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Cover Page Footnote

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BEYOND *BETAMAX* AND BROADCAST: HOME RECORDING FROM PAY TELEVISION AND THE FAIR USE DOCTRINE

*Joni Lupovitz**

INTRODUCTION

A modern dilemma: A movie you have been waiting to see will be shown tonight on Home Box Office ("HBO"), or some other premium cable channel. Or perhaps your favorite team is in the basketball play-offs on the Electronic Sports Programming Network ("ESPN"). Or a critically acclaimed mini-series is on one of the basic cable channels. But you have to work late, and won't be home until after the movie, game, or show is over. You consider setting your video cassette recorder ("VCR") to record the program for later viewing at a more convenient time. Copyright infringement? Or fair use?

In *Universal City Studios, Inc. v. Sony Corp. of America ("Betamax III")*,[1] the Supreme Court held that home videotaping for time-shifting purposes is a lawful "fair use" of copyrighted television programs. The Court concluded: "One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home . . . ."[2] The specific facts of that case involved the private home use of VCRs for recording programs broadcast over-the-air without charge.[3] The Court noted that, "[n]o issue concerning . . . the copying of programs transmitted on pay or cable television systems was raised."[4]

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1. 464 U.S. 417 (1984).

2. *Id.* at 456.

3. *Id.* at 425.

4. *Id.*; *accord id.* at 458 n.2 (Blackmun, J., dissenting). Likewise, the trial court did not decide whether copying from pay television is prohibited. Universal City Studios, Inc. v. Sony Corp. of America (Betamax I), 480 F.Supp. 429, 433 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981) (*Betamax II*), *rev'd*, 464 U.S. 417

Consider the issue now raised. Recent figures show that VCRs are currently used in approximately three-quarters of U.S. homes.[5] Furthermore, cable and pay television services are becoming prolific.[6] Cable television service is now available to more than ninety percent of American households, with approximately sixty percent of U.S. homes actually paying to receive cable service.[7] Pay television programming is also available via direct satellite transmission to individual subscribers[8] and via multiple-channel microwave distribu-

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(1984) (*Betamax III*). The trial court stated that: "It is important to note the limits of this suit. Neither pay nor cable television stations are plaintiffs in this suit and no defendant recorded the signals from either." *Id.* at 442. Accordingly, the court's ruling was based on "home use recording"—the use of a VCR in a private home to record programs broadcast free to the public over public airwaves for subsequent home viewing. *Id.*

5. Patrick M. Reilly, *Camcorder Makers, With Growth Easing, Try to Bring New Markets Into the Picture*, WALL ST. J., Dec. 26, 1991, at B1 (stating that 74% of U.S. homes have VCRs, and 97% of U.S. homes have color television sets; in comparison, only 14% of American homes have video camcorders); *Pay Cable Penetration*, TELEVISION DIG., Jan. 27, 1992, at 10 (citing Nielson report that VCR penetration reached 73.3% in November 1991); *VCR Penetration*, TELEVISION DIG., Oct. 14, 1991, at 5 (estimating VCR penetration at 78.2% of U.S. TV homes (Arbitron Report)).

6. *See generally* Paul Farhi, *Fighting for a Leading Edge on the Future: Cable TV, Phone Firms Compete for Control of Tomorrow's Technology*, WASH. POST, Jan. 24, 1992, at A1, A14 (describing present and future television and telecommunications technologies); David E. Leibowitz, *The Sequential Distribution of Television Programming in a Dynamic Marketplace*, 34 CATH. U. L. REV. 671 (1985).

7. Paul Farhi, *Reregulating Cable: A Political Response to a Wired Nation*, WASH. POST, Jan. 22, 1992, at A1, A14 (stating that 58% of all households, about 54 million households in all, receive cable); *VCR Penetration*, *supra* note 5, at 5 (estimating that 63.8% of U.S. households subscribe to cable). Similarly, a survey of the top 100 cable operators showed that 59.53% of homes passed by cable subscribed to basic cable services; 74.49% of these subscribers (i.e., 44.34% of all homes passed by cable) subscribe to pay cable services. *Top 100 Basics Growing Again, Pay Units Improve Slightly*, TELEVISION DIG., Nov. 18, 1991, at 1-2. Nielson reports pay cable penetration at 28.1% in November 1991. *Pay Cable Penetration*, *supra* note 5, 1992, at 10.

8. As of 1991, approximately 3.4 million households owned home satellite dishes. Satellite television provides access to over 80 subscription services, such as HBO, The Disney Channel, Cinemax and other movie channels, ESPN and other sports networks, Cable News Network ("CNN"), and television "superstations," among other programming services. *Oversight Hearing on Copyright and Telecommunications Before the Subcomm. on Intellectual Property & Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. (1991) (written statement of Andrew R. Paul, Sr. Vice President, Satellite Broadcasting and Communications Association, Appendix A). Technological developments have enabled home dish owners to intercept satellite-delivered signals that were originally intended to be distributed only to cable systems. Consequently, most resale satellite carriers now encode or scramble their signals and provide descrambling devices to home dish owners who pay to subscribe to their television programming service. H.R. REP. No. 887(I), 100th Cong., 2d Sess. 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5611, 5615.

tion systems, the so-called "wireless cable" companies.[9]

In addition, some cable and satellite operators offer pay-per-view ("PPV") services where the subscriber is charged on a per-program basis for certain programs and movies, such as major sporting events and feature films. As of mid-1991, approximately twenty million homes were equipped to receive PPV; the number of homes capable of receiving PPV through cable or satellite delivery is expected to double by 1995.[10] Hereinafter, all television programming received via cable, satellite, or microwave, including PPV services, will be referred to generically as "pay television" or "pay TV."

With the increase in both VCR ownership and in reception of pay television services, the issue of home taping from non-broadcast television signals is drawing increased attention.[11] In an attempt to squelch copying from cable, some motion picture distributors, video software dealers, and other copyright interests would like pay television signals protected by anti-copy coding to prevent all unauthorized home recording or, alternatively, to require additional remuneration from home viewers who record the television signal.[12] In contrast, some consumers and consumer electronics manufacturers assert that the non-commercial "fair use" upheld in *Betamax III*

9. About 400,000 households subscribe to multiple-channel microwave distribution systems. In this system, microwave or "wireless cable" companies receive satellite-delivered programming and then transmit it by microwave beam directly to individual subscribers. The subscribers pick up the microwave signal with home receiving dishes; no hard wire cable is involved. *See* Farhi, *supra* note 6, at A14.

10. *Hearing on S. 1096, Motion Picture Anti-Piracy Act of 1991 Before the Subcomm. on Technology and the Law, joint with the Subcomm. on Patents, Copyrights and Trademarks, of the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 4 (1991) (written Statement of Richard S. Leghorn, President, Eidak Corporation). [hereinafter Leghorn Statement].

11. *See, e.g., Home Copying Hard to Get Economic Handle On*, BILLBOARD, Dec. 14, 1991, at 54.

12. *See, e.g.*, Paul Sweeting, *Taping From Standard Vs. PPV Cable Is Addressed in Survey*, BILLBOARD, Feb. 10, 1990, at 51; *Home Copying Hard to Get Economic Handle On, supra* note 11, at 54; *Anti-Copy System Finding Vid-Dealer Favor*, BILLBOARD, Dec. 7, 1991, at 6; *Hearing on S. 1096, Motion Picture Anti-Piracy Act of 1991 Before the Subcomm. on Technology and the Law, joint with the Subcomm. on Patents, Copyrights and Trademarks, of the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 4 (1991) (testimony of Timothy A. Boggs, Vice President, Time Warner Inc., on behalf of the Motion Picture Association of America).

According to one video software executive, "Basically we don't think people should copy tapes. We're against copying. But at the same time, we think the programming aired on Showtime, the Movie Channel, the Disney Channel, and HBO should be copy-encrypted, too. We're for copy protection globally." ANTI-COPY SYSTEM FINDING VID-DEALER FAVOR, *supra* note 12, at 85 (quoting Blockbuster Entertainment Sr. Vice President Ron Castell).

Similarly, another video dealer opines: "The cable channels exploit home taping. Our chapter considers home taping another form of piracy." *Home Copying Hard to Get Economic Handle On, supra* note 11, at 54 (quoting Rich Thorward,

extends likewise to consumers' private, non-commercial recording from pay television. Under this view, they protest measures that would indiscriminately prevent or control consumer home video recording from pay TV signals.[13]

In response to the growing public debate, Congress is now considering several legislative initiatives that could impact on home copying from non-broadcast television services. The "Motion Picture Anti-Piracy Act of 1991," for example, would create an exclusive right for copyright owners to prevent all unauthorized copying of an audiovisual work through the use of special treatments or mechanisms that inhibit copying; anti-copy coding of video signals is one such mechanism.[14] In contrast, the "Cable Equipment Act of 1992" would prohibit cable operators from scrambling or otherwise encrypting local broadcast signals that are delivered as part of cable service.[15]

This Article examines whether home video-recording from pay television services should be considered "fair use" or copyright infringement. Part I briefly summarizes relevant copyright law. Part II reviews the facts and findings of the *Betamax* litigation regarding home recording and fair use.[16] Part III outlines post-*Betamax* developments in the doctrine of fair use. Part IV provides further analysis of the factors considered under the fair use doctrine. Finally, Part V argues that under the doctrine of fair use, consumers have the right to record any television signal they lawfully acquire for private non-commercial use. This Article concludes that any legislative measures enacted should be carefully fashioned to uphold the "fair use" of copyrighted audiovisual works.

