Fair Use and Home Videotape Copying of Television Broadcasts

Recent technological advances such as photocopiers, home sound recorders, and now home videotape recorders, raise unanswered questions about liability for private copying of copyrighted material. Assuming an author's copyright prohibits private copying,[1] United States copyright law, designed to protect authors' and publishers' commercial interests,[2] is poorly adapted to protect copyright holders from the private copying these machines foster. Although detection of infringing works is relatively easy when a single infringer mass produces and distributes the copyrighted work, detection of private copying is difficult. Yet, because private copies satisfy some of the demand for a copied work, thus reducing the volume of a copyright holder's sales, the aggregate effect of private copying is potentially as injurious as mass production and distribution of infringing works.

This comment discusses home videotape recording under both the 1909 Copyright Act[3] and the new copyright law[4] which

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1. Private or personal copying or use, as used in this comment, connotes copying by an individual for his or her own personal use, or use with a small, closed group such as family and friends. A use is not personal or private if the individual copying the work, whether for profit or gratuitously, distributes copies or allows an unlimited group to use the copy. Some writers doubt whether United States copyright law prohibits copying for personal use. *See* Shaw, *Publication and Distribution of Scientific Literature*, 17 COLLEGE AND RESEARCH LIBRARY 294 (1956); Gosnell, *The Viewpoint of the Librarian and Library User*, in COPYRIGHT, CURRENT VIEWPOINTS ON HISTORY, LAWS, LEGISLATION 56, 61 (A. Kent and H. Lancour eds. 1972). *See also* Goldstein v. California, 412 U.S. 546 (1973), where, in dictum, the Court stated:

> An author who possesses an unlimited copyright may preclude others from copying his creation *for commercial purposes* without permission. In other words, to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the *sale or commercial use* of copies of their works.

Id. at 555 (emphasis added).

2. Although United States copyright is designed to protect the copyright holder's commercial interests, its purpose is not to assure the copyright holder's commercial gain. The Constitution grants Congress the power to pass legislation "[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." U.S. CONST. art. I, § 8, cl. 8.

As the Court stated in Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975): "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."

3. 17 U.S.C. §§ 1-216 (1970).

4. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (to be codified in title 17 of U.S.C.) [hereinafter cited as 1976 Act].

becomes effective January 1, 1978. Because home videotaping violates the copyright holder's exclusive rights to transcribe or copy the copyrighted program, the comment focuses on the application of the fair use doctrine[5] to home recording of television programs. If home videotape recording is not a fair use, individuals recording copyrighted television programs are liable for copyright infringement; yet, because private copying is difficult to detect, it may be impossible for copyright holders to protect themselves from this private copying. The comment, therefore, discusses the possibility of preventing distribution of home videotaping machines and concludes by suggesting a change in our copyright law. Before considering the fair use doctrine, however, it is helpful to consider American copyright law as it applies to television broadcasts.

Under the 1909 Act, the United States has a dual system of common law and statutory copyright, which, although protecting essentially the same rights,[6] protects these rights at different times. Live television broadcasts of uncopyrighted material must depend on common law copyright,[7] which protects the author's rights from the work's creation until the author permits publication of the work.[8] All prerecorded programs can receive statutory

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5. "Fair use may be defined as the privilege in others than the owner of the 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, THE LAW OF COPYRIGHTED AND LITERARY PROPERTY 260 (1944).

6. M. NIMMER, NIMMER ON COPYRIGHT § 111 (1976) [hereinafter cited as NIMMER]; Solinger, *Unauthorized Uses of Television Broadcasts*, 48 COLUM. L. REV. 848, 853-54 (1948). *See also* Palmer v. De Witt, 47 N.Y. 532, 7 Am. Rep. 480 (Ct. App. 1872).

7. *See* Comment, *Copyright Protection for Live Sports Telecasts*, 29 BAYLOR L. REV. 101 (1977). Broadcasts themselves are never copyrighted. If the broadcast originated from copyrighted material, such as a copyrighted script or videotape, statutory copyright protects the broadcast, but the broadcast itself is not copyrighted. If the underlying material is not copyrighted, the broadcast receives no statutory protection. Common law copyright protects broadcasts of material not copyrighted under the copyright statute.

Some writers indicate the fair use doctrine does not apply to works protected by common law copyright because unlike statutory copyright, common law copyright seeks to protect the author's privacy as well as his commercial interests. SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT REVISION STUDY No. 14, at 7 (Comm. Print 1960) [hereinafter cited as STUDY No. 14]; Cohen, *Fair Use in the Law of Copyright*, 6 ASCAP COPYRIGHT L. SYMP. 43, 51 (1955) [hereinafter cited as Cohen]. This seems to prevent application of the fair use doctrine to home videotaping of television broadcasts such as sporting events. One could argue, however, that the fair use doctrine should apply to home videotaping of television broadcasts of uncopyrighted material if the videotaping does not injure the author, because once millions of viewers see the broadcast, the author no longer has a privacy interest in that work.

8. NIMMER, *supra* note 6, § 46. *See also* Kortland v. Bradford, 116 Misc. 664, 190 N.Y.S. 311 (Sup. Ct. 1921). Common law copyright is often referred to as the right of first publication. NIMMER defines publication:

copyright protection,[9] which generally begins when the author publishes the work and grants the author a monopoly limited both in the scope of the rights protected[10] and in the duration of protection.[11]

The new copyright law nearly abolishes the United States' dual system of common law and statutory copyright by preempting all state and common law copyright for any work capable of obtaining statutory copyright.[12] Under the new law, every work

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> *[P]ublication occurs when by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such disposition does not occur.*

NIMMER, *supra* note 6, § 49, at 194-95 (emphasis in the original) (footnotes omitted). A. SEIDEL, WHAT THE GENERAL PRACTITIONER SHOULD KNOW ABOUT TRADEMARKS AND COPYRIGHTS 113 (2d ed. 1967), also defines publication in terms of distribution of tangible copies.

Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc., 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964), held that a television broadcast did not divest the author of common law copyright protection. *See also* Solinger, *Unauthorized Uses of Television Broadcasts,* 48 COLUM. L. REV. 848, 857 (1948); Ferris v. Frohman, 223 U.S. 424 (1912). Although no court has held to the contrary, it is arguable that the tangible copy distinction should not apply to television broadcasts because to apply it would give the author the exclusive right to benefit from the work for an unlimited period. Once the author allows the work to enter the stream of commerce, either by distribution of tangible copies or by broadcast over the air waves, statutory copyright should govern the author's rights.

9. Although the courts have never decided whether videotapes may obtain statutory copyright, the Copyright Office has accepted videotape copies for copyright registration since 1961, and courts have assumed statutory copyright protection exits. Holland, *The Audiovisual Package: Handle With Care,* 22 BULL. COPYRIGHT SOC'Y 104, 106 (1974); Walt Disney Prods. v. Alaska Television Network, Inc., 310 F. Supp. 1073 (W.D. Wash. 1969). *See also* 37 C.F.R. § 202.15(d) (1976). For an article questioning the constitutionality of copyright protection for news broadcasts, see Patterson, *Private Copyright and Public Communication: Free Speech Endangered,* 28 VAND. L. REV. 1161 (1975).

10. The author's monopoly is limited to the exclusive rights expressed in 17 U.S.C. § 1 (1970). *See* NIMMER, *supra* note 6, § 100, at 374.

11. 17 U.S.C. § 24 (1970).

12. The 1976 Act, *supra* note 4, § 301, preempts all state and common law protection except for works not copyrightable under § 102 and § 103. Sections 102 and 103 are so broad that for all practical purposes only those works not fixed in tangible form are subject to common law protection. See H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 129, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5659, 5745.

The 1976 Act, *supra* note 4, defines a work fixed in tangible form:

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The 1976 Act, *supra* note 4, § 101.

obtains statutory copyright from the moment of its fixation in tangible form.[13] The new law's definition of fixation includes those programs which the networks broadcast live while simultaneously making a videotape copy.[14] Because networks videotape virtually everything they broadcast, the new law protects most television broadcasts, thereby preempting common law protection.[15]

Both the 1909 Act and the new copyright law grant the copyright holder several exclusive rights.[16] For purposes of home videotaping of television broadcasts, the right to transcribe[17] under

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13. H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 129, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5659, 5745; Panel Discussion on the New Copyright Law, APLA at 658 (Oct.-Nov. 1976).

14. The 1976 Act, *supra* note 4, states:

> "Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.
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> A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The 1976 Act, *supra* note 4, § 101.
The 1976 Act, *supra* note 4, also states:

> (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. Words of authorship include the following categories:
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> (6) motion pictures and other audiovisual works.

The 1976 Act, *supra* note 4, § 102.
Live broadcasts which are not simultaneously taped, because outside the law's scope, remain subject to common law protection.

15. Preemption of common law protection for television broadcasts eliminates the possible problem of applying the fair use doctrine to live television broadcasts. Because the new law protects all broadcasts, the fair use doctrine is potentially applicable in every instance.

16. The work's nature determines the scope and nature of the rights obtained. *See* 17 U.S.C. § 1 (1970). For example, the owner of a copyright in a dramatic work has the exclusive right to perform or present the work publicly, 17 U.S.C. § 1(d) (1970); while the owner of a copyright in a musical composition has the exclusive right to perform the work publicly for profit. 17 U.S.C. § 1(e) (1970).

The new law reduces the relationship between the exclusive rights and the nature of the work by giving all copyright holders essentially the same rights. The rights to perform the work publicly and to display the work publicly are the only rights directly related to the work's nature. The 1976 Act, *supra* note 4, § 106.

17. 17 U.S.C. § 1(c) and (d) (1970). In similar language both sections give the exclusive right "to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, . . . or reproduced."

the 1909 Act and the right to copy[18] under the new law are the most important rights. The respective laws define a transcription or a copy as any tangible object from which the copyrighted work may be exhibited, performed, or reproduced. A videotape recording of a copyrighted program infringes the author's exclusive right to transcribe[19] or to copy[20] because the videotape is a tangible object from which the home viewer, with the aid of a television and a play back machine, can view the copied program. Users of home videotape recording machines, therefore, may be liable for copyright infringement.

Although some writers indicate private use is outside the scope of statutory copyright,[21] an examination of statutory copyright's purpose reveals private use may subject the private user to liability for copyright infringement. The United States Constitution grants Congress the power to create statutory copyright to encourage the creation and spread of ideas for the public benefit.[22] Congress designed statutory copyright to ensure authors full financial benefit from the creation and distribution of their works, thereby encouraging authors to create and share their ideas.[23] Whether one individual copies a work and distributes 10,000 copies to individual users or whether 10,000 individuals copy the

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18. The 1976 Act, *supra* note 4, § 106(1), gives copyright holders the exclusive right to copy. The 1976 Act, *supra* note 4, § 101, defines copies: "'Copies' are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

19. Walt Disney Prods. v. Alaska Television Network, Inc., 310 F. Supp. 1073 (W.D. Wash. 1969), held that a videotape copy of network broadcasts violated the exclusive right to transcribe. A videotape recording infringes the author's common law copyright because the rights protected are essentially the same as the rights conferred by statutory copyright. *See* note 6 *supra*.

20. Any videotape copy infringes the copyright owner's exclusive right to copy. *See* note 18 *supra*.

21. *See* note 1 *supra*. Other writers, however, indicate that although private copying is within the scope of statutory copyright, private copying is always fair use. Cohen, *supra* note 7, at 58; E. KITCH & H. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS 909 (1972). *Contra*, Nimmer, *New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A. L. REV. 931, 950-52 (1968); STUDY NO. 14, *supra* note 7, at 12. Other writers, though admitting an individual's hand copying constitutes fair use, state that machine copying for personal use does not constitute fair use. B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 101-02 (1967); Goldman, *Copyright as it Affects Libraries: Legal Implications*, in COPYRIGHT, CURRENT VIEWPOINTS ON HISTORY, LAWS, LEGISLATION 30, 40 (A. Kent and H. Lancour eds. 1972). *Contra*, W. NASRI, CRISIS IN COPYRIGHT 88-90 (1976), where the author states if personal use is fair use, the method of reproduction is immaterial.

