The Threatened Future of Home Video Recorders - Universal City Studios v. Sony

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THE THREATENED FUTURE OF HOME VIDEO RECORDERS—
UNIVERSAL CITY STUDIOS V. SONY

The evolution of the copyright law has been marked by repeated confrontation with technological advancements. At the inception of the initial Copyright Act, Congress could not possibly have envisioned all the progressions in the arts and sciences that would continually emerge. It has, therefore, gradually expanded the scope of copyright protection by amending and revising the Act to encompass new advancements. Additionally, however, these advancements have created the need to limit the author's or inventor's rights under the Copyright Act where the public interest has been

1. The major technological innovations that have affected the scope and applicability of the copyright law are: motion pictures, sound recordings, radio and television, photocopying, cable television, microfilm, video tapes, and computer programs. Each of these advancements has been addressed to some extent within the Copyright Act, either expanding the copyright protection or expanding the permissible uses of copyrighted materials. Legislative action has generally followed judicial attempts at reconciling issues presented by technological progression. CRC SYSTEMS INCORPORATED, Impact of Information Technology on Copyright Law in the Use of Computerized, Scientific and Technological Information Systems, in TECHNOLOGY AND COPYRIGHT 137 (G. Bush & R. Dreyfuss ed. 1979). For a discussion of the copyright questions various technologies have raised, see generally D. JOHNSTON, COPYRIGHT HANDBOOK (1978) [hereinafter cited as HANDBOOK], Fine, Record Piracy and Modern Problems of Innocent Infringement: A Comparative Analysis of United States and British Copyright Law, 21 SANTA CLARA L. REV. 357 (1981); Library Photocopying; An International Perspective, 26 COPYRIGHT L. SYMP. (ASCAP) 53 (1981); The Supreme Court and Copyright Liability for Retransmission of Television and Radio Signals: A Dubious Performance, 26 COPYRIGHT L. SYMP. (ASCAP) 127 (1981); Note, Copyrights, Computers and Confusion, 56 CAL. ST. B.J. 148 (1981).

2. The first Copyright Act was implemented in 1790. Copyright Act, ch. 15, 1 Stat. 124 (1790) (current version at 17 U.S.C. §§ 101-810 (1976 & Supp. IV 1980)). Its stated purpose was to encourage learning, which it accomplished by granting exclusive statutory protection to authors of maps, charts, and books with respect to printing, reprinting, publishing, or vending such works. Id.

3. Subsequent to the initial Copyright Act, four comprehensive revisions were adopted in 1831, 1870, 1909, and 1976, although numerous amendments to the Act were implemented on a piecemeal basis. The copyright revision approved on February 3, 1831 added musical compositions to the list of copyrightable works and lengthened the basic period of 14 years to 28 years for statutory protection. Copyright Act, ch. 16, 4 Stat. 437 (1831) (current version at 17 U.S.C. §§ 101-810 (1976 & Supp. IV 1980)). On July 8, 1870, the Act was consolidated to encompass both the copyright and patent statutes. Additionally, this revision added fine arts to the scope of the statutory protection and included copying within the category of exclusive rights. Copyright Act, ch. 230, 16 Stat. 198 (1870) (current version at 17 U.S.C. §§ 101-810 (1976 & Supp. IV 1980)). The third revision, enacted March 4, 1909, among other things expanded the exclusive rights to encompass five separate categories that exist in similar form in the current code: to reproduce and sell the work; to prepare derivative works; to perform a dramatic work; to use or authorize the use of a work in a lecture, sermon, or similar public manner and; to perform a musical work. Copyright Act, ch. 320, 35 Stat. 1075 (1909) (current version at 17 U.S.C. §§ 101-810 (1976 & Supp. IV 1980)). While the 1976 revision retains much
determined to be superior. The most significant limitation has been the doctrine of fair use which allows a copyrighted material to be used in a reasonable manner without an express license.

The recent advent of the video cassette recorder has once again brought into question the scope of the copyright protection and the applicability of the doctrine of fair use. As a result of the prominence these recorders are gaining in American homes, two courts have thus far been asked to determine whether off-the-air video taping, for private, noncommercial purposes, infringes upon the copyright interests in the original television materials. In Universal City Studios v. Sony Corporation of America, the Ninth Circuit Court of Appeals concluded that the in-home, noncommercial video reproduction of copyrighted materials violated the United States copyright laws. In doing so, the Sony court upheld the copyright holder's economic interest at the expense of the public's interest in accessibility to

of the structure of the 1909 Act, some major departures were made. The old Act left it up to the states to afford protection to unpublished works. The new Act provides federal protection from the time the work becomes tangible. The new Act also changes the statutory copyright period to the author's lifetime plus an additional 50 years. Perhaps most importantly, the new law provides a more detailed explanation of the scope of the exclusive rights of ownership through the limitations set forth in §§ 107-118. Copyright Act, 17 U.S.C. §§ 101-810 (1976 Supp. IV 1980). For historical background and discussion of the copyright law, see H.R. REP. No. 1476, 94th Cong., 2d Sess. 47, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5660; R. BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW (1912); CAMBRIDGE RESEARCH INSTITUTE, OMNIBUS COPYRIGHT REVISION (1973) [hereinafter cited as OMNIBUS]; HANDBOOK, supra note 1; M. NIMMER, NIMMER ON COPYRIGHT (1981) [hereinafter cited as NIMMER].

4. The Copyright Act provides 12 sections of limitations on the scope of the copyright holder's interest. See 17 U.S.C. §§ 107-118 (1976 & Supp. IV 1980). These sections entail limitations with respect to: fair use; reproduction by libraries and archives; transfer of copy or phonorecord; exemption of certain performances and displays; secondary transmissions; ephemeral recordings; pictorial, graphic, and sculptural works; sound recordings; compulsory licenses for phonorecords; coin operated phonorecord players; computers and similar information systems; noncommercial broadcasting. Id.

5. The doctrine of fair use is a judicially created, discretionary limitation that allows courts to uphold uses of copyrighted works that would otherwise constitute copyright infringement. The doctrine is to be applied on a case-by-case basis where the court deems the interest in the public's accessibility to the copyrighted work to be superior in importance to the copyright holder's exclusive rights. See infra notes 33-60 and accompanying text.

6. The two courts thus far have been the United States District Court for the Central District of California in Universal City Studios v. Sony Corp. of Am., 480 F. Supp. 429 (C.D. Cal. 1979), and the Ninth Circuit-Court of Appeals in a subsequent appeal of the above case, Universal City Studios v. Sony Corp. of Am., 659 F.2d 963 (9th Cir. 1981), cert. granted, 102 S. Ct. 2927 (1982).

7. Video recorders, such as the Sony Betamax, enable audio-visual reproductions of television programs to be made as the programs are being broadcast over the airwaves. These recorders also provide for subsequent viewing of the tapes made as well as for the viewing of pre-recorded, commercially marketed video tapes by transmitting the taped materials from the recorder to the television screen. The process is basically similar to the use of audio tape recorders.

8. 659 F.2d 963 (9th Cir. 1981).

9. Id. at 969.
this technological advancement. From a practical standpoint, *Sony* has presented a difficult precedent and should be thoroughly examined.