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former head of the New York/New Jersey chapter of the Video Software Dealers Association).

This view is at odds with video software dealers' earlier enthusiasm about home taping and the growth of the VCR industry.

13. *See, e.g.*, Letter from Gary J. Shapiro, Chairman, Home Recording Rights Coalition, to the Honorable Herbert H. Kohl, United States Senator (Aug. 23, 1991) (regarding July 24, 1991 Joint Hearing of Subcommittees on Patents, Copyrights & Trademarks and Technology & the Law on S. 1096).

14. S. 1096, 102d Cong., 1st Sess. § 2 (1991) (introduced by Senator Herbert Kohl of Wisconsin); *accord* H.R. 2367, 102d Cong., 1st Sess. § 2 (1991) (companion House bill sponsored by Rep. Howard Berman of California).

15. Senate Amendment No. 1504, 102d Cong., 2d Sess. § 624A(d)1 (1992) (introduced by Senator Patrick Leahy of Vermont as an amendment to S. 12, the Cable TV Consumer Protection Act, 102d Cong., 1st Sess. (1991)), *reprinted in* CONG. REC. S 582 (Jan. 29, 1992).

16. The main issue and holding in *Betamax III* involved whether the sale of VCRs to the public constitutes contributory infringement of copyrights. 464 U.S. at 420, 456. A discussion of the doctrine of contributory infringement, however, is beyond the scope of this Article.

I. COPYRIGHT LAW

A. *Purpose*

The United States Constitution empowers Congress "To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[17] As the Supreme Court has stated, "[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[18]

Accordingly, the goal of copyright law is delicately to balance competing private and public interests.[19] When new technology raises new copyright issues, however, the scales must tip toward public availability of creative works:

> The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary objective in conferring the monopoly . . . lie in the general benefits derived by the public from the labors of authors." *When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.*[20]

B. *Statute*

Section 106 of the Copyright Act of 1976 provides that the copyright owner has the exclusive rights to reproduce, distribute, perform, and display the copyrighted work, as well as to prepare derivative works based thereon.[21] Nevertheless, the Supreme Court

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17. U.S. CONST. art. I, § 8, cl. 8. For a more complete discussion of the development of copyright law, see Mary L. Mills, Note, *New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change*, 65 CHI.-KENT L. REV. 307, 312-26 (1989).

18. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

19. *See, e.g., Betamax III*, 464 U.S. at 429 (noting that the challenge of copyright is to strike the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand").

20. *Id.* at 432 (emphasis added) (citations omitted).

21. Specifically, section 106 provides that:

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work 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,

has explained that this statutory grant of exclusive rights does not afford the copyright owner complete control over all uses of the work; the public may make some unauthorized uses of copyrighted works.

> The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, § 1 of the Act enumerates several "rights" that are made "exclusive" to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these "exclusive rights," he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe.[22]

Significantly, the copyright holder's exclusive rights are subject to the doctrine of fair use, codified in section 107 of the 1976 Copyright Act as follows:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

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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.A. § 106 (West 1977 & Supp. 1991).

22. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 393-95 (1968) (footnotes omitted).

As one commentator noted: " 'The fundamental [is] that "use" is not the same thing as "infringement," that use short of infringement is to be encouraged . . . .' " B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 57 (1967), *quoted in Fortnightly*, 392 U.S. at 393 n.8; *accord* Teleprompter Corp. v. Columbia Broadcasting Sys., 415 U.S. 394, 398 n.2 (1974).

In this sense, courts have long distinguished the rights granted by patent statutes. *E.g.*, Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346 (1907); Bauer & Cie v. O'Donnell, 229 U.S. 1, 15-16 (1912). The patent statute provides the inventor with "the exclusive right to make, *use*, and vend the invention or discovery." *Id.* at 16 (citations omitted). In contrast, the copyright act confers the exclusive rights to make and to sell the copyrighted work, but does *not* confer the exclusive right to use the subject work. Accordingly, copyright owners may not exclude others from using the subject work nor control how others use it. *Id.*; *Bobbs-Merrill*, 210 U.S. at 350-51.

(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.[23]

The four statutory factors are illustrative only—they are neither exhaustive nor definitive.[24] Moreover, the statute gives no guidance as to the relative weight of the factors.[25] In codifying the judicial doctrine of fair use, both the House and the Senate emphasized that the doctrine must remain flexible to meet new situations created by new technology:

> The statement of the fair use doctrine in section 107 offers some guidance to users determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during the period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.[26]

C. *Legislative History*

The Copyright Act of 1909 was subject to its first comprehensive revision in 1976. This overhaul was designed in large part to amend the Copyright Act to conform to the significant changes in technologies since the 1909 Act was crafted. These changes included, of course, the advent of motion pictures, sound recordings, radio, and television.[27] After an extensive review of the congressional deliberations, the *Betamax* trial court concluded that "legislative history shows an intent to allow home-use copying of both

23. 17 U.S.C. § 107 (1988). Enacted in the 1976 revisions to the Copyright Act, section 107 gave express statutory recognition for the first time to the judicial doctrine of fair use. H.R. REP. 1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678. *Compare* 17 U.S.C. § 107 *with* Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973) (listing the same four factors for fair use nearly verbatim), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975). The House and Senate Reports state that "[s]ection 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. REP. No. 1476 at 66.

24. MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A], at 13-82.1 & n.15 (1991).

25. *Betamax I*, 480 F. Supp. at 429; NIMMER, *supra* note 24, at 13-82.1.

26. H.R. REP. No. 1476, *supra* note 23, at 66; *see also* S. REP. No. 473, 94th Cong., 1st Sess. 62 (1975).

27. H.R. REP. No. 1476, *supra* note 23, at 47.

sound recordings and broadcasted audiovisual material."[28]

In the legislative process leading up to the major Copyright Act revision, Congress enacted the Sound Recording Amendment of 1971 to provide immediate relief for the more urgent problem of commercial record piracy.[29] This 1971 amendment was merged into the new 1976 Copyright Act without any suggestion that its legislative intent had changed. Therefore, its legislative history is instructive in interpreting the meaning of the 1976 Act's provisions.[30] Significantly, the legislative history shows that Congress had no intention of restraining home recording for private, noncommercial use.

The House Report that accompanied the 1971 Sound Recording amendment stated:

Home Recording

> In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, *it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it.* This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.[31]

Furthermore, dialogue in floor debate[32] and committee hear-

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28. *Betamax I*, 480 F. Supp. at 447.

29. *Id.* at 443-44.

30. *See id.* at 444-45.

31. H.R. REP. No. 487, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1572 (emphasis added).

32. The following colloquy occurred on the House floor:

> MR. KAZEN. Am I correct in assuming that the bill protects copyrighted material that *is duplicated for commercial purposes only?*
>
> MR. KASTENMEIER. Yes.
>
> MR. KAZEN. In other words, if your child were to *record off of a program which comes through the air on* the radio or *television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?*
>
> MR. KASTENMEIER. *This is not included in the bill. I am glad the gentleman raises the point.*
>
> On page 7 of the report, under "Home Recordings," Members will note that under the bill the same practice which prevails today is called for; namely, *this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes.* This is made clear in the report.

117 Cong. Rec. 34,748 (1971), *quoted in Betamax I*, 480 F. Supp. at 446.

ings[33] regarding the Sound Recording Amendment also demonstrates that Congress did not intend to outlaw noncommercial home recording with either audio or video recorders. Eventually, the United States Supreme Court confirmed this view with regard to home video recording.

II. BETAMAX: THE VCR WARS BEGIN

The Betamax case was spawned in 1976 by a proposal for a catchy campaign slogan: "NOW YOU DON'T HAVE TO MISS KOJAK BECAUSE YOU'RE WATCHING COLUMBO (OR VICE VERSA)." The would-be ad ended with the words "BETAMAX—IT'S A SONY."[34] The executives at Universal Pictures were not amused.[35]

In late 1976, Universal Pictures and Walt Disney Productions,

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33. In June 1971 subcommittee hearings, Representative Beister engaged in the following dialogue with Barbara Ringer, then Assistant Register of Copyrights:

> MR. BEISTER. I do not know that I can add very much to the questions which you have been asked so far.
>
> I can tell you I must have a small pirate in my own home.
>
> My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set.
>
> Now, he may retrieve in addition something else onto his recording, but nonetheless, he does retrieve the basic sound, *and this legislation, of course, would not point to his activities, would it?*
>
> MISS RINGER. I think the answer is clearly, *"No, it would not."*
>
> I have spoken at a couple of seminars on *video cassettes lately, and this question is usually asked: "What about the home recorders?"*
>
> The answer I have given and will give again is that *this is something you cannot control. You simply cannot control it.*

Hearings on S. 646 before the Subcomm. No. 3 of the House Judiciary Comm., 92d Cong., 1st Sess. 22 (June 9 and 10, 1971), [hereinafter "Hearings"], *quoted in Betamax I*, 480 F. Supp. at 445.

In her testimony following, Ms. Ringer distinguished the problem of public distribution of unauthorized copies ("bootlegging") from private home use. Ringer recognized that Congress may want to address unauthorized public distribution in the future, yet she stated that this threat could not be addressed by carrying copyright enforcement into the home or by banning devices for off-the-air recording. *Id.* ("I do not see anybody going into anyone's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping." (quoting Ms. Ringer)) *Hearings, supra*, at 22-23; *see also* REGISTER OF COPYRIGHT, REPORT ON COPYRIGHT LAW REVISION 30 (July 1961) ("New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright."), *quoted in Betamax I*, 480 F. Supp. at 446.

