

464 U.S. 417, *; 104 S. Ct. 774, **;
1984 U.S. LEXIS 19, ***; 78 L. Ed. 2d 574

[edited version]

**SONY CORPORATION OF AMERICA ET AL. v. UNIVERSAL CITY STUDIOS,
INC., ET AL.**

No. 81-1687

SUPREME COURT OF THE UNITED STATES

*464 U.S. 417; 104 S. Ct. 774; 1984 U.S. LEXIS 19; 78 L. Ed. 2d 574; 52 U.S.L.W.
4090; 220 U.S.P.Q. (BNA) 665; 224 U.S.P.Q. (BNA) 736; 55 Rad. Reg. 2d (P & F) 156*

January 17, 1984, Decided

STEVENS, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, WHITE, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion in which MARSHALL, POWELL, and REHNQUIST, JJ., joined, post, p. 457.

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners manufacture and sell home video tape recorders. Respondents own the copyrights on some of the television [*420] programs that are broadcast on the public airwaves. Some members of the general public use video tape recorders sold by petitioners to record some of these broadcasts, as well as a large number of other broadcasts. The question presented is whether the sale of petitioners' copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act.

...

An explanation of our rejection of respondents' unprecedented attempt to impose copyright liability upon the distributors of copying equipment requires a quite detailed recitation of the findings of the District Court. In summary, those findings reveal that the average member of the public uses a VTR principally to record a program he cannot view as it is being televised and then to watch it once at a later time. This practice, known as "time-shifting," enlarges the television viewing audience. For that reason, a significant amount of television programming may be used in this manner without objection from the owners of the [***8] copyrights on the programs. For the same reason, even the two respondents in this case, who do assert objections to time-shifting in this litigation, were unable to prove that the practice has impaired the commercial value of their copyrights or has created any likelihood of future harm.

Given these findings, there is no basis in the Copyright Act upon which respondents can hold petitioners liable for distributing VTR's to the general public. The Court of Appeals' holding that respondents are entitled to enjoy the distribution of VTR's, to collect royalties on the sale of such equipment, or to obtain other relief, if affirmed, would enlarge the scope of respondents' statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection. Such an expansion of the copyright privilege is beyond the limits of the grants authorized by Congress.

I

The two respondents in this action, Universal City Studios, Inc., and Walt Disney Productions, produce and hold the copyrights on a substantial number of motion pictures and other audiovisual works. In the current marketplace, they can exploit their rights in these works in a number of ways: [***9] [*422] by authorizing theatrical exhibitions, by licensing limited showings on cable and network television, by selling syndication rights for repeated airings on local television stations, and by marketing programs on prerecorded videotapes or videodiscs. Some works are suitable for exploitation through all of these avenues, while the market for other works is more limited.

Petitioner Sony manufactures millions of Betamax video tape recorders and markets these devices through numerous retail establishments, some of which are also petitioners in this action. n2 Sony's Betamax VTR is a mechanism consisting of three basic components: (1) a tuner, which receives electromagnetic signals transmitted over the television band of the public airwaves and separates them into audio and visual signals; (2) a recorder, which records such signals on a magnetic tape; and (3) an adapter, which converts the audio and visual signals on the tape into a composite signal that can be received by a television set.

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n2 The four retailers are Carter Hawley Hales Stores, Inc., Associated Dry Goods Corp., Federated Department Stores, Inc., and Henry's Camera Corp. The principal defendants are Sony Corporation, the manufacturer of the equipment, and its wholly owned subsidiary, Sony Corporation of America. The advertising agency of Doyle Dane Bernback, Inc., also involved in marketing the Betamax, is also a petitioner. An individual VTR user, William Griffiths, was named as a defendant in the District Court, but respondents sought no relief against him. Griffiths is not a petitioner. For convenience, we shall refer to petitioners collectively as Sony.