A close analysis of the legislative history of the copyright laws and the limited rights granted under the Copyright Act reveals that the *Sony* court erred in determining that the fair use doctrine did not justify the private, noncommercial use of video recorders. In misconstruing the legislative intent of the Copyright Act, the *Sony* court has threatened the technological value of video recorders to the public. Future courts should look closely at the legislative history that allows a similar type of reproduction in the context of sound recording. This history provides the most analogous example of legislative direction on the video recording issue.

**BACKGROUND**

Pursuant to the United States Constitution, Congress is vested with the power to promote the public interest in the arts and sciences. This con-

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10. In terms of enforcement, there does not appear to be any feasible means of controlling video recorder use. If the recorders are taken off the market, a problem remains as to the recorders which have already been purchased. Imposing a fee on the sale of recorders would raise a question as to how those fees could adequately be distributed to copyright holders. Equipping the recorders with an automatic erase after the first playback of a tape would deter the uninfringing use of viewing commercially marketed tapes. Consumers would not spend the money for pre-recorded tapes if their investment would be destroyed after the first viewing. For suggested alternatives to the video dilemma, see Marsh, *Betamax and Fair Use: A Shotgun Marriage*, 21 SANTA CLARA L. REV. 49 (1981); Comment, *The Conscientious Fair User's Guide to the Copyright Act of 1976: Video Recordation and Its Fair Use*, 42 U. PITT. L. REV. 317, 361 (1981); Note, *Copyright: Gone with the Betamax*, 8 N.Y.U. REV. L. & SOC. CHANGE 45 (1978).

11. The *Sony* court appeared to be more concerned with the interests of the copyright holder than achieving the primary goal of the Copyright Act, to promote broad accessibility of the public to information and ideas. See infra notes 21-24 and accompanying text.


13. U.S. CONST. art. I, § 8, cl. 8. The article provides in pertinent part: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ." Id.

Despite this constitutional provision, however, copyright is not a constitutionally protected interest. In some cases the public's interest in the copyrighted materials may, nevertheless, warrant constitutional protection through the first amendment. The first amendment guarantees reasonable access to information as well as the right to receive information and ideas. See Kliendienst v. Mandel, 408 U.S. 753, 762-63 (1972) (the scope of the first amendment's veil of protection encompasses the right to receive information); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (the public has the right to receive access to information and ideas); Associated Press v. United States, 326 U.S. 1, 20 (1945) (the widest possible dissemination of information is essential to the first amendment and the public welfare). Thus, where the public's interest bears constitutional weight it must necessarily prevail over the copyright
stitutional authority allows Congress to protect the authors' and inventors' interests in receiving just compensation for their works. Accordingly, the Copyright Act grants to the copyright holder a limited monopoly interest in any tangible, original work.

Although the Act vests in the author or inventor exclusive rights regard-

holder's statutory interest. See Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94, 112-13 (1973) (although the broadcaster is not without first amendment protection, it is the right of the viewers and listeners that is paramount).


16. See 17 U.S.C. § 106 (1976 & Supp. IV 1980). Subject to §§ 107-118, 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 audiovisual works, to perform the copyrighted work publicly; and
   (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Id.

17. See 17 U.S.C. § 102 (1976 & Supp. IV 1980). This section defines the types of work that are eligible for copyright protection. The work must be original although not necessarily novel and the medium of expression must be a tangible form. Thus, ideas themselves are not copyrightable because they are not tangible and news or facts are not copyrightable because they are not original. Omnibus, supra note 3, at 6-7.

While § 102 does provide an exemplary list of the types of copyrightable works, the language "any tangible medium of expression, now known or later developed" indicates flexibility in the scope of copyrightable materials. 17 U.S.C. § 102 (1976 & Supp. IV 1980). New forms of expression are constantly coming into being. Thus, this wording allows for statutory extension without the need for legislative changes. 17 U.S.C.A. § 102 historical note (West 1977).

The Copyright Act does not compel the holder to register with the Office of Copyrights as a requisite for certain infringement remedies. What the Act does require, however, is notice of the copyright to be displayed on all publicly distributed copies of the work. 17 U.S.C. §§ 401-412 (1976 & Supp. IV 1980).

Registration is for the most part a permissive matter under the Act, yet, there are practical advantages for registering a copyright. Registration serves, for example, as a public record of the copyright interest, thus, the public has access to the information which may provide a basis for avoiding infringement. Additionally, a certificate of registration is prima facie evidence of the validity of a copyright. It also provides protection against inaccurately published notice and conflicting transfers of ownership. For unpublished works, registration protects the owner's rights to statutory damages and attorney's fees, which would otherwise be lost. Handbook, supra note 1, at 41-45.
ing control of the copyrighted work, there are various limitations that curtail that control. These limitations, set forth in the Copyright Act, represent permissible uses of copyrighted works. Permissible uses are ways in which the public may utilize the work without infringing upon the owner's exclusive control. These limitations have been delineated because Congress determined that certain public interests must prevail over the interests of the copyright holder. Inherent in these limitations, therefore, is a balance between encouragement and reward to the author and benefit to the public through accessibility to information, ideas, and new technologies.

In weighing this balance, courts have often found that the interest in rewarding the author is secondary; the major priority lies in deriving public benefits. In Twentieth Century Music Corp. v. Aiken, for example, the United States Supreme Court noted that while the immediate effect of the copyright law is financial reward to the copyright holder, its ultimate purpose is to serve the public.

In examining copyright questions, the courts have been flexible in their


20. For a general discussion of these limitations and the interests they seek to protect, see H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65-120, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5678-735; OMNIBUS, supra note 3, at 35-100; HANDBOOK, supra note 1, at 85-120.

21. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975). The Twentieth Century Court acknowledged this balance stating:

The 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: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.

Id. at 156.

For a very early enunciation of the balancing necessitated by the copyright interest, see Lord Mansfield's statement quoted in Cary v. Longman, 1 East 358, 361 n.(b) (1801):

[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 be deprived of their just merits, and the reward of their ingenuity and labour, the other, that the world may not be deprived of the improvements, nor the progress of the arts be retarded.

Id.

22. See Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (the primary objective and sole interest in granting the copyright monopoly lie in the benefits derived by the public). For additional authorities articulating that reward to the owner is subordinate to the public welfare, see Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954); United States v. Paramount Pictures, 334 U.S. 131, 158 (1948); Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973), aff'd, 420 U.S. 376 (1975); Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544 (2d Cir. 1964); H.R. REP. NO. 222, 60th Cong., 2d Sess. 9 (1909); UNITED STATES OFFICE OF COPYRIGHT, COPYRIGHT LAW REVISION (July 1961) [hereinafter cited as COPYRIGHT REVISION].

23. 422 U.S. 151 (1975).