34. *See* James Lardner, *Annals of Law: The Betamax Case I*, NEW YORKER, Apr. 6, 1987, at 45.

35. For a complete discussion of the factual background for the Betamax litigation, *see generally id.* (first part of two-part article); James Lardner, *Annals of Law: The Betamax Case II*, NEW YORKER, Apr. 13, 1987, at 60 (second part of two-part article); *see also* JAMES LARDNER, FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE VCR WARS (1987) (detailing history and development of the VCR industry).

creators and copyright holders of audiovisual works, brought suit, charging that the videotaping of movies and television programs off-the-air was a violation of copyright law.[36] These plaintiffs sought an injunction against the sale and distribution of the Betamax VCR to prevent future infringement.[37]

A. *First Run Theatre: The District Court Opinion*

"After three years of litigation, five weeks of trial and careful consideration of extensive briefing by both sides,"[38] the district court held that an individual's off-the-air home video recording of copyrighted television programs for private, noncommercial use constitutes "fair use," and therefore is not copyright infringement.[39]

In contrast to prior "fair use" cases, the *Betamax I* court emphasized two factors: (1) copying was done by individuals in the privacy of their own homes for use in their homes, and (2) the programs copied were voluntarily sold by the copyright holders for broadcast free of charge over the public airwaves.[40] The court pretermitted issues such as recording from pay or cable television, tape swapping, tape duplication, and off-the-air recording for use outside the home.[41]

The district court decision was like a shot heard around the world of Disney, and beyond. For the first time, a court ruled that copying for mere entertainment, convenience or increased access (rather than criticism, news reporting, or scholarship) was fair use;[42] that

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36. *Betamax I*, 480 F. Supp. at 441-442. These plaintiffs sued Sony Corporation (the Betamax manufacturer), Sony Corporation of America (U.S. Betamax distributor), certain retail stores that sold the Betamax, and the advertising agency, as direct or contributory copyright infringers. In addition, the plaintiffs sued an individual VCR user, William Griffiths, who used his Betamax VCR in his home to copy plaintiffs' broadcast material for his private use. *Id.* at 432. Griffiths was a client of the plaintiffs' law firm and consented to being a defendant in the suit; although plaintiffs elicited testimony regarding his VCR use, they sought no relief against him. *Betamax III*, 464 U.S. at 422-23 nn.2-3; *Betamax I*, 480 F. Supp. at 437.

37. The Court's ultimate holding in the *Betamax* litigation turned on an equally significant finding as to the burden for establishing contributory infringement. The Court held that given some commercially significant non-infringing use, such as a fair use, sales of devices could not support a holding of contributory infringement, even though the other uses could be infringing. *Betamax III*, 464 U.S. at 442, 456.

A discussion of the doctrine of contributory infringement is beyond the scope of this Article. For an analysis of contributory infringement and digital audio recorders, *see generally* Seth D. Greenstein, *Contributory Infringement, The Second Time Around: The Copyright Case Against Digital Audio Tape Recorders*, 3 J. PROPRIETARY RIGHTS 2 (July 1991).

38. *Betamax I*, 480 F. Supp. at 432.

39. *Id.* at 442, 456.

40. *Id.* at 450.

41. *Id.* at 442.

42. As to the "nature" of the material copied, the court declined to characterize

copying of a whole work could qualify;[43] and that it would be "highly intrusive" and "practically impossible" to enforce copyright prohibitions involving noncommercial copying in the home.[44] Perhaps most significantly, the decision suggested that the copyright holder must prove economic harm to prove copyright infringement.

Although plaintiffs complained that their profits from televised works would decrease if VCR use was not enjoined, the district court found that the plaintiffs' prediction of harm was speculative, based on a series of assumptions in a rapidly changing market.[45] The court noted that Hollywood has "proven resilient to change in market practices arising from other technological inventions, e.g., cable television, [and] pay television."[46] Moreover, copyright law "does not protect authors from change or new considerations in the marketing of their products."[47] Quoting the Supreme Court from an earlier copyright infringement case, the trial court added: " 'While securing compensation to the holders of copyright was an essential purpose of that Act, freezing existing economic arrangements for doing so was not.' "[48]

B. *Betamax's Second Run: The Appellate Court Decision*

The Ninth Circuit Court of Appeals completely reversed the trial court, holding that off-the-air home videotaping constitutes an infringement of copyrighted audiovisual materials.[49] In a restrictive reading of the fair use doctrine, the Ninth Circuit stated that fair use traditionally sanctions only "productive use" of copyrighted works—*not* mere reproduction for "convenience," "entertainment,"

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the subject television programs, such as the "New Mickey Mouse Club," as either "educational," "informational," or "mere entertainment." *Id.* at 452. Rather, the court found that the most important aspect of the "nature" of the televised works was that the copyright owners voluntarily chose to telecast the programs over the air, free of charge to the public. *Id.* at 453; *see also infra* note 44 and accompanying text.

43. As to the "substantiality" of the use, the court found that the home copying usually involves copying the entire work. Yet the court concluded: "This fact, however, does not defeat the defense of fair use, because all factors must be taken together." *Betamax I*, 480 F. Supp. at 454.

44. Considering the "purpose" of the allegedly infringing use, the court found that the salient characteristics were that the copying was noncommercial and in the home. *Id.* at 453-54. In addition, the copying would increase access to broadcast material. *Id.* at 454.

45. *Id.* at 450-52; *see also id.* at 467 ("Harm from time-shifting is speculative and, at best, minimal.").

46. *Id.* at 452.

47. *Id.*

48. *Betamax I*,480 F. Supp. at 452 (quoting *Teleprompter*, 415 U.S. at 414 n.150).

49. *Betamax II*, 659 F.2d at 969.

or "increased access."[50]

Moreover, the appellate court set forth a less stringent standard for proving actual or potential harm, citing the following test with approval: " '[T]he central question in the determination of fair use is whether the infringing work *tends* to diminish or prejudice the potential sale of plaintiff's work.' "[51] The appellate court criticized the lower court for not paying "sufficient attention to the *cumulative* effect of mass reproduction of copyrighted works" made possible by VCRs which, in turn, would tend to diminish the potential market for the copyrighted works.[52]

C. *The Supreme Court Decision:* Betamax I *Re-Released*

After hearing, and rehearing, the Supreme Court reversed the court of appeals with a five-to-four majority, holding that private, noncommercial home time-shifting—even if unauthorized—is legitimate fair use.[53] The Court completely rejected the court of appeals' "two-dimensional" categorical requirement for "productive use."[54] Significantly, the Court required a showing of a "meaningful likelihood" of future harm to prove that noncommercial use is infringing.[55]

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50. 659 F.2d at 970-72 (citing 17 U.S.C. § 107; LEON SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 24 (1978); Note, *Universal City Studios, Inc. v. Sony Corp.: 'Fair Use' Looks Different on Videotape*, 66 VA. L. REV. 1005, 1012-14 (1980)).

The Ninth Circuit's analysis of the four statutory factors for fair use went as follows. *First*, as for "purpose and character of use," the Ninth Circuit quoted the lower court, noting that " '[c]ourts have traditionally applied this factor by asking whether the copyrighted material is used for criticism, research or other independent work.' " *Betamax II*, 659 F.2d at 972 (quoting *Betamax I*, 480 F. Supp. at 453). The Ninth Circuit added that section 107 contrasts commercial use with non-profit educational purposes, and stated that "copying of entertainment works for convenience does not fall within the latter category." *Id. Second*, turning to the "nature" of the copyrighted work, the appellate court stated that works that are more appropriately characterized as "creative" or "entertainment" are less likely to support a claim of fair use than "informational type" works. *Id.* at 972. *Third*, the appellate court found that the "amount and substantiality" of copyrighted works used in home videotaping (usually the entire work) clearly weighed against a finding of fair use. According to the Ninth Circuit, excessive copying precludes fair use, regardless of any market affect. *Id.* at 973. *Fourth*, the court of appeals disagreed with the lower court's treatment of the "harm" factor, stating that the trial court was "much too strict" in requiring plaintiffs to prove actual or future harm. *Id.* at 973.

51. *Id.* at 974 (citing NIMMER, § 13.05[E][4][c], at 13-84 (1981)).

52. *Id.* at 974.

53. *Betamax III*, 464 U.S. at 442. The Court defined "time-shifting" as "the practice of recording a program to view it once at a later time, and thereafter erasing it." *Id.* at 423. The Court further explained: "Time-shifting enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a broadcast that they desire to watch." *Id.*

54. *Id.* at 455 n.40.

55. *Id.* at 451.

In its fair use analysis, the Supreme Court found that time-shifting for private home use, a noncommercial, nonprofit activity, is presumptively fair.[56] Given the nature of televised programming, the Court noted that "time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, [therefore] the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use."[57]

The Court also considered the "harm" factor, the "effect of the use upon the potential market for or value of the copyrighted work."[58] The majority opinion set forth the following test for determining potential harm from noncommercial uses of copyrighted works:

> A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. *What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists.* If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.[59]

Noting respondents' admission that no actual harm had occurred to date, as well as the trial court's finding that no likelihood of future harm was shown at trial,[60] the Court concluded that "respondents failed to demonstrate that time-shifting would cause any likelihood of non-minimal harm to the potential market for, or the value of, their copyrighted works."[61]

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56. *Id.* at 449.

57. *Betamax III*, 464 U.S. at 449-50.

58. *Id.* at 450.