22. *See* note 2 *supra*.

23. Patterson, *supra* note 9, at 1168; Meyer, *TV Cassettes—A New Frontier for Pioneers and Pirates*, 19 BULL. COPYRIGHT SOC'Y 16, 47 (1971).

work independently for their own use, the copyright holder's potential sales decrease by 10,000. A decrease in sales might deter authors from creating and sharing their ideas. To achieve its purpose, statutory copyright must prohibit private as well as commercial uses of copyrighted works which unnecessarily deter authors from creating and publishing their ideas.

To protect authors, the 1909 Act on its face gives the copyright holder the exclusive right to copy or reproduce any portion of the protected work.[24] Although substantial similarity and access to the copyrighted work are often used to show that the defendant copied plaintiff's work,[25] courts also have interpreted the 1909 Act as imposing liability for infringement only if the derivative work is substantially similar to the protected work.[26] A derivative work is substantially similar if it contains a substantial quantity of the copied work, or if it contains any of the copyrighted work's important or essential material.[27] Limiting the use of an earlier work to its unimportant or nonessential parts, however, reduces the effectiveness of criticisms and interferes with the improvement and development of the ideas contained in the earlier work. Because strict adherence to the copyright statute would impede the development and spread of ideas by severely limiting the use of earlier works, courts developed the equitable doctrine of fair use to balance the public's interest in the development and distribution of ideas against the author's interest in his limited monopoly.[28]

Although courts agree a finding of fair use relieves the user from liability for copyright infringement, commentators disagree on whether a finding of fair use excuses the individual's infringe-

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24. Title 17, U.S.C., § 1(a) (1970), gives the copyright holder the exclusive right to copy the protected work and does not qualify or limit the right in any way.

25. NIMMER, *supra* note 6, § 141.2.

26. *See* Caddy-Imler Creations, Inc. v. Caddy, 299 F.2d 79, 82 (9th Cir. 1962). *See also* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), where the court stated that liability for copyright infringement requires a showing of copying and that the material copied constituted an improper appropriation. *Id.* at 468. The court recognized there can be permissible copying. *Id.* at 472. In this case where the plaintiff alleged the defendant copied part of plaintiff's musical composition, the question was whether the defendant took a part of plaintiff's work which was pleasing to those hearing it. *Id.* at 473. *See also* NIMMER, *supra* note 6, § 143.1. *But see* Henry Holt & Co. v. Ligget & Myers Tobacco Co., 23 F. Supp. 302, 303 (E.D. Pa. 1938).

27. NIMMER, *supra* note 6, § 143.12, at 629-30.

28. Casson, *Fair Use: The Advisability of Statutory Enactment,* 13 IDEA 240, 241 (1969); W. NASRI, CRISIS IN COPYRIGHT 29 (1976). *Accord,* Berlin v. E.C. Publications, Inc., 329 F.2d 541, 543-44 (2d Cir. 1964); Greenbie v. Noble, 151 F. Supp. 45, 67 (S.D.N.Y. 1957).

ment[29] or limits the copyright holder's exclusive rights, thus making the individual's use noninfringing.[30] Under the 1909 Act, commentators could debate the nature of fair use because the Act did not specifically recognize the doctrine. The new law settles the disagreement by expressly recognizing the fair use doctrine as a limitation on the copyright holder's exclusive rights.[31]

In certain instances, fair use allows reasonable uses of copyrighted works without the copyright holder's consent.[32] The new law codifies the four factors courts generally consider in determining fair use.[33] The factors are: (1) the effect of the use on the copyrighted work's value; (2) the nature of the use; (3) the amount of the copyrighted work used; and (4) the nature of the copyrighted work. Although courts consider all four factors in deciding if a particular use is a fair use, the effect and nature of the use are the crucial factors. Courts must carefully balance these two factors to maximize the creation and spread of ideas, thereby achieving statutory copyright's purpose. Authors may refrain from publishing their creations if courts allow uses which

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29. Pforzheimer, *Historical Perspective on Copyright Law and Fair Use*, in TECHNOLOGY AND COPYRIGHT 269, 281 (G. Bush ed. 1972), defines fair use as a taking so insubstantial as not to infringe the copyright. *See also* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

30. NIMMER, *supra* note 6, § 145, at 644-45.

31. The 1976 Act, *supra* note 4, states:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The 1976 Act, *supra* note 4, § 107.

Section 106 of the 1976 Act, *supra* note 4, gives copyright holders their exclusive rights, but expressly subjects those rights to the fair use limitation of § 107.

Congress did not intend the doctrine's codification to alter the courts' application of the doctrine. H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 65-66, *reprinted in* [1976] 5 U.S. CODE CONG. & AD NEWS 5659, 5679-80.

32. *See* note 5 *supra*.

33. *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973), *aff'd without opinion by an equally divided Court*, 420 U.S. 376 (1975).