24. Id. at 156.
interpretations of the applicable law.\textsuperscript{25} In \textit{Fortnightly Corp. v. United Artists Television, Inc.},\textsuperscript{26} the United States Supreme Court observed that the Copyright Act should not be so narrowly interpreted that new discoveries and inventions would necessarily be precluded.\textsuperscript{27} In construing the Act, the Court was mindful of technological change and, therefore, concluded that a community antenna, which accentuated broadcast signals over the airwaves, did not constitute a copyright infringement.\textsuperscript{28}

In a similar fashion, the Court in \textit{Twentieth Century Music Corp. v. Aiken}\textsuperscript{29} recognized that the applicability of the Copyright Act may become ambiguous in light of technological change.\textsuperscript{30} The ambiguity in \textit{Twentieth Century} was whether a loud speaker system, which transmitted radio broadcasts to restaurant patrons, constituted an unlawful performance of copyrighted works. The Court flexibly construed the statute to find that no copyright infringement occurred.\textsuperscript{31}

A judicially created tool for incorporating flexibility into the Copyright Act has been the doctrine of fair use.\textsuperscript{32} Initially adopted as an equitable measure,\textsuperscript{33} this doctrine allows courts to examine copyright questions on a

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\item 25. This flexibility has allowed the courts to resolve disputes not clearly addressed by the wording of the Copyright Act. See, e.g., Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1350 (Cl. Ct. 1973) (flexibility required where wording of Copyright Act rendered literal application ambiguous), \textit{aff'd}, 420 U.S. 376 (1975).
\item 26. 392 U.S. 390 (1968).
\item 27. \textit{Id.} at 395.
\item 28. \textit{Id.} at 402.
\item 29. 422 U.S. 151 (1975).
\item 30. \textit{Id.} at 156. Other cases have also recognized that new technology renders the plain meaning of the Copyright Act ambiguous. See Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1350 (Cl. Ct. 1973) (Copyright Act ambiguous when presented with the issue of photocopying), \textit{aff'd}, 420 U.S. 376 (1975); Jerome H. Remick & Co. v. American Auto. Accessories Co., 5 F.2d 411, 411-12 (6th Cir. 1925) (radio, while not anticipated by Congress, was within the purview of the Copyright Act).
\item 31. \textit{Twentieth Century Music Corp.}, 422 U.S. at 162.
\item 32. The doctrine has been defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright." H. Ball, \textit{The Law of Copyright and Literary Property} § 125 (1944). For a general discussion of the fair use doctrine, see Nim- mer, \textit{supra} note 3, § 13.04; Fried, \textit{Fair Use and the New Act}, 22 N.Y.L. Sch. L. Rev. 497 (1977); Rosenfeld, \textit{The Constitutional Dimension of Fair Use in Copyright Law}, 50 Notre Dame Law. 790 (1975).
\item 33. The fair use doctrine is an equitable judicial creation that originally surfaced in Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841). The specific term "fair use," however, was not recognized until Lawrence v. Dana, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869). In 1976, the fair use doctrine was codified into the Copyright Act at 17 U.S.C. § 107 (1976 & Supp. IV 1980). The codification represents merely a Congressional recognition of the doctrine and was not intended to alter the fair use doctrine in any way. The legislature, in codifying fair use, acknowledged the need for the doctrine to be flexible, without exact rules in order to allow equitable examination of the endless variety of copyright questions, "especially during a period of rapid technological change." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66, \textit{reprinted in} 1976 \textit{U.S. Code Cong. & Ad. News} 5659, 5680. See Triangle Publications, Inc. v. Knight-
case-by-case basis. As a defense to claims of copyright infringement, fair use provides a basis for upholding certain allegedly infringing uses of copyrighted works that would appear to be precluded by the wording of the Act.

As the fair use doctrine has developed, the courts have commonly applied four factors to determine the existence of a fair use. One factor that has been considered is the purpose and character of the use. Traditionally, if the unauthorized use of the copyrighted material was for criticism, research or other independent work, it was more likely that a fair use would be found to exist. The scope of this factor has recently encompassed whether the individual used the copyrighted material for a commercial or nonprofit educational purpose. Although a commercial use would not necessarily be

Ridder Newspapers, Inc., 626 F.2d 1171, 1174 (5th Cir. 1980) (the legislative codification of fair use did not alter the judicial doctrine); Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741, 745 (S.D.N.Y. 1980) (Congress did not intend the codification of fair use to supplant the judicial doctrine).

34. See Nimmer, supra note 3, § 13.05. Due to the flexible, ad hoc nature of the doctrine of fair use, it has been characterized as "the most troublesome in the whole law of copyright," Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939); and as "so flexible as virtually to defy definition," Time, Inc. v. Bernard Geis, Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

35. See Rubin v. Boston Magazine Co., 645 F.2d 80 (1st Cir. 1981) (fair use justifies uses that appear to violate the Copyright Act yet was of no avail as a defense to an appropriation from a doctoral dissertation); Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., 621 F.2d 57 (2d Cir. 1980) (fair use allows courts to avoid rigid application of Copyright Act where to do so would circumvent the Act's purpose of fostering creativity).

36. Despite the lack of an exact definition of fair use, these factors have been employed by the courts as representing the relevant areas of inquiry. These factors also appear within the Copyright Act as suggested areas of examination. See 17 U.S.C. § 107 (1976 & Supp. IV 1980). For a general introduction into the fair use factors, see Omnibus, supra note 3, at 35-39; Handbook, supra note 1, at 85-96; Nimmer, supra note 3, § 13.05(A); Seltzer, Exemptions and Fair Use in Copyright, 24 Bull. Copyright Soc'y 215, 230-36 (1977).


39. The statutory codification explicitly added the wording "including whether such use is of a commercial nature or is for nonprofit educational purposes," 17 U.S.C. § 107 (1976 & Supp. IV 1980), as an express recognition that this aspect is to be considered along with the other factors in the fair use analysis. See 17 U.S.C.A. § 107 historical note (West 1977).
precluded, such a use would be less likely to constitute a fair use. Conversely, a nonprofit educational purpose would render a favorable inference of fair use.

Another factor common to the fair use analysis has been the nature of the copyrighted material. Generally, if the work was of scientific, historical, or legal merit, it would lend itself to a finding of fair use. The courts, however, have been less rigid in applying the traditional bases under this factor. For example, in Rosemont Enterprises, Inc. v. Random House, Inc., the court examined whether the nature of the work was such that its distribution would serve the public's interest in accessibility to information. If so, a fair use was more likely. The court in Iowa State University Research Foundation, Inc. v. American Broadcasting Co. considered whether a

40. See, e.g., Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1178 (5th Cir. 1980) (fair use found despite commercial purpose where harm to plaintiff's copyright interest was not significant); Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., 621 F.2d 57, 61 (2d Cir. 1980) (commercial exploitation did not necessarily preclude fair use); Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977) (commercial use, standing alone, insufficient to preclude fair use).


42. See, e.g., Italian Book Corp. v. American Broadcasting Co., 458 F. Supp. 65, 71 (S.D.N.Y. 1978) (television news broadcast of a part of plaintiff's song containing music and lyrics of 21 Italian songs was a fair use); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957, 961 (D. N.H. 1978) (use by opposition of 15 seconds of political candidate's copyrighted songs was a fair use).