[***10]

Several capabilities of the machine are noteworthy. The separate tuner in the Betamax enables it to record a broadcast off one station while the television set is tuned to another channel, permitting the viewer, for example, to watch two simultaneous news broadcasts by watching one "live" and recording the other for later viewing. Tapes may be reused, and programs that [**779] have been recorded may be erased either before or after viewing. A timer in the Betamax can be used to activate and deactivate the equipment at predetermined [*423] times, enabling an intended viewer to record programs that are transmitted when he or she is not at home. Thus a person may watch a program at home in the evening even though it was broadcast while the viewer was at work during the afternoon. The Betamax is also equipped with a pause button and a fast-forward control. The pause button, when depressed, deactivates the recorder until it is released, thus enabling a viewer to omit a commercial advertisement from the recording, provided, of course, that the viewer is present when the program is recorded. The fast-forward control enables the viewer of a previously recorded program to run [***11] the tape rapidly when a segment he or she does not desire to see is being played back on the television screen.

The respondents and Sony both conducted surveys of the way the Betamax machine was used by several hundred owners during a sample period in 1978. Although there were some differences in the surveys, they both showed that the primary use of the machine for most owners was "time-shifting" -- the practice of recording a program to view it once at a later time, and thereafter erasing it. Time-shifting enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a

broadcast that they desire to watch. Both surveys also showed, however, that a substantial number of interviewees had accumulated libraries of tapes. n3 Sony's survey indicated [*424] that over 80% of the interviewees watched at least as much regular television as they had before owning a Betamax. n4 Respondents offered no evidence of decreased television viewing by Betamax owners. n5

n3 As evidence of how a VTR may be used, respondents offered the testimony of William Griffiths. Griffiths, although named as an individual defendant, was a client of plaintiffs' law firm. The District Court summarized his testimony as follows:

"He owns approximately 100 tapes. When Griffiths bought his Betamax, he intended not only to time-shift (record, play-back and then erase) but also to build a library of cassettes. Maintaining a library, however, proved too expensive, and he is now erasing some earlier tapes and reusing them.

"Griffiths copied about 20 minutes of a Universal motion picture called 'Never Give An Inch,' and two episodes from Universal television series entitled 'Baa Baa Black Sheep' and 'Holmes and Yo Yo.' He would have erased each of these but for the request of plaintiffs' counsel that it be kept. Griffiths also testified that he had copied but already erased Universal films called 'Alpha Caper' (erased before anyone saw it) and 'Amelia Earhart.' At the time of his deposition Griffiths did not intend to keep any Universal film in his library.

"Griffiths has also recorded documentaries, news broadcasts, sporting events and political programs such as a rerun of the Nixon/Kennedy debate." *480 F.Supp. 429, 436-437 (1979)*.

Four other witnesses testified to having engaged in similar activity. [***12]

n4 The District Court summarized some of the findings in these surveys as follows:

"According to plaintiffs' survey, 75.4% of the VTR owners use their machines to record for time-shifting purposes half or most of the time. Defendants' survey showed that 96% of the Betamax owners had used the machine to record programs they otherwise would have missed.

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"When plaintiffs asked interviewees how many cassettes were in their library, 55.8% said there were 10 or fewer. In defendants' survey, of the total programs viewed by interviewees in the past month, 70.4% had been viewed only that one time and for 57.9%, there were no plans for further viewing." *Id.*, at 438.

n5 "81.9% of the defendants' interviewees watched the same amount or more of regular television as they did before owning a Betamax. 83.2% reported their frequency of movie going was unaffected by Betamax." *Id.*, at 439.

Sony introduced considerable evidence describing television programs that could be copied without objection from any copyright holder, with special emphasis on sports, religious, [***13] and educational programming. For example, their survey indicated that 7.3% of all Betamax use is to record sports events, and representatives of professional baseball, football, basketball, and hockey testified that they had no objection [**780] to the recording of their televised events for home use. n6

n6 See Defendants' Exh. OT, Table 20; Tr. 2447-2450, 2480, 2486-2487, 2515-2516, 2530-2534.

[*425] Respondents offered opinion evidence concerning the future impact of the unrestricted sale of VTR's on the commercial value of their copyrights. The District Court found, however, that they had failed to prove any likelihood of future harm from the use of VTR's for time-shifting. *480 F.Supp.*, at 469.