Fair use is a question of fact requiring consideration of all relevant factors; no single factor is determinative. *See* Mathews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73, 85 (6th Cir. 1943); Karll v. Curtis Publishing Co., 39 F. Supp. 836, 837 (E.D. Wis. 1941).

economically injure copyright holders.[34] Yet, uses of copyrighted works which benefit society by distributing useful ideas may justify tolerating some harm to the copyright holder.[35] The initial consideration, therefore, should be the nature of the use.[36] The greater the societal benefits of a use, the more tolerant courts should be of some harm to the copyright holder because the use may benefit society more than the possible detriment to society incurred by allowing injury to the copyright holder.[37] When the use has little societal benefit, however, courts should not risk possible deterrence of other authors by allowing the use to continue if it injures the copyright holder.[38]

There are two factors to consider when examining the nature of the use. First is the commercial versus the scholarly or artistic elements of the use.[39] Although nearly all uses contain both of these elements,[40] some uses are obviously primarily commercial, such as advertisements, or primarily scholarly or artistic, such as scientific, historical, or educational uses. A commercial use possessing little value as a distributor of useful ideas will be difficult to justify as a fair use.[41] A use, whether or not motivated by a

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34. Statutory copyright's assurance of full financial benefit from the copyrighted work encourages authors and publishers to share their ideas with society. Without such assurance, authors may not devote time to create valuable works because others could appropriate and benefit from the authors' labors. Publishers may not invest the time and money in editing and typesetting a work which another publisher may steal, thereby avoiding many initial costs and enabling the thief to undersell the original publisher. If the defendant's use substantially injures the copyright holder's financial interests, therefore, courts generally find the use unfair. Cohen, *supra* note 7, at 62. *Accord,* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901); Lawrence v. Dana, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8,136).

35. See Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544 (2d Cir. 1964), where the court stated: "[C]ourts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."

36. Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966).

37. Pforzheimer, *supra* note 29, at 282; SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., STUDY NO. 15 (Comm. Print 1960) [hereinafter cited as STUDY NO. 15]. *See also* Cohen, *supra* note 7, at 49.

38. *See* Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937); Marvin Worth Prods. v. Superior Films Corp., 319 F. Supp. 1269 (S.D.N.Y. 1970).

39. Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1354 (Ct. Cl. 1973), *aff'd without opinion by an equally divided Court,* 420 U.S. 376 (1975).

40. Note, *Parody and Copyright Infringement,* 56 COLUM. L. REV. 585, 597 (1956).

41. See Henry Holt & Co. v. Ligget & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938), where fair use did not protect from liability a defendant who used three lines from the plaintiff's book in its advertisement.

Commercial uses of little scholarly or artistic benefit are also disfavored because they will likely compete directly with the original work, creating a greater risk of economic injury to the copyright holder. Note, *Parody and Copyright Infringement,* 56 COLUM. L.

desire for commercial gain, containing useful information will be easier to justify as a fair use.[42] The second factor is whether the copier plans to distribute multiple copies of the work or otherwise allow others to use the copy, or whether the copier plans to keep the copy for his or her own personal use. Noncommercial, private uses of copyrighted works differ in two respects from commercial uses where the copier allows others to use the copy. First, unlike commercial use, private use does not compete on the open market with the original work. A noncommercial use is therefore less likely to injure the copyright holder's financial interests than a commercial use.[43] Secondly, because it is not generally disseminated, a private use does not distribute useful information to society.

The final two factors courts consider in deciding whether a use is fair, the copied work's nature and the amount of the original work used, are important primarily in relation to the effect of the use on the copyrighted work's economic value.[44] The nature of the copied work indicates the likely effect of the use on the original work because copies injure the value of some works more than others.[45] The amount of the copied work used also affects the original work's economic value because as the quantity taken from the original work increases, the new work becomes a better substitute for the original.[46]

In applying the four enumerated factors to home videotaping of television broadcasts, one possible obstacle to finding it a fair

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REV. 585, 596-97 (1956). *See also Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269, 1274 (S.D.N.Y. 1970).

42. *See* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 309 (2d Cir. 1966); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd without opinion by an equally divided Court*, 420 U.S. 376 (1975). Additionally, creation of the most beneficial works, such as scientific, historical, or other research works, often necessitates the use of earlier works on the same subject, thereby making such use easier to justify. 51 TEX. L. REV. 137, 143 (1972).

43. Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 597 (1956). Although private use may injure the copyright holder, an individual who copies a work, then distributes copies to the public is likely to inflict greater injury upon the copyright holder because people who otherwise might buy the original work might buy the copy.

44. STUDY NO. 15, *supra* note 37, at 50-51. Pforzheimer, *supra* note 29, at 281.

45. Courts also consider the copied work's nature in relation to the defendant's use. It is generally easier to justify using the copyright holder's scientific, historical, or educational work. Goldman, *supra* note 21, at 40. Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352-53 (Ct. Cl. 1973), *aff'd without opinion by an equally divided Court*, 420 U.S. 376 (1975).

46. Hill v. Whalen & Martell, Inc., 220 F. 359, 360 (S.D.N.Y. 1914): "One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much as has been reproduced as will materially reduce the demand for the original." *Accord*, 27 WASH. U.L.Q. 127, 129 (1941).

use is that viewers will likely record entire programs. Although courts often state substantial or complete taking is never fair use,[47] the reader must remember no court has considered a private user's liability for copyright infringement.[48] When the user distributes a complete or substantial copy of the original work, great potential for economic harm to the copyright holder exists because the copy satisfies some of the demand for the original.[49] When the user, such as the viewer videotaping a television broadcast for his own use, does not distribute his complete copy of the original work, the potential for economic harm to the copyright holder decreases, reducing the importance of the quantity copied or used.[50] That the viewer likely will record the entire program should not, therefore, by itself, bar a finding of fair use.[51]

Because home videotaping possesses no significant societal benefits as a scholarly or artistic use, it is fair use only if it does not harm the copyright holder's financial interests.[52] Because videotape copies are for personal use and are not disseminated, home videotaping does not distribute useful ideas to society's benefit. At the most, home videotaping allows individuals to view scholarly or artistic programs they otherwise might miss. The effect of allowing complete copying of scholarly or artistic works under the fair use doctrine is to eliminate statutory copyright protection for these works. This elimination would severely injure authors of scholarly or artistic works and deter other authors from expending their efforts in creating similar works, thereby defeating statutory copyright's purpose of encouraging the creation and distribution of beneficial works.[53] This result is diametrical to the

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47. Public Affairs Assocs., Inc. v. Rickover, 284 F.2d 262, 272 (D.C. Cir. 1960), *vacated per curiam for insufficient record*, 369 U.S. 111 (1962); Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484, 486 (9th Cir. 1937).

48. STUDY NO. 14, *supra* note 7, at 11-12.

49. *See* 15 S. CAL. L. REV. 249, 250-51 (1942).

50. Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1353 (Ct. Cl. 1973), *aff'd without opinion by an equally divided Court*, 420 U.S. 376 (1975). *See also* Needham, *Tape Recording, Photocopying, and Fair Use*, 10 ASCAP COPYRIGHT L. SYMP. 75, 84-86 (1959).

51. *See* note 46 *supra*. Needham, *supra* note 50, at 86, states: "In the ordinary case it would seem unimportant whether the user's work could substitute for the author's, if it was not going to be circulated generally." (Footnote omitted.)

Although the number of copies does not affect the question of infringement, it may affect the question of fair use. Needham, *supra* note 50, at 94.

52. See 51 TEX. L. REV. 137, 142-43 (1972), which recognizes that when defendant's use competes with plaintiff's work, and neither defendant's nor plaintiff's work is a scientific, historical, educational, or other scholarly research use or work, the effect on the plaintiff's work's value is the most important factor in determining fair use.

53. *See* note 2 *supra*.

fair use doctrine's goal of furthering statutory copyright's purpose.[54] Complete copying, therefore, will not receive deferential treatment merely because the copied work is scholarly or artistic;[55] the favored treatment given scholarly or artistic uses contemplates the expansion and improvement of the copyrighted work's ideas. Unless a home videotape copy contains a scholarly or artistic mixture of the copied program and other material, the copy is not a scholarly or artistic use.

In considering the nature of the copied work, one should notice that copyrighted television programs differ in two respects from most other copyrighted works. First, networks broadcast programs free of charge. Instead of viewers paying the networks for programs they watch, advertisers pay the networks a designated rate per thousand viewers per minute of air time used.[56] The number of viewers watching a program, therefore, determines the network's and ultimately the copyright holder's[57] financial return.[58] Secondly, broadcasts are temporary. Unless the viewer preserves the broadcast by recording it, he must watch the program when the network shows it. Recording a broadcast increases its audience by allowing persons unable to view the program when first shown to view the program and accompanying advertisements later, and also by allowing multiple viewings of a single broadcast, thereby increasing the financial return for that broadcast.[59]

Although home videotaping of television broadcasts may actually increase the copyright holder's return for the copied broadcast, home videotaping also may injure the copyright holder's financial interests in two ways. Because a viewer possessing a videotape copy of a program is less likely to view subsequent broadcasts of that program, home videotaping reduces the copyright holder's financial return from subsequent broadcasts of the program. Additionally, development of home videotape systems allows copyright holders to sell videotape cassettes of their pro-

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54. *See* text accompanying notes 33 and 34 *supra*.

55. Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966); Needham, *supra* note 50, at 90.

56. B. OWEN, TELEVISION ECONOMICS 4, 41 (1974).

57. *Id.* at 38-39.

58. *Id.* at 18.

59. This statement assumes networks and advertisers will perceive the increased audience. This assumption is reasonable in light of the modern sampling techniques used to determine audience size. Knowledge of the number of machines on the market and the program's popularity among the viewing public should indicate how many viewers are taping the program.

grams on the retail market much the same as music companies sell their product. A home viewer possessing a home-made videotape copy of a program is less likely to purchase a videotape cassette of that program from the copyright holder.[60]

In deciding whether home videotaping of copyrighted programs is fair use, the crucial factor is the nature of the copied program because the program's nature determines the economic effect of videotaping.[61] The majority of televised programs, such as dramatic, comedy, or variety series and specials, news commentaries, game shows, movies, talk or interview programs, and certain special or championship sporting events, possess some economic value after their initial broadcast because a substantial number of those viewing the first broadcast would watch the program again. Although the rerun or resale values of these various programs differ, an individual possessing a copy of any program is less likely to watch that program when it is broadcast again. Home videotaping of these programs, therefore, injures the copyright holder's financial interests by reducing the program's rerun audience and the potential retail market for videotape cassettes of the program.[62] To avoid the possibility of deterring the creation and broadcast of useful and entertaining television programs, courts should not allow home videotaping of rerunable, resalable programs under the fair use doctrine.[63] A limited num-

60. In determining fair use, it is immaterial that copyright holders have not yet marketed videotape cassettes of television programs. A use is not fair if it reduces the potential value of any of the copyright holder's rights, even if the copyright holder has not yet exercised the affected right. NIMMER, *supra* note 6, § 145, at 646-47.

61. Meyer, *supra* note 23, at 37-38, suggests consideration of the copied work's nature bars a finding of fair use in home videotaping of network broadcasts because recording will concentrate on the programs most adversely affected: specials, movies, and series. To bar all television recording because it adversely affects certain programs, however, totally disregards consideration of the copied work's nature.

62. Although home videotaping also benefits the copyright holder's financial interests by increasing the original broadcast's audience, *see* text accompanying notes 56-59 *supra*, the reduction in the potential retail sales market will bar a finding of fair use; the beneficial and detrimental effects cannot be balanced. Title 17, U.S.C., § 1(c) and (d) (1970), and § 106(4) of the 1976 Act, *supra* note 4, give the exclusive right to perform the copyrighted work. Home videotaping may increase the value of this exclusive right by increasing the original broadcast's audience. Title 17, U.S.C., § 1(a) (1970), and § 106(3) of the 1976 Act, *supra* note 4, give the copyright holder the exclusive right to vend the copyrighted work. Home videotaping decreases the value of this exclusive right by decreasing the potential retail market for videotape cassettes of the program. Because home videotaping decreases the value of the copyright holder's right to vend, the benefit to the copyright holder's right to perform is immaterial. If the use does not merit the tolerance of some harm to the copyright holder, a reduction in the economic value of any right bars a finding of fair use. NIMMER, *supra* note 6, § 145, at 646-47.