44. Under this factor, the courts have examined varying aspects of the nature of the work other than the traditional fair use indicators. See Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1176 (5th Cir. 1980) (finding that the commercial nature of the copyrighted work neither advanced nor hindered the fair use defense); Universal City Studios v. Sony Corp of Am., 480 F. Supp. 429, 453 (C.D. Cal. 1979) (considering the mode of distribution as an aspect of the nature of the work); Nimmer, supra note 3, § 13.05(A) (one aspect of the nature of the work is whether the work was available to the user).

45. 366 F.2d 303 (2d Cir. 1966).

46. Id. at 307. The court noted that this public interest test explains why the fair use doctrine has often been applied in cases dealing with science, law, history, and medicine. Id.

47. 621 F.2d 57 (2d Cir. 1980).
copyrighted educational film was of essentially the same nature as a commercially motivated reproduction, thus, rendering fair use unavailable as a defense.48 Finally, other courts have implied that if the nature of the work was purely entertainment, a finding of fair use was less likely.49

A third factor that courts have employed to determine fair use is the amount and substantiality40 of the copyrighted work used. Traditionally, the greater the amount of the copyrighted work used, the less likely a fair use would be found. Some courts have held that a use of substantially all of the copyrighted material would preclude fair use.51 In Williams & Wilkins Co. v. United States,52 however, the court departed from this traditional application by finding a fair use in a substantial appropriation of a copyrighted work. The Wilkins court concluded that other factors relevant to the photocopying of entire journal articles outweighed the substantiality concern.53

Finally, a fourth factor commonly explored under the fair use doctrine is the tendency of the allegedly infringing use to decrease the market value of the original work.54 Courts have generally looked to whether the widespread use of the infringing activity would tend to cause a significantly adverse im-

48. Id. at 61.


50. Substantiality also encompasses questions of the similarity between two works. Thus, this factor may involve a qualitative as well as quantitative determination. NIMMER, supra note 3, § 13.05(A).

51. See Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 756-57 (9th Cir. 1978) (verbatim copying not defensible as fair use), cert. denied, 439 U.S. 1132 (1979); Rosemont Enter., Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966) (extensive verbatim copying could not meet the reasonableness standard of fair use), cert. denied, 385 U.S. 1009 (1967); Benny v. Loew's, Inc., 239 F.2d 532, 536 (9th Cir. 1956) (wholesale copying not a fair use), aff'd, 356 U.S. 43 (1958).


53. Id. at 1362. The court in Wilkins considered the four fair use factors as well as four other factors it deemed relevant to the particular issue. See infra note 103 and accompanying text.

54. As one author points out, this is often viewed as the most important factor. The issue of harm to plaintiff's copyright interest must be examined along with all the other fair use factors because it is relevant to more than just the extent of damages caused by the alleged infringement. NIMMER, supra note 3, § 13.05(A).

The district court in Sony recognized three issues to which harm is relevant in a copyright infringement action. These are: whether the use is a fair use; whether an injunction is an appropriate remedy; and if infringement is found, the apportionment of damages. Universal City Studios v. Sony Corp. of Am., 480 F. Supp. 429, 451 (C.D. Cal. 1979).
pact on the copyright holder's economic interest. Where such a tendency exists, this factor weighs against a finding of fair use.\textsuperscript{55}

Although these traditional parameters have become apparent in the application of the fair use factors, the weight each factor merits is to be determined on a case-by-case basis.\textsuperscript{56} The doctrine is intended to evaluate copyright questions on the whole, examining all relevant factors as interrelated considerations.\textsuperscript{57} The fair use factors are not, therefore, necessarily determinative nor exclusive.\textsuperscript{58} Courts have the discretion to incorporate into the analysis any other factors they deem pertinent to the particular case. According to the \textit{Iowa State Research Foundation, Inc. v. American Broadcasting Co.}\textsuperscript{59} court, the absence of rigid standards for applying fair use has allowed the doctrine to protect creativity that would otherwise be stifled by a strict interpretation of the copyright laws.\textsuperscript{60}

In view of the flexibility that Congress has shown toward technological change, as well as the flexibility that the courts have shown through the implementation of the fair use doctrine, the advent of another technological

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\item \textsuperscript{55} See Sid & Marty Krofft Television Prod. v. McDonald's Corp., 562 F.2d 1157, 1169 n.13 (9th Cir. 1977) (explored whether there was a tendency to decrease the market for the original in determining existence of fair use); Marvin Worth Prod. v. Superior Films Corp., 319 F. Supp. 1269, 1275 (S.D.N.Y. 1970) (where distribution of a film could be expected to decrease the value of plaintiff's copyrighted work, fair use was unavailable); Mura v. Columbia Broadcasting System, 245 F. Supp. 587, 590 (S.D.N.Y. 1965) (in determining fair use, court looked to the tendency to interfere with the market for the copyrighted work).
\item \textsuperscript{56} See Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977) (the delineation between fair use and infringement must be drawn on the basis of the facts of the case), cert. denied, 434 U.S. 1013 (1978); Mathews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73, 85 (6th Cir. 1943) (fair use depends on the facts of the case); Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741, 744-45 (S.D.N.Y.) (distinction between fair use and infringement requires examination of the specific facts involved), aff'd, 623 F.2d 252 (2d Cir. 1980). See also H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, \textit{reprinted in} 1976 U.S. CODE CONG. & AD. NEWS 5659, 5679 (the doctrine lacks precise definition and, thus, must be adapted to unique facts of each case); NIMMER, supra note 3, § 13.05(A) (the weight ascribed to each factor is discretionary depending on the case).
\item \textsuperscript{57} See Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977) (the factors that bear upon fair use must be considered in concert), cert. denied, 434 U.S. 1013 (1978); Key Maps, Inc. v. Pruitt, 470 F. Supp. 33, 37 (S.D. Tex. 1978) (the fair use factors must be evaluated in concert); Meredith Corp. v. Harper & Row Publishers, Inc., 378 F. Supp. 686, 689 (S.D.N.Y.) (fair use is determined by the usual factors as well as all relevant evidence), aff'd, 500 F.2d 1221 (2d Cir. 1974) (quoting Mathews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73, 85 (6th Cir. 1943)).
\item \textsuperscript{58} The legislative history behind the 1976 amendment of the Copyright Act sets forth Congress' acceptance of the fair use doctrine and the legislative intent behind codifying the doctrine and its common factors. The history explicitly states that these factors are suggestive of the relevant inquiries but are not to be determinative in every case. The determination of fair use is left to judicial discretion. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, \textit{reprinted in} 1976 U.S. CODE CONG. & AD. NEWS 5659, 5678-79. See also 17 U.S.C.A. § 107 historical note (West 1977) (the endless variety of situations that can arise precludes formation of exact rules under fair use).
\item \textsuperscript{59} 621 F.2d 57 (2d Cir. 1980).
\item \textsuperscript{60} Id. at 60.
\end{itemize}
invention would appear to be acceptable under the copyright laws. In
Universal City Studios v. Sony Corp. of America, however, the court
found video recorders to be an unacceptable source of copyright infringe-
ment.

THE SONY DECISION AND ANALYSIS

As holders of copyright interests in various television and motion picture
works, Universal City Studios and Walt Disney Productions brought a
copyright infringement action against the manufacturer, distributor, and
ultimate consumer of a popular video cassette recorder. The plaintiffs
charged that off-the-air video recording, even in the context of private,
noncommercial use, violated their copyright interests. Although neither
Universal Studios nor Walt Disney had suffered any direct harm or
monetary loss, they claimed that the continued use of video recorders

61. 659 F.2d 963 (9th Cir. 1981).