59. *Id.* at 451 (emphasis added).

60. *Id.* at 452-54.

61. *Betamax III*, 464 U.S. at 456. The dissenting opinion took issue with the finding that the 1976 Copyright Act contains "an implied exemption for 'home-use recording,'" and concluded that time-shifting cannot be deemed a "fair use." *Id.* at 470, 475, 486 (Blackmun, J., dissenting, joined by Marshall, J., Powell, J., and Rehnquist, J.). This conclusion rested largely on a lesser standard for proving harm, to wit: "[W]hen the proposed use is an unproductive one, a copyright owner need prove only a *potential* for harm to the market for or the value of the copyrighted work." *Id.* at 482 (citing NIMMER, § 13.05[E][4][c], at 13-84 (1981)). Under this standard, the dissent found that the plaintiffs demonstrated that they had been deprived of the ability to exploit the sizable potential market that VCR technology created for their copyrighted programs, and that time-shifting has a substantial adverse effect upon this potential market. *Id.* at 485-86.

III. DOCTRINE OF FAIR USE: THE SEQUEL

No subsequent cases have turned on the home taping aspects of *Betamax III*. A year later, however, the Supreme Court embellished its analysis of the doctrine of fair use. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[62] the Court reexamined the four fair use factors set forth in section 107. Although that case involved unauthorized publication of quotations in *The Nation Magazine* ("*The Nation*") from a soon-to-be published manuscript, the Court's analysis sheds light on application of the fair use doctrine generally.

1. Purpose and Character of the Use

In *Harper & Row*, the Court interpreted the first fair use factor as follows: "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[63] In addition, the Court, for the first time, explicitly stated that standards of generally acceptable public behavior should be considered in analyzing the character and purpose of the use.[64] According to the Court, "[f]air use presupposes 'good faith' and 'fair dealing.' "[65]

2. Nature of the Copyrighted Work

As to the second fair use factor, the Court emphasized that the

62. 471 U.S. 539 (1985) (holding, by a vote of six to three, that the unauthorized use of quotations from a former president's as yet unpublished manuscript constituted copyright infringement and not a fair use sanctioned by section 107).

63. *Harper & Row*, 471 U.S. at 562. Although seemingly clear and objective, this interpretation of the "commercial" factor contrasts markedly with those offered in *Betamax III*. Justice Stevens, writing for the majority in *Betamax III*, equated "commercial" with money-making (as opposed to "nonprofit"). Justice Blackmun, in dissent, looked to the user's motivation, contrasting commercial activities with activities motivated by a "humanitarian impulse." Justice O'Connor's definition for the majority opinion in *Harper & Row* adds a third, yet no less problematic, twist to this factor, as she looks not to motive or monetary gain, but to whether the user pays the "customary price"—which is undefined. *See generally* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1673-74 & nn.63-67 (1988) (discussing the three readings of the commercial/noncommercial distinction).

64. *Harper & Row*, 471 U.S. at 562 ("Also relevant to the 'character' of the use is 'the propriety of the defendant's conduct.' " (quoting NIMMER, § 13.05[A], at 13-72 (1981))). For a discussion of the difficulty in relying on such "popular morality," *see* Fisher, *supra* note 63, at 1678-82.

65. *Harper & Row*, 471 U.S. at 562 (quoting Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968)); *see also id.* at 563 ("Fair use distinguishes between 'a true scholar and a chiseler who infringes a work for personal profit.' ") (quoting Wainwright Sec. Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) (quoting *Hearings on Bills for the General Revision of the Copyright Law Before the House Committee on the Judiciary*, 89th Cong., 1st Sess. 1706 (1966) (statement of John Schulman)), *cert. denied*, 434 U.S. 1014 (1978)).

copyrighted work had not yet been published. The Court explained that "the scope of fair use is narrower with respect to unpublished works," and that the "author's right to control the first public appearance of his expression weighs against . . . [the] use of the work before its release."[66] In essence, the *Harper & Row* Court, like the *Betamax III* Court, considered whether (and how) the copyrighted work had been disseminated to the unauthorized user as a critical factor in the fair use analysis.

The Court also considered the "fact vs. fiction" distinction, stating that "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."[67] Accordingly, it would follow that unauthorized users of copyrighted "entertainment-oriented" works would have a greater burden to establish fair use than unauthorized users of informational works.

3. Amount and Substantiality of the Portion Used

Regarding the amount of the copyrighted work used, the *Harper & Row* Court noted that the quotations copied in that case, (verbatim copying of 300 words out of approximately 200,000 words), were an insubstantial portion of the copyrighted work in strict quantitative terms.[68] Yet in qualitative terms, the Court found that the portions quoted were "essentially the heart of the book."[69] The Court further found that the quotations constituted a substantial and key portion of *The Nation*'s article, and "serve as its dramatic focal points."[70] This emphasis on the derivative work in essence looks to whether the second work is a "productive" one or merely exploits the most valuable portions of the original work, a consideration the *Betamax III* majority and the dissenting opinion in *Harper & Row* eschewed (emphasizing instead the adverse consequences of the copying).[71]

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66. *Id.* at 564.

67. *Id.* at 563. The Court characterized the copyrighted work at issue in *Harper & Row* as an unpublished historical narrative or autobiography, *i.e.*, a factual work. The Court then proceeded to analyze whether the quotations used in the derivative work were necessary to convey the facts adequately, or were more subjective or expressive elements of the copyrighted work. *Id.* at 563-64.

68. *Id.* at 564.

69. *Id.* at 564-65 (quoting with approval the trial court's finding, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983)).

70. *Id.* at 565-66. Oddly, the Court examined the amount and substantiality of the copyrighted work used in relation to the *second* derivative work as whole, even though section 107 points to "the amount and substantiality of the portion used in relation to the [original] copyrighted work as a whole." 17 U.S.C. § 107 (3).

71. *Cf. Betamax III*, 464 U.S. at 449-50, 455 n.40; *Harper & Row*, 471 U.S. at 599 n.23 (Brennan, J., dissenting, joined by White, J., and Marshall, J.) ("As the statutory directive implies, it matters little whether the second author's use is 1- or 100-percent appropriated expression if the taking of that expression had no adverse effect on the copyrighted work.").

4. Effect on the Potential Market or Value

The Court stated that "[t]his last factor is undoubtedly the single most important element of fair use."[72] The Court explained that fair use is limited to copying that does not "materially impair" the potential market for or value of the copied work.[73] The Court further noted that some economists believe that fair use should be permitted only where "the market fails or the price the copyright holder would ask is near zero."[74] Under this view, fair use should not be allowed where it would disrupt normal channels of distribution of the copyrighted work.[75]

The Court reiterated that "to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.' "[76] This inquiry also includes consideration of harm to the value of any rights in the copyrighted work, such as adaptation or serialization rights.[77] In general, " 'a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement.' "[78] Conversely, it would follow that a use that does not supplant the normal market for the copyrighted work nor materi-

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72. *Harper & Row*, 471 U.S. at 566. The dissent agreed. *Id.* at 602.

73. *Id.* at 566-67 (quoting NIMMER, § 1.10[D], at 1-87 (1981)).

74. *Id.* at 566 n.9; *cf.* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982) (proposing a market approach to fair use, and suggesting that unauthorized use of copyrighted works should be considered fair "[w]here (1) defendant could not appropriately purchase the desired use through the market; (2) transferring control over the use to defendant would serve the public interest; and (3) the copyright owner's incentives would not be substantially impaired by allowing the user to proceed") (footnotes omitted). *But see* Fisher, *supra* note 63, at 1671 (noting that "fair" use will impair the marketability of the copyrighted work in all but the rare cases in which the user would be unwilling to pay the copyright holder anything).

75. *See Harper & Row*, 471 U.S. at 566 n.9

76. *Id.* at 568 (quoting *Betamax III*, 464 U.S. at 451; *id.* at 484 & n.36 (dissenting opinion)). One commentator states that by citing the passages in the *Betamax III* dissenting opinion that expansively define "potential market," the *Harper & Row* Court quietly adopted a definition that would nearly always favor the copyright holder, because there will nearly always be *some* material adverse impact on a "potential market." Fisher, *supra* note 63, at 1671 & n.53. This reading is troublesome; although there may nearly always be *some* adverse impact on a "potential market," it is quite another thing to suggest that there will nearly always be some *material* adverse impact. As that author later states, "a court confronted with a fair use defense must estimate the *magnitude* of the market impairment caused by privileging the defendant's conduct; merely ascertaining the *existence* of adverse impact will not suffice." *Id.* at 1672.

77. 471 U.S. at 568 (quoting NIMMER, § 13.05[B], at 13-77 to 78 (1981)). Justice Brennan agreed in his dissent. *Id.* at 602. The dissenting opinion, however, criticized the majority's "exceedingly narrow definition" and "constricted reading of the fair use doctrine." *Id.* at 579.

78. *Id.* at 568 (quoting S. REP. No. 473, 94th Cong., 1st Sess. 65 (1975)).

ally impact the marketability of derivative rights in the copyrighted work may be a fair use.

IV. DOCTRINE OF FAIR USE: A CRITICAL REVIEW

From early on, the doctrine of fair use was called "the most troublesome in the whole law of copyright."[79] *Betamax III* and *Harper & Row* reflect the difficulty of forcing the flexible fair use doctrine into a solid framework. In each case, the trial court was reversed by the appellate court, which was reversed by a closely divided Supreme Court. It is therefore difficult to predict the outcome of a fair use analysis in a different context, especially where the uncertainties regarding a new technology are involved.

