The Home Audio Recording Act: An Inappropriate Response to the Home Taping Question

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I. Introduction

The framers of the United States Constitution recognized the need to protect the control of authors over their original written expression and therefore gave Congress the power to grant authors and inventors a limited monopoly in their creative works. In the past two hundred years, technological advances have raised perplexing copyright problems. In addition, these advances have led to statutory revisions to meet the needs created by developments in the methods of expression.

1. See U.S. CONST. art. I, § 8, cl. 8. The Constitution authorizes Congress "[t]o 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." Id.


As part of the 1976 general revision of the federal copyright statute, Congress created the National Commission on New Technological Uses of Copyrighted Works (CONTU), to make recommendations for changes in federal copyright law necessitated by technological advances. See NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS FINAL REPORT 1 (1978). CONTU, however, limited its study to the problems raised by computer software and photocopying. See id. CONTU was disbanded in 1978. See id. at 106. Incorporating CONTU's recommendations, the 1976 Copyright Act contains a statutory exemption from liability for copyright infringement for library photocopying of materials, and provides copyright protection for computer programs. See 17 U.S.C. §§ 108, 117 (1982).

In particular, recent developments in audio technologies\(^4\) have caused

It is by this process of amendments and complete revisions that Congress has responded to technological advances by gradually bringing new forms of technology within the ambit of copyright protection. Most notable among these amendments are copyright protection for prints, see Act of Apr. 29, 1802, ch. 36, 2 Stat. 171; photographs, see Act of Mar. 3, 1865, ch. 126, 13 Stat. 540; motion pictures, see Act of Aug. 24, 1912, ch. 356, 37 Stat. 488; and sound recordings. See Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391. The Copyright Act of 1976 adopted, in virtually unchanged form, the provisions of the 1971 Sound Recording Amendment, which are now codified at 17 U.S.C. §§ 101, 102(a)(7), 106(1), (3)-(4), 116, 401, 402, 412, 501-504 (1982). For the complete record of the more than twenty-year legislative effort resulting in the 1976 Copyright Act, see OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman ed. 1976-77).

4. Among the most popular new types of stereo systems and portable audio recorders available in the market are those containing two cassette wells. See The Home Audio Recording Act: Hearings on S. 1739 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 1 (1985) (statement of Stanley Gortikov, President, Recording Industry Association of America) (declaring that “these [dual-cassette] machines dominate the marketplace”) [hereinafter Hearings on S. 1739]. Dual-cassette machines can copy a cassette inserted in one well onto a blank cassette inserted in the other well. See id.

The American recording industry has expressed concern about the increasing availability of dual-cassette recorders to the general public. See Pareles, Royalties on Recorders and Blank Audio Tapes, N.Y. Times, Nov. 21, 1985, at C34, col. 3 [hereinafter Pareles]. George Weiss, President of the Songwriters' Guild, has said: “This technology is like putting the tools for stealing into people's hands.” Id. Recording industry officials believe that the increasing availability and popularity of such machines will result in an increase of home recorded copies of prerecorded, copyrighted cassettes and, thus, will lead to a decrease in industry sales of prerecorded cassettes. See Hearings on S. 1739, supra, at 3. The contrary result, however, has in fact occurred. See Horowitz, RIAA Figures: Cassettes Paced A Record '84, Billboard, Apr. 13, 1985, at 1, col. 1 [hereinafter RIAA Figures]. Sales of prerecorded cassettes have increased steadily, despite the increasing availability of dual-cassette machines, and prerecorded cassettes have overtaken albums as the preferred format of prerecorded music. See id.

In 1984, cassettes surpassed albums as the preferred format of prerecorded music, accounting for over 55% of the industry's total revenues. See id. In 1985, 54% of prerecorded music purchased was on cassettes. See Pareles, supra at C34, col. 4. In addition, compact disk recordings, the latest technological phenomenon in sound recording available to the general public, have already drawn many cassette and album purchasers. See RIAA Figures, supra at 1, col. 2. In 1984, sales of compact disks increased 625% to 5.8 million units, while sales of albums dropped 2% from 209.6 million units to 204.6 million units. See id.

Recently, the American recording industry balked at the prospect of the distribution of digital audio tape (DAT) in the United States early in 1987. See Japan Rejects Plea for Device to Curb Tape-Copying, N.Y. Times, Dec. 13, 1986, at 13, col. 3. The recording industry fears the new technology behind DAT, which can offer sound quality equal to a digital compact disk, will lead to an increase in home taping activity. See id.; see also Schiffres, The New Sound of Music, U.S. NEWS & WORLD REP., Jan. 26, 1987, at 54, col. 1 (report on DAT player-recorders); RIAA Chief Expresses Fears on DAT, Billboard, Aug. 16, 1986, at 1, col. 2 (record industry concerned that DAT originals and copies will be perfect replications).
Congress to reexamine the home audio recording phenomenon and to reconsider the nature and purpose of copyright protection for prerecorded music. Increasingly, consumers tape music off the radio or from an album they have purchased or borrowed. The recording industry contends that consumer home taping is copyright infringement and wants consumers to pay additional royalty fees to copyright holders. Congress is currently considering legislation that would expand copyright protection of prerecorded music for copyright holders by imposing royalty fees on blank audio tape and recording equipment.

A similar problem confronted the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, when it ruled on advances in technology in the area of video recording. In this 1984 decision, the Supreme Court held that home video recording is "fair use" and that video cassette recorder (VCR) manufacturers are not liable as contributory infringers under the federal copyright law. While the Court's decision in *Sony* rests heavily on the "time-
shifting’ element of home video recording,15 a factor not present in home audio taping,16 home audio recording may satisfy the fair use considerations set forth in the 1976 Copyright Act in other ways.17 Under this analysis, audio equipment manufacturers would similarly be absolved from liability as contributory infringers.18

This Note examines the controversy over consumers’ home audio taping activities and finds the legislation under consideration by Congress an inappropriate remedy. Initially, this Note reviews the proposed legislation introduced in Congress addressing the issue of home audio taping.19 The Note then surveys the rationale behind the Sony decision, which determined that video recorder manufacturers were not liable as contributory infringers, and advocates that audio recorder manufacturers receive similar treatment.20 Next, this Note analyzes whether home audio recording may constitute fair use under the federal copyright law.21 This Note concludes that even if certain forms of home audio recording are infringing uses under the Sony rationale,22 Congress should reject the proposed legislation.23 In its present form it is overbroad,24 because it unduly penalizes consumers whose taping activities may qualify as fair use, or who use audio recording equipment in ways that do not infringe on copyright owners’ interests.25

II. Background: Copyright, Proposed Legislation, and Current Case Law

The proposed legislation seeks to increase the degree of copyright protection afforded to copyright holders of sound recordings. To explain better the effect on copyright protection that the proposed legislation would have, this Part provides a discussion of copyright law, the proposed legislation, and current case law.

15. See 464 U.S. at 442-56. “Time-shifting” is the recording of a program at a time when the video cassette recorder (VCR) owner cannot view the broadcast in person and would like to watch it at a later time. See id. at 442. For a further discussion of the “time-shifting” capabilities of VCRs, see infra note 96 and accompanying text.
16. See infra notes 90-97 and accompanying text.
17. See infra notes 101-217 and accompanying text.
18. See infra notes 66-100 and accompanying text.
19. See infra notes 43-55 and accompanying text.
20. See infra notes 60-68 and accompanying text.
21. See infra notes 101-217 and accompanying text.
23. See infra notes 43-55 and accompanying text.
24. See infra notes 218-45 and accompanying text.
25. See infra notes 99-113 and accompanying text.
A. Copyright Law

A system under which all creative works are in the public domain would discourage creative efforts. Thus, copyright law seeks to guarantee an economic return to copyright holders by granting them a limited monopoly in their works. Under the 1976 Copyright Act, the duration of a copyright depends on the creation date of a work. The copyright law generally provides that a copyright in a work created on or after January 1, 1978, the effective date of the 1976 Copyright Act, subsists for the life of the author and fifty years after the author's death. Through this grant of a temporary monopoly, copyright law achieves its goal of balancing the desire of the public for unrestricted access with creators' desires for financial reward.

26. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1974) ("[t]he 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").

27. The Supreme Court has stated that "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . . . Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." Mazer v. Stein, 347 U.S. 201, 219 (1954). The Court has also noted that the law of copyright furthers public interest by providing for broad public availability of literature, music and other arts. See Twentieth Century Music, 422 U.S. at 156; cf. United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("copyright law . . . makes reward to the owner a secondary consideration").


29. See id. § 302(a) (1982).

30. See Twentieth Century Music, 422 U.S. at 156 ("[t]he limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest") (citing 1 M. Nimmer, Nimmer on Copyright § 5 (1974)). The Court also stated that "[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." Id. (citing Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)); see also Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors"); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875, 882 (S.D. Fla. 1978) ("primary purpose of the Copyright Act is to stimulate creativity for the public welfare and to preserve for the creator the right to retain the written work unpublished or to publish it and derive monetary compensation therefrom"), aff'd, 626 F.2d 1171 (5th Cir. 1980).

In this balance of competing interests, however, tension frequently arises not only between creators' economic incentive and the public's desire for unrestricted access to existing works, but also between copyright law and the first amendment to the United States Constitution. See id. at 881-82. Although "[b]oth laws are oriented toward the preservation of an atmosphere conducive to the interchange
The 1909 Copyright Act, which controlled copyright duration and royalty fees until 1978, provided protection only to the author of the written composition underlying a recorded performance. The draftsmen of the 1909 Copyright Act failed to foresee that a particular

of ideas", the copyright statute "seeks to diminish the threat posed by the person... commercially releas[ing] a copy of a creation more quickly than the creator," whereas the first amendment to the Constitution "seeks to allay the threat posed by the person releas[ing]... his words with greater speed, volume and punch." Id. at 882. For a discussion of the tension between copyright law and the first amendment, see Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983 (1970); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press, 17 U.C.L.A. L. Rev. 1180 (1970); Comment, The First Amendment Exception to Copyright: A Proposed Test, 1977 Wis. L. Rev. 1158. See Comment, Copyright: History and Development, 28 Calif. L. Rev. 620 (1940); see also Fenning, The Origin of the Patent and Copyright Clause of the Constitution, 17 Geo. L.J. 109 (1929) (discussing history and proceedings resulting in inclusion of copyright clause in Constitution).

31. See 17 U.S.C. § 114 (1982) (specifying extent of exclusive rights available to holder of copyright of sound recordings). Section 114 states that the exclusive rights of copyright holders of sound recordings are "limited to the rights specified by clauses (1), (2), and (3) of section 106." Id. § 114(a). In section 106, the 1976 Copyright Act grants the copyright holder exclusive rights to use and to authorize the use of his work in five qualified ways. See id. § 106 (1982). These rights include the right to reproduce the copyrighted work in copies. See id. § 106(1). Section 106 of the 1976 Copyright Act provides:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audio visual 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 audio visual work, to display the copyrighted work publicly.

Id. § 106 (1982).

A phonorecord may encompass three distinct copyrightable works: the phonorecord itself, which the manufacturer has the right to prevent others from reproducing, see 17 U.S.C. §§ 101, 106 (1982); the sound recording embodied in the phonorecord, see id. § 101, 102, 104 (1982); and the musical composition underlying the recorded performance, see id. §§ 102, 106 (1982). See infra note 36 for a discussion of which types of works are copyrightable. Until the 1909 Copyright Act was amended to provide for increased protection, performers and producers had no copyright in a sound recording. See id. § 402 (1982). This result stemmed primarily from the Supreme Court's decision in White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908), holding that piano rolls did not constitute copies of the underlying musical compositions when they caused a player piano to reproduce the sound, because piano rolls could not be deciphered by the naked eye. See 209 U.S. 1, 18 (1908).
singer's or musician's rendition of a musical composition might also be a unique work of authorship and might, therefore, also deserve copyright protection. The 1971 Sound Recording Amendment (1971 Amendment) to the 1909 Copyright Act corrected this problem.

The problem of record "piracy," the unauthorized reproduction and commercial distribution of records and tapes, which was rampant in the late 1960's, prompted passage of the 1971 Amendment. Prior to this amendment, it was possible for a pirate to reproduce any popular recording at a low cost. He could then proceed to flood the market with the illegal product to the detriment of a legitimate recording company that had already invested in promoting and producing the original song and artist. A pirate could completely avoid copyright infringement liability merely by paying the copyright holder of the underlying music the statutory royalty fee. Subsequent to the 1971 Amendment, sound recordings today are protected in

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34. See Act of Mar. 4, 1909, ch. 320, 35 Stat. 1081-82; supra note 31 and accompanying text. While statutory damages were limited to three times the amount of the unpaid royalty, other penalties could be imposed on the pirate infringer. See Miller v. Goody, 125 F. Supp. 348 (S.D.N.Y. 1954) (permitting impoundment of equipment used to produce pirate copies). See generally Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667 (5th Cir. 1975), cert. denied, 423 U.S. 841 (1975) (summary judgment granted in music publisher's copyright infringement action against tape pirates who made and sold unauthorized reproductions of authorized recordings of copyrighted musical compositions).