62. A detailed statement of the facts of this case is set forth in the district court's opinion,
Universal City Studios v. Sony Corp. of Am., 480 F. Supp. 429, 432-41 (C.D. Cal. 1979),
therefore, the circuit court did not find it necessary to restate the facts in its decision. Uni-
versal City Studios v. Sony Corp. of Am., 659 F.2d 963, 964 (9th Cir. 1981).

Universal's copyrighted materials consist of motion pictures created for theater viewing and
in some cases subsequent television licensing. Universal markets prerecorded videotapes of
theater films, including pictures that have previously been aired on television. Universal's
copyright interests also include movies made for television. These movies are produced ex-
clusively for first run, network showings and some are then licensed for network reruns and/or
syndication to local stations. 480 F. Supp. at 433-34.

Disney's copyrighted interests include a variety of animated and live action works. While
only three of Disney's full length, animated features have been licensed to television, it does
license other theatrical film works. Disney, like Universal, has marketed prerecorded video
tapes of various copyrighted materials. Additionally, Disney has a long running contract with
NBC to air features weekly on "The Wonderful World of Disney" as well as syndicated pro-
grams such as "The New Mickey Mouse Club." Id. at 434-35.

63. 659 F.2d 963, 964. The named defendants were Sony Corporation and Sony Corpora-
tion of America, the manufacturer and distributor of a commercially marketed video cassette
recorder, the Betamax; Doyle Dane Bernach, Inc., the advertising agency responsible for pro-
moting the Betamax; four retail stores that sold the Betamax and made copies of various
 television programs as a demonstration of the product; and one individual, William Griffi-
th's, apparently named in exemplary capacity only for home-use infringement via the Betamax, as
no damages or costs were sought from him. Id.

64. Id. at 964. In addition to whether off-the-air copying by means of video recorders con-
stitutes copyright infringement, four other issues were examined by the Sony court: whether
the corporate defendants could be held liable for home video recording under direct or con-
tributory infringement or vicarious liability; whether injunction or another remedy would ap-
propriately redress damage; whether the retail stores violated the copyright laws by using
prerecorded tapes to demonstrate the Betamax; and whether a claim for unfair competition
was valid. Id. at 964-65. The scope of this Note is limited, however, to the initial inquiry of
home use infringement.

65. 480 F. Supp. at 439. The district court found the issue of harm to be relevant to three
inquiries: whether home use video recording is a fair use; whether an injunction is appropriate;
and damages if infringement were found. Id. at 451.

The circuit court did not find the issue of harm to be relevant to the liability question. It
would cause them irrevocable damage.\textsuperscript{66} This alleged damage would stem from a decrease in the value of their copyright interests by depleting rerun value and diminishing the live television audience.\textsuperscript{67}

Denying the plaintiffs' claim, the trial court concluded that private non-commercial video recording did not constitute copyright infringement.\textsuperscript{68} On appeal, however, the Ninth Circuit Court of Appeals concluded that the home use of video cassette recorders amounted to a violation of the copyright interests in the owners of the televised materials.\textsuperscript{69} The \textit{Sony} court found that neither the statute itself nor the doctrine of fair use justified home video recording.\textsuperscript{70}

Initially, the \textit{Sony} court set the tone for its examination of the infringement issue by indicating its belief that compensation to the copyright holder was more than a secondary concern.\textsuperscript{71} The court then proceeded to conduct two inquiries. First, it examined whether the Copyright Act could be interpreted as implying an exception for the noncommercial use of video recorders.\textsuperscript{72} Under this inquiry, the court found that the wording of the Act was unequivocally clear\textsuperscript{73} and, thus, provided no basis for an implied video recording exception to the copyright holder's exclusive control.\textsuperscript{74}
Audiovisual reproduction is specifically addressed under limited circumstances by the Copyright Act. The court interpreted the existing statutory treatment of video recording to mean that no general exception for home video recording was warranted.

The court's second inquiry examined fair use to determine whether video cassette recording could be upheld under this equitable doctrine. Prior to addressing the four standard factors, Sony explicitly stated its conclusion that no fair use existed. It proceeded, nevertheless, to discuss the fair use factors, affording great deference to the parameters traditionally applied.

In analyzing the purpose and character of the use, the court determined that the noncommercial nature of private video recording was not a saving characteristic. Although this factor now incorporates "commercial nature" within its scope, the Sony court stated that more was required than a simple commercial/noncommercial distinction. The fact that the recording takes place in the home was also found to have no mitigating effect on the purpose and character of the alleged infringement.

With respect to the second factor, the nature of the copyrighted work, the Sony court briefly stated that a fair use would be less likely where the work was primarily of entertainment value. It also found that the manner in which Universal Studios and Walt Disney chose to distribute their works was insignificant to the analysis. The fact that plaintiffs voluntarily chose to disseminate their works over public airwaves was irrelevant.

75. 17 U.S.C. § 108 (1976 & Supp. IV 1980). This section provides for the reproduction of copyrighted works for noncommercial library and archive use. Primarily, the Sony court focused on subsection (h) which exempts audiovisual works, except such works dealing with news, from portions of the § 108 grant of permissible uses. The Sony court deemed this to indicate special protection for audiovisual works not afforded to sound recordings. Thus, according to the court, this section served a twofold purpose. It demonstrated that the sound recording amendment, see infra notes 122-34 and accompanying text, was not analogous to the issue of video recording since Congress treated them as separate categories under the Act. Additionally, this section demonstrated that the Act itself was unequivocally clear because Congress would have addressed the home video issue, as it did § 108, if it had seen fit. 659 F.2d at 967-68.

The exclusion of works under subsection (h) is not, however, absolute because the legislative history behind § 108 states that the doctrine of fair use is fully applicable to justify reproduction of such works, even though they appear to be precluded by the statute. See H.R. REP. No. 1476, 94th Cong., 2d Sess. 78, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5692.

76. 659 F.2d at 967-68.
77. Id. at 971-72. The court inductively reached its conclusion and then referred to the fair use factors in support, rather than deducting its conclusion from the fair use analysis.
78. Id. at 972.
80. 659 F.2d at 972. The district court, however, found the noncommercial nature of video recording as well as the private nature of the use to warrant a positive inference from this factor. 480 F. Supp. at 454.
81. 659 F.2d at 972.
82. Id. See supra note 49 and accompanying text.
83. 659 F.2d at 972. The district court did find this factor to be significant as it incorporated all relevant considerations into its analysis. According to the district court, the volun-
Relying heavily upon the substantiality of the use, the Sony court cited several decisions illustrating the traditional focus of this factor.\textsuperscript{44} Previously, courts have held that a finding of fair use was precluded where the allegedly infringing use was of substantially all of the copyrighted work.\textsuperscript{5} The Sony court determined that this interpretation should not be altered.\textsuperscript{6} The reproduction capabilities of video recorders enable owners to record entire television programs as they are broadcast into the home. The recorders provide, therefore, for the reproduction of a substantial amount of each copyrighted work. Accordingly, the substantiality of video recorder use weighed heavily against a fair use finding.\textsuperscript{7}

Despite its seemingly preclusive finding of substantiality, the court proceeded to discuss the element of harm, stating that the cumulative effects of video recording must be considered beyond the limited factual setting of the case.\textsuperscript{8} Although Universal Studios and Walt Disney could not establish any present injury, the Sony court concluded that subsequent use of the reproduced works would tend to decrease the market for the original because the copy would be used as the functional equivalent of the original.\textsuperscript{9} Widespread use of video cassette recorders would, according to the court, lead to "insuperable obstacles"\textsuperscript{10} for Universal Studios and Walt Disney in protecting their statutory interests.