* * *

II

Article I, § 8, of the Constitution provides:

"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."

[*429]

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. [***21] Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

"The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, 'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public [***22] appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly. n10

n10 In its Report accompanying the comprehensive revision of the Copyright Act in 1909, the Judiciary Committee of the House of Representatives explained this balance:

"The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, ... but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. ...

"In enacting a copyright law Congress must consider ... two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a

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benefit upon the public that outweighs the evils of the temporary monopoly." H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

***23]

[*430]

From its beginning, the law of copyright has developed in response to significant changes in technology. n11 Indeed, it [*783] was the invention of a new form of copying equipment -- the printing press -- that gave rise to the original need for copyright protection. n12 Repeatedly, as new developments have [*431] occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. Thus, long before the enactment of the Copyright Act of 1909, 35 Stat. 1075, it was settled that the protection given to copyrights is wholly statutory. *Wheaton v. Peters*, 8 Pet. 591, 661-662 (1834). The remedies for infringement "are only those prescribed by Congress." *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889).

n11 Thus, for example, the development and marketing of player pianos and perforated rolls of music, see *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), preceded the enactment of the Copyright Act of 1909; innovations in copying techniques gave rise to the statutory exemption for library copying embodied in § 108 of the 1976 revision of the copyright law; the development of the technology that made it possible to retransmit television programs by cable or by microwave systems, see *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), prompted the enactment of the complex provisions set forth in 17 U. S. C. § 111(d)(2)(B) and § 111(d)(5) (1982 ed.) after years of detailed congressional study, see *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 129 (CA2 1982).

By enacting the Sound Recording Amendment of 1971, 85 Stat. 391, Congress also provided the solution to the "record piracy" problems that had been created by the development of the audio tape recorder. Sony argues that the legislative history of that Act, see especially H. R. Rep. No. 92-487, p. 7 (1971), indicates that Congress did not intend to prohibit the private home use of either audio or video tape recording equipment. In view of our disposition

of the contributory infringement issue, we express no opinion on that question. ***24]

n12 "Copyright protection became necessary with the invention of the printing press and had its early beginnings in the British censorship laws. The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other. Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammelled dissemination of ideas." Foreword to B. Kaplan, *An Unhurried View of Copyright* vii-viii (1967).

The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. See, e. g., *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908); ***25] *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 487 F.2d 1345 (1973), aff'd by an equally divided Court, 420 U.S. 376 (1975). Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests. In doing so, we are guided by Justice Stewart's exposition of the correct approach to ambiguities in the law of copyright:

"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 [*432] encouraged and rewarded, but private motivation must ultimately serve the cause ***26] of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary

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object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.' *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127. See *Kendall v. Winsor*, 21 How. 322, 327-328; *Grant v. Raymond*, 6 Pet. 218, 241-242. When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (footnotes omitted).

[**784] Copyright protection "subsists ... in original works of authorship fixed in [***27] any tangible medium of expression." 17 U. S. C. β 102(a) (1982 ed.). This protection has never accorded the copyright owner complete control over all possible uses of his work. n13 Rather, the Copyright Act grants the [*433] copyright holder "exclusive" rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies. β 106. n14 All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a "fair use"; the copyright owner does not possess the exclusive right to such a use. Compare β 106 with β 107.

n13 See, e. g., *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S., at 19; cf. *Deep South Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530-531 (1972). While the law has never recognized an author's right to absolute control of his work, the natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopolies of the copyright and the patent. See, e. g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-158 (1948) (copyright owners claiming right to tie license of one film to license of another under copyright law); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (copyright owner claiming copyright renders it immune from state taxation of copyright royalties); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 349-351 (1908) (copyright owner claiming that a right to fix resale price of his works within the scope of his copyright); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936) (patentees claiming right to tie sale of unpatented article to lease of patented device). [***28]

n14 Section 106 of the Act provides:

"Subject to sections 107 through 118, the owner of copyright under this title has the

exclusive rights to do and to authorize any of the following:

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

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

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other 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."