35. Section 115(c) specifies the royalty payable under the compulsory license provisions of the copyright statute. 17 U.S.C. § 115(c) (1982). For each song contained on a phonorecord, the current royalty payable under the compulsory license provisions is the larger amount of either two and three-fourths cents, or one-half of one cent per minute of playing time. See id. Prior to the 1976 Copyright Act, the royalty was two cents. See id. § 1(e) (1947). Because of the small amount of the statutory royalty due copyright holders, tape pirates were not effectively deterred. See, e.g., Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260, 266 (2d Cir. 1957) (limiting copyright owner's recovery against seller of pirate tapes to statutory two-cent royalty, and noting that in some cases court has discretion to award triple amount of royalty due); Leo Feist, Inc. v. Apollo Records, 300 F. Supp. 32, 43 (S.D.N.Y.), aff'd, 418 F.2d 1249 (2d Cir. 1969) (court award of two times statutory amount due as royalties); Famous Music Corp. v. Seeco Records, Inc., 201 F. Supp. 560, 569 (S.D.N.Y. 1961) (treble damages awarded). Under the 1971 Sound Recording Amendment to title 17 of the United States Code, however, tape pirates who wilfully and for profit made identical copies of recorded versions of copyrighted musical compositions which were recorded prior to February 15,
two distinct ways: (1) the original, underlying musical composition is protected as a written work; and (2) the particular recorded artist’s rendition is protected as a phonorecording.36

Congress first considered the home audio recording controversy during its preparation of the 1971 Amendment.37 While the text of

1972, were nevertheless subject to criminal prosecution, even if they paid the statutory royalty to the composition copyright holder. Heilman v. Levi, 391 F. Supp. 1106, 1113 (E.D. Wis. 1975).

36. See 17 U.S.C. §§ 102(a), 106(1)-(3), 114, 115 (1982). The 1976 Copyright Act treated sound recordings and phonorecords the same as other mediums of expression, and these recordings receive copyright protection comparable to other creative works. See id. § 106 (1982). Section 102 of the 1976 Copyright Act currently provides that:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audio visual works; and (7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.


the amendment does not specifically refer to home audio recording, a passage from a report of the House Judiciary Committee indicates an intent to exclude home audio recording from liability for copyright infringement. In addition, several exchanges took place in the House Subcommittee on the Judiciary hearings on the amendment and on the floor of the House that indicate an intent to exclude home audio recording activities from liability for copyright infringement. These

After the Supreme Court handed down the Sony decision, congressional discussion of legislation on home recording slowed until June 27, 1985. On June 27, 1985, Representative Morrison and others introduced H.R. 2911 to amend title 17 of the U.S. Code with respect to home audio recording and audio recording devices and media. See H.R. 2911, 99th Cong., 1st Sess., 131 Cong. Rec. H5227 (daily ed. June 27, 1985). Shortly thereafter, on October 7, 1985, Senator Mathias and others introduced S. 1739. See S. 1739, 99th Cong., 1st Sess., 131 Cong. Rec. S12795 (daily ed. Oct. 7, 1985). H.R. 2911 and S. 1739 seek to impose compulsory license fees on manufacturers and importers of audio recording equipment and blank tape to distribute their products in the United States. See infra note 43 and accompanying text. Following a day of hearings on October 30, 1985, the Senate Subcommittee on Patents, Copyrights and Trademarks returned the bill to its staff for further modifications. See Pareles, supra note 4, at C34, col. 4. The Senate subcommittee revised S. 1739 on May 21, 1986, by removing the proposed royalty provisions on blank tape. See AUDIO NEWS 1 (Audio Recording Rights Coalition 1986) [hereinafter AUDIO NEWS]. The Reagan administration, through the Commerce Department’s Patent and Trademark Office, has expressed opposition to the proposed royalty legislation. See Holland, Reagan Opposes Senate’s Home-Taping Legislation, Billboard, Aug. 16, 1986, at 1, col. 1 [hereinafter Holland]. Although representatives of the Reagan administration believe that additional legislation protecting copyright holders’ interests should be considered, they found the proposed royalty amounts “arbitrary, and the collection provisions and distribution formula . . . bureaucratically burdensome.” Id. While previously considered bills had addressed both audio and video recording, the present royalty legislation purportedly addresses only home audio recording. See infra note 240 for an explanation of the Home Audio Recording Act, and its possible coverage of VCRs and video tape.


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.


discussions, however, occurred in the House after the Senate had approved the 1971 Amendment. Thus, even though the Representatives may have understood or intended an exemption for home taping, the Senate failed to indicate such an exemption.\textsuperscript{40}

Moreover, although the legislative history of the 1976 Copyright Act includes verbatim much of the proceedings on the 1971 Amendment, it omits the portion of House Report No. 487 discussing an exemption for home audio recording.\textsuperscript{41} Thus, even if the 1971 Amendment had created an exemption from liability for copyright infringement for home taping of sound recordings, this exemption probably failed to survive the 1976 general revision of the federal copyright law.\textsuperscript{42} The recording industry maintains that home taping

\textsuperscript{1} Sess. 22 (1971). During these hearings, the following dialogue took place between Representative Beister and Barbara Ringer, Assistant Register of Copyrights:

Mr. Beister: My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set .... [T]his legislation, of course, would not point to his activities, would it?

Ms. Ringer: I think the answer is clearly, “No, it would not.” .... [T]his 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. My own opinion ... is that sooner or later there is going to be a crunch here. But that is not what this legislation is addressed to, and I do not see the crunch coming in the immediate future.

\textit{Id.} at 22-23. When the 1971 Sound Recording Amendment reached the House floor for consideration, the following discussion on noncommercial home audio recording occurred between Rep. Kazen and Rep. Kastenmeier, chairman of the subcommittee responsible for the 1971 Sound Recording Amendment, further indicating an intent to exclude home audio recording from liability for copyright infringement:

Mr. Kazen: 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 use 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. 34748-49 (1971).

40. The Senate did not join in the quoted passage of H.R. REP. No. 487. See supra note 38, at 7.


is copyright infringement and is currently lobbying Congress to require additional royalty fees.

B. The Proposed Legislation

Two bills now before Congress seek to impose royalties on blank audio tapes and recording equipment. Although both bills purport

Against Home Taping, ROLLING STONE, Sept. 16, 1982, at 59 (report on record industry’s support for increased copyright fee legislation in Congress) [hereinafter Schrage].

43. Compare H.R. 2911, 99th Cong., 1st Sess. 1 (1985) [hereinafter H.R. 2911] with S. 1739, 99th Cong., 2d Sess. 1 (1986) [hereinafter S. 1739]. Both bills ostensibly concern only audio recording. See H.R. 2911, supra, at 1; see also S. 1739, supra, at 1. Each bill addresses the issue of audio recording by affording new protections and additional compensation to copyright holders through the imposition of a royalty on blank audio tape and recording equipment. See H.R. 2911, supra, at 2-4; see also S. 1739, supra, at 2-4. In the current form of the two bills, only the House version would impose royalties on blank tapes. Compare H.R. 2911, supra, § 119(b) with S. 1739, supra, § 119(b). In an effort to gain support for the passage of S. 1739, proponents removed the blank tape provision from the Senate version of the Home Audio Recording Act in May, 1986. See AUDIO NEWS, supra note 37, at 1. Under H.R. 2911, the Register of Copyrights would collect the fees and distribute them to owners of copyrights in musical works and sound recordings. See H.R. 2911, supra, §§ (3)-(5). In contrast, S. 1739 provides for a more complex royalty distribution system, under which royalty fees would be collected by the Register of Copyrights and ultimately transferred to the Copyright Royalty Tribunal for distribution to the National Endowment for the Arts and to owners of copyrights in musical works in sound recordings. See S. 1739, supra, §§ (3)-(4). While some opponents to the royalty legislation consider it a special interest tax intended to benefit the powerful recording industry lobby, supporters insist on terming the fees a “royalty.” See Pareles, supra note 4, at C34, col. 4. The terms “tax” and “royalty” may be distinguished on the basis of who receives the funds collected. See BLACK’S LAW DICTIONARY 1195, 1307 (5th ed. 1979) (“Tax: [A] pecuniary contribution . . . for the support of government”); “Royalty: Compensation for the use of property, usually copyrighted material”); see also Pareles, Should Rock Lyrics Be Sanitized, N.Y. Times, Oct. 13, 1985, at H1, col. 1; id. at H5, col. 1 (noting current conservative political climate surrounding RIAA lobby for surcharges on blank tape and tape recorders “that would benefit copyright holders, notably record companies”). See generally Rudell, Legislation to Deal with Audio Taping, N.Y.L.J., Nov. 22, 1985, at 1, col. 1 (discussion of home audio recording legislation under consideration by Congress). For a discussion of the provisions of the proposed royalty legislation, see infra notes 44-55 and accompanying text.

A further comparison of H.R. 2911 and S. 1739 yields other differences. For example, in the House bill, the proposed royalty on single-cassette recorders would be 10% of the first domestic sale price. See H.R. 2911, supra, § 119(c)(1). In contrast, the Senate bill provides for a 5% royalty on single-cassette recorders. See S. 1739, supra, § 119(c)(1)(A). Both bills call for a royalty of 25% of the first domestic sale price for dual-cassette recorders. Compare H.R. 2911, supra, § 119(c)(2) with S. 1739, supra, § 119(c)(1)(B). In addition, the House bill would impose a royalty of one cent per minute of the maximum playing time on blank tapes. See H.R. 2911, supra, § 119(c)(3). Except for these distinctions, the bills are virtually
to make an exemption from liability for copyright infringement for those individuals who make single copies of copyrighted musical works for private use, they impose mandatory royalties on manufacturers and importers who facilitate home audio recording by providing these goods on the market. As a matter of economics, the industry will not absorb this added operating cost, and consumers will ultimately bear the economic brunt of this legislation by paying greatly increased retail prices.

The royalty would modify the way intellectual property is currently protected in the United States. The royalty creates a compulsory

[44. See H.R. 2911, supra note 43, § 119(a); S. 1739, supra note 43, § 119(a).
45. See H.R. 2911, supra note 43, § 119(b)(1), (b)(2).
46. See Hearings on S. 1739, supra note 4, at 7 (statement of Jack Battaglia, General Manager, Memtek Products).
First of all, this tax is not modest. . . . For some of our tape, the tax will almost double the price. My company will be unable to internalize such a large tax, or any other tax for that matter. Because my company survives on tight [profit] margins, we will have to pass this tax through to our customers.
Id.; see also id. at 5 (statement of Carol Tucker Foreman, President, Foreman & Company) ("[whatever exemption the bill provides for noninfringing uses will still be an added cost to the consumer").
47. See supra note 36 for a discussion of the types of works currently protected under federal copyright law. Under the Home Audio Recording Act, consumers would pay a fee for the potential infringing use of copyrighted material by the blank tapes and recorders they purchased. See Pareles, supra note 4, at C34, col. 1. The fees would not be paid for an actual or provable use, but rather because such products were mechanically capable of reproducing copyrighted sound recordings. See id.
48. A compulsory license fee is a statutorily required fee that a person using the intellectual property must pay to a copyright holder for the use of his copyrighted work. See generally 17 U.S.C. §§ 111, 115, 116, 118 (1982). The Copyright Act currently provides for compulsory licenses in four specific situations: (1) cable transmissions, see 17 U.S.C. § 111(c)-(d) (1982); (2) production and distribution of nondramatic musical works, see 17 U.S.C. § 115 (1982); (3) jukebox performances, see id. § 116 (1982); and (4) noncommercial broadcasting. See id. § 118 (1982). These provisions state that any party may use a copyrighted work, but must pay the copyright owner a statutory royalty. See id. § 115(c) (1982). For example, cable system operators pay a specified percentage of their gross receipts to the Register of Copyrights to be divided by the Copyright Royalty Tribunal. See id. § 111(d)(2)(B)-(D) (1982). The current statutory royalty for jukeboxes is $8.00 per unit per year, which is paid by machine owners and distributed to copyright holders by the Copyright Royalty Tribunal. See id. § 116(b)(1)(A) (1982).
Cable system operators pay compulsory license fees as required under 17 U.S.C. § 111 (1982). Although a cable system operator may not be using copyrighted works in his broadcasts, he is still required to pay the compulsory license fee. This inequitable situation is highly unlikely to occur. See id. § 111. It is very probable,
license fee for private copying. Unlike the traditional method of exacting fees for authorized uses of creative works, the modification would result in copyright fees being levied on the blank audio tapes and recorders themselves, based on the physical capabilities of these products.