63. Addressing the similar problem of home tape recording of copyrighted material from the radio, Needham feels the listener is not liable for copyright infringement if the

ber of programs, however, principally news and sports broadcasts, possess little or no economic value after their initial broadcast[64] because they primarily convey information to the viewers, who ordinarily have no desire to receive such information twice.[65] Home videotaping of these broadcasts does not injure the copyright holder's financial interests.[66] Because home videotaping of these programs does not harm the copyright holder, there is no risk that home videotaping will deter the creation and distribution of these programs. The fair use doctrine, therefore, permits home videotape copying of news and most sports broadcasts.

Although viewers videotaping copyrighted television programs are liable for copyright infringement in most instances, as a practical matter, preventing unfair home videotaping, while permitting fair use, is difficult. Copyright holders are responsible for protecting their rights. Without the movement of infringing works on the open market, identifying a particular individual as an infringer is very difficult. Both the 1909 Act[67] and the new law[68] provide remedies including injunctions prohibiting infringement, minimum statutory damages of $250, and destruction of infringing copies. Unless the copyright holder can prove an individual infringed the holder's copyright, however, the remedies are of

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tapes are not generally disseminated. The copyright holder's remedy is to charge the broadcaster more for the use of the copyrighted work. Needham, *supra* note 50, at 101.

64. Any rerun value of a news or sports broadcast stems from those viewers who did not see the original broadcast. Because viewers generally watch these programs only once, home videotaping increases the first run audience to the same extent it decreases the rerun audience.

Assuming news and sports programs possess no retail sales value, the copyright holder's only valuable right is the right to perform or broadcast the program. Home videotaping's effect on the value of the performance right can only be determined by determining the overall effect of such videotaping. Determining the overall effect requires a balancing of the original broadcast's increased audience with the subsequent broadcast's decreased audience.

65. Although sports broadcasts convey more than just information, their primary appeal stems from viewing the competitive activity leading to an unknown ending. Unless the event is particularly exciting or important, most viewers would not care to see the entire sporting event a second time.

66. Copyright holders sometimes combine the particularly exciting or comical segments of news or sports broadcasts to form a new and financially valuable program. Home videotaping of the original broadcasts from which the new program is made should not injure the new work's value because a collection of videotapes containing all the programs from which the copyright holder made the new program is a poor substitute for the new program itself. The new program's informative or entertaining quality stems from the copyright holder's creative editing of the original programs and narrating of the new program.

67. 17 U.S.C. § 101 (1970).

68. 1976 Act, *supra* note 4, §§ 502, 503, and 504.

little value.[69]

Copyright holders might more effectively protect their interests by proving manufacturers and distributors of home videotape recording systems are liable for copyright infringement as secondary actors.[70] This would allow the copyright holders to pursue their remedies against a small, identifiable group. Forcing destruction of infringing copies would not be an effective remedy against the manufacturers or distributors because they possess no infringing copies. Recovery of actual damages,[71] however, would protect copyright holders from home videotaping, as would preventing distribution of home videotape recording systems.[72]

Absent an employment or lease relationship,[73] courts have imposed vicarious liability primarily where the secondary actor had both a financial interest in the infringement and control over the principal actor's activity.[74] Thus, in *Elektra Records Co. v. Gem Electronics Distributors, Inc.*,[75] the federal district court granted the plaintiff a preliminary injunction prohibiting defendant record store's use of its self-service sound recording machine. The record store charged customers fifty cents to use the machine, loaned customers copyrighted musical tapes from which to record, and sold blank tapes. In *Davis v. E.I. DuPont de Nemours & Co.*,[76] the defendant sponsored a television program bearing its name. The defendant had to approve several steps in the production process, including selection of the work, before production

69. The fact that record companies have not used these remedies against individual infringers of copyrighted records suggests the remedies may not be effective.

70. NIMMER, *supra* note 6, § 134.1, at 583.

71. 17 U.S.C. § 101(b) (1970); 1976 Act, *supra* note 4, § 504(a)(1).

72. Preventing distribution of the machines probably would be the most effective remedy. Collection of damages would require periodic court action, while copyright holders could permanently enjoin distribution of the machines in a single action.

73. Many cases of vicarious liability for copyright infringement rest on grounds of respondeat superior. The most noted of these are the dance hall cases where a band's employer is held liable for the band's infringement. *See* Bourne v. Fouche, 238 F. Supp. 745 (E.D.S.C. 1965); Shapiro, Bernstein & Co. v. Veltin, 47 F. Supp. 648 (W.D. La. 1942).

74. See Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963), where the court states:

> When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired . . . the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.

Accord, Rexnord, Inc. v. Modern Handling Sys., Inc., 379 F. Supp. 1190 (D. Del. 1974); Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 312 F. Supp. 581 (S.D.N.Y. 1970), *aff'd,* 443 F.2d 1159 (2d Cir. 1971).

75. 360 F. Supp. 821 (E.D.N.Y. 1973).

76. 240 F. Supp. 612 (S.D.N.Y. 1965).

began. The federal district court found the defendant liable because the sponsor had control over the program's content and benefited from the infringing broadcast.[77]

With one exception,[78] if no employment or lease relationship exists, courts have not found secondary actors liable for infringement where either a financial benefit in the principal's infringement, or control over the principal's actions is absent. In *Roy Export Co. Establishment v. Trustees of Columbia University,*[79] the federal district court refused to find the University liable even though it furnished a student organization projection equipment knowing the students would use it to infringe plaintiff's copyright, and even though the University had the ability to prevent the infringement, because the University received no financial benefit from the infringement. Another court refused to find a television broadcast's sponsor liable for the station's infringement of plaintiff's copyrighted movie although the sponsor benefited from sponsoring the broadcast and knew of its infringing nature because the sponsor had no control over the broadcast's contents.[80]

In *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.,*[81] a case contrary to the predominant view, the principal infringer manufactured and sold bootleg record albums. The defendant advertising agency had no control over the principal's actions. The federal district court, nevertheless, found the agency liable for copyright infringement because the album had such a low selling price the agency knew or should have known of the album's infringing nature. Because of the fly-by-night nature of the bootleggers themselves, the court expressed concern this might be plaintiff's only effective means of combating the serious problem of record piracy.[82]

Because neither a lease nor employment relationship exists between the videotape recording machine manufacturers and the home user, under the predominant line of cases, manufacturers are liable only if they benefit financially from the user's infringe-

77. *Id.* at 631-32.

78. Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 327 F. Supp. 788 (S.D.N.Y. 1971), *rev'd on other grounds,* 453 F.2d 552 (2d Cir. 1972).

79. 344 F. Supp. 1350 (S.D.N.Y. 1972).

80. Rohauer v. Killiam Shows, Inc., 379 F. Supp. 723 (S.D.N.Y. 1974). *See also* Robert Stigwood Group Ltd. v. Hurwitz, 462 F.2d 910 (2d Cir. 1972).

81. 327 F. Supp. 788 (S.D.N.Y. 1971), *rev'd on other grounds,* 453 F.2d 552 (2d Cir. 1972).

82. Judge Weinfeld expressed this concern in denying the defendant's motions for summary judgment. 256 F. Supp. 399, 404 (S.D.N.Y. 1966).

ment and have control over the home user's copying. Although manufacturers do not directly benefit from the home user's infringement in the sense that each infringement results in a calculable benefit,[83] the home user's infringement does benefit the manufacturers indirectly. Many people undoubtedly purchase home videotaping systems to record and preserve popular programs and movies in violation of the holder's copyright.[84] Sales of home videotaping systems to these users financially benefit the home videotape machines' manufacturers. Although machine manufacturers benefit indirectly from the user's infringement, manufacturers cannot control the home user's use of the machines. Manufacturers could, however, prevent the home user's infringement by removing their machines from the market. Under the predominant line of cases, in finding secondary actors liable for copyright infringement, courts indicate the secondary actors' ability to control the principals' actions is the important factor.[85] Courts have refused to find secondary actors liable because the actors lacked control over the principals' actions even though the principals' infringements would not have occurred as they did without the secondary actors' aid.[86] The manufacturers' power to prevent the home user's infringement by removing their machines from the market, therefore, is insufficient to support a finding of vicarious liability.

Although manufacturers of home videotaping systems may escape liability for copyright infringement under the predominant line of cases, manufacturers may be liable for infringement under the reasoning of *Screen Gems-Columbia Music, Inc.*,[87] be-

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83. In Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963), and Elektra Records Co. v. Gem Electronic Distribs., Inc., 360 F. Supp. 821 (E.D.N.Y. 1973), the secondary actors benefited directly from the principal's infringement in that they received either a percentage of the principal's income from each infringement or a set sum for each infringement. Such a direct financial benefit, however, is not necessary to find the secondary actor liable for the principal's infringement, provided the secondary actor has control over the principal's actions. *See* Rexnord, Inc. v. Modern Handling Sys., Inc., 370 F. Supp. 1190 (D. Del. 1974); Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 312 F. Supp. 581 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 1159 (2d Cir. 1971); Davis v. E.I. DuPont de Nemours & Co., 240 F. Supp. 612 (S.D.N.Y. 1965).

84. *See* text accompanying notes 61-63 *supra*.

85. Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963); Rexnord, Inc. v. Modern Handling Sys., Inc., 379 F. Supp. 1190, 1196 (D. Del. 1974); Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 312 F. Supp. 581, 583 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 1159 (2d Cir. 1971); Davis v. E.I. DuPont de Nemours & Co., 240 F. Supp. 612, 631 (S.D.N.Y. 1965).

86. Robert Stigwood Group Ltd. v. Hurwitz, 462 F.2d 910 (2d Cir. 1972); Rohauer v. Killiam Shows, Inc., 379 F. Supp. 723 (S.D.N.Y. 1974).

87. 327 F. Supp. 788 (S.D.N.Y. 1971), *rev'd on other grounds*, 453 F.2d 552 (2d Cir. 1972).

cause they knowingly aid the principal infringer and reap financial benefit by supplying videotape machines. The manufacturers' position in home videotaping of copyrighted programs is similar to the defendant's position in *Screen Gems-Columbia Music, Inc.* in that the copyright holder's most effective remedy is to sue the secondary party. Unlike the advertising agency in *Screen Gems-Columbia Music, Inc.*, however, manufacturers do not deal with a single individual they know is infringing the plaintiff's copyright. The manufacturers are merely selling their machines to purchasers, some of whom the manufacturers know or should know will use the machines in an infringing manner. Manufacturers, therefore, are liable for copyright infringement only if sale of a product capable of use in an infringing manner to persons, some of whom the manufacturers know or should know will use the product in an infringing manner, is enough to impose vicarious liability for copyright infringement.

Although case authority directly on point is scant, existing authority indicates secondary actors are liable for copyright infringement resulting from their sale of noninfringing products only if they encourage or intend the purchasers to use the product in an infringing manner.[88] The United States Supreme Court has indicated on two occasions that "mere indifferent supposition or knowledge on the part of the seller" may not be enough to impose liability for the buyer's infringement.[89] In *Harper v. Shoppell*,[90] a lower court decision, the defendant sold an uncopyrighted engraving of plaintiff newspaper's copyrighted picture to another newspaper which used the plate to print the picture in its paper in violation of the plaintiff's copyright. The federal circuit court stated:

> The cut was capable of use innocently in various ways having no relation to the publication and sale of a newspaper. If the defendant had sold the electrotype plate, intending or even expecting the purchasers to use it in competition with the plaintiff, he might be regarded as having sanctioned that use in ad-

88. This theory of vicarious liability differs from the previously discussed theory requiring financial benefit and control. The previously discussed theory rests primarily on the relationship of secondary actor to the principal actor, no sale of a tangible object is involved. The theory this paragraph discusses is based upon the sale of a tangible object.

89. Kalem Co. v. Harper Bros., 222 U.S. 55, 62 (1911). *Accord,* Superior Oil Co. v. Mississippi *ex rel.* Knox, 280 U.S. 390, 395 (1929).