"Anyone who violates any of the exclusive rights of the copyright owner," that is, anyone who trespasses [***29] into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, "is an infringer of the copyright." β 501(a). Conversely, anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute or who makes a fair use of the work is not an infringer of the copyright with respect to such use.

The Copyright Act provides the owner of a copyright with a potent arsenal of remedies against an infringer of his work, including an injunction to restrain the infringer from violating [*434] his rights, the impoundment and destruction of all reproductions of his work made in violation of his rights, a recovery of his actual damages and any additional profits realized by the infringer or a recovery of statutory damages, and attorney's fees. β β 502-505. n15

n15 Moreover, anyone who willfully infringes the copyright to reproduce a motion picture for purposes of commercial advantage or private financial gain is subject to substantial criminal penalties, 17 U. S. C. β 506(a) (1982 ed.), and the fruits and instrumentalities of the crime are forfeited upon conviction, β 506(b).

[***30]

* * *

The two respondents in this case do not seek relief against the Betamax users who have allegedly infringed their copyrights. Moreover, this is not a class action on behalf of all copyright owners who license their works for television broadcast, and respondents have no right to invoke whatever rights other copyright holders may [**785] have to bring infringement actions based on Betamax copying of their works. n16 As was made clear by their own evidence, the copying of the respondents' programs represents a small portion of the total use of VTR's. It is, however, the taping of respondents' own copyrighted programs that provides them with standing to charge Sony with contributory infringement. To prevail, they have the burden of proving that users of the Betamax have infringed their copyrights and that Sony should be held responsible for that infringement.

If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory. The closest analogy is provided by the patent law cases to which it is appropriate to refer because of the historic kinship between patent law and copyright law.

* * *

n16 In this regard, we reject respondents' attempt to cast this action as comparable to a class action because of the positions taken by *amici* with copyright interests and their attempt to treat the statements made by *amici* as evidence in this case. See Brief for Respondents 1, and n. 1, 6, 52, 53, and n. 116. The stated desires of *amici* concerning the outcome of this or any litigation are no substitute for a class action, are not evidence in the case, and do not influence our decision; we examine an *amicus curiae* brief solely for whatever aid it provides in analyzing the legal questions before us.

We recognize there are substantial differences between the patent and copyright laws. But in both areas the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective -- not merely symbolic -- protection of the statutory monopoly, and the rights of others freely to [**789] engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

IV

[***31]

III

The Copyright Act does not expressly render anyone liable for infringement committed by another. In contrast, the [*435] Patent Act expressly brands anyone who "actively induces infringement of a patent" as an infringer, 35 U. S. C. § 271(b), and further imposes liability on certain individuals labeled "contributory" infringers, § 271(c). The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity. n17 For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.

The question is thus whether the Betamax [***41] is capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore *all* the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the District Court a significant number of them would be noninfringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home. It does so both (A) because respondents have no right to prevent other copyright holders from authorizing it for their programs, and (B) because the District Court's factual findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use.

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[*443] A. *Authorized Time-Shifting*

Each of the respondents owns a large inventory of valuable copyrights, but in the total spectrum of television programming their combined market share is small. The exact percentage is not specified, but [***42] it is well below 10%. n22 If they were to prevail, the outcome of this litigation would have a significant impact on both the producers and the viewers of the remaining 90% of the programming in the Nation. No doubt, many other producers share respondents' concern about the possible consequences of unrestricted copying. Nevertheless the findings of the District Court make it clear that time-shifting may enlarge the total viewing audience and that many producers are willing to allow private time-shifting to continue, at least for an experimental time period. n23

n22 The record suggests that Disney's programs at the time of trial consisted of approximately one hour a week of network television and one syndicated series. Universal's percentage in the Los Angeles market on commercial television stations was under 5%. See Tr. 532-533, 549-550.

n23 The District Court did not make any explicit findings with regard to how much broadcasting is wholly uncopyrighted. The record does include testimony that at least one movie -- *My Man Godfrey* -- falls within that category, *id.*, at 2300-2301, and certain broadcasts produced by the Federal Government are also uncopyrighted. See *17 U. S. C. § 105* (1982 ed.). Cf. *Schnapper v. Foley*, *215 U. S. App. D. C. 59, 667 F.2d 102 (1981)* (explaining distinction between work produced by the Government and work commissioned by the Government). To the extent such broadcasting is now significant, it further bolsters our conclusion. Moreover, since copyright protection is not perpetual, the number of audiovisual works in the public domain necessarily increases each year.