In an attempt to draw some generalities, one commentator suggests that a close reading of the majority opinions in *Betamax III* and *Harper & Row* reveal a set of questions the Court deemed relevant:

> (1) Did the infringement have a material impact on the "potential market" for the copyrighted work? (2) Was the use "commercial" or "noncommercial"? (3) Had the copyrighted work been published at the time of copying? (4) How much—quantitatively and qualitatively—of the putatively infringing work was drawn from the copyrighted work? (5) Was the unauthorized use consistent with customary standards of propriety?[80]

Another legal scholar emphasizes an obvious, yet easily overlooked, consideration for fair use: *fairness*.[81] As the *Betamax III* and *Harper & Row* opinions demonstrate, a strict utilitarian or economic analysis based on four ill-defined statutory factors is not always sufficient to deal (fairly) with a tough case. Sometimes,

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79. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

80. Fisher, *supra* note 63, at 1668. This author further suggests that the Court's majority opinions in *Betamax* and *Harper & Row* reveal three secondary considerations: (1) the fact versus fiction distinction; (2) the necessity of the copying to the defendant's goal; and (3) the "productivity" of the secondary work (a factor minimized by both majority opinions, but considered significant in the dissents). *Id.* at 1682-86.

This commentator states that the Court's opinions reveal four objectives that should be served by copyright law in general and the fair use doctrine in particular:

> (a) advancing social utility by increasing the supply of intellectual products and facilitating their distribution; (b) enforcing an author's natural right to a reasonable portion of the fruits of his labor; (c) protecting an author's interest in controlling the way in which his creations are presented to the world; and (d) aligning the law with custom and popular conceptions of decent behavior.

Id. at 1668-69, 1687-92.

81. Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1150 (1990).

especially where new technology or novel copyright issues are involved, society's broader considerations of fairness transcend the statutory factors:

> . . . [I]t makes a difference whether a user obtained his copy of the original work lawfully or by theft, and if lawfully, by a means that is entirely proper or in some manner underhanded. It makes a difference whether a copyright owner's reason for refusing to give a license for the use is one that the community generally approves, copyright issues aside, or is one that it allows but disapproves. The community's understanding of and attitude toward a practice that directly implicates considerations of copyright may nevertheless transcend that aspect of the matter and dictate a contrary conclusion. That may occur, for example, when a new technology is introduced for which the closest analogies within the area of copyright are inapt, because of an overwhelming difference of scale or scope that transforms the place of the practice in everyday life.[82]

In short, when analyzing whether a certain activity falls within the fair use privilege, one must be sure not to become so intertwined with assessing the four statutory factors that consideration of the "fairness" of the activity in question is overlooked.

V. SO WHAT ABOUT COPYING FROM CABLE & PAY TELEVISION?

A. *Home Taping Should Be Considered Fair Use*

Back to our scenario. A would-be home taper has lawfully acquired (and paid for) cable and pay television service to his or her home.[83] The potential home taper is contemplating recording from the pay television signals for private, noncommercial use; the subscriber simply wants to view the program at a later time.[84] The

82. *Id.* at 1152-53; *see also* New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152, 160 (2d Cir. 1990) (noting that courts look to additional considerations that may suggest unfairness, such as the unauthorized user's bad faith (citing Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1264 (2d Cir. 1986)).

83. Federal and state laws protect against the unauthorized receipt of cable and subscription television services. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2796-97 (codified at 47 U.S.C. § 553 (1984)), created both criminal penalties and a private right of action and civil damages for theft of cable services. Similarly, the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949, 3959-60 (codified at 47 U.S.C. § 605 (1988)), stiffened criminal and civil penalties to enhance remedies against piracy of satellite-delivered video programming. Anti-theft telecommunications laws have also been enacted by the majority of states. *See, e.g.*, CAL. PENAL CODE § 593e (West 1991); TEX. PENAL CODE ANN. § 31.12 (West 1991) (Unauthorized Use of Television Decoding and Interception Device or Cable Descrambling, Decoding, or Interception Device); N.C. GEN STAT. § 14-118.5 (1990) (Theft of Cable Television Services); *see also* Leibowitz, *supra* note 6, at 688 n.87 (citing state statutes).

84. The fair use analysis in this Article is limited to home recording from pay

home taper has no intent to sell the home-made recording, no intent to "library" the home-made video permanently,[85] and no intent to duplicate the home-recorded copy (to make a "second generation" or "serial" copy).[86]

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television for "time-shifting" purposes—the most prevalent home taping activity. In a 1988 survey of home tapers, the majority (62%) of individuals who record video programming from broadcast or cable television reported that their most recent videotape was made for temporary use only. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 161 (1989) [hereinafter OTA SURVEY].

85. "Librarying," the practice of recording television programs to keep indefinitely (rather than for temporary use) is not as common as time-shift recording. Approximately one-third (35%) of survey respondents reported that the most recent tape they recorded from television was made to keep. OTA SURVEY, *supra* note 84, at 287 (Tbl. 12-10). The total number of videotapes that a VCR household owns is also telling: 42% of VCR owners report having fewer than 10 videotapes; 28% report having between 11 and 25 videotapes; 16% have between 26 and 50 tapes. Only 7% of VCR households claim to have more than 50 videotapes. JOHN M. BOYLE, PH.D., KENNETH E. JOHN & JANE A. WEINZIMMER, A SUPPLEMENTARY REPORT ON HOME VIDEOCASSETTE COPYING AND RECORDING 9 (1988) (report submitted to the Office of Technology Assessment by Schulman, Ronca & Bucavalas, Inc.) [hereinafter OTA SUPPLEMENTAL REPORT]. The total number of videotapes reported above includes blank tapes, prerecorded tapes, tapes recorded from home video cameras, as well as tapes recorded from television. *Id.* at 8-9. Thus, the great majority of home recorders have only a minimal number of videotapes recorded from television in their video "libraries."

Witness testimony and survey evidence introduced in the *Betamax I* trial similarly shows that the expense, in terms of purchasing blank tapes, and the time needed to record and then watch the recorded programs, limits the size of "libraries" of home-made tapes of television programs. *Betamax I*, 480 F. Supp. at 436, 438-49.

86. Copying of home-made or prerecorded videos is not very widespread. Copying a videocassette requires a second VCR, yet the vast majority of households with both a VCR and cable (79%) own but a single VCR. Sweeting, *supra* note 12, at 51, 57; OTA SUPPLEMENTAL REPORT, *supra* note 85, at 6. Even if a household has two or more VCRs, they are not necessarily of the same format. *Id.* at 3, 7. One analysis states that "[t]he nature of the technology makes it more difficult and inconvenient for the consumer to copy videotapes [than audio formats]. The limited penetration of multiple VCRs in households suggests that relatively few households are willing to buy the technology to copy videotapes conveniently." *Id.* at 3.

In the 1988 OTA Survey, only one in five respondents who had acquired a videotape in the past year reported *ever* having copied a video, either prerecorded or home recorded. OTA SURVEY, *supra* note 84, at 162. When considering only respondents who were over 17 years old and have a VCR in their household (or had owned, borrowed, or rented a VCR in the last year), only 14% of this population reported ever having copied a videotape. OTA SUPPLEMENTAL REPORT, *supra* note 85, at 16. Only one in 10 VCR owners reported having copied a videotape in the past year; fewer than one in 20 (3%) copied a videotape in the past month. OTA SURVEY, *supra* note 84, at 162; OTA SUPPLEMENTAL REPORT, *supra* note 85, at 18. Tape *copies* (either from a prerecorded videotape or a television recording) accounted for only 2% of the most recently acquired video tapes; in comparison, respondents purchased 23% of their most recently acquired videotapes and recorded 54% from television. OTA SURVEY, *supra* note 84, at 162; OTA SUPPLEMENTAL REPORT, *supra* note 85, at 13.

This Article asserts that home video recording for time-shifting purposes is a legitimate fair use of copyrighted television programming that is lawfully acquired via pay television services (as well as free over-the-air broadcasts).

1. The Four Statutory Fair Use Factors

(a) *Purpose and Character of the Use*

Analyzed in light of the commercial/noncommercial distinction, home taping from pay television, like home taping from broadcast television, should be characterized as private and noncommercial when it is conducted in the home, for private use. Under Justice Stevens' analysis in *Betamax III*, wherein he equates "commercial" with "profitmaking" (as opposed to "noncommercial, nonprofit"),[87] the home recorder would not realize any direct profit or cost savings from the home recording. In fact, each recording episode would result in additional costs, both monetary (cost of the recording equipment and blank media) and "opportunity" cost (i.e., time and effort to plan the recording session, and purchase blank tapes).[88]

Similarly, under the *Harper & Row* profit/nonprofit distinction, the home taper does not "[stand] to profit from exploitation of the copyrighted material without paying the customary price."[89] The home taper does not profit from nor "exploit" the recorded work at all, but merely watches the home-recorded program in the home at a different time from its scheduled dissemination. Moreover, assuming that the home taper is a paying subscriber and is authorized to receive the pay television signal, he or she has already paid the customary price for the program.

Home taping would also probably be considered consistent with customary standards of propriety. VCR use has penetrated most households in the last decade.[90] As a consequence, home recording of broadcast and cable television has become widespread[91] and, presumably, relatively non-controversial.[92] There is no evi-

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87. *Cf. Betamax III*, 464 U.S. at 449; *see also supra* note 63.