\textbf{CRITIQUE}

Although the Sony court correctly observed that the public must rely on authors and inventors to supply advancements in the arts and sciences,\textsuperscript{91} its mechanical analysis of the fair use doctrine evinced too strong an empathy transmittal by the copyright owners was also important to the issue of harm. Because the television viewers do not pay directly for broadcasts, the harm was rendered even more speculative. 480 F. Supp. at 453.

84. 659 F.2d at 973. See Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1979) (substantiality alone may be preclusive to a fair use finding), cert. denied, 439 U.S. 1132 (1979). See also Meeropol v. Nizer, 560 F.2d 1061, 1070 (2d Cir. 1977); Rosemont Enter., Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966) (both supporting the preclusive weight of substantiality). \textit{But see} Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973) (there is no inflexible rule that substantiality be preclusive in all cases), \textit{aff'd}, 420 U.S. 376 (1975); Universal City Studios v. Sony Corp. of Am., 480 F. Supp. 429, 455 (C.D. Cal. 1979) (the cases holding substantiality to be preclusive indicated this concern primarily where substantiality caused harm to plaintiff).

85. \textit{See} supra note 51 and accompanying text.
86. 659 F.2d at 973.
87. \textit{Id.}

88. \textit{Id.} at 974. The district court, however, found that the ramifications presented by the video issue extended beyond the boundaries of the case. Noting that the legislature should be encouraged to clarify the dispute, the district court chose not to embark on a course of judicial legislating by exploring all possible uses and consequences. 480 F. Supp. at 442.

89. 659 F.2d at 974. This rationale is known as the "functional test" which has been applied in some cases to preclude a finding of fair use. \textit{See} NIMMER, supra note 3, § 13.05(B).
90. 659 F.2d at 974.
91. \textit{Id.} at 965.
toward the copyright holder. Contrary to the Sony court's finding, the Copyright Act does not require that the copyright owner be allowed to "exploit the market" for his work. Instead, the copyright law requires a balancing of the public interest against the rights of the author or inventor. In its reluctance to depart from the traditional applications of the doctrine of fair use, the Sony court avoided an equitable balancing of these interests.

The court examined the fair use factors in a cursory manner, more as support for its determination that an infringement did exist than as a basis for extracting its conclusion. The court failed to approach fair use as an analysis involving interrelated considerations. Rather, it touched on the factors individually, noting how in-home video recording fell short of the traditionally defined standards for each. In doing so, the Sony court overlooked the judicial and legislative intent that the doctrine be flexible and that its value as a defense be determined through a case-by-case approach. The issue of private noncommercial video recording presented a case of first impression and, thus, presented a use that had not been contemplated as the fair use doctrine developed. The Sony decision, in effect, stagnated fair use by affording no special consideration to this new technological development.

In adapting the copyright law to encompass technological change, Williams & Wilkins Co. v. United States offered a more practical approach. The Sony court, however, rejected the Wilkins decision as a dangerous extension of fair use. The Wilkins court found the doctrine applicable in this case of first impression, fair use presented a viable approach. The court stated that the advent of video recorder technology invited application of the fair use doctrine. With no single factor being determinative, the court balanced the equities. The Sony court stated that due to the unique factual setting all relevant considerations, in addition to the four fair use factors, were to be used in balancing the equities. The Sony court stated that due to the unique factual setting all relevant considerations, in addition to the four fair use factors, were to be used in balancing the equities.

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92. See supra notes 22-24 and accompanying text. See also H.R. Rep. No. 2222, 60th Cong., 2d Sess. 9 (1909) (copyright is intended primarily to benefit the public, not the author).
93. 659 F.2d at 974.
94. The fact that the copyright law does not require that the copyright holder have the sole interest in exploiting the market is evidenced by the limitations Congress and the courts have imposed upon the holder's exclusive rights. Courts have repeatedly recognized the balance inherent in the copyright law, thus, the holder's interest in his market is not absolute. See supra notes 18-20 and accompanying text. See also Copyright Revision, supra note 22, at 6 (copyright law must strike a balance between the author's interest in controlling his work and the public's interest in the widest possible dissemination of those works).
95. See supra notes 21-24 and accompanying text.
96. The district court in Sony stated that due to the unique factual setting all relevant considerations, in addition to the four fair use factors, were to be used in balancing the equities, with no single factor being determinative. 480 F. Supp. at 456. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5679 (each case raising a fair use question must be decided on the basis of its own specific facts). See Copyright Revision, supra note 22, at 6 (copyright law must strike a balance between the author's interest in controlling his work and the public's interest in the widest possible dissemination of those works).
97. See supra notes 33-35 and accompanying text.
98. The district court expressed that in this case of first impression, fair use presented a viable approach. The court stated that the advent of video recorder technology invited application of the fair use doctrine. The Sony court expressed that in this case of first impression, fair use presented a viable approach. The court stated that the advent of video recorder technology invited application of the fair use doctrine. 480 F. Supp. at 448. See supra notes 21-24 and accompanying text.
100. 659 F.2d at 971. The Sony court found that recognizing "new technology which makes possible the mass reproduction of copyrighted materials . . . places a strain on the fair use doctrine." Id. Contra Copyright Revision, supra note 22, at 30 (technological advances that provide for in-home video reproduction cannot be precluded by the copyright laws).
applicable to the photocopying of copyrighted medical journal articles for research purposes. Although _Wilkins_ is factually distinguishable, its merit rests in the stance the court adopted in examining the advent of photocopy technology.

The _Wilkins_ court balanced the fair use factors as well as four other considerations it deemed relevant to the case. In view of the speculative nature of the harm and the fact that medical research would be impaired if such reproduction were not allowed, the court recognized a fair use. Although the photocopying involved a substantial amount of the copyrighted works, _Wilkins_ observed that the traditional parameters were not inflexible rules, excluding certain uses in all cases. As a result, the substantiality factor could be outweighed by other concerns. Furthermore, the court noted that until clear legislative direction was issued, fair use could be employed to protect the public from bearing the loss. Thus, the _Wilkins_ court thoroughly examined the issue before it and based its deter-

101. 487 F.2d at 1362.

102. As the district court noted, the precedential value of _Wilkins_ is limited to its specific factual setting. The district court found it persuasive, however, for its application of the fair use doctrine in a case of new technology and a noncommercial use. 480 F. Supp. at 450.