90. 26 F. 519 (C.C.S.D.N.Y. 1886), *rev'd on retrial,* 28 F. 613 (C.C.S.D.N.Y. 1886). At the second trial, the circuit court held the defendant liable because defendant knew the buyer would use the plate to infringe plaintiff's copyright. The court, however, cited the original opinion as controlling.

> vance, and consequently as occupying the position of a party acting in concert with them and responsible with them as joint tort-feasors.[91]

The court further stated the law should not assume the defendant intended or expected the buyer to use the plate to infringe copyright even though the buyer was another newspaper.[92] *Harper* holds that even if the facts indicate the buyer may use the product to infringe copyright, before the law will impose liability, the seller must actually know at the time of sale this buyer will use the product illegally.

Manufacturers of home videotaping systems are not vicariously liable for copyright infringement under any of the accepted tests. No lease or employment relationship exists between the manufacturers and users, nor can manufacturers prevent purchasers from using the machines in an infringing manner. The relationship between the manufacturers and individual users, therefore, is insufficient to impose liability. Additionally, the sale of home videotape recording machines cannot support a finding of liability because manufacturers do not intend that buyers use the machines to infringe copyright. Courts should not infer that manufacturers intend or encourage use of their machines in an infringing manner unless the manufacturers actually know a particular buyer intends to use the machine to infringe copyright.[93] Courts, therefore, should not impose liability merely because the circumstances indicate the purchaser of a product capable of use in a noninfringing manner[94] intends to use the product to infringe copyright.[95]

Neither the 1909 Act nor the new copyright law adequately protects copyright holders from home videotape recording. Individuals copying most copyrighted programs are liable for copyright infringement,[96] but because discovering private copying is difficult copyright holders cannot adequately protect their rights by bringing actions against the copiers. Although copyright holders' most effective remedy under the 1909 Act and the new law is

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91. 26 F. at 521.

92. *Id.*

93. *See* Harper v. Shoppell, 26 F. 519 (C.C.S.D.N.Y. 1886), *rev'd on retrial,* 28 F. 613 (C.C.S.D.N.Y. 1886).

94. *See* text accompanying notes 62-64 *supra.*

95. *See* Superior Oil Co. v. Mississippi *ex rel.* Knox, 280 U.S. 390, 395 (1926); Kalem Co. v. Harper Bros., 222 U.S. 55, 62 (1911); Harper v. Shoppell, 26 F. 519, 521 (C.C.S.D.N.Y. 1886), *rev'd on retrial,* 28 F. 613 (C.C.S.D.N.Y. 1886).

96. *See* text accompanying notes 61-63 *supra.*

to prevent distribution of the machines,[97] they cannot prevent distribution because manufacturers of home videotape recording machines are not vicariously liable for copyright infringement.[98] The two laws, therefore, give copyright holders the exclusive right to transcribe or copy their programs, but no effective means of protecting that right.

It has been suggested those holding copyrights in television broadcasts can adequately protect their interests by charging more for the original broadcast of their programs.[99] This increased profit on the first run arguably cancels any loss the copyright holders might suffer on subsequent broadcasts and retail marketing of the programs due to videotape copying. Although such a remedy eliminates statutory copyright protection from videotape recording and requires copyright holders to protect themselves, it may have practical significance. For years people have copied radio broadcasts of sound recordings, yet those creating sound recordings do not seem to suffer a great deal.[100] Nor has such copying noticably decreased the creation or marketing of sound recordings. If home videotape copying affects holders of copyrights in television programs in a similar manner, a slight increase in the price copyright holders charge for broadcasts of their programs may adequately protect copyright holders' interests.

The West German system[101] of dealing with videotape copying of television broadcasts or recording of radio broadcasts, however, is more equitable. Under the West German system, the sale price of recording equipment includes a royalty fee. Copyright holders whose works are susceptible to copying by use of the machines can, through an authors' society, force the machines' manufacturers to pay the copyright holders a royalty. Although the system presents problems of the amount of the royalty fee and how to divide the fee, its adoption here would provide some compensation to copyright holders. Such a remedy is certainly superior to the ineffective remedies United States copyright holders now possess. Additionally, the system of royalty fees is more equi-

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97. *See* text accompanying notes 67-72 *supra.*

98. *See* text accompanying notes 73-95 *supra.*

99. Needham, *supra* note 50, at 101.

100. In fact, when Congress passed the Sound Recording Amendment of 1971 (17 U.S.C. § 1(f) (Supp. 1975)), the House Report clearly stated the amendment was not intended to prohibit private copying of copyrighted sound recordings. H.R. REP. No. 92-487, 92d Cong., 1st Sess., *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 1566, 1572.

101. Art. 53(5) of the Law of Sept. 9, 1965, [1965] Bundesgesetzblatt [BGB1] I 1273 (W. Ger.). *See also* de Freitas, *Audio Visual Systems,* 18 BULL. COPYRIGHT SOC'Y 304, 307-08 (1971).

table than having copyright holders increase the price they charge for broadcasts of their programs because it forces those people most likely to copy the programs to pay the damages such copying causes. Furthermore, the royalty system insures compensation for those copyright holders who cannot command a higher price for their product.

Holders of copyrights in televised programs need more protection than the 1909 Act or the new copyright law provides. Under both laws individuals copying televised programs for personal use are liable for copyright infringement in most instances, yet copyright holders cannot protect their interests adequately by pursuing the individual copiers. Copyright holders cannot prevent distribution of home videotaping machines because machine manufacturers and distributors are not vicariously liable for the individual copier's infringement. Adoption of a royalty system similar to West Germany's supplies copyright holders the needed protection, while also allowing noninjurious fair uses. The system would not only assure copyright holders adequate compensation for any injury due to home videotaping, it would also force those people most likely to cause the damage to pay the fee. In addition, by allowing continued use of home videotaping machines, the system would permit fair uses of televised programs. The royalty system, therefore, would effectuate statutory copyright's purpose of encouraging the creation and spread of ideas by compensating the copyright holder for injurious copying, while allowing noninjurious copying, which does not interfere with the creation and spread of ideas, to continue.

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