[***43]

The District Court found:

"Even if it were deemed that home-use recording of copyrighted material constituted infringement, the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording.

[*444] "Defendants introduced considerable testimony at trial about the potential for such copying of sports, religious, educational and other programming. This included testimony from representatives of the Offices of the Commissioners of the National Football, Basketball, Baseball and Hockey Leagues and Associations, the Executive Director of National Religious Broadcasters and various educational communications agencies. Plaintiffs attack the weight of the testimony offered and also contend that an injunction is warranted because infringing [**790] uses outweigh noninfringing uses.

"Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an [***44] extremely harsh remedy, as well as one unprecedented in copyright law." *480 F.Supp., at 468.*

Although the District Court made these statements in the context of considering the propriety of injunctive relief, the statements constitute a finding that the evidence concerning "sports, religious, educational and other programming" was sufficient to establish a significant quantity of broadcasting whose copying is now authorized, and a significant potential for future authorized copying. That finding is amply supported by the record. In addition to the religious and sports officials identified explicitly by the District Court, n24 two items in the record deserve specific mention.

n24 See Tr. 2447-2450 (Alexander Hadden, Major League Baseball); *id.*, at 2480, 2486-2487 (Jay Moyer, National Football League); *id.*, at 2515-2516 (David Stern, National Basketball Association); *id.*, at 2530-2534 (Gilbert Stein, National Hockey League); *id.*, at 2543-2552 (Thomas Hansen, National Collegiate Athletic Association); *id.*, at 2565-2572 (Benjamin Armstrong, National Religious Broadcasters). Those officials were authorized to be the official spokespersons for their respective institutions in this litigation. *Id.*, at 2432, 2479, 2509-2510, 2530, 2538, 2563. See Fed. Rule Civ. Proc. 30(b)(6).

[***45]

[*445] First is the testimony of John Kenaston, the station manager of Channel 58, an educational station in Los Angeles affiliated with the Public Broadcasting Service. He explained and authenticated the station's published guide to its programs. n25 For each program, the guide tells whether unlimited home taping is

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authorized, home taping is authorized subject to certain restrictions (such as erasure within seven days), or home taping is not authorized at all. The Spring 1978 edition of the guide described 107 programs. Sixty-two of those programs or 58% authorize some home taping. Twenty-one of them or almost 20% authorize unrestricted home taping. n26

n25 Tr. 2863-2902; Defendants' Exh. PI.

n26 See also Tr. 2833-2844 (similar testimony by executive director of New Jersey Public Broadcasting Authority). Cf. *id.*, at 2592-2605 (testimony by chief of New York Education Department's Bureau of Mass Communications approving home taping for educational purposes).

Second is the testimony of Fred [***46] Rogers, president of the corporation that produces and owns the copyright on Mister Rogers' Neighborhood. The program is carried by more public television stations than any other program. Its audience numbers over 3,000,000 families a day. He testified that he had absolutely no objection to home taping for noncommercial use and expressed the opinion that it is a real service to families to be able to record children's programs and to show them at appropriate times. n27

n27 "Some public stations, as well as commercial stations, program the 'Neighborhood' at hours when some children cannot use it. I think that it's a real service to families to be able to record such programs and show them at appropriate times. I have always felt that with the advent of all of this new technology that allows people to tape the 'Neighborhood' off-the-air, and I'm speaking for the 'Neighborhood' because that's what I produce, that they then become much more active in the programming of their family's television life. Very frankly, I am opposed to people being programmed by others. My whole approach in broadcasting has always been 'You are an important person just the way you are. You can make healthy decisions.' Maybe I'm going on too long, but I just feel that anything that allows a person to be more active in the control of his or her life, in a healthy way, is important." *Id.*, at 2920-2921. See also Defendants' Exh. PI, p. 85.