103. 487 F.2d at 1354-61. The other four factors were: the nonprofit status of the defendants; the copies were used only for research purposes; the practice had been going on, unrestrained for many years; medical science would be impaired if such copying were discontinued. _Id._

104. The _Wilkins_ court found that the evidence did not support a presumption of harm, thus, it refused to make a mechanical assumption that a tendency toward harm existed. 487 F.2d at 1359.

105. _Id._ at 1353-54. The public interest in _Wilkins_ was medical research, thus, the nature of the copyrighted work did fall within a traditional category of the fair use analysis although the substantial amount did not.

In _Sony_, the public interest is technology. While this interest is not reflected in the nature of the work, it represents a strong public concern that cannot be ignored. The technology in _Sony_, video recorders, provides the public with greater accessibility to information and entertainment. This would seem to be in keeping with the general stature of the copyright laws. See Note, Home Videorecording: Fair Use or Infringement?, 52 S. CAL. L. REV. 573, 608 (1979) (too rigid an application of the substantiality criterion would severely limit dissemination of copyrighted works by new technologies). See also Brill, _Will Betamax Be Busted?_, 89 ESQUIRE 19, 20 (June 20, 1978). “If science has developed a way for Junior to watch _Monday Night Football_ the next day, why should some greedy movie companies be able to use a stubborn reading of the law to stand in the way?” _Id._ at 22 (quoting Harvard Law School copyright professor Arthur Miller).

106. 487 F.2d at 1353. The _Wilkins_ court discounted the general rule on substantiality as being unsupported by actual practice. The court cited as example, several instances of daily life in which copying of entire works is commonly accepted, such as the photocopying of newspaper articles given from one friend to another or even from judges to colleagues in daily legal life. _Id._

107. _Id._ at 1354. The district court in _Sony_, like the court in _Wilkins_, limited the scope of its holding to the facts of the case due to the potential magnitude of a broad holding and the probable effect such a holding would have on both the industry and the public. The district court felt it more conservative to save the video dispute for the legislature but, until such action was forthcoming, it chose to allow the public the benefit of the doubt. 480 F. Supp. at 442. The Ninth Circuit, however, chose to impose a drastic holding on a quickly growing industry, thus, depriving the public for the sake of speculative harm. 659 F.2d at 974.
mination on an equitable balance between the competing interests rather than a mechanical analysis of the fair use formula.

Under a similar balancing of the equities, the Sony court could have concluded that the private noncommercial use of video recorders constituted a fair use. It relied on substantiality, however, as weighing heavily against fair use, seemingly to the point of this single factor being determinative. While the court stated that it need not rest its conclusion on substantiality, it cited case law holding substantiality to be preclusive. This factor, therefore, emerged as the impetus for the negative fair use determination.

A substantial appropriation of a copyrighted work does not always dictate the absence of fair use. Other factors, as in the Wilkins decision, may be sufficient to outweigh substantiality. The Sony court’s strong dependence on this factor undercut the public interest in accessibility to progress, an interest that the copyright laws were created to protect rather than hinder. Effectively, the Sony decision suggests that the public can be deprived of the benefits of video recorder technology and that electronic progress can be impeded by the existence of copyright laws.

Moreover, the Sony court overlooked other strong considerations that could have outweighed the negative implications of substantiality. In addition to the significant public interest at stake, the court disregarded the speculative nature of the harm. A finding of harm required a number of

108. 659 F.2d at 973.
109. Id. The court cited Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979), which held that the substantiality factor was the one preclusive consideration in the fair use calculus. Id. at 758.
110. The Sony court’s discussion of the first two factors was passive, merely stating that a use not falling within the traditional parameters weighed against fair use. Its discussion of substantiality, however, indicated that the court viewed this factor as its strongest support. The court stated that it did not need to rest its conclusion on this factor but failed to state exactly what, instead, it would rest on. 659 F.2d at 973.
111. See supra notes 21-24 and accompanying text.
112. See Brill, Will Betamax Be Busted?, 89 ESQUIRE 19 (June 20, 1978). In referring to the district court in Sony, prior to its disposition, the author stated: this “may end up being a classic example of law not keeping up with progress. Then it will be up to Congress to give us back the Betamax.” Id.
113. See Comment, All’s Fair in Love and Private Video Recording—The Copyright Infringement Issues in the Sony Case, 30 CATH. U.L. REV. 620, 629-30 (1981) (invalid assumption that harm will be caused by viewing video tapes rather than watching television because video watchers are part of a market who are looking for more in an entertainment form than television offers).

Studies show that impact upon television markets will not be substantial. See Public TV
presumptions by the court. Such presumptions include that video recorder owners would "library" tapings of televised programs, that they would be prone to view self-recorded tapes rather than live television, and that in taping the programs, commercials would be omitted. While the harm factor requires only a tendency to reduce the value of the original, it is this tendency that is speculative in Sony. If, as studies have shown, video recorder owners are not inclined to library tapes or view self-recorded tapes more than once, the tendency toward harm is tenuous. Additionally, from an equitable standpoint, the Sony court failed to consider that the television and motion picture industries have already proven themselves resilient to other technological advancements such as cable and pay television.

Although the presence of video recorders may change the plaintiffs' marketing strategies and advertising considerations, the copyright law was not meant to protect the copyright holder's economic monopoly from such change.

Study Says VCRs Don't Detract from Viewing Levels, Broadcasting 46 (July 21, 1980) (audiences still watch the same amount of television, thus, there is little danger of negative effect upon television); Not to Worry, Broadcasting 48 (May 12, 1980) (the 1980's will probably only show a 10% decrease in audience size due to all new technologies combined, which will be countered by a 10% increase in audience households).

114. "Library" is a term of art that refers to the accumulation of previously recorded tapes by the video cassette owner for viewing at a later date.


116. See supra notes 54-55 and accompanying text.

117. See Public TV Study Says VCR's Don't Detract from Viewing Levels, Broadcasting 46 (July 21, 1980) (68% of all playback of home recorded programs occurs within two days of broadcast with little evidence of librarying); Home Video Fever High Tech in the Living Room, High Fidelity & Musical America 102 (June 1980) (most recorder owners only view their self-recorded tapes once). See also Universal City Studios v. Sony Corp. of Am., 480 F. Supp. at 438 (studies showed that 70.4% of recorded tapes were viewed only once; 55.8% of video recorder owners had fewer than 10 tapes in their collection).

118. See 480 F. Supp. at 469. MCA chairman Louis Wasserman testified to this resilience at the district court trial, stating: "[p]eople that have constantly forecast the doom of a particular industry in the entertainment industry have historically been wrong. . . . They forecast the doom of radio stations when television developed on the horizon. Stations are more profitable today than they have ever been." Id.

The district court further noted that television productions by plaintiffs were more profitable than ever at the time of the trial and no concrete evidence was offered to support a future adverse effect on their profitability. Id. See also Brill, Will Betamax Be Busted?, 89 Esquire 19 (June 20, 1978). With regard to the Betamax, the author stated: "[s]ome of the doomsday claims seem farfetched, such as the one that financially crucial syndication rights (to sell old prime time shows to stations for daytime reruns) won't be sold because millions of Americans will instead record libraries of shows like 'I Love Lucy.'" Id. at 22.