The funds collected would be distributed through a complex financial structure among copyright holders who have filed claims with the Register of Copyrights or the Copyright Royalty Tribunal (CRT). Any owner of a copyright in a musical work or sound recording that was transmitted over radio or television, or sold in the form of records or tapes during the period in question would be entitled to claim royalty fees. Nevertheless, as discussed below, the Supreme Court's analysis of home video recording in Sony and the possibility that home audio recording may be fair use render however, that a consumer may use a blank tape and a tape recorder to record noncopyrighted material. For example, a consumer may use a blank tape and a tape recorder to record a business meeting, or to record a school lecture. See YANKELOVICH, SKELLY AND WHITE, INC., WHY AMERICANS TAPE: A SURVEY OF HOME AUDIO TAPEING IN THE UNITED STATES 14 (Sept. 1982) [hereinafter YANKELOVICH SURVEY].

49. See Pareles, supra note 4, at C34, col. 1.
51. See supra note 44 and accompanying text.
52. See H.R. 2911, supra note 43, § 119(b)(3). The House bill provides that: The Register shall receive all fees deposited under this section and, after deducting reasonable administrative costs, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury shall direct. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Register as provided by this title. Id. S. 1739 contains a similar provision, except that the Senate bill provides that the Copyright Royalty Tribunal would collect the funds and distribute them according to a detailed allocation system. See S. 1739, supra note 43, § 119(b)(3)-(5).
53. Section 101 of title 17 of the United States Code defines the term "sound recordings" to mean "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101 (1982).
54. "Transmission" is also a defined term in the federal copyright law. See id. "To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." Id.
57. See infra notes 61, 101-217 and accompanying text.
this legislation an inappropriate response to the home audio taping issue.

C. The Sony Decision

In Sony, two film production companies brought a copyright infringement action against the manufacturer of the Betamax, a widely marketed VCR that is capable of off-the-air recording. Employing the judicial doctrine of "fair use" codified in the 1976 Copyright Act, the Court found that home video recording is fair use. Specifically, the Court held that home video taping for private viewing is a fair use of a copyright work and that the sale of VCRs fails to constitute contributory infringement. A contributory infringer is someone who knows that a person is infringing on a valid copyright, and assists that person in the infringing activity.

III. Problems with the Proposed Legislation

The proposed legislation is marred by two primary problems: (1) it fails to extend the Sony decision to audio taping, despite a compelling need to do so; and (2) it is overly broad, arbitrary and unfair.

A. Failure to Extend the Sony Decision to Audio Taping

The Court based its decision in Sony on a fair use analysis of home video taping, balanced with an "equitable rule of rea-
son,' as espoused by Congress. The Court stated that supplying the means to accomplish a potentially infringing activity was insufficient to establish liability for contributory infringement. Although it failed to consider the issue of whether home audio recording of copyrighted sound recordings for private use constitutes copyright infringement, the rationale behind the Court's decision on home video taping is applicable to home audio recording. Thus, the Court's decision in *Sony* should be extended to absolve home audio tapers from liability for copyright infringement.

1. **Manufacturers as Contributory Infringers**

The *Sony* Court held that the knowledge that consumers might use their products for an infringing purpose was insufficient to make VCR manufacturers contributory infringers. The Court noted that the only contact between buyers and sellers of such equipment occurred at the point of sale, and that it was impossible for vendors to know how consumers would utilize the equipment. Although manufacturers and importers of blank video and audio recording

65. 464 U.S. at 448-49. The *Sony* Court referred to House Report No. 1476 in reaching its decision. See 464 U.S. at 448. The report stated:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. . . . 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.


The Senate Committee studying home video taping activities similarly disapproved of a rigid approach to "fair use" determinations. See S. Rep. No. 473, 94th Cong., 2d Sess. at 65-66 (1975). The report advocated "that off-the-air recording for convenience" could be considered "fair use" in some instances, but made it clear that it did not intend to suggest that off-the-air recording for convenience should be deemed "fair use" under all circumstances. *Id.* at 65-66.

66. 464 U.S. at 442. "[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes." *Id.*

67. See generally *id.* at 420.

68. See infra notes 69-100 and accompanying text.

69. See 464 U.S. at 442; see also * supra* note 13 and accompanying text.

70. 464 U.S. at 438. "The only contact between Sony and the users of the Betamax that is disclosed by this record occurred at the moment of sale." *Id.* The Court also distinguished *Sony* from other cases, in which the contributory infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner. See, e.g., Gershwin Publishing Corp. v. Columbia Artists Management Inc., 443 F.2d 1159 (2d Cir. 1971) (direct infringers retained contributory infringer to manage their performances);
equipment benefit economically from consumers' home recording activities, they do not intentionally induce customers to infringe on copyrights. Nor do they supply their products to identified individuals known to be engaging in infringing activities.

In reasoning that VCR manufacturers are not liable as contributory infringers, the Sony Court analogized to the "staple article of commerce" doctrine in patent law. A "staple article of commerce" is a product that is capable of infringing and noninfringing uses. Although they are two separate areas of the law, a historic relationship exists between patent and copyright laws. Therefore, it is


1. The audio recording industry enjoyed sales of $7 billion in 1984. See Pareles, supra note 4, at C34, col. 1.

2. 464 U.S. at 439. "Sony certainly does not 'intentionally induc[e]' its customers to make infringing uses of respondents' copyrights, nor does it supply its products to identified individuals known by it to be engaging in continuing infringement of respondents' copyrights." 464 U.S. at 439 n.19 (citation omitted). Referring to the trial court's findings of fact, the Sony Court noted that "[t]he district court expressly found that 'no employee of Sony, Sonam or DDBI had either direct involvement with the allegedly infringing activity or direct contact with purchasers of Betamax who recorded copyrighted works off-the-air.'" Id. at 438 (citing 480 F. Supp. 429, 460 (1979)). In addition, the district court found "no evidence that any of the copies made by Griffiths [the named individual defendant] or the other individual witnesses in this suit were influenced or encouraged by [Sony's] advertisements." Id.

3. See id. at 439 n.19.

4. See id. at 442.

5. The "staple article of commerce" doctrine is codified in title 35 of the United States Code. See 35 U.S.C. §§ 1-376 (1982). Section 271(c) of title 35 provides:

   Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

Id. § 271 (1982). In applying the "staple article of commerce" doctrine to contributory infringement cases arising under the federal patent laws, the Supreme Court has denied the patentee any right to control the distribution of unpatented articles unless they are "unsuited for any commercial noninfringing use." Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 198 (1980).

6. 464 U.S. at 442. "We recognize there are substantial differences between the patent and copyright laws. But in both areas the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication . . . or publication to the products or activities that make such duplication possible." Id. "The two areas
appropriate to consider the applicability of the staple article of commerce doctrine\textsuperscript{77} to the sale of blank audio tape and recording equipment.\textsuperscript{78}

The Supreme Court has held that "a sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce."\textsuperscript{79} Indeed, as the \textit{Sony} Court stated, the product in question "need merely be capable of substantial noninfringing uses."\textsuperscript{80}

The varied uses of blank audio tape and recording equipment place these products within this description, for blank audio tape and recording equipment are suitable for both infringing and non-infringing uses. A consumer may use a tape to copy a prerecorded copyrighted work for commercial gain (an infringing use),\textsuperscript{81} or to record, for example, a business meeting (a noninfringing use).\textsuperscript{82}

While such noninfringing uses are typical uses of single capacity cassette recorders (those having only one cassette well), double capacity recorders (containing two cassette wells in one deck) are frequently used to copy prerecorded cassettes.\textsuperscript{83} The cassettes copied of the law, naturally, are not identical twins, and we exercise the caution which we have expressed in the past in applying doctrine formulated in one area to the other." \textit{Id.} at 439 n.19; \textit{see}, e.g., \textit{United States v. Paramount Pictures, Inc.}, 334 U.S. 131, 158 (1948) (economic result of copyright law similar to patent law); \textit{Fox Film Corp. v. Doyal}, 286 U.S. 123, 131 (1932) (copyright royalties and federal government's purpose conferring copyrights is same as royalties from patent rights). \textit{See generally Mazer v. Stein}, 347 U.S. 201, 217-18 (1954); \textit{Bobbs-Merrill Co. v. Straus}, 210 U.S. 339, 345 (1908).

It is possible, therefore, to compare the protections and purposes of patent law with those of copyright law. No such kinship, however, exists between copyright law and trademark law. \textit{See The Trade-Mark Cases}, 100 U.S. 82, 93-94 (1879) (similarities between copyright and patent law absent in trademark law); \textit{see also United Drug Co. v. Theodore Rectanus Co.}, 248 U.S. 90, 97 (1918) (trademark right "has little or no analogy" to copyright or patent); \textit{McLean v. Fleming}, 96 U.S. 245, 254 (1878) (ownership interest in use of trademark "bears very little analogy to that which exists in copyrights or in patents"); \textit{Canal Co. v. Clark}, 80 U.S. (13 Wall.) 311, 322 (1872) (interest in trademark "has very little analogy to that which exists in copyrights, or in patents for inventions").

\textsuperscript{77} \textit{See supra} note 75 and accompanying text.

\textsuperscript{78} \textit{See infra} notes 79-88 and accompanying text.


\textsuperscript{80} \textit{Sony}, 464 U.S. at 442.

\textsuperscript{81} \textit{Cf. 17 U.S.C. § 106(3)} (1982) (copyright owner holds exclusive right to distribute copies of records commercially).

\textsuperscript{82} For a discussion of other noninfringing uses of tape recording, see \textit{infra} notes 107-13 and accompanying text.

\textsuperscript{83} The recording industry maintains that consumers use dual-capacity recorders primarily to copy prerecorded cassettes. \textit{See Hearings on S. 1739, supra} note 4,
may contain uncopyrighted material or copyrighted music.\textsuperscript{84} Dupli-
cating prerecorded copyrighted music cassettes serves purposes dif-
f erent from making a single cassette recording of an album or song
for personal use.\textsuperscript{85}

Just as the copyright law seeks to serve a balance of competing
interests,\textsuperscript{86} the Supreme Court has said that “[t]he staple article of
commerce doctrine must strike a balance between a copyright holder’s
legitimate demand for effective—not merely symbolic—protection of
the statutory monopoly, and the rights of others freely to engage
in substantially unrelated areas of commerce.”\textsuperscript{87} Therefore, the sale
of audio recording equipment and blank tapes does not constitute
contributory infringement if the consumer uses the products for
substantial noninfringing purposes.\textsuperscript{88} The Supreme Court’s reasoning
in \textit{Sony}, based on a finding that VCRs are capable of substantial
noninfringing uses, is applicable to audio recording equipment.\textsuperscript{89}

Indeed, when one considers two important differences in the me-
chanical capabilities of video and audio recorders, an even stronger
argument exists for not finding contributory infringement through
the sale of audio recording equipment. First, VCRs are equipped
with built-in tuners that allow consumers to record programs off-
the-air while simultaneously viewing a different program on another
channel.\textsuperscript{90} Audio recorders lack this capability. A radio listener is

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\textsuperscript{84} See generally YANKELOVICH SURVEY, supra note 48, at 35, 37 (types of
materials taped by consumers).

\textsuperscript{85} Cf. infra note 135 and accompanying text. See \textit{Hearings on S. 1739, supra}
ote 4, at 1-2 (statement of Stanley Gortikov, President, Recording Industry As-
ociation of America). Mr. Gortikov expressed the recording industry’s belief that
increased home taping by consumers replaces purchases of prerecorded music.
“First it was an occasional hobby for a few. Then it became a common practice
for many. Now it is a way of life for millions—the standard way to acquire
prerecorded music without paying for it.” \textit{Id.}

\textsuperscript{86} See supra notes 27, 30 and accompanying text.

\textsuperscript{87} \textit{Sony}, 464 U.S. at 442.

\textsuperscript{88} See \textit{id}.

\textsuperscript{89} See supra notes 69-80 and accompanying text.

\textsuperscript{90} See 464 U.S. at 422 (discussing unique mechanical capabilities of VCRs).

