in the statutory text." (emphasis added)).

[94] S. 1758, 97th Cong., 1st Sess., 127 CONG. REC. S11810-11 (1981), was introduced on Oct. 21, 1981 by Senator DeConcini (D-Ariz.) on behalf of himself and Senator D'Amato (R-N.Y.). The bill proposed amendment of the Copyright Act of 1976 by the addition of a new section 119 to chapter 1 of Title 17 of the U.S. Code. The proposed section 119 would provide:

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

[95] In the House, bills essentially identical to the original version of S. 1758, *supra* note 94, were introduced by Representatives Parris (R-Va.) (H.R. 4794, 97th Cong., 1st Sess. (1981)) and Duncan (R-Tenn.) (H.R. 4783, 97th Cong., 1st Sess. (1981)). Another bill which would exempt video recordings made for home use from copyright infringement was introduced at the end of the legislative session by Representative Foley (D-Wash.), the Majority Whip of the House. H.R. 5250, 97th Cong., 1st Sess. (1981).

[96] Amendment to the bill S. 1758, 97th Cong., 1st Sess., 127 CONG. REC. S15723-24 (daily ed. Dec. 16, 1981) (statement of Sen. Mathias).

[97] *Id.* (proposing § 119(b), (c) of the 1976 Act). *See also infra* notes 118-24 and accompanying text.

those whose copyrighted audio-visual works are copied. The exemption would apply to copies made off the air or from cable, subscription television or multipoint distribution services.[98]

VI. Additional Statutory Support—Exemption For Noncommercial Use

Additional statutory support for the conclusion that home-use recording from cable television is exempt from liability is shown by analogy to other provisions of the 1976 Copyright Act. Sections 110[99] and 111[100] are possible grounds for finding noninfringement based upon their limited noncommercial use exemptions.

Because "cable systems are commercial enterprises [whose profitable basic service is] based on the carriage of copyrighted program material,"[101] it seemed unfair to allow them to profit from free use of others' copyrighted programs. Therefore, after much debate,[102] section 111 of the 1976 Copyright Act was enacted to extend limited copyright liability to the cable industry, thereby neutralizing the Supreme Court's decisions in *Fortnightly* and *Teleprompter*, which had characterized cable television's secondary transmission function as reception. That characterization is inappropriate, at least as applied to a cable system which imports distant signals or originates its own programming, as Teleprompter did. However, use of a VCR is properly characterized as reception, and the logic of *Fortnightly* and *Teleprompter* can be correctly applied to home video recording. Just as the coaxial cable between a cable system's processing center and the home television set enables the viewer to receive a program which would have been unavailable because of a physical barrier, so the coaxial cable between a VCR and the home television set enables him to receive a program which would have been unavailable because of a temporal barrier. The fact that a viewer is not at his television set at a particular hour and elects to shift his viewing to a more convenient time should no more create a legal liability than does the signal-distorting mountain range.[103] Delayed viewing—time-shifting—is an

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[98] Amendment to S. 1758, *supra* note 96, proposing § 119(d).

[99] 1976 Act, 17 U.S.C. § 110.

[100] *Id.* § 111.

[101] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 87 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5704.

[102] *See supra* notes 44-66 and accompanying text.

[103] *See also* 3 M. Nimmer, *supra* note 71, § 13.05 [A][2], at 13-63 (1979). If a work is unavailable through normal channels, reproduction may be more justifiable. A program transmitted in the past is "unavailable for purchase through normal channels" and is in many ways analogous to a book which is "out of print."

option of reception and therefore fits the analytical framework of *Fortnightly* and *Teleprompter*.

The electronic signal of a television program is received by a viewer/subscriber through his antenna or cable, which is plugged into his VCR. The VCR stores the signal, still electromagnetically encoded, on a tape in a videocassette. Subsequently, at a time of his own choosing, the viewer activates the VCR's controls and plays the tape, and—perhaps for the first time—the signal is perceptible as the program itself. The function of the VCR was only to intercept the signal and to hold it until the viewer wished to receive it in intelligible audiovisual form.

Section 111(a) of the 1976 Act exempts some secondary transmissions from copyright liability:

> The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—
>
> (1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission.[104]

A private home is not an "establishment," but the exemptions granted to an apartment house for retransmission to residents and to a hotel for retransmission to its guests are significantly larger in scope than would be necessary to exempt an entirely private noncommercial retransmission. The secondary transmission within an apartment house or hotel has a commercial aspect to it: even if no direct charge is made for access to the retransmission, its availability is certainly an added inducement to patronize the hotel or take up residence in the apartment house. The fact that this broader exemption exists strongly supports an analagous exemption for retransmission from a VCR to the television monitor within one's own home.