88. *Cf.* John Cirace, *When Does Complete Copying of Copyrighted Works for Purposes Other Than for Profit or Sale Constitute Fair Use? An Economic Analysis of the Sony Betamax and Williams & Wilkins Cases*, 28 ST. LOUIS U. L.J. 647, 661-62 (1984).

89. *See Harper & Row*, 471 U.S. at 562.

90. *See supra* note 5 and accompanying text.

91. OTA SURVEY, *supra* note 84, at 161 (citing a survey that found that 59% of VCR owners reported recording one or more programs from broadcast or cable television in the past month); Sweeting, *supra* note 12, at 51 (citing a 1989 consumer survey that found that nearly 61% of households that subscribe to cable TV and own a VCR record programs from cable; 50% of such households record from PPV).

92. *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 208-09 (1986) [hereinafter OTA

dence that the increasing availability of pay television services has had any affect on the scale or scope of home video recording so as to alter this general public practice and acceptance.

(b) *Nature of the Copyrighted Work*

As to the nature of pay television programming, consider first that the copyright owner has voluntarily disseminated the television work to the public, and the home viewer has lawfully acquired the right to view the programming. Indeed, copyright owners license their works—for a fee—for dissemination via pay television distribution. The subscriber, in turn, pays for the right to receive the programming. Home recording of pay television programming for time-shifting purposes is, in effect, a means of "receiving" the paid-for programming—an alternative to contemporaneous viewing.[93] Thus, the case for permitting home viewers to record from cable and pay television services is arguably even stronger than for allowing home recording from conventional broadcast television.

Consumers do not directly pay for broadcast television programming. Advertisers pay, based on the size of the television audience, to air their commercials; and consumers indirectly pay for this advertising through increased costs for advertised products and services. In contrast, cable and pay television subscribers pay directly to receive programming. Although the subscriber's payments are made to the pay television distributor (not the copyright holder), that distributor, in turn, pays licensing fees to the copyright holders.[94]

INTELLECTUAL PROPERTY REPORT] (citing an OTA survey finding that the vast majority of the public (over 7 in 10) believes that copying from one's own television for noncommercial use is acceptable behavior); *see also* OTA SURVEY, *supra* note 84 at 163-64 n.82 (finding that the general public consensus considered home taping from audio formats acceptable behavior, except for home taping to sell).

93. Taking this argument one step further, some legal scholars have suggested that home copying for private use, including home audio or video recording, should not be considered a "reproduction" subject to the exclusive right to make and to authorize copies set forth in section 106 of the Copyright Act. *See* 17 U.S.C.A. § 106(1) (West 1977). Rather, the right to reproduce "may well mean only the right again to produce, which is to say to communicate publicly. No kind of ordinary home copying for private use is in that sense a reproduction." *Hearings on Copyright and Technological Change Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 71-72 (1983) (statement of David Lange, Professor of Law, Duke University) [hereinafter *Lange Statement*]. Under this view, a fair use analysis need not even come into play, because home copying for private use would not infringe the reproduction right, nor any other exclusive rights in section 106.

94. Premium cable networks such as HBO, Cinemax, and ESPN pay license fees to copyright holders to air copyrighted programs and movies. In turn, resale satellite carriers and cable operators generally pay license fees to carry these cable networks. *See* Paul Farhi, *Broadcast TV Helped Secure Rival Cable's Position in Marketplace*, WASH. POST, Jan. 22, 1992, at A14.

Cable systems and satellite carriers do not pay royalty fees for local retransmis-

In the case of pay television services, copyright proprietors should have no greater right to control consumers' ability to record in their homes for use in their homes than in the context of free over-the-air broadcasts; a heavy burden should be required to overcome this presumption.[95] The argument for separate compensation for VCR viewing and recording essentially is not so much that such price discrimination is *necessary*, but that it is now technically *possible*.

Technological developments and new methods of signal encryption offer to satellite and cable operators the means to establish and maintain control over copying access to pay television programming. It is foreseeable that pay television distributors might want to withhold the ability to record unless the subscriber pays a special "copying" fee in addition to the basic subscription fee. This type of price discrimination, where programming is offered at one price for viewing only and at a higher price for copying, is objectionable on several grounds.

The copying surcharge is analogous to a royalty payment for the right to record the subject television program for private noncommercial use. Using economic analytic models, legal scholars previously have asserted that such price discrimination may overcompensate copyright proprietors for any harm suffered from noncommercial home video recording and may overstimulate production of their works.[96] Copyright owners therefore should pursue other marketing alternatives that would cause less distortion to income distribution and resource allocation.[97]

If technological means are used to control the subscriber's ability to copy, conforming hardware (i.e., television sets, VCRs, and related devices) would be required to implement the controlled access or total anti-copy system. Such controlled-copy systems could be subverted by incompatibility of existing hardware or technological adaptations by electronics manufacturers. Although such tech-

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sion of broadcast stations that subscribers can receive over-the-air. *See* 17 U.S.C.A. § 111(d)(1)(B), § 119(a)(2)(B) (West 1977 & Supp. 1991). Yet cable operators do make royalty payments for the secondary transmission of distant non-network programming; under the cable compulsory licensing scheme, royalty payments are based on the gross receipts from cable system subscribers. *Id.* Similarly, satellite carriers are subject to statutory licensing for secondary transmission to private home viewers of "superstations" and network stations that the household cannot receive over-the-air. 17 U.S.C.A. § 119(a)(1)-(2). License fees are calculated based on the number of home satellite subscribers. 17 U.S.C.A. § 119(b)(1)(B). A "superstation" is a non-network television broadcast station that is retransmitted by satellite. 17 U.S.C.A. § 119(d)(9)). These statutory licensing schemes are an ongoing topic of legislative debate.

95. See discussion regarding the requisite showing of harm, *infra* notes 107-110 and accompanying text.

96. Cirace, *supra* note 88, at 678-81.

97. *Id.* at 681.

nological maneuverings could be prohibited by law, statutory restrictions could have the unwanted consequence of freezing technological development. The legal uncertainty created by a vague right to price discrimination and to control copying could severely slow the pace at which new products are offered in the marketplace.[98]

Pay television systems that would automatically and indiscriminately prevent or add a surcharge for home recording also would be inconsistent with existing copyright law absent any provision for non-infringing copying, such as fair use copying for scholarly, educational, and other purposes, copying of works in the public domain, and even copying where the copyright holder has no objection to home recording.[99] Distributors of pay television programming should not have the right to prevent or control copying unless that control is strictly limited to known infringing uses.[100] The nature of pay television as a medium offers a wealth and diversity of programming previously unavailable. This suggests that the potential for noninfringing copying likewise increases exponentially.

As for the secondary "fact vs. fiction" factor regarding the nature of the copyrighted work, this consideration is not especially enlightening. As in *Betamax I*, the line between dissemination of scholarly information and mere entertainment is not always bright.[101] In the current age of "docudramas" and the like, factual stories are often fictionalized, and fiction is often based on fact.[102] Moreover, pay television subscribers may record television programs that are indisputably "factual" in nature, such as news and current affairs programs, sporting events and, more recently, highly publicized court and legislative proceedings.[103]

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98. *See* discussion of the Motion Picture Anti-Piracy Act, *infra* notes 114-120 and accompanying text.

99. *See* OTA INTELLECTUAL PROPERTY REPORT, *supra* note 92, at 119-20 (stating that "technological protection may be a poor way to protect intellectual property rights because it ignores part of the constitutional compromise between the public welfare and the profit-making of intellectual creators").

100. *Cf. Betamax III*, 464 U.S. at 442 (stating that the sale of copying equipment does not constitute contributory infringement if the product can be used for legitimate, noninfringing purposes).

101. *See Betamax I*, 480 F. Supp. at 452-53; *see also* Stanley v. Georgia, 394 U.S. 557, 566 (1969) (stating, in First Amendment case, that "[t]he line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all").

102. Compare popular television series such as "America's Most Wanted," where actual crimes are re-enacted, with the television series "L.A. Law," where the supposedly fictional legal controversies are frequently based on actual cases.

103. In a 1988 survey, home tapers were asked to reveal the type of program they recorded in their most recent recording session from television. One quarter of the respondents had recorded "factual" programming: 16% of the respondents

(c) *Amount and Substantiality of the Portion Used*

As with conventional broadcast television, presumably individuals recording from pay television services would record the entire program. There has long been disagreement among the courts about whether complete copying can be considered fair use.[104] The *Betamax III* Court, of course, allowed copying of an entire copyrighted work from broadcast television. In any event, the underlying question is whether the copying has any adverse effect on the copyrighted work, as discussed below.[105]

(d) *Effect on the Potential Market or Value*

As the Supreme Court made clear, the single most important inquiry in connection with fair use is: Would the subject use *materially* impair the potential market for or value of the copyrighted work? If home taping from pay television became widespread, is there a meaningful likelihood that it would adversely affect the normal channels of distribution for the copyrighted works featured on such services? For motion pictures and pay television programming, this inquiry should account for potential harm to the initial dissemination of the work, as well as harm to the market for future distribution (such as repeat showings, syndication, and exploitation of alternative markets like home video and broadcast television).[106]

The analysis of potential harm should properly focus on the *magnitude* of any market impairment caused by privileging the home taping; merely ascertaining the *existence* of some adverse impact should not support a finding of copyright infringement. Proponents of expanded copyright protections, especially those at odds with well-established concepts, should bear a heavy burden of proof in demonstrating the requisite harm to justify new limits on consumers' noncommercial use of copyrighted works.[107] Accordingly, if copy-

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recorded sporting events in their most recent taping session; 4% recorded news specials, documentaries, or current events programs; 3% recorded talk shows; and another 2% recorded educational or science shows. OTA SUPPLEMENTAL REPORT, *supra* note 85, at tbl. 12-9.