“The separate tuner in the Betamax enables it to record a broadcast off one station
simply unable, as a matter of engineering, to hear one radio broadcast while taping another station's broadcast with the same machine.\textsuperscript{91}

Thus, home tapers who record songs off the radio are physically present and able to hear the promotions of advertisers.\textsuperscript{92} Unlike VCR users, who can fast-forward during commercials,\textsuperscript{93} audio tapers must hear some advertisements in full, at least once, in the course of waiting for the desired song.\textsuperscript{94} Fast-forwarding of commercials by home video viewers subverts the advertising function of television stations and may ultimately result in reduced advertising revenues to television stations.\textsuperscript{95}

Second, VCRs, unlike audio recorders, are equipped with built-in timers to allow consumers to record programs when they are not at home.\textsuperscript{96} While it is true that one can attach an electric timer to an audio recording device to achieve this capability, it is normally not a function of home audio recording.\textsuperscript{97}

Although the Supreme Court acknowledged these two functions of video tape recorders, it still found them capable of substantial noninfringing uses.\textsuperscript{98} The absence of these functions in audio re-

\begin{itemize}
\item while the television set is tuned to another channel, permitting the viewer, for example, to watch two simultaneous news broadcasts by watching one 'live' and recording the other for later viewing." \textit{Id.}
\item \textsuperscript{91} Cf. \textit{id.}
\item \textsuperscript{92} Cf. \textit{infra} note 93.
\item \textsuperscript{93} See \textit{Sony}, 464 U.S. at 423.
\end{itemize}

The Betamax is also equipped with a pause button and a fast-forward control. The pause button, when depressed, deactivates the recorder until it is released, thus enabling a viewer to omit a commercial advertisement from the recording, provided . . . that the viewer is present when the program is recorded. The fast-forward control enables the viewer of a previously recorded program to run the tape rapidly when a segment he or she does not desire to see is being played back on the television screen.

\textit{Id.}

\begin{itemize}
\item \textsuperscript{94} See \textit{supra} note 93.
\item \textsuperscript{95} See Wermiel, \textit{Taping of TV Programs at Home Is Approved 5-4 by Supreme Court}, Wall St. J., Jan. 18, 1984, at 3, col. 3 (advertising executives believe "the growth of home taping could weaken the effectiveness of TV commercials if viewers use their machines to eliminate them").
\item \textsuperscript{96} See 464 U.S. at 422-23.
\end{itemize}

A timer in the Betamax can be used to activate and deactivate the equipment at predetermined times, enabling an intended viewer to record programs that are transmitted when he or she is not at home. Thus a person may watch a program at home in the evening even though it was broadcast while the viewer was at work during the afternoon.

\textit{Id.}

\begin{itemize}
\item \textsuperscript{97} See \textit{infra} notes 107-16 and accompanying text for a discussion of the functions of home audio recording.
\item \textsuperscript{98} See 464 U.S. at 442.
\end{itemize}
corders shows that they are even more capable of substantial non-infringing uses than are VCRs. Thus, the existence of these two physical distinctions between video and audio recorders creates an even stronger argument for Congress to apply the Supreme Court’s reasoning in *Sony* to audio equipment and audio equipment manufacturers.

2. **Home Audio Recording as Fair Use**

Not only are audio recorders capable of substantial noninfringing uses, but home audio recording may also qualify as "fair use" under federal copyright law. Fair use doctrine allows a person to use a copyrighted work without the copyright holder’s consent, and without paying a royalty fee. The four factors generally considered in a fair use analysis are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount of the work used in relation to the work as a whole; and (4) the effect of the use on the potential market for the copyrighted work.

Copyright law distinguishes between a fair use of copyrighted material and a use that fails to implicate copyright law. Thus, in the context of home taping, one must distinguish between home audio taping that: (1) may qualify as fair use under consideration of the four fair use factors listed in the 1976 Copyright Act; and (2) does not involve the recording of copyrighted works.

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99. See * supra* notes 75, 90-97 and accompanying text.
100. See * supra* notes 90-96 and accompanying text.
101. See * infra* notes 107-12 and accompanying text.
102. See * infra* notes 103-217 and accompanying text.
104. See *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174-75 (5th Cir. 1980); see also 17 U.S.C. § 107 (1982). Courts generally accept that "normally these four factors would govern the analysis." See 626 F.2d at 1175 n.10.
107. More than half of all home audio recording does not involve the taping of prerecorded music. A study conducted in 1982 found that 52% of all home audio tapes were made for reasons other than taping prerecorded music. See *Yankelovich Survey, supra* note 48, at 14. A survey conducted in 1980 found that 38% of current tapers—defined by the study as tape consumers who made
Examples of the latter activity include: students who tape classes with an instructor’s permission; businessmen and legislators who tape meetings; musicians who tape their own original music; and persons who correspond via cassettes—not to mention a myriad of other examples.

Thus, a large portion of consumer taping involves, not prerecorded music, but rather uncopyrighted material. In addition, several studies have found that a majority of home tapers who do record prerecorded music tape from albums that they already own. They some form of audio recording during the survey year—had used blank tape for personal or family recordings or for school or office work. See WARNER COMMUNICATIONS, INC., A CONSUMER SURVEY: HOME TAPING 12 (Mar. 1982) [hereinafter WARNER SURVEY].

108. Forty-five percent of the total number of tapers using blank tape for purposes other than taping prerecorded music, used audio tape for educational purposes. See YANKELOVICH SURVEY, supra note 48, at 14. The Yankelovich Survey classified tape consumers into three categories: (1) tapers (“Americans who are at least 14 years old and living in the continental United States who have made an audio tape in the past two years”); (2) home music tapers (“[t]hose tapers who have ever taped music from records, prerecorded tapes, or the radio”); and (3) recent home music tapers (“[t]apers who have made a tape in the last three months from a record, prerecorded tape or the radio”). Id. at 13.

109. Eighteen percent of total tapers used blank tape for “other business uses,” referring to usage of blank tapes other than for dictation (16%), in a telephone answering machine (9%), or for use with a home computer (6%). YANKELOVICH SURVEY, supra note 48, at 14.

110. Forty-eight percent of tapers surveyed used blank tapes for taping music performed by their family, friends or themselves. See id. In 1980, the Warner Survey found that 29% of current tapers used blank tape to record personal or family recordings. See WARNER SURVEY, supra note 107, at 12.

111. Thirty-three percent of tapers surveyed used blank tape for recording instructions, messages or letters. See YANKELOVICH SURVEY, supra note 48, at 14.

112. Other uses of blank audio tape include taping childrens’ voices, weddings, birthdays or other family occasions, use by private reporting services and educational institutions. See id. These uses of blank tapes and equipment account for tens of millions of blank tapes that consumers and institutions use in ways that do not involve copyrighted works. See AUDIO RECORDING RIGHTS COALITION, TAXING BLANK TAPE AND RECORDERS: UNTIMELY, UNNECESSARY, AND UNFAIR 11 (July 1985).

113. See supra notes 107-12 and accompanying text. The Yankelovich Survey found that nearly 25% of all home tapers have never (or were unsure if they ever) taped prerecorded music. See YANKELOVICH SURVEY, supra note 48, at 29. Furthermore, 44% of tapers age 50 and over have never taped any prerecorded music. See id. at 43. Thus, the royalty legislation would especially penalize older adults, who are significantly less likely to tape prerecorded music than are teen-agers. See id. at 42.

114. Sixty-six percent of home music tapers have made home-recorded tapes from their own music collections. See YANKELOVICH SURVEY, supra note 48, at 51. Fifty-one percent of all music tapes of prerecorded music made at home were made from records or tapes owned by the tape consumer. See id.; cf. WARNER SURVEY, supra note 107, at 22. The Warner Survey divided home music taped into two
tape to preserve the condition of an album\textsuperscript{115} or, increasingly, to create an easily portable format of a favored recording.\textsuperscript{116} Statistics also show that home music tapers are more frequent purchasers of prerecorded music than are nontapers.\textsuperscript{117} As discussed below, the reasons why consumers tape are vital considerations in a fair use analysis.\textsuperscript{118}

In \textit{Sony}, the Court deemed it sufficient that some potential uses of the Betamax were noninfringing and that others were fair use.\textsuperscript{119}

categories: complete albums taped and selections taped. \textit{See id.} The survey found that 45\% of albums and 33\% of selections were taped from a tape consumer's own records or tapes, while 34\% of albums and 21\% of selections were made from borrowed tapes, and 21\% of albums and 40\% of selections were made from the radio, along with an approximate 6\% of selections made from live performances. \textit{See id.} at 23. Thus, the Warner Survey in 1980 found that the majority of tapes made at home were not made from records and tapes in a taper's collection. \textit{See id.}

\textsuperscript{115} Forty-two percent of those surveyed who had recorded tapes from their own music collection during the past six months stated the desire to preserve their records as an important factor in the appeal of home-recorded tapes made from one's own collection. \textit{See Yankelovich Survey, supra note 48, at 57.}

\textsuperscript{116} Fifty-nine percent of home tapers surveyed who had recorded tapes from their own collection in the past six months stated portability as a very important reason for home audio recording. Other very important factors to survey respondents were convenience (61\%) and selection taping (58\%). \textit{See id.} at 58.

\textsuperscript{117} The Yankelovich Survey found a direct relationship between prerecorded music purchases and home music taping, indicating:

[H]ome music taping is clearly most widespread among those individuals who are frequent record purchasers. Among the lightest home music tapers, the average number of records owned was only 67. Among the heaviest home music tapers, the average number of records owned was nearly three times as great. Similarly, heavy home music tapers have three times as many prerecorded tapes as light home music tapers have. \textit{Id.} at 61. Thus, the surveys found that home taping stimulates purchases of prerecorded music. \textit{See id.} at 16; \textit{see also Warner Survey, supra note 107, at 32 (82\% of tapes surveyed were current buyers of records and prerecorded tapes; while only 44\% of nontapers reported purchasing prerecorded music). The Warner Survey explained this phenomenon by noting that "buying and taping both reflect a more general commitment to music . . . [T]he more one sees music as important, the more likely one is to engage in both buying and taping." Id. at 36. The surveys indicate, therefore, the positive economic effect home audio taping has on the music industry. An article on the recording industry’s push for royalty legislation concluded:

Home tapers aren’t a bunch of freeloaders, they’re the very people the record industry depends on to turn a release platinum. The Electronic Industries Association’s analysis of Warners’ data asserts that the average taper spends \textit{seventy percent more} on recorded music than the nontaper who buys recorded music. In essence, the record industry is saying that its best customers are its worst enemies. \textit{Schrage, supra note 42, at 63 (emphasis in original).}

\textsuperscript{118} \textit{See infra} notes 131-61 and accompanying text.

\textsuperscript{119} In determining whether VCRs were staple articles of commerce, and that their sale did not, therefore, constitute contributory infringement, the \textit{Sony} Court
In holding that private noncommercial time-shifting is fair use, the Court focused on two principal findings: (1) the plaintiffs had no right to prevent other copyright holders from authorizing the taping of their programs; and (2) even unauthorized home time-shifting of plaintiffs' programs could be legitimate fair use. Although home audio recording serves purposes different from the time-shifting purposes of home video taping that the Court found, comparable grounds exist for holding that home audio recording is fair use.

Prior to the passage of the 1976 Copyright Act, the fair use defense existed only as a judicial doctrine that courts could invoke to immunize certain acts of copyright infringement when infringement was necessary to further the public interest. The fair use defense "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." The statute fails to define fair use spe-

examined whether VCRs could be used for noninfringing purposes. See Sony, 464 U.S. at 442. In reaching its decision the Court stated:

The question is . . . whether the Betamax is capable of commercially significant noninfringing uses. . . . [W]e need not explore all the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the District Court a significant number of them would be noninfringing . . . . [W]e need not give precise content to the question of how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home.

Id.

120. See id.

121. See infra notes 131-217 and accompanying text.

122. Although the "fair use" doctrine is codified in section 107 of the 1976 Copyright Act, an accompanying House Report expressly stated that the section was "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, 94th Cong., 2d Sess. 66, reprinted in 1976 U.S. Code Cong. & Admin. News 5659 [hereinafter H.R. Rep. No. 1476]. The House Report further stated that section 107 was not intended "to freeze the doctrine in the statute, especially during a period of rapid technological change." Id. at 66; see also Quinto v. Legal Times of Washington, Inc., 506 F. Supp. 554, 560 (D.D.C. 1981) (legislative history of § 107 of 1976 Copyright Act states that statute was not intended to change present judicial doctrine of fair use); Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741, 745 n.8 (S.D.N.Y.), aff'd, 623 F.2d 252 (2d Cir. 1980) (statutory fair use exception intended by Congress to codify, not supplant, common law doctrine of fair use); Key Maps, Inc. v. Pruitt, 470 F. Supp. 33, 37 (S.D. Tex. 1978) (express statutory recognition by Congress of judicial doctrine of fair use indicates intent to limit exclusive right of copyright owner where circumstances require it).

123. Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., 621 F.2d 57, 60 (2d Cir. 1980).
cifically.\textsuperscript{124} Instead the statute includes four factors courts should consider before reaching a fair use determination.\textsuperscript{125} One court has said that fair use is "so flexible as virtually to defy definition,"\textsuperscript{126} while another has described the doctrine as "the most troublesome in the whole law of copyright."\textsuperscript{127}

The four factors listed in section 107 of the 1976 Copyright Act are not absolute criteria that a court must satisfy in order to rule that an activity qualifies as fair use.\textsuperscript{128} Traditionally, however, courts have considered fair use claims on a case-by-case basis, which includes a consideration of the four factors.\textsuperscript{129} Section 107 sets forth the factors in general terms and fails to indicate the weight a court should accord a particular factor.\textsuperscript{130} Since the four factors listed in section 107 are the only statutory guidelines for reaching a fair use determination, however, home audio recording must satisfy some of these factors to qualify as fair use. Accordingly, a brief discussion of each factor follows.