A secondary transmission is defined in section 111(f) as the simultaneous further transmitting of a primary transmission.[105] Technically, the retransmission of a signal from a VCR to a television set is not a "secondary transmission" because it is not simultaneous with the

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[104] 17 U.S.C. § 111(a)(1) (1976).

[105] *Id.* § 111(f).

original transmission.[106] But any retransmission can be secondary only in relation to the "primary" transmission which it retransmits. When a television station broadcasts a program which it originates, that is a primary transmission; when those signals are retransmitted, for example by a cable system, the retransmission is a secondary transmission. But if that cable system retransmission is further transmitted, for example by an apartment house manager to the private lodgings of residents, the cable system's is the primary transmission in relation to the apartment manager's secondary transmission.[107]

Since time-shifting can be characterized as reception, a non-simultaneous retransmission can be analogized to a "secondary transmission," with a resulting exemption under section 111(a)(1).[108]

Even more directly in point is section 110(5) of the 1976 Act,[109] which exempts some "communication[s] of a transmission" from liability in a way consistent with the foregoing interpretation of section 111(a)(1). Section 110(5) provides that:

> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> (5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public.[110]

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[106] *See id.* Section 111(f) defines "secondary transmission" as picking up a broadcast off the air and retransmitting it simultaneously, usually by cable. This section normally does not cover situations where someone tapes a program off the air and the program is later transmitted from the tape.

[107] Meyer, *The Feat of Houdini or How the New Act Disentangles the CATV—Copyright Knot*, 22 N.Y.L. SCH. L. REV. 545, 550-51 (1977).

[108] The concept of simultaneity could be regarded as significant in this context; but, because it implies the lack of permanence and avoids the making of a copy, the underlying philosophy of section 111(a)(1) is strong enough to support the analogy to home-use recording. The exclusive right granted the copyright owner by section 106(a) of the 1976 Act to reproduce the copyrighted work in copies is expressly made subject to sections 107 through 118. *See* 17 U.S.C. §§ 106(a), 107, 111(a)(1), 118 (1976).

See, e.g., 2 M. NIMMER, *supra* note 71, § 8.18 [E][5][b], at 8-228 (1979) ("[s]ection 111 may be said to be 'instinct' with a reproduction privilege, 'imperfectly expressed'," referring to Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917) (Cardozo, J.)).

[109] 17 U.S.C. § 110(5) (1976).

[110] *Id.*

This provision is the codification of the Supreme Court's decision in *Twentieth Century Music Corp. v. Aiken*.[111] In that case, the owner of a small take-out restaurant hooked up four speakers to his radio and placed them about his establishment. He was charged under the 1909 Copyright Act with infringing the copyright owner's exclusive right "[t]o perform the copyrighted work publicly for profit."[112] The Court ruled that he had not infringed, citing its decisions in *Fortnightly* and *Teleprompter*, which "explicitly disavowed the view that the reception of an electronic broadcast can constitute a performance."[113] Again, the exemption under section 110(5) is broader than necessary to cover home video recording.

That "further transmission" forfeits the exemption only if it is "to the public" invites the conclusion that the legislature considered retransmission for private viewing not to be an infringement in any case. Taken together, sections 110(5) and 111(a)(1) encourage the inference that home recording for private use of broadcast or pay television is beyond the area of statutory concern; if there is no commercial use of a retransmission there is no infringement.

Further support for the determination that home-use video recording, particularly from cable or other pay television, is exempt from liability comes from the language of section 111(b).[114] Ordinarily, a secondary transmission of a "primary transmission [that] is not made for reception by the public at large but is controlled and limited to reception by particular members of the public"[115] would be an infringement. But section 111(b) specifies that, for a retransmission of a pay television transmission to be an infringement, the retransmission must be "to the public." To perform a work "publicly" means to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[116]

Playing a tape of a pay television broadcast at home, privately, is thus excluded from the ambit of infringement under section 111(b).

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[111] 422 U.S. 151 (1975). According to the legislative history of section 110(5), the decision in Twentieth Century Music Corp. v. Aiken represents the "outer limits" of this exemption. H.R. REP. No. 1476, *supra* note 74.