[***47]

[*446] If there are millions of owners of VTR's who make copies of televised sports events, religious broadcasts, and educational programs such as Mister Rogers' Neighborhood, and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized [**791] reproductions of respondents' works. The respondents do not represent a class composed of all copyright holders. Yet a finding of contributory infringement would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting.

Of course, the fact that other copyright holders may welcome the practice of time-shifting does not mean that respondents should be deemed to have granted a license to copy their programs. Third-party conduct would be wholly irrelevant in an action for direct infringement of respondents' copyrights. [***48] But in an action for *contributory* infringement against the seller of copying equipment, the copyright holder may not prevail unless the relief that he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome. In this case, the record makes it perfectly clear that there are many important producers of national and local television programs who find nothing objectionable about the enlargement in the size of the television audience that results from the practice of time-shifting for private home use. n28 The seller of the equipment that expands those producers' audiences cannot be a contributory [*447] infringer if, as is true in this case, it has had no direct involvement with any infringing activity.

n28 It may be rare for large numbers of copyright owners to authorize duplication of their works without demanding a fee from the copier. In the context of public broadcasting, however, the user of the copyrighted work is not required to pay a fee for access to the underlying work. The traditional method by which copyright owners capitalize upon the television medium -- commercially sponsored free public broadcast over the public airwaves -- is predicated upon the assumption that compensation for the value of displaying the works will be received in the form of advertising revenues.

In the context of television programming, some producers evidently believe that permitting home viewers to make copies of their works off the air actually enhances the value of their copyrights. Irrespective of their reasons for

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authorizing the practice, they do so, and in significant enough numbers to create a substantial market for a noninfringing use of the Sony VTR's. No one could dispute the legitimacy of that market if the producers had authorized home taping of their programs in exchange for a license fee paid directly by the home user. The legitimacy of that market is not compromised simply because these producers have authorized home taping of their programs without demanding a fee from the home user. The copyright law does not require a copyright owner to charge a fee for the use of his works, and as this record clearly demonstrates, the owner of a copyright may well have economic or noneconomic reasons for permitting certain kinds of copying to occur without receiving direct compensation from the copier. It is not the role of the courts to tell copyright holders the best way for them to exploit their copyrights: even if respondents' competitors were ill-advised in authorizing home videotaping, that would not change the fact that they have created a substantial market for a paradigmatic noninfringing use of Sony's product.

[***49]

B. Unauthorized Time-Shifting

Even unauthorized uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute. *Twentieth Century Music Corp. v. Aiken*, 422 U.S., at 154-155. Moreover, the definition of exclusive rights in § 106 of the present Act is prefaced by the words "subject to sections 107 through 118." Those sections describe a variety of uses of copyrighted material that "are not infringements of copyright" "notwithstanding the provisions of section 106." The most pertinent in this case is § 107, the legislative endorsement of the doctrine of "fair use." n29

n29 The Copyright Act of 1909, 35 Stat. 1075, did not have a "fair use" provision. Although that Act's compendium of exclusive rights "to print, reprint, publish, copy, and vend the copyrighted work" was broad enough to encompass virtually all potential interactions with a copyrighted work, the statute was never so construed. The courts simply refused to read the statute literally in every situation. When Congress amended the statute in 1976, it

indicated that it "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H. R. Rep. No. 94-1476, p. 66 (1976).

[***50]

[*448] [**792]

That section identifies various factors n30 that enable a court to apply an "equitable rule of reason" analysis to particular claims of infringement. n31 Although not conclusive, the first [*449] factor requires that "the commercial or nonprofit character of an activity" be weighed in any fair use decision. n32 If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity. Moreover, when one considers the nature of a televised copyrighted audiovisual work, see *17 U. S. C. § 107(2)* (1982 ed.), and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact [*450] that the entire work is reproduced, see § 107(3), does not have its ordinary effect of militating against a finding of [***51] fair use. n33

n30 Section 107 provides:

"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 other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"(2) the nature of the copyrighted work;

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

"(4) the effect of the use upon the potential market for or value of the copyrighted work." *17 U. S. C. § 107* (1982 ed.).