\textit{(a) The Purpose and Character of the Use}

The first factor listed in section 107 of the Copyright Act is whether the "character of the use" is "of a commercial nature or is for nonprofit educational purposes."\textsuperscript{131} Although this factor is

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\textsuperscript{124} The factors listed in 17 U.S.C. § 107 (1982) are preceded by the words "shall include." See 17 U.S.C. § 107 (1982). The term "including" is defined in the Copyright Act as "illustrative and not limitative." Id. § 101 (1982); see supra note 104 and accompanying text.

\textsuperscript{125} 17 U.S.C. § 107 (1982).


\textsuperscript{127} See Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

\textsuperscript{128} See supra note 124 and accompanying text.

\textsuperscript{129} See supra note 122, at 65-66.

\textsuperscript{130} 464 U.S. at 448-49 nn.31-32 (citing H.R. Rep. No. 1476, supra note 122, at 66). This House Report stated:

The Committee has amended the first of the criteria to be considered—"the purpose and character of the use"—to state explicitly that this factor includes a consideration of "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.


not itself dispositive, in *Sony* the Court stated that it must be "weighed in any fair use decision." 626 F.2d 1171, 1174 (5th Cir. 1980) (same); Iowa State Univ. Research Found. v. American Broadcasting Co., 621 F.2d 57, 60 (2d Cir. 1980) (same); Association of Am. Medical Colleges v. Mikaelian, 571 F. Supp. 144, 151 (E.D. Pa. 1983), aff'd, 734 F.2d 3 (3d Cir. 1984) (same).

Courts look at the motivation for an activity implicating copyrighted work, including whether products available on the market adequately satisfy the use. 133

Home audio recording is usually not done for commercial gain. 135 While it is true that some consumers tape from borrowed albums or directly off the radio, studies have shown that, in the end, this type of home taping often stimulates these consumers to purchase prerecorded music. 136 An increase in the price of blank audio tapes and recording equipment might price some of these consumers out of the market for home taping. 137


132. See supra note 130 and accompanying text.

133. Courts have considered applying the fair use doctrine to cases on education, commercial, and parody uses of copyrighted works. See, e.g., Marcus v. Rowley, 695 F.2d 1171, 1178-79 (9th Cir. 1983) (educational use found not to be fair use); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979) (excessive parody use not fair use); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Cl. Cl. 1973), aff'd per curiam by an equally divided court, 420 U.S. 376 (1975) (library photocopying of medical articles for patrons found fair use).


135. See YANKELOVICH SURVEY, supra note 48, at 58 (table of reasons for most recent home taping of music from a tape consumer's personal collection). The surveys show that tape consumers do not record cassettes in order to sell them commercially. Rather, they tape music for personal use. See id. Charles Ferris, former chairman of the Federal Communications Commission, has asserted: "If anyone makes a copy and sells it, that's piracy, but if you do it for your personal use, that's a right you obtain when you purchase a disk." See Japan Rejects Plea for Device to Curb Tape-Copying, N.Y. Times, Dec. 13, 1986, at 13, col. 3. Whether purchasers of prerecorded music acquire any such rights, and the actual impact of home taping on sales of prerecorded music, is the crux of the home taping conflict. Cf. Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (holding that wheat grown for home consumption substantially affects the amount of wheat sold in interstate commerce and is, therefore, subject to government regulation under commerce clause).

136. The Yankelovich Survey found that home audio recording is a stimulus to future prerecorded music purchases for the majority of home tapers. See YANKELOVICH SURVEY, supra note 48, at 47. A majority (55%) of home music tapers reported that they often or sometimes buy a record after taping all or part of it. See id. Sixty-four percent of those questioned said that borrowing and taping a record enabled them to discover a performer or composer they liked and, hence, led them to purchase a prerecorded copy of that artist's work. See id. The Warner Survey similarly concluded that tapers were "not only more likely than non-tapers to be current buyers of records and prerecorded tapes, but on the average, tapers spend more money on prerecorded music than do non-tapers." See WARNER SURVEY, supra note 107, at 32.
of the market and thus result in a decrease in fees received by copyright holders.\textsuperscript{137} In addition, one could argue that the public has a right to tape material played on the radio and that this activity broadens dissemination of information played for public use.\textsuperscript{138}

Radio programs, like television broadcasts, are presented to the public, which ultimately supports stations by patronizing advertisers.\textsuperscript{139} All parties involved—producers, management, advertisers, and artists—are aware that listeners may ultimately tape the broadcast materials.\textsuperscript{140} In fact, radio stations may have already taken this consideration into account in their license agreements with copyright holders or their agents.\textsuperscript{141}

Consumers use blank audio tapes and recording equipment for a wide variety of purposes.\textsuperscript{142} Their taping of lectures, meetings, music

\textsuperscript{137} If prices of blank audio tapes and recording equipment increase because of royalty fees, some consumers may be unable to afford these goods. Consequently, they may not discover new performers whose music they enjoy, and this will decrease their purchases of prerecorded music. See \textit{Hearings on S. 1739, supra} note 4, at 24 (statement of Charles Ferris, Audio Recording Rights Coalition). “Taping may also occur because record owners want to ensure proper handling of records in their collections . . . . In some instances, moreover, friends may pool resources to buy, and share, an album or cassette that, on their own, none could afford to buy.” \textit{Id.}

\textsuperscript{138} Dissemination of information is a fundamental purpose of the federal copyright statute. See \textit{Meeropol v. Nizer}, 560 F.2d 1061, 1068 (2d Cir. 1977); \textit{see also \textit{Hearings on S. 1739, supra}} note 4, at 24 (statement of Charles Ferris, Audio Recording Rights Coalition). Mr. Ferris stated: “With respect to copyrighted material, such as books and records, copyright law recognizes the importance of exchanging and disseminating works. Indeed, the law contemplates that the ability to share prerecorded music is an element of the price that is paid to copyright owners.” \textit{Id.} Opponents to the royalty legislation maintain that consumers have a right to copy prerecorded music they have purchased. See \textit{supra} note 135.

\textsuperscript{139} See \textit{J. BITTNER, BROADCAST LAW AND REGULATION} 236 (1982).

\textsuperscript{140} Radio stations, like cable television stations, pay a percentage of their profits in exchange for compulsory licenses to use copyrighted materials. See 17 U.S.C. \textsection 115 (1982).

\textsuperscript{141} The American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) are private enterprises that control the performance copyrights to most musical works published in the United States. See \textit{S. SHEMEL \& M. KRASILOVSKY, THIS BUSINESS OF MUSIC} 157 (4th ed. 1979) [hereinafter \textit{THIS BUSINESS OF MUSIC}]. A copyright owner licenses his performance rights to one of these organizations and, in turn, the organization issues a blanket license to broadcast any title in the ASCAP or BMI repertoire. See \textit{id.} at 158. The license fee is usually based on a percentage of the station’s gross receipts, less certain adjustments and the royalty fees, less ASCAP’s or BMI’s commission. See \textit{id.} The license fee is paid to the copyright owner on the basis of market survey information that determines the frequency with which the copyrighted work has been broadcast. See \textit{id.} See \textit{generally} \textit{3 M. NIMMER, NIMMER ON COPYRIGHT, § 10.10[E]} (1982) (it is only “small” or nondramatic performing rights that copyright owner licenses in these instances).

\textsuperscript{142} \textit{See infra} notes 146-53 and accompanying text.
practice sessions, and other items does not involve the taping of copyrighted work. Consumers also use blank audio tape to copy prerecorded music. Consumers engage in this type of taping activity primarily for personal entertainment, not commercial purposes.

The most frequently stated reasons for home taping of prerecorded music include: (1) the desire to make a copy of a purchased album for one's portable stereo cassette player, such as the Sony Walkman, or car stereo; (2) the poor quality of tape used for prerecorded cassette releases; (3) the unavailability of some releases in cassette form; and (4) the desire to make a tape of favorite selections from various albums on a single, conveniently portable, cassette. The recording industry could never satisfy this last reason for home taping.

In addition to the poor quality of tape the recording industry uses for prerecorded cassette releases, the prerecorded music itself is inferior in sound quality in comparison to a homemade copy.

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143. See supra notes 107-13 and accompanying text.
144. See YANKELOVICH SURVEY, supra note 48, at 36 (48% of those questioned had used blank tape to copy prerecorded music in the three months prior to the survey); see also WARNER SURVEY, supra note 107, at 9.
145. See WARNER SURVEY, supra note 107, at 9; see also Hearings on S. 1739, supra note 4, at 5 (statement of Jack Battaglia, General Manager, Memtek Products) ("home tapers tend to be audiophiles, the people who love music and are the biggest purchasers of the record companies' products").
146. See YANKELOVICH SURVEY, supra note 48, at 80.
147. See id. at 89-90. See infra notes 153-55 and accompanying text for a discussion of the quality of tape used for prerecorded cassettes.
148. See YANKELOVICH SURVEY, supra note 48, at 89-90. The Yankelovich Survey also found that 41% of the total group of tapers interviewed rated prerecorded music tapes as fair or poor with respect to availability of desired music. See id. at 99.
149. Selection taping was the most commonly cited reason for preferring home recorded tapes over prerecorded tapes (71%). See id. at 89. Following selection taping in importance were cost (55%) and the longer playing time of home recorded tapes (51%). See id. at 89-90.
150. Fifty-seven percent of home music tapers stated convenience was a very important reason for sometimes using a home recorded tape rather than an album. See id. at 4; see also WARNER SURVEY, supra note 107, at 16 (9% of those surveyed favored convenience of cassettes).
151. Seventy-seven percent of tapers stated portability was a very important factor in their preference to use cassettes rather than albums. "Portability is important because 80% of all home tapers own one or more portable tape players, such as car stereo systems or Walkman-type players, and do half of their total listening to home-recorded tapes on these portable systems." See YANKELOVICH SURVEY, supra note 48, at 4; see also WARNER SURVEY, supra note 107, at 16.
152. See Hearings on S. 1739, supra note 4, at 5-6 (statement of Jack Battaglia, General Manager, Memtek Products). See generally YANKELOVICH SURVEY, supra note 48, at 58, 67; WARNER SURVEY, supra note 107, at 15.
153. See YANKELOVICH SURVEY, supra note 48, at 89; WARNER SURVEY, supra
The sound quality of prerecorded cassettes is inferior because recording companies mass produce cassette copies at high speeds. In this production process, much of the music's sound quality, which is more easily discernible on an album, is lost.

A consumer's purchase of an album will result in compensation for the creative efforts of the copyright holder. Few consumers note 107, at 16. Because prerecorded tapes offer poorer sound quality than a home-recorded copy of an album, many consumers prefer to make their own high-quality cassette copies. See Hearings on S. 1739, supra note 107, at 4-5 (statement of Jack Battaglia, General Manager, Memtek Products).

Many of these consumers who do tape prerecorded music do so not to avoid buying records, but to get the best quality portable music possible. Consumers have never been able to buy high quality prerecorded music in audio cassette form. The cassettes used by the recording studios to make prerecorded tapes are inferior in quality to the audio cassettes we make. In fact, I would say that the best prerecorded tape is no better than bottom-of-the-line Memorex tape.

Id. 154. Recording companies mass produce prerecorded cassettes at speeds up to sixty-four times real time. Id. at 5. "Record companies persist in using poor quality tapes, recorded at high speeds, and with shorter playing times for the distribution of prerecorded music on cassettes." Hearings on S. 1739, supra note 4, at 13 (statement of Charles Ferris; Audio Recording Rights Coalition). See generally YANKELOVICH SURVEY, supra note 48, at 89 (one-third of those surveyed preferred better quality of home-recorded cassettes over quality of prerecorded cassettes).


156. See 17 U.S.C. § 106(1), (3) (1982). The exclusive rights to make and to distribute phonorecords of nondramatic musical works are subject to compulsory licensing under certain conditions set forth in § 115. Section 115 provides:

(o)(1) To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed. (2) Except as provided by clause (1), the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license. For this purpose, a phonorecord is considered "distributed" if the person exercising the compulsory license has voluntarily and permanently parted with its possession. With respect to each work embodied in the phonorecord, the royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.


Because of the way the music industry is organized, copyright royalties are divided between record companies, music publishers and artists (singers and composers). See THIS BUSINESS OF MUSIC, supra note 141, at 147. Performers often work for a flat fee, paid by the recording company, and assign for a lump sum advance payment their rights in the sound recording. See id. at 10. Other performers assign their rights in the sound recording in exchange for a share of the record revenues, as agreed upon in contract negotiations between the performer and the record.
would be likely to purchase the identical material both in the form of a prerecorded cassette and an album if both were available. Thus, this particular type of home audio recording—obtaining a high-quality portable copy of material from one's own album or compact disc—presents the strongest argument for a finding of fair use.