[112] 1909 Copyright Act, *supra* note 10, § 1(e).

[113] 422 U.S. at 161.

[114] 17 U.S.C. § 111(b) (1976).

[115] *Id.*

[116] *Id.* § 101.

VII. Conclusion

Because of the economic differences between ordinary broadcast and pay television, home-use videotaping from pay television is likely not to be considered fair use, even if such copying from free television is eventually adjudged to be so. However, if there is a home-use exception in the 1976 Act, home-use videotaping from cable as well as broadcast television is not copyright infringment. Contrary to the Ninth Circuit's opinion, the legislative history of the 1976 Copyright Act strongly implies such an exemption, as does its statutory language in many sections.[117]

Most compellingly, sections 110(5) and 111(a)(1) contain permission for use of copyrighted works which far exceeds that made by a home-use recorder. That these limits are set forth in the Copyright Act indicates that a lesser use is also noninfringing. Additionally, section 111(b) states that a retransmission of a work intended by its primary transmitter to have limited reception is an infringement only when the retransmission is to the public, not to private gatherings or to an audience of family and friends.

While this Note concludes that home use of a VCR is not a copyright infringement, in fairness, the owner of a copyright should be entitled to payment for the use of his work. If the work is copied only for time-shifting, the payment decided upon in the original agreement between programmer and copyright owner should be sufficient. Moreover, because of the greater value of their works in attracting advertisers due to the larger numbers of viewers who will be able to watch by time-shifting, in the future copyright owners can negotiate for increased royalties.

If the work is taped for the viewer's private library, the copyright owner is within his rights to expect an additional payment.[118] Such payment is not available to him at this time. The amount of the royalty should not be as high as if he had sold a prerecorded video cassette. First, the taped copy may eventually be erased. Secondly, the quality of the image on a home-recorded tape is inferior to that recorded by a studio.[119] Finally, the copyright owner did not have the

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[117] *See id.* §§ 107-12, 118 (1976). These sections make distinctions between commercial and noncommercial uses of copyrighted material, and generally forbid or restrict only commercial or public uses.

[118] *See supra* note 91.

[119] The quality of a home-made recording depends on a number of factors: the strength and clarity of the signal received; the condition of the recording "heads"; and the possibility of interference caused by electric appliances which may be plugged into the same circuit. These variables are unlikely to exist at a professional recording studio. *See generally Manual, supra* note 32.

expenses of making the recording, or of packaging, distributing and marketing it.

The most often proposed method of collecting a royalty for the copyright owner is the imposition of a charge on either the machine or on blank tapes.[120] Proponents of the machine charge estimate that it would be assessed at about fifty to one hundred dollars per unit, collected once, at the time of purchase.[121] This approach ignores the substantial noninfringing uses of video recorders, including classroom use, use with a video camera and recording of noncopyrighted materials, and, if the bills currently under consideration in Congress[122] become law, virtually all common home uses of the machine. A procedure to certify noninfringing users as exempt from the machine charge, while theoretically possible, would be unwieldy in practice, and probably disproportionately expensive to administer.

A more equitable alternative would be a charge on blank video tape, amounting to between one and two dollars on each blank tape sold. This sum should be paid by the manufacturer to the Copyright Royalty Tribunal.[123] Since the number of blank video tapes sold is an accurate barometer of the amount of recording done, the surcharge on blank tapes would create an adequate fund from which royalties could be paid. Unlike the machine charge, this tape charge would be proportionate, depending upon the number of permanent recordings made.[124] The individual who amasses a private library would pay the tape charge on each tape which is not reused. The individual who reuses each tape many times for time-shifting would not be unduly penalized, since the prorated share of the charge per tape use would be minimal. By this means, therefore, home video recording could be accorded exempt status under the Copyright Act, while the copyright owners would be permitted to earn a proper fee for this new use of their work.

Sarah Kramer Steiner

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[120] *See, e.g., Tax on Videotaping is Urged*, N.Y. Times, Apr. 22, 1982, at C21, col.1.

[121] *Id.*

[122] *See supra* notes 94-98 and accompanying text.

[123] *See* 17 U.S.C. §§ 801-810 (1976).

[124] *See generally* 3 M. NIMMER, *supra* note 71, § 13.05 [F][5], at 13-101-02 (1979) (advantages of compulsory licenses).