104. Cirace, *supra* note 88, at 653-54 & nn.35-40 (citing conflicting court opinions about whether the copying of an entire work can be fair use); *see also* New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152, 158 (2d Cir. 1990) (stating that: " 'There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.' " (quoting Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1263 (2d Cir. 1986))); *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions*, H.R. REP. No. 1476, *supra* note 23, at 68-70, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681-83 (copying of *complete* poem, article, story, or essay may be fair use under certain circumstances).

105. *Harper & Row*, 471 U.S. at 599 n.23 (Brennan, J., dissenting).

106. *See generally* Leibowitz, *supra* note 6, at 694-95 (outlining several sequential levels of potential program distribution).

107. *See Lange Statement*, *supra* note 93, at 64-65; Robert W. Kastenmeier &

right proprietors seek to circumscribe the *Betamax III* holding to the specific facts of that case (over-the-air broadcasts) and to assert that consumer home recording from pay television is copyright infringement (rather than fair use), they have a tremendous burden of showing that potential harm from noncommercial recording from pay television services compels enhanced copyright protection.[108]

As a general matter, the extent of harm from complete copying for purposes other than profit or sale is extremely difficult to assess.[109] This difficulty in assessing "harm" is exacerbated in cases where new technology is involved, with no proven track record to ex-

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Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417, 438-42 (1985); *see also Betamax III*, 464 U.S. at 449-451 (noting that there is a presumption that nonprofit, noncommercial use is fair use, and that a meaningful likelihood of future harm must be demonstrated to overcome this presumption); Peter Jaszi, *The Case Against Performance Rights in Sound Recordings* 3-4, 20 (1990) (unpublished manuscript submitted in response to Notice of Inquiry in Docket No. RM 90-6, Copyright Office Study of Digital Audio Broadcast and Cable Services) ("Proponents of [new copyright interests] must do more than show that they would benefit from the imposition of new restrictions; they must demonstrate that those restrictions would not unnecessarily disrupt settled economic and cultural arrangements built on the foundation of vested expectations.").

Former Congressman Kastenmeier and Mr. Remington, former Chief Counsel of the House Committee on the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, set forth a four-pronged test for those who propose change to the intellectual property landscape. Kastenmeier & Remington, *supra*, at 438-42. First, the proponent of a new protectable interest must show that the interest is in harmony with the existing legal framework. *Id.* at 440-41. Second, the proponent must be able to define the new interest in clear and satisfactory terms. *Id.* at 441. Third, the proponent should present an "honest" cost-benefit analysis of the proposed change. *Id.* Finally, any advocate of a new protectable interest should demonstrate how giving protection to that interest will enrich or enhance the aggregate public domain. *Id.* at 441-42.

This four-pronged analysis was developed in the context of a legislative proposal to extend a new form of intellectual property protection to semiconductor chips; nevertheless, this analytical framework is equally applicable to any analysis of extending intellectual property protections to any new technologies. Ultimately, decisions to expand the scope of copyright protections are soundly made only when all relevant interest groups have negotiated to compromise their differences and presented the agreed upon results in the form of legislative proposals. Jaszi, *supra*, at 9-11, and citations therein. This method assures that the overall copyright balance accommodates the interests of copyright owners, copyright users, and institutional interest groups. *See generally Lange Statement, supra* note 93, at 66-68 (posing several hurdles a proponent of a new copyright interest must overcome to rebut the presumption against recognizing new copyright interests).

108. In this connection, Professor Lange remarked that economic interests may have developed in reliance on established copyright concepts, thus proponents of change must demonstrate both why they are entitled to such change and why others who may have benefited by existing law should bear the burden of that change. *Lange Statement, supra* note 93, at 67, 74.

109. Cirace, *supra* note 88, at 654.

amine.[110] Nevertheless, over the years certain patterns in response to new technologies have emerged.

As the *Betamax III* Court found, the movie and television industry has proven strikingly resilient to new technologies and new consumer viewing habits. Although Hollywood initially scorned the advent of the VCR, this consumer device has proven to be a big boon to the entertainment industry. Indeed, the VCR revolution has significantly enhanced the value of motion picture production. In addition to increasing access to broadcast programming, the VCR spawned a totally new market for "home video"—the sale and rental of prerecorded videocassettes.

Although the use of VCRs and the practice of home recording for time-shifting purposes has become widespread, cable and pay television services have proliferated. The potential market for and value of copyrighted movies and television programming continues to increase with these expanded markets and services. There is no evidence that subscribers' ability to record from pay television does or will present a meaningful likelihood of harm to the market for copyrighted pay television programming.[111] On the contrary, the ability to record from pay television increases the utility, convenience, and value of the pay television services to consumers. Home video recording does not distrupt the normal channels of distribution, it enhances them. Consequently, more consumers probably subscribe to such services, and perhaps even pay more to subscribe. The ability to record from pay television thus arguably increases the market for copyrighted works, ultimately enhancing compensation to copyright owners of the subject programs and movies.[112]

Furthermore, analyses have shown that the cost (both monetary and opportunity) of individual copying for private use effectively

110. OTA INTELLECTUAL PROPERTY REPORT, *supra* note 92, at 197-201 (describing the difficulties in assessing actual and potential harm to copyright proprietors caused by private use, especially where claims of potential harm are based on an alleged right to the new opportunities provided by technology). The OTA INTELLECTUAL PROPERTY REPORT concluded that "[t]he harm done to producers by private use is . . . *indeterminate*." *Id.* at 201. This report adds that an estimate of any harm caused by private copying should include a consideration of the beneficial effects of new technology to new and existing markets for intellectual property. For example, the OTA Report notes that, "[a]lthough the videocassette recorder may give rise to copying, it also permits the exploitation of markets that would otherwise not exist. Both factors must be taken into account in considering harm." *Id.*

111. *Id.* at 101, 200-01 (finding that it is often impossible to answer definitively whether a particular instance of consumer copying actually displaced either a sale of a prerecorded copy or further exploitation of the copyrighted work).

112. Even if copyright interests could demonstrate that they could make greater aggregate returns if they were remunerated for consumer home copying by means of price discrimination, such a result does not, by itself, demonstrate the requisite "harm" so as to justify the creation of additional intellectual property rights to achieve this end. *See id.* at 187, 197-98; *Lange Statement, supra* note 93, at 67.

limits the amount of such copying and the consequent harm to copyright owners.[113] Potential harm to the market or value of copyrighted works from home recording is therefore inherently circumscribed by the nature of home recording practices. There is no meaningful likelihood that home recording will supplant the normal channels of initial or sequential distribution for copyrighted movies and other television programs.

2. The Fairness Factor

In addition to the four statutory factors outlined above, consideration of "fairness" dictates that time-shift recording should be considered fair use regardless of the method of transmission. Consider the following:

- Broadcast television stations are also transmitted by cable and satellite services. Does a consumer engage in fair use when taping from broadcasts received over the air, but infringe copyrights when taping the same program carried on cable?
- Is a consumer who tapes a football game from broadcast television a fair user, while the time-shifter recording from ESPN is an infringer?
- Is a time-shift recording of *Raiders of the Lost Ark* fair use if taped from a broadcast network but infringement if recorded from HBO?
- Is it any less a fair use for a cable subscriber to tape a program airing late at night for private viewing the next day?
- What about consumers who work the night shift? Aren't they fair users if they tape a pay-per-view event for viewing at their convenience?

Put simply, whether video recording is a fair use should be determined primarily by the nature of the use and not the manner in which the program is received. Once the copyright owner voluntarily elects to exploit commercially an audiovisual work through pay television services, he or she should not be allowed to discriminate among the means by which the consumer receives the program by way of intellectual property sanction. Whether the reception mechanism includes contemporaneous viewing or recording for later viewing should be irrelevant. Where the subscriber's motives and practices are private and noncommercial, the burden is on the copyright proprietor to show that user or price discrimination is necessary to maintain normal channels of distribution of the work.

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113. Cirace, *supra* note 88, at 682. This analysis concluded that "complete copying of publicly available copyrighted works for purposes other than profit or sale, by an 'individual' or his or her agent (e.g., secretary), for the individual or his or her family's own use, whether by hand, typewriter, photocopying, phonorecording, or video recording, should be fair use and thus not constitute copyright infringement." *Id.*

B. *Special Preview of Legislative Action*

Congress is currently considering several legislative initiatives that could impact on home copying from non-broadcast television services. These legislative measures generally take one of two broad approaches: either authorizing copyright owners to prevent all copying of their works or, alternatively, ensuring consumers' ability to record in their homes.

The "Motion Picture Anti-Piracy Act of 1991," for example, would create an exclusive right for copyright owners to protect unauthorized copying of an audiovisual work through the use of any process, treatment, or mechanism that prevents or inhibits copying, such as anti-copy coding of the video signals.[114] The legislation would create civil and criminal sanctions for the manufacture, sale, or distribution of any equipment or device "the primary purpose or effect of which is to avoid, bypass, deactivate, or otherwise circumvent" such anti-copy protection.[115] Although ostensibly aimed to give statutory protection to copy protection systems such as Macrovision's encryption on commercial videocassettes,[116] and to outlaw the so-called "black boxes" used to circumvent such anti-copy coding, the proposed legislation could also impact home video recording from cable and pay television services.[117]

As a broad copyright measure, this type of legislation is problematic because it would allow cable and satellite operators and copyright owners to prevent *all* unauthorized copying, without provision for fair use. This approach would reverse prior legislative intent to allow noncommercial home taping of audiovisual works, and would strictly limit, for the first time, the home taping aspects of *Betamax III* to the specific facts of that case—home taping from over-the-air broadcast television.