119. See 480 F. Supp. at 452 (the Betamax, as well as other technical innovations, may cause plaintiffs to alter marketing strategies).

This same result was inflicted upon radio as television became popular. Radio changed its format to music and news in order to provide the public with an alternative to television. Video recorders are not, however, anticipated to cause the need for drastic change. See supra note 113.

Within the court's discussion of the remaining two factors, the purpose of the use and the nature of the copyrighted work, it failed to give weight to several relevant concerns. The significant aspects of video recording that should have been balanced by the court are the in-home and non-commercial nature of the copying, the fact that the reproduced works can be informational and educational as well as entertaining, and that the reproduced works are broadcast freely over the public airwaves. The Sony court dismissed these concerns, however, as lending no support to the analysis. While individually, these concerns would not be sufficient to render a determination of fair use, taken together, with the standard factors, they may have been sufficient to warrant such a finding. A balancing of all relevant factors could have established a fair use and, thus, as in Wilkins, protected the public from bearing the loss.

A SUGGESTED APPROACH

One of the most significant concerns that the Sony court omitted from its analysis of home video infringement was the home-use exception set forth under the sound recording amendment. The Copyright Act was amended in 1971 to include sound recordings within the scope of copyrightable materials. In creating this new copyright interest, Congress, within the amendment's legislative history, specifically addressed the issue of private, noncommercial sound recording. It found that reproducing a sound recording for noncommercial use would not amount to a copyright infringement. Congress concluded that the pervasiveness of private, nonprofit recording, as well as the difficulty in enforcing a ban on such use, necessitated this result.

This home-use exception to the copyright holder's exclusive rights in sound recordings presents an analogous situation to the video recording dispute. The Sony court refused to find relevance in the home-use exception, thereby, overlooking two major points. First, in-home sound recording and in-home video recording are virtually indistinguishable pro-

121. 659 F.2d at 972-74.
122. The Sony court did address the sound recording amendment but found it irrelevant to the video issue. The court stated that Congress was simply not addressing video recording. Id. at 967-68.
   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.

125. Id.
126. 659 F.2d at 967-68.
cesses. Both involve reproducing copyrighted works that are voluntarily broadcast by the copyright holders into private homes. In addition both involve future use of the recording for a private, noncommercial purpose. Thus, the justification for allowing one form of reproduction while prohibiting the other appears tenuous.

The second point that Sony overlooked was that the same considerations that supported the home-use exception for sound recordings have now manifested themselves in the context of video recording. Prior to the home-use exception, private, noncommercial use of sound recorders was a common and unrestrained practice. Furthermore, Congress did not foresee a significantly detrimental effect on the copyright holders through such a use. Similarly, video recorders are currently being used in many homes on an unrestrained basis. There does not appear to be any feasible means of controlling this use, absent removing video recorders from the market. This solution, however, would leave unresolved the problem of recorders that are already in private homes.

The similarity between sound and video recording was acknowledged in Congressional hearings on the sound recording amendment. In a Senate committee hearing, the Assistant Register of Copyrights noted that the advent of video recorders would be beyond the control or scope of the copyright laws. Although video recorders did not pose an immediate threat, the Senate hearings indicated that intruding into private homes or creating legislation to prevent home video recording would not be viable

127. See Comment, All’s Fair in Love and Private Video Recording—The Copyright Infringement Issues in the Sony Case, 30 CATH. U.L. REV. 621 (1981) (the acts of making recordings of sound and recordings of images are indistinguishable for infringement purposes); Comment, Betamax and Infringement of Television Copyright, 1977 DUKE L.J. 1181, 1218 (no difference between the acts necessary to reproduce sound or pictures). But see Brill, Will the Betamax Be Busted?, 89 ESQUIRE 19 (June 20, 1978) (the process of sound reproduction is less advantageous).

128. See supra note 124.

129. Id.

130. The 1981 production figure for the Electronic Industries Association of Japan, which accounts for 90% of the world market of video recorders, was approximately 8.4 million. BUSINESS WEEK 185 (July 20, 1981).

131. Alternatives have been suggested such as the imposition of a tax on the sale of video recorders to provide for a continuing royalty payment to copyright holders. This raises the question, however, of how to adequately apportion the proceeds. A second alternative that has been suggested is to equip the recorders with an automatic erase as the tape is being viewed. The problem with this suggestion is that it would also erase the commercially prerecorded tapes. See Universal City Studios v. Sony Corp. of Am., 659 F.2d 963, 976 (9th Cir. 1981) (appropriate solutions include injunctive relief or a continuing royalty); Marsh, Betamax and Fair Use: A Shotgun Marriage, 21 SANTA CLARA L. REV. 49 (1981) (video recorders could be equipped with an automatic erase). See also the West German Copyright Act of Sept. 9, 1965, 51 Bundesgesetzbblatt 1273 (1965), reprinted in Comment, New Technology and the Law of Copyright: Reprography and Computers, 15 U.C.L.A. L. REV. 939, 971 n.104 (1968) (a flat fee shall be paid from the manufacturer to the copyright holder).

alternatives. Additionally, ten years prior to the sound recording amendment, the Register of Copyrights published its intent that future technological advancements that would make home video recording possible would not lead to infringing uses under the copyright law.

Due to the substantial similarities between sound and video recording, the *Sony* court erred in disregarding this analogous legislative direction. Future courts examining the home video issue should view the sound recording amendment as the most pertinent indication of Congressional intent. The amendment’s history, as well as the several statements acknowledging video recording, provide a basis for expanding fair use to encompass this technology. Acceptance by other courts of the *Sony* precedent will effectively freeze the development of fair use in its present state, a result inconsistent with the equitable nature of the doctrine.

If the video dispute progresses further through the courts, and the rationale of *Sony* is adopted, then legislative action will be needed. The legislature recognized the need to exempt noncommercial home-use of sound recordings from the scope of copyright infringement. If, as the legislative history suggests, it also intends to exempt the private, noncommercial use of video recorders, this intention should, similarly, be expressed. An appropriate legislative action would be to codify the home-use exception with respect to both noncommercial sound and video recording.

**CONCLUSION**

The *Sony* court employed a mechanical analysis in this case of first impression. With a view toward the purpose and intent behind the Copyright Act and the fair use doctrine, however, such an analysis was improper. The court’s decision necessitates acceptance of the proposition that the public has less at stake than the copyright holders. This is not, however, simply an issue of whether video copies of various television broadcasts are superior in importance to compensating the artists. Rather, it is a question of whether technology may be impeded by the existence of the copyright laws. The danger inherent in allowing a strict construction of the Copyright Act to dictate the fate of home-use video recorders is that it ultimately favors the copyright owner’s economic interest over the public’s interest in progress. Such a result was not contemplated by the Act.

The home video issue is analogous to the sound recording amendment’s home-use exception, which could have supplied a basis for a fair use finding in *Sony*. This exception should be adopted in future examinations of the video dispute. If this suggested approach is not accepted, Congress should rectify the course of the judiciary and issue its specific intent with respect to the noncommercial home-use of video cassette recorders.

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133. *Id.*