In sum, whether they are making a high quality cassette of an album they had previously purchased or a customized recording of song selections, consumers tape to fulfill needs the recording industry cannot or is not willing to meet. These two common purposes of company. See id. at 212-13. A problem here, however, is that "the negotiations between performers and these companies usually take place on highly uneven terms; inevitably, few performers get much of the profit on the records they create." See Audio Recording Rights Coalition, Taxing Blank Tape and Recorders: Untimely, Unnecessary, and Unfair 12 (July 1985).

The recording industry is an oligopoly comprised of six major conglomerates controlling almost the entire market. See id. at 12 n.55. The six major recording companies are WCI (Warner Brothers, Atlantic and Elektra-Asylum labels), CBS (Columbia, Epic and other labels), RCA (RCA-Victor and Arista labels), EMI-America (EMI, Capitol, and Ariola labels), and Polygram (Polydor, RSO, Casablanca and Capricorn labels). See id. at 12. In 1984, the Federal Trade Commission (FTC) blocked the merger of WCI and Polygram, fearing that the resulting superconglomerate would lead to reduced competition in the recording industry and increased prices to consumers. "As a result of the FTC's challenge of the proposed merger, WCI and Polygram dropped their merger plans." Id.

Because of the power concentrated in the recording industry oligopoly negotiations between performers and recording companies are usually unbalanced. See id. As an alternative to working through a large recording company, a composer can either try to market his songs to performers himself or contract with a music publisher to market his work. See id. Normally, a music publisher receives 50% of all the composer's royalties, whether or not the publisher is actually responsible for getting the composer's work recorded. See id. at 13. Thus, performers often contract with recording companies to assign their rights in exchange for a sum guaranteed in advance. See id. at 12-13.

157. Because of the inferior sound and tape quality of prerecorded cassettes, consumers prefer to make their own cassettes of albums they have purchased. See Hearings on S. 1739, supra note 4, at 5 (statement of Jack Battaglia, General Manager, Memtek Products).

[T]he prerecorded music is inferior to music an audiophile can have by making a tape of a record or compact disc . . . . Therefore, many . . . who want music in a prerecorded format will buy both the record and our tape to make their own cassette rather than buy the industry's inferior cassette offering. Our tapes are also often used to make customized tapes using selections from several albums. By and large these albums are also owned by the consumer.

Id.; see id. (statement of Carol Tucker Foreman, President, Foreman and Company) (questioning equity of forcing consumer to buy identical record album and cassette; concluding that "[s]o often, she can make a higher quality tape at home than she could buy at a store").

158. See supra notes 146-55 and accompanying text.
home audio recording\textsuperscript{159} satisfy the first factor of a fair use analysis.\textsuperscript{160} The taping is done for a noncommercial purpose, and the use served cannot be met by products available on the market.\textsuperscript{161}

(b) \textit{The Public Interest in the Use}

The second factor is the nature of the copyrighted work.\textsuperscript{162} In examining this factor, courts consider whether the work is of such a nature that additional access to the work would serve the public interest in the free dissemination of information.\textsuperscript{163} As part of this determination, courts consider the educational value of the use.\textsuperscript{164} In \textit{Sony}, the Court held that recording for entertainment value could qualify as fair use, and thus disagreed with the Ninth Circuit's finding that such recordings could never qualify as fair use.\textsuperscript{165} The home audio recording situation differs markedly from home video taping, since in most instances the consumer is recording from

\begin{thebibliography}{99}
\bibitem{Footnote159} See Hearings on S. 1739, \textit{supra} note 4, at 5-6 (statement of Jack Battaglia, General Manager, Memtek Products.)
\bibitem{Footnote161} See \textit{supra} notes 145-55 and accompanying text.
\bibitem{Footnote163} See Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977) (doctrine of fair use "offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern").
\bibitem{Footnote164} See 17 U.S.C. § 107(1) (1982); see also \textit{supra} note 133 and accompanying text.
\bibitem{Footnote165} See 17 U.S.C. § 107(2) (1982) at 971-72 (1981). The court of appeals concluded, therefore, that taping a television program merely to enable the viewer to receive information or entertainment he would otherwise miss because of a personal scheduling conflict could never be a fair use. See 464 U.S. at 455 n.40. "That understanding of 'fair use' was erroneous." \textit{Id.} In contrast to the court of appeals' holding, the Supreme Court in \textit{Sony} stated:

Congress has plainly instructed us that [a] fair use analysis calls for a sensitive balancing of interests. The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative. . . . Copying for commercial gain has a much weaker claim to fair use than copying for personal enrichment. But the notion of social "productivity" cannot be a complete answer to this analysis . . . . Making a copy of a copyrighted work for the convenience of a blind person is expressly identified in the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or inform need motivate the copying. In a hospital setting, using a V[C]R to enable a patient to see programs he would otherwise miss has no productive purpose other than contributing to the psychological well-being of the patient.

\textit{Id.}
an album he owns or is taping a song off the radio to which he is simultaneously listening.

In the home video taping situation, the consumer sets a timer to record a performance while he is out, or while he is simultaneously watching another program. The consumer who tapes an album he has purchased has already compensated the copyright holder by paying the price of the album and thereby fulfills the constitutional purpose of copyright protection. Radio stations compensate copyright holders through the compulsory licensing system. Consumers who record televised programs, however, can record programs without compensating copyright holders and without listening to advertisers' promotions. Thus, home audio taping may further dissemination of information more than home video taping disseminates it.

Also related to the factor of the public interest in unrestricted use is the question of whether additional copyright fees could increase the creative output of artists beyond the current high level. The nature of works that consumers tape at home spans the entire...

166. See supra note 114.
167. See supra notes 93-96 and accompanying text.
168. See supra notes 90, 96 and accompanying text.
169. See supra note 156.
170. See supra notes 26-30.
171. See supra note 140 and accompanying text.
172. See supra note 93.
173. A goal of the federal copyright statute is stimulating creative output of artists for the benefit of the general public. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
174. Currently we are experiencing a high level of creative output. See Hearings on S. 1739, supra note 4, at 3 (statement of Carol Tucker Foreman, President, Foreman and Company).

Right now, creative and artistic output are very high—so high that it seems like there must be enough money in the system to elicit all kinds of new music. For example, many new women country artists have emerged lately . . . . In rock, Wham, . . . Tears for Fears, and the Thompson Twins are all hot. It may not sound like music to this Subcommittee, but it is to the millions of kids buying their records. Please ask yourself—would more money to the copyright community make any difference? It's also hard to justify handing over more money to the record industry when you take a look at its profits in recent years. The record industry enjoyed a record high $4.5 billion in sales in 1984. Id.; see Horowitz, '84 A Peak Year For Recordings, Billboard, Mar. 23, 1985, at 1, col. 1 (reporting net industry shipments worth $4.5 billion in 1984, new high figure for recording industry). Opponents of S. 1739 feel that this type of royalty legislation is contrary to the basic purpose of copyright—stimulating creative output to benefit the general public. See Hearings on S. 1739, supra note 4, at 3 (statement of Carol Tucker Foreman, President, Foreman and Company).
spectrum, from educational programs to purely entertainment recordings. The Ninth Circuit’s decision in Sony had distinguished between productive and unproductive uses. In rejecting the Ninth Circuit’s rigid distinction, the Supreme Court noted that while this distinction is helpful in determining the balance of interests involved in a fair use analysis, it is not, in itself, determinative. In light of the variety of works that a consumer may tape using home audio recording, no rigid determination can be made as to the nature of copyrighted works being used and their role in a fair use analysis.

(c) The Amount and Substantiality of the Portion Used

The third factor is the amount of the work the consumer uses, and the substantiality of the portion, in relation to the work as a whole. Home audio recording usually involves the taping of an entire song, a number of songs from various albums, an entire album or an entire program. Thus, this factor, considered alone, would not support an argument in favor of a fair use exemption for home taping, and is therefore unlike the first two factors. Nevertheless, one must bear in mind the varied purposes served by home audio taping, and that no one factor is dispositive. Courts must use a case-by-case approach in making a fair use determination, and consider the context of the use.

The traditional American rule is that excessive copying precludes a finding of fair use. In Williams & Wilkens Co. v. United

Before Congress decides that a shift of money from consumers to the recording industry is warranted, Congress needs to return to the framework underlying copyright and ask some fundamental questions like: How much is enough? How much money do artists need to induce artistic output? These are not easy questions to answer, but their difficulty doesn't justify assuming that there's no limit to what copyright owners should receive.

Id.; see id. at 3 (statement of Stanley Gortikov, President, Recording Industry Association of America) (referring to American artists as “the greatest musical creative community in the world”).

175. See supra notes 107-14 and accompanying text.
177. 464 U.S. at 455 n.40.
178. See supra note 165 and accompanying text.
180. See generally Yankelovich Survey, supra note 48, at 65; Warner Survey, supra note 107, at 14.
181. See supra notes 131-78 and accompanying text.
182. See supra notes 128-29 & 142-58 and accompanying text.
183. See supra notes 130, 165.
184. See supra notes 131-78 and accompanying text.
185. Courts examining the amount and substantiality of copyrighted material
States, however, the Supreme Court affirmed a decision of the Court of Claims that the copying of entire scientific articles is fair use. The Court of Claims had found no infringement, and stated that research would be impaired if such copying were held unlawful. Although it may be argued that copying for scientific purposes deserves a wider scope than reproducing copyrighted music or spoken programs, the basic concern—encouraging creators to produce new works and assuring public access—is also a function of home audio recording.

The Williams Court stated that "there is . . . no inflexible rule excluding an entire copyrighted work from the area of 'fair use.' " The amount of the copying is, therefore, but one factor, along with several others, that a court must consider. Thus, the disposition made in Williams illustrates that even copying of an entire copyrighted work may be fair use. In light of the Court's decision in Williams, the traditional American rule may be waning in its applicability. Thus, the taping of an entire song, radio program, or collection of songs may constitute fair use in conjunction with a consideration of the other factors of a fair use analysis.

186. 487 F.2d 1345 (Ct. Cl. 1973), aff'd per curiam by an equally divided court, 420 U.S. 376 (1975) (memorandum opinion).
187. 487 F.2d at 1362.
188. Id.
190. See supra note 117 and accompanying text for a discussion of the functions of home audio recording.
191. 487 F.2d at 1353.
192. See id.; see supra note 165.
193. 487 F.2d at 1353.
194. See supra note 185.
(d) The Effect of the Use upon the Potential Market

The fourth factor is the effect of the use on the potential market for the product. In *Sony*, the Supreme Court held that the plaintiffs had failed to meet their burden of proof in showing that home video recording tended to diminish the potential market for their work. Similarly, in light of the recording industry's current unprecedented sales and the increase in sales of prerecorded cassettes, it would be difficult for the recording industry to prove that home audio recording has significantly harmed it. In addition, sales of blank tapes have failed to increase at the same rate as tape

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197. See * supra* notes 4, 174; see also *Hearings on S. 1739*, * supra* note 4, at 6 (statement of Charles Ferris, Audio Recording Rights Coalition) (“[g]iven the extraordinary prosperity of the industry, there can be no doubt whatsoever as to the sufficiency of market-generated incentives for copyright owners”).
198. See * supra* note 4.
199. See *id.* Rather than harming the recording industry, the increasing availability and popularity of portable cassette player-recorders simultaneously raised consumer interest in recording music at home and increased consumer desire and need for prerecorded cassettes. Recording equipment industry officials assert that overall, home audio recording has beneficial effects on the record industry. *See Hearings on S. 1739*, * supra* note 4, at 4 (statement of Charles Ferris, Audio Recording Rights Coalition).

The industry's many purported analyses of injury from home taping conspicuously omit the benefits that it realizes from the widespread marketplace penetration of recording technology. In addition to the stimulative effect of taping behavior on the purchase of prerecorded music, home recording technologies have created vast marketplace opportunities for record companies, and for the broader creative community. The “boombox,” the car stereo, and “walkman”-type players have made it possible for the industry to more than double its sales of prerecorded cassettes from 1981 to 1984. Thus, before deciding to impose economic constraints on home taping and home taping technologies, it is critical that their net impact on creative artists be understood.

*Id.* (emphasis in original).

Furthermore, consumers using blank tape to record music spend more money on prerecorded music than nontaping consumers.

That home taping and the purchasing of prerecorded music are involved in a synergistic, not predatory, relationship is further demonstrated by the fact that over half of all home music tapes are made from music in a taper's own collection . . . that music can be and is being taped is not to be bemoaned as being detrimental to the industry; instead, it is an essential part of the motivation for purchasing music in the first place . . . . The relationship between purchasing and taping music is, therefore, synergistic. Tapers . . . spend much more money on music than those who do not tape. Each activity reinforces the other.