As a technical measure, the particular approach of the Motion Picture Anti-Piracy Act is also troublesome. While the bill sets forth a broad-ranging definition of the devices and circuitry it outlaws, it

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114. S. 1096, 102d Cong., 1st Sess. § 2 (1991) (introduced by Senator Herbert Kohl of Wisconsin); *accord* H.R. 2367, 102d Cong., 1st Sess. § 2 (1991) (identical companion bill sponsored by Rep. Howard Berman of California).

115. S. 1096 § 3; H.R. 2367 § 3.

116. Macrovision primarily markets copy protection technology for prerecorded videocassettes. Sweeting, *supra* note 12, at 51; *Hearing on S. 1096, Motion Picture Anti-Piracy Act of 1991 Before the Subcomm. on Technology and the Law, joint with the Subcomm. on Patents, Copyrights and Trademarks, of the Senate Committee on the Judiciary*, 102d Cong., 1st Sess. 1 (1991) (testimony of John Ryan, Chairman of Macrovision) (noting that in addition to copy protection encryption for videocassettes, Macrovision is also developing copy protection technologies for PPV television formats).

117. *See Leghorn Statement*, *supra* note 10 (describing Eidak's fledgling copy protection treatment for audiovisual works transmitted electronically on pay television services).

contains no definition of the circuitry, designs, or even concepts that would *conform* to its requirements. Thus, such legislation must invariably chill the design and distribution of conventional television sets and VCRs, as there can be no assurance of compatibility with all copy protection treatments or technologies.[118] Moreover, forcing legislation that relies upon a technological approach to prevent home recording completely is prone to eventual failure, circumvention, or obsolescence.[119] As Barbara Ringer, former U.S. Register of Copyright, opined over twenty years ago, the home video recording issue should not be addressed by carrying copyright enforcement into the home, by banning video recording devices, or by imposing technologies to prevent video recording.[120]

In an entirely different approach, the "Cable Equipment Act of 1992" ("Amendment") would prohibit cable operators from scrambling or otherwise encrypting any local broadcast signal that is offered via cable.[121] The Cable Equipment Act would not, however, restrict the use of scrambling or encryption technology that does not interfere with the operation of cable subscribers' televisions or VCRs.[122] This legislation is designed to ensure that cable systems and converter boxes do not disable the full benefits and special features of modern televisions and VCRs, including the ability to record programming televised on cable.[123]

If enacted, the Cable Equipment Act would ensure that consumers will be entitled to "fair use" of broadcast programming they receive by cable. The Amendment would also take steps to preclude

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118. Under S. 1096, a person would be a copyright infringer if that person:

> imports, manufactures, sells or distributes any equipment or device, or any component or circuitry incorporated into any equipment or device, the primary purpose or effect of which is to avoid, bypass, deactivate or otherwise circumvent the process, treatment, mechanism, or system used by the owner of a copyright to prevent or inhibit copying.

S. 1096, 102d Cong., 1st Sess. § 3 (1991).

119. As the district judge in the *Betamax* case predicted, even if consumer electronics manufacturers are ordered to install a "jamming device" to prevent home taping, "as sure as you and I are sitting in this courtroom today, some bright young entrepreneur, unconnected with Sony, is going to come up with a device to unjam the jam. And then we have a device to jam the unjamming of the jam, and we all end up like jelly." Lardner, *supra* note 34, at 62-63 (quoting Judge Ferguson).

120. *See supra* note 33.

121. Senate Amendment No. 1504, 102d Cong., 2d Sess. § 624A(d)1 (1992) (introduced by Senator Patrick Leahy of Vermont as an amendment to S. 12, the Cable TV Consumer Protection Act, 102d Cong., 1st Sess. (1991)), *reprinted in* CONG. REC. S582 (Jan. 29, 1992). This Senate Amendment offers the substance of S. 2063, 102d Cong., 1st Sess. § 1(d) (1991), a bill introduced by Senator Leahy during the preceding session.

122. *Id.*

123. *See* CONG. REC. S 583 (Jan. 29, 1992) (statement of Senator Leahy); *see also* CONG. REC. S 18,377-78 (Nov. 26, 1991) (statement of Senator Leahy regarding S. 2063).

cable operators from needlessly interfering with subscribers' use of their televisions and VCRs.[124] In effect, it codifies the *Betamax III* decision. The measure, however, may not ultimately address encryption of other basic cable services, premium cable channels, PPV, microwave distribution systems, or direct-satellite services.[125]

Congress has shown increasing sensitivity to consumer complaints regarding the increasing control copyright holders and pay television distributors are demanding over consumer use of pay television signals.[126] Nevertheless, no comprehensive solution has yet been offered.

To fully protect the consumer's right to fair use home video recording, this author would propose a simple piece of legislation.[127] The legislation would expressly confirm that home video recording of lawfully acquired television signals for private, noncommercial purposes does not constitute copyright infringement. Accordingly, the legislation would prohibit any copy protection methods or devices (such as signal scrambling, signal encryption, converter boxes, or descrambling devices) that interfere with consumers' fair use of

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124. The requirement for a cable converter box for signal reception prevents cable viewers from watching a program on one channel while taping another; from taping two consecutive programs on different channels; from using the TV or VCR remote control unit; and even from enjoying special features such as "picture-in-a-picture." *See* CONG. REC. at S 582-83 (Jan. 29, 1992) (reprinting S. Amendment No. 1504, § 624A(b), 102d Cong., 2d Sess., and statement of Senator Leahy). The Cable Equipment Act would help ensure that cable systems are more compatible with televisions and VCRs, and that the cable is installed to bypass the converter box wherever possible.

125. The Amendment requires the Federal Communications Commission (FCC), in consultation with representatives of the cable industry and the consumer electronics industry, to report to Congress regarding "means of assuring compatibility between televisions and VCRs and cable systems so that cable subscribers will be able to enjoy the full benefit of both the programming available on cable systems and the functions available on their televisions and VCRs." S. Amendment No. 1504, § 624A(h), 102d Cong., 2d Sess., *reprinted in* CONG. REC. S 583 (Jan. 29, 1992); *see also* CONG. REC. S 583 (Jan. 29, 1992) (statement of Senator Leahy). The Amendment does not, however, set forth specific guidelines or a policy mandate to guide the FCC in balancing the various public and private interests so as to assure that televisions, VCRs, and cable services are "compatible." In particular, it is unclear whether the ability to make home recordings from pay television services is encompassed within the assurance of "compatibility."

126. *See, e.g.*, CONG. REC. S 583 (Jan. 29, 1992) ("Cable operators have every right to try to protect the security of their premium programming. But they show little regard for their customers when they choose a means of protection that will sabotage the customer's television and VCR." (statement of Senator Leahy)); *id.* at S 584 ("It is obvious what is going on here, cable operators don't like consumers having control over the cable signal once it comes into their homes . . . ." (statement of Senator Gore)).

127. With respect to such legislation, there are additional considerations, such as analysis of contributory infringement and benefits conferred on copyright holders by new technology, that are beyond the scope of this Article.

copyrighted audiovisual works. This would include consumers' ability to record for private, noncommercial use television signals that their household is authorized to receive. The legislation would not preclude the use of signal protection methods to prevent unauthorized receipt of television programming if such methods do not interfere with an individual's private use of lawfully acquired programming, including uses that involve private, noncommercial home recording. The legislation would apply to all commercial television distribution systems, including basic cable service, premium cable networks, direct-satellite services, multi-channel microwave distribution systems, and PPV services.

The delicate copyright balance would thus be struck, but not stricken. On one scale, the legislation would preserve ready, inexpensive access to copyrighted works for the consuming public. Authorized subscribers' right to fair use of pay television service would be upheld. On the other scale, the rights of private copyright proprietors are also upheld. Copyright holders and pay television distributors would be protected from material impairment to the market for their copyrighted works by existing laws that prohibit unauthorized reception of pay television signals and commercial piracy of copyrighted audiovisual works.[128]

CONCLUSION

Despite the major changes in telecommunications and consumer electronics technologies during this century, Hollywood has endured and prospered. There is no reason to believe that the rising popularity and availability of pay television services, combined with consumer recording of programs delivered by these services, will undermine the financial incentives for those who create and distribute motion pictures and television programming. On the contrary, history has shown that new technologies provide new marketing opportunities for copyright holders and program distributors.

Indeed, consumers thirst for *new* things, especially new means and modes of entertainment. The glamour and excitement surrounding the release of a new motion picture, the airing of a new hit television series, or the debut of an exclusive cable "special" continue to capture our imagination—regardless of whether such works are distributed on film, over-the-air, via cable, or by direct-satellite. New technology will not stifle America's love affair with TV and the movies.

Yet, in the process of technological development, as new means to control access to copyrighted audiovisual works emerge, the doctrine of fair use, and its representation of the public domain, is in-

128. *See supra* note 83 and accompanying text.

creasingly threatened by claims of proprietors to enhanced return. The event that was once freely broadcast, and then made available only on pay cable, will now be offered only on pay-per-view. The use of further discriminatory monetary and technological means to control the viewer's mode of use once the audiovisual signal has been acquired ought to be examined skeptically. "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[129]

129. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).