*Id.* at 8-10 (footnote omitted); see * supra* note 76 and accompanying text.
recorder sales,\textsuperscript{200} which suggests that consumers are increasing their purchases of prerecorded cassettes to use in these machines.\textsuperscript{201}

Some home taping increases sales of prerecorded music through a consumer's purchase of an album version of a release in order to make his own cassette copy,\textsuperscript{202} or through a home taper's purchase of a prerecorded copy of a work he has previously heard by borrowing it or recording it off the radio.\textsuperscript{203} If Congress increases prices on blank audio tapes and recording equipment, consumers would be less likely to go through this added trouble and expense to obtain a cassette recording,\textsuperscript{204} or to purchase blank tapes in order to tape a song off the radio to decide whether they like it enough to want to purchase the artist's release.\textsuperscript{205}

Data compiled by the Recording Industry Association of America (RIAA) indicate that sales of prerecorded music might be approximately twenty-five percent greater without home taping.\textsuperscript{206} Neither this estimated figure, however, nor even a higher figure, justifies

\begin{itemize}
\item[200.] See Pareles, \textit{supra} note 4, at C34, col. 4 (blank tape sales have not increased to match tape recorder purchases); \textit{Hearings on S. 1739, supra} note 4, at 6 (statement of Jack Battaglia, General Manager, Memtek Products) ("sales of blank cassettes over the last three years have been rather flat").
\item[201.] The increase in sales of prerecorded cassettes, coupled with stagnant sales of blank tape, demonstrates that consumers are buying prerecorded cassettes to use in portable cassette player-recorders. See \textit{generally} Pareles, \textit{supra} note 4, at C34, col. 4. This buying pattern benefits recording equipment manufacturers and the recording industry. Accordingly, the recording industry has recently changed its practices to better satisfy consumers' demands.
\item[D]uring the last few years, the recording industry has begun to respond to the strong demand for prerecorded music in cassette form, and it has upgraded the quality of its prerecorded tapes. . . . [T]he initial efforts have been rewarded with vastly higher sales of prerecorded tapes. . . . [W]ith continued improvement in the quality of prerecorded cassettes, the record industry will continue to expand their sales.
\item[202.] See \textit{Yankelovich Survey}, \textit{supra} note 48, at 51.
\item[203.] See \textit{supra} note 136 and accompanying text.
\item[204.] See \textit{Hearings on S. 1739, supra} note 4, at 24 (statement of Charles Ferris, Audio Recording Rights Coalition).
\item[205.] See \textit{generally} \textit{Warner Survey, supra} note 107, at 17 (table of reasons for taping music and other professional entertainment).
\item[206.] The RIAA maintains that it loses sales when music is taped at home. See \textit{Hearings on S. 1739, supra} note 4, at 6 (statement of Alan Greenspan, Chairman and President, Townsend-Greenspan & Co., Inc.). Sample data collected for the RIAA indicates that:
\item[M]ore than two-fifths of home taping was in lieu of the purchase of prerecorded records or tapes last year . . . represent[ing] lost sales of approximately 26 percent of the total volume of record sales in 1984 . . .
\end{itemize}
penalizing all blank tape and audio recorder consumers. Some home tapers record as an alternative to purchasing prerecorded music. If the recording industry would like cassette users to increase purchases of prerecorded music cassettes, it must expand its use of higher quality tape and offer consumers higher quality sound recordings.

As the above analysis indicates, it is possible for some home audio recording to qualify as a fair use of copyrighted material. The Sony Court emphasized that a fair use determination requires an "'equitable rule of reason' " balanced with a consideration of the four fair use factors listed in section 107 of the 1976 Copyright Act. Most consumers engage in home audio recording for their

[W]e estimate the overall retail dollar losses from home taping last year were about $1.5 billion.

Id. (emphasis in original). The Coalition to Save America's Music (a lobbying group including record companies, publishers, songwriters' groups and the musicians' union) similarly asserts that home taping deprives the recording industry of $1.5 billion in sales per year. See Pareles, supra note 4, at C34, col. 3.

207. See infra notes 218-45 and accompanying text.

208. Although the majority of home tapers record from prerecorded music they own, some home tapers record from borrowed albums or radio broadcasts instead of purchasing prerecorded music. See WARNER SURVEY, supra note 107, at 16. Home taping "is a way of life for millions . . . [a] standard way to acquire prerecorded music." Hearings on S. 1739, supra note 4, at 2 (statement of Stanley Gortikov, President, Recording Industry Association of America); cf. YANKELOVICH SURVEY, supra note 48, at 5. The Yankelovich Survey found:

A significant proportion of home tapers do not cite cost at all as a . . . "very important" reason for sometimes using home-recorded instead of prerecorded tapes, but virtually all tapers who do mention cost as a reason for preferring home-recorded tapes also cite several other reasons, especially selection taping, portability, and the better quality and longer playing time of home-recorded tapes. Nine out of ten respondents who referred to cost also listed four or more other advantages to home-recorded tapes over records.

Id. Thus, saving money does not appear to be the primary impetus for home audio recording. See id.

209. See supra notes 153-54, 201.
211. See supra notes 102-210.
212. 464 U.S. at 448. Cf. id. at 429 (reiterating balance of interests in copyright law). Congress grants copyright protection to benefit authors and the public. See id.

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Id.; see supra note 65.
own personal use, not for a commercial sale, usually to satisfy functions recording companies do not or cannot fulfill through prerecorded music. Thus, home taping may in fact increase recording company sales. Therefore, home audio recording for personal use, particularly from one’s own album, may qualify as fair use upon consideration of the factors enumerated in the 1976 Copyright Act, balanced with an "'equitable rule of reason'" as the Sony Court required regarding home video taping.

B. Other Problems: Overbreadth, Arbitrariness, and Unfairness

Although the proposed legislation expressly provides an exemption from copyright liability for individual home tapers for a single copy made for private use, it nevertheless will indirectly force consumers to pay for their home taping. The proposed legislation holds manufacturers and importers of blank audio tapes and tape recorders liable as infringers if they fail to register their products and remit the mandatory royalty fees. This provision, aside from being contrary to the spirit of the Supreme Court’s holding in Sony, in effect eviscerates the exemption for individuals. Manufacturers and importers will pass along the royalty fees to consumers through increased retail prices. Thus, because it is impossible to police individual home taping activities, the bills use the manufacturer as a conduit for exacting additional copyright fees from consumers.

In the proposed legislation, Congress would grant the Register of Copyrights or the CRT the authority to establish additional exemptions for tapes and recorders that are unsuitable for making audio recordings for private use based on technical criteria, or that a trade or business uses for professional purposes. These

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213. See supra note 135 and accompanying text.
214. See supra note 149.
215. See supra notes 136, 199-201 and accompanying text.
217. See 464 U.S. at 454-55.
218. See H.R. 2911, supra note 43, § 119(a); see also S. 1739, supra note 43, § 119(a).
219. See supra note 46 and accompanying text.
220. See H.R. 2911, supra note 43, § 119(b); see also S. 1739, supra note 43, § 119(b).
221. See supra notes 60-66 and accompanying text.
222. See supra note 46 and accompanying text.
224. See H.R. 2911, supra note 43, § 119(c)(4); see also S. 1739, supra note 43, § 119(c)(5)(C).
225. See H.R. 2911, supra note 43, § 119(c)(5); see also S. 1739, supra note 43.
exemptions, however, are merely optional. In addition, these optional exemption provisions are far too vague. This sweeping delegation of power by Congress is, perhaps, too broad to withstand constitutional scrutiny.

Every standard size cassette tape is technically suitable for making audio recordings. It is impossible for consumers to prove the particular purpose for which a blank audio tape will be used, or for manufacturers to know what material their product will be used


[T]he "exemption" provisions of the recording industry proposal are imprecise and inequitable and, consequently, likely to result in abuse. They would impose [fees] on machines that could be used for taping prerecorded music, but seldom or never are. Although S. 1739 purports to require the CRT to "exempt" classes of users who use recorders and tapes for business, the proposal is flawed. Many users, equally as deserving as those that the bill purportedly "exempt," would not be exempted.

Id. (footnote omitted). Examples of these types of consumers, who would not be exempt under the bill’s present provisions, include journalists, businessman and educators. See id.

226. The bills state that the Register of Copyrights or the CRT may exempt from royalty fees certain kinds of audio recording devices and blank tapes, if any, that they deem unsuitable for making audio recordings for private use. See H.R. 2911, supra note 43, § 119(c)(4); see also S. 1739, supra note 43, § 119(c)(1)(C).

227. See Hearings on S. 1739, supra note 4, at 32 n.28. Mr. Ferris, and others who oppose the proposed royalties, question the constitutionality of Congress’ delegation of power to the CRT, whose structure and functioning were recently criticized. See id.

Empowering the CRT to adjust the amount of the levy and to disburse the proceeds raises a significant concern with respect to the constitutionality of the proposal. Recent decisions of the Supreme Court suggest that such tasks—adjudicating interests between private parties and involving essentially private rights—should be undertaken by federal courts, created pursuant to Article III of the Constitution, and not by entities created by Congress pursuant to an exercise of its Article I powers.


228. The Home Audio Recording Act’s provisions exempting lower quality tape are unfeasible, because all standard size cassettes can be used to record music or other materials. See Hearings on S. 1739, supra note 4, at 10 (statement of Jack Battaglia, General Manager, Memtek Products).

There are five grades of standard Memorex tape . . . . Every one of these grades is suitable for making audio recordings. There are no technical distinctions between the tapes which can be used to distinguish which tape is or is not tape suitable for recording music. Certainly someone using tape to record lectures is more likely to use our lowest quality tape, but that does not mean someone else could not use that same tape to record music.
to record. Thus, the exemption provisions are illusory at best. They appear to exempt consumers who purchase blank tape and recording equipment for noninfringing purposes but in reality contain no specific provisions protecting the interests of such consumers.

The proposed legislation critically fails to consider the varied noninfringing uses of blank audio tapes. Imposing a royalty fee on manufacturers and importers is inequitable because it penalizes all consumers without regard to the type of material they will record, or the possibility that they intend only to make fair use of the work. The percentage rates on recording equipment are

*Id.* Distinctions in price or tape quality fail to indicate for what purpose a tape will be used. See *id.* at 7-8 (statement of Leonard Feldman, Owner, Leonard Feldman Electronics Laboratories).

[An]y one of the four current generic types of tape may be used for any recording purpose . . . . Each grade is capable of making "high quality" recordings of audio programs . . . . [T]he "quality" of the tape can never be judged in isolation—it all depends on the design parameters of the recorder(s) with which the tape will be used . . . . [A]ttempting to classify tapes in terms of their intended use is not only impractical; it is for all intents and purposes impossible.

*Id.*

229. Cf. *supra* note 70 and accompanying text.

230. See *supra* notes 107-13 and accompanying text.

231. Opponents of the Home Audio Recording Act stress the current financial success enjoyed by the recording industry, and question the fairness of charging consumers responsible for these high revenues higher prices. See *Hearings on S. 1739, supra* note 4, at 5 (statement of Carol Tucker Foreman, President, Foreman and Company).

At a time when the recording industry is doing so well, does it seem fair to make the consumer pay a tax to create his own tape of his favorite songs from different albums in his collection? . . . . [D]oes it seem right to make a consumer pay to rearrange the contents of a particular record she owns to suit her tastes? . . . . [W]hat about the music lover who feels like taping a record she bought to have for the cassette player in her car? Should we make her buy the record and the cassette of the same album? . . . . [T]hose questions of "why should the consumer pay" and "how much is enough" are exactly the right ones to ask.

*Id.*

232. Because the exemptions created under S. 1739 are unworkable, all consumers would pay increased prices for blank tapes and recording equipment, without regard to the use of the blank tape or the equipment. Thus, all purchasers of these products would pay increased prices, even if they taped only noneopyrighted materials. See *id.* at 5-6.

[L]et’s not forget the real injustices S. 1739 does, in the name of copyright, to people whose taping never gets close to a copyright . . . . Whatever exemption the bill provides for non-infringing uses will still be an added cost to the consumer . . . . In fact, all this bill does is unfairly shift the burden to consumers to prove they’re using the tapes they buy for non-infringing purposes.

*Id.*
arbitrary and punish consumers who choose to purchase higher quality equipment, even though less expensive components have the identical mechanical capabilities. The legislation would generate a windfall for copyright holders—who are generally recording companies and music publishers—by giving them a share of fees collected on tapes and equipment that may not be used to record copyrighted works.

Unlike previously considered legislation, which sought to impose royalties on video tape and video recorders as well, the proposed legislation presumptively applies to only blank audio tapes and recording equipment. It appears, however, that the proposed leg-

233. Recording industry lobbies claim that the industry loses sales of $1.5 billion a year because of home taping by consumers. See Pareles, supra note 4, at C34, col. 3. This figure, however, is speculative, because it is based on predicted possible sales rather than comprehensive studies of the net impact of home taping. See Hearings on S. 1739, supra note 4, at 28 (statement of Charles Ferris, Audio Recording Rights Coalition).

Although the intent of the royalty tax legislation is to compensate copyright owners for any “losses” from home taping, the amount of the levy... is simply pulled out of thin air. There have been no comprehensive studies of the overall, net financial impact of home taping on copyright owners.... [T]he only relationship between the amount proposed by S. 1739 and either the amount of home taping or the level of any purported damage from taping practices is an arbitrary one. Id. (footnote omitted); see supra note 199; see also Holland, supra note 37, at 1, col. 1.

234. See Holland, supra note 37, at 1, col. 1. Royalty legislation would result in higher prices to consumers because of markup at the manufacturer, distributor and retailer levels. See id. at 1, col. 3. Thus, the retail price to a consumer of a dual-cassette recorder subject to a royalty fee of 25% could have doubled. See id. at 1, col. 3.

235. The royalty legislation would raise approximately $200 million a year from surcharges on blank tapes and recording equipment. See Pareles, supra note 4, at C34, col. 2. “[A] royalty tax on consumers is tantamount to an annual windfall of hundreds of millions of dollars for the recording industry.” Hearings on S. 1739, supra note 4, at 6 (statement of Charles Ferris, Audio Recording Rights Coalition); see also supra note 156.

236. See id.

237. The net effect of the royalty as a stimulus of creative efforts by artists has been questioned by critics of the proposed legislation. See Hearings on S. 1739, supra note 4, at 5 (statement of Charles Ferris, Audio Recording Rights Coalition). “The bureaucratic mechanics of S. 1739 ensure that any stimulus to creativity that might be generated by the royalty funds will be dissipated. The procedure guarantees litigiousness by copyright owner claimants, and delays in distribution.” Id.

238. See supra note 43 and accompanying text.

239. Proponents of the Home Audio Recording Act maintain that it applies only to audio taping. See Introductory Statement of Hon. Bruce A. Morrison, Home Audio Recording Act, June 27, 1985, reprinted in CURRENT DEVELOPMENTS IN COPYRIGHT LAW 706 (P.L.I. 1986). “I would like to emphasize that our legislation pertains only to audio taping. I do not intend for this legislation to serve as a
islation may inadvertently cover video tapes and video recording equipment.\textsuperscript{240} The progress of this legislation will surely have a great impact on intellectual property rights in other media whose works can be copied electronically.\textsuperscript{241} The legislation may also inhibit the development of new technologies.\textsuperscript{242}

In sum, the proposed legislation is inappropriate because it is contrary to the thrust of the \textit{Sony} decision.\textsuperscript{243} In addition, it is

\begin{quote}
vehicle for amendments addressing the video home taping problem.’’ \textit{Id.}; \textit{Hearings on S. 1739, supra} note 4, at 1 (opening statement of Sen. Mathias) (‘‘I want to emphasize that the bill will not affect the current status of video home taping and is not a precursor of similar legislation on videotaping’’).

240. Because of recent developments in video recording technology, some consumers use VCRs and video tape to record music. \textit{See} Schiffres, \textit{The New ABC’s of VCRs}, \textit{U.S. News & World Rep.}, Nov. 17, 1986, at 58, col. 3. Thus, despite intentions of advocates of the royalty legislation, the legislation’s definitions may cover VCRs and video tape. \textit{See} \textit{Hearings on S. 1739, supra} note 4, at 8 (statement of Jack Battaglia, General Manager, Memtek Products).

Video tape manufacturers may have already lost the opportunity to avoid the tax, however, because video tape may already be covered by this legislation. ‘‘Hi fi’’ VCRs produce such a high quality audio sound that many audiophiles tape music on video tape. They can do this without taping any video image. Because the bill defines audio tape as any medium upon which can be fixed an ‘‘aurally perceptible copy without accompanying visual images,’’ . . . all video tape may already be covered under the legislation.

\textit{Id.}; \textit{see} id at 29 (statement of Charles Ferris, Audio Recording Rights Coalition) (indicating difficulty of meeting technological classifications outlined in S. 1739 and reiterating that VCRs are currently used by consumers to make sound recordings).


242. Opponents to the proposed legislation have voiced concern about the potential effect it may have on the development of technology. \textit{See} \textit{Hearings on S. 1739, supra} note 4, at 29 (statement of Charles Ferris, Audio Recording Rights Coalition). ‘‘[I]f a royalty on some products, but leaving others untaxed, will significantly intrude on technological decisions about the future course of consumer electronics technology . . . . Manufacturers will have substantial incentives to reconfigure products to avoid the levy.’’ \textit{Id.} Opponents of the legislation believe that royalty legislation affecting some machines, but not others, will impede the unification of audio and video recording into one system. \textit{See} id. at 4 (statement of Leonard Feldman, President, Leonard Feldman Electronics Laboratories). ‘‘[I]t will not be long before \textit{identical recording systems} are commonly used to record not only ‘‘audio’’ and ‘‘video,’’ but computer data as well . . . . [A] single piece of hardware and a single software product, unless the government interferes, can and will combine to be the most common and efficient method for storing \textit{all three} types of data.’’ \textit{Id.} (emphasis in original). The high amount of the royalties provided for in the legislation, in particular, will encourage manufacturers to segregate audio and video tape technology. \textit{See} id. at 8 (statement of Jack Battaglia, General Manager, Memtek Products). ‘‘This tax is so substantial . . . . it will have a serious effect on future technological development . . . . [which] is moving in the direction of a merger of audio and video tape into one size and format. Because of this legislation, however, manufacturers will avoid the marriage of audio and video and try to keep video tape distinct from audio.’’ \textit{Id.}

243. \textit{See} 464 U.S. 417 (1984); \textit{see} supra notes 60-68 and accompanying text.
contrary to Congress' past hesitation to expand copyright protection.\textsuperscript{244} Finally, it is not the least restrictive means of addressing the home audio recording issue.\textsuperscript{245}

\section*{IV. Recommendations}

A more equitable approach to the home taping dilemma would be a uniform surcharge only on cassette recorders containing two or more cassette wells.\textsuperscript{246} This approach could be implemented by imposing a license fee\textsuperscript{247} only on double or greater capacity cassette recorders capable of copying from one tape onto another tape in the same deck.\textsuperscript{248} Instead of a fee based on a percentage of the

\begin{itemize}
\item \textsuperscript{244} See 464 U.S. at 431 (reiterating Court's deference to Congress when technological developments have necessitated changes in the copyright law, emphasizing that "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology").
\item \textsuperscript{245} The Supreme Court has held that even if the purpose underlying legislation is to support a substantial governmental interest, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted). See Schneider v. State, 308 U.S. 147, 161 (1939) ("courts to weigh [on a case-by-case basis] the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation").
\item Coincidentally, it was the invention of a new type of reproduction equipment that led to the initial need for copyright protection. Copyright protection became necessary with the invention of the printing press. . . . The fortunes of the law of copyright have always been closely connected with freedom of expression . . . and with technological improvements in means of dissemination. . . . Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammeled dissemination of ideas. Warren, \textit{Foreword to B. Kaplan, An Unhurried View of Copyright} at vii-viii (1967). Protection of copyright holders' interests can be increased by less restrictive means than the proposed legislation calls for. See \textit{infra} notes 246-56 and accompanying text.
\item \textsuperscript{246} See \textit{supra} notes 4, 83 and accompanying text.
\item \textsuperscript{247} A uniform licensing system on dual-cassette recorders would be similar to that formerly imposed by the Federal Communications Commission on purchasers of Citizen Band radios. See \textit{CB Rules & Regulations} 10 (Sams ed. 1976). A standard four dollar license fee was charged with each license application. See \textit{id.} at 6. The requirement was in effect from 1958 until its abolishment in 1983, and although license application was voluntary and the law was rarely enforced, approximately 70\% of all Citizen Band radio purchasers complied with the license requirement. See \textit{generally} FCC, \textit{Private Radio Bureau Station Statistics} (1983).
\item \textsuperscript{248} See \textit{supra} notes 4, 83.
\end{itemize}
wholesale price, the amount of this license should be equal for all consumers who choose to purchase this type of machinery.\(^{249}\)

The determination of the proper amount of this license fee requires further congressional investigation.\(^ {250}\) Factors entering this consideration should, however, include the number of such machines sold each year and an approximation of the number and types of copyrighted works likely to be reproduced by such machines.\(^ {251}\) These figures may be determined, to a degree, by use of ASCAP and BMI reports of album popularity and frequency of radio play.\(^ {252}\) This is the optimal means of assuring compensation to copyright holders whose works are being copied by such machines while recognizing the noninfringing uses and possible fair uses of some home audio taping, particularly taping utilizing single capacity cassette recorders.

Another alternative that Congress should consider is a smaller, reasonable royalty on blank tapes, similar to that imposed in a number of European countries.\(^ {253}\) The House version of the bill's proposal for a royalty of one-cent per minute of playing time is an immense royalty in relation to the total purchase price\(^ {254}\) and bears no relation to the purpose for which a given tape will be used.\(^ {255}\) A reasonable royalty of between ten and twenty cents per tape, regardless of playing time, would be more equitable to artists and to

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\(^{250}\) See supra note 244 and accompanying text.

\(^{251}\) See supra note 141.

\(^{252}\) Several European countries provide for smaller royalties on blank tapes, including Austria, West Germany, Finland, France, Hungary and Iceland. See S. 1739, supra note 43, app. III (chart comparing legislation in countries imposing royalties or taxes on blank tapes or recording equipment). Norway, Sweden and Turkey impose taxes on blank tapes. See id. Under all of the above systems the funds are paid by manufacturers, importers or distributors and some exemptions are provided. See id. In 1980, Austria became the first country to impose a royalty on blank audio tape. See id. The German royalty statute of 1965 was the first to place a mandatory tax on the sale of equipment to generate revenue for royalties, and was prompted by decisions of the German Federal Supreme Court in May and June of 1955. See UNESCO, Copyright Laws and Treaties of the World (1982). For a discussion of German law governing home taping, see Klaver, The Legal Problems of Video-Cassettes and Audio-Visual Discs, 23 Bull. Copyright Soc'y 152 (1975-76); Seemann, Sound and Video-Recording and the Copyright Law: The German Approach, 2 Cardozo Arts & Ent. L.J. 225 (1983); Weimann, Private Home Taping Under Sec. 53(5) of the German Copyright Act of 1965, 30 J. Copyright Soc'y 153 (1982).

\(^{253}\) See supra note 46 and accompanying text.

\(^{255}\) See supra notes 107-16, 153-55.
consumers. This smaller royalty balances the competing interests involved in the copyright law better than its counterpart in the proposed legislation. Such a system would compensate artists for infringing uses of their copyrighted works, while recognizing the possible fair use exemption for some home audio recording and the many noninfringing uses of blank tapes and recording equipment.

V. Conclusion

Congress should reject the proposed legislation because it contravenes the spirit of the *Sony* decision. In addition, the proposed legislation is overbroad, and imposes an inequitable and unwarranted surcharge on products capable of substantial noninfringing uses. Finally, the proposed legislation fails to consider adequately a possible fair use exemption for home audio recording. Perhaps in the future, recording companies may develop technology that will prevent the copying of prerecorded copyrighted music onto blank tapes and thereby end the home audio recording dilemma entirely. In the meantime, however, Congress should pursue further study and consider alternative answers to the home taping question. Congress must seek a more workable and equitable means of carrying

256. See supra notes 27, 30.
257. Copyright law has historically attempted to balance the competing interests of creators against the interests of the general public. See supra notes 26-30 and accompanying text. An observation of Lord Mansfield in an early copyright case in 1785, however, is still timely:

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. Cary v. Longman, 102 Eng. Rep. 138, 139-40 n.(b) (K.B. 1801) (citation omitted).
258. See supra notes 43-46 and accompanying text.
259. See supra notes 219-45.
260. See supra note 174 and accompanying text.
261. See generally supra notes 107-13 and accompanying text.
262. See CBS "Copy-Code" System Shown in Home Taping Sesh, Variety, Apr. 2, 1986, at 82, col. 2 ("copy-code" system demonstrated in Senate hearings "which encodes disks with an inaudible signal that causes an interruption in the tape when picked up by recorders equipped with decoders"); See also Japan Rejects Plea for Device to Curb Tape-Copying, N.Y. Times, Dec. 13, 1986, at 13, col. 3 (American record companies ask Japanese electronics manufacturers to install special electronic chip in new digital audio tape recorders preventing home taping of commercially recorded music). Video tape producers have already developed tapes that consumers are unable to copy. See Prospects: Foiling the Video Pirates, N.Y. Times, Nov. 2, 1986, § 3 (Business), at 1, col. 1 (anti-duplicating process distorting picture in any copied version of tape used on over 50 million tapes in 1986).
out the constitutional purpose of copyright protection, while carefully balancing the dual interests of compensating creators and assuring the public access to these creative works.

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