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n31 The House Report expressly stated that the fair use doctrine is an "equitable rule of reason" in its explanation of the fair use section:

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

....

"General intention behind the provision

"The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." H. R. Rep. No. 94-1476, *supra*, at 65-66.

The Senate Committee similarly eschewed a rigid, bright-line approach to fair use. The Senate Report endorsed the view "that off-the-air recording for convenience" could be considered "fair use" under some circumstances, although it then made it clear that it did not intend to suggest that off-the-air recording for convenience should be deemed fair use under any circumstances imaginable. S. Rep. No. 94-473, pp. 65-66 (1975). The latter qualifying statement is quoted by the dissent, *post*, at 481, and if read in isolation, would indicate that the Committee intended to condemn all off-the-air recording for convenience. Read in context, however, it is quite clear that that was the farthest thing from the Committee's intention. [***52]

n32 "The Committee has amended the first of the criteria to be considered -- 'the purpose and character of the use' -- to state explicitly that this factor includes a consideration of 'whether such use is of a commercial nature or is for non-profit educational purposes.' This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition

that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions." H. R. Rep. No. 94-1476, *supra*, at 66.

n33 It has been suggested that "consumptive uses of copyrights by home VTR users are commercial even if the consumer does not sell the homemade tape because the consumer will not buy tapes separately sold by the copyright holder." Home Recording of Copyrighted Works: Hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess., pt. 2, p. 1250 (1982) (memorandum of Prof. Laurence H. Tribe). Furthermore, "[the] error in excusing such theft as noncommercial," we are told, "can be seen by simple analogy: jewel theft is not converted into a noncommercial veniality if stolen jewels are simply worn rather than sold." *Ibid*. The premise and the analogy are indeed simple, but they add nothing to the argument. The use to which stolen jewelry is put is quite irrelevant in determining whether depriving its true owner of his present possessory interest in it is venial; because of the nature of the item and the true owner's interests in physical possession of it, the law finds the taking objectionable even if the thief does not use the item at all. Theft of a particular item of personal property of course may have commercial significance, for the thief deprives the owner of his right to sell that particular item to any individual. Time-shifting does not even remotely entail comparable consequences to the copyright owner. Moreover, the time-shifter no more steals the program by watching it once than does the live viewer, and the live viewer is no more likely to buy prerecorded videotapes than is the time-shifter. Indeed, no live viewer would buy a prerecorded videotape if he did not have access to a VTR.

[***53]

[**793] This is not, however, the end of the inquiry because Congress has also directed us to consider "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no

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demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would [*451] merely inhibit access to ideas without any countervailing benefit. n34

n34 Cf. A. Latman, Fair Use of Copyrighted Works (1958), reprinted in Study No. 14 for the Senate Committee on the Judiciary, Copyright Law Revision, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights, 86th Cong., 2d Sess., 30 (1960):

"In certain situations, the copyright owner suffers no substantial harm from the use of his work. ... †Here again, is the partial marriage between the doctrine of fair use and the legal maxim *de minimus non curat lex*."

[***54]

Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

In this case, respondents failed to carry their burden with regard to home time-shifting. [***55] The District Court described respondents' evidence as follows:

"Plaintiffs' experts admitted at several points in the trial that the time-shifting without librarying would result in 'not a great deal of harm.' Plaintiffs' greatest concern about time-shifting is with 'a point of important philosophy that transcends even commercial judgment.' They fear that with any Betamax usage, 'invisible boundaries' are passed: 'the copyright owner has lost control over his program.'" 480 F.Supp., at 467.

[*452] Later in its opinion, the District Court observed:

"Most of plaintiffs' predictions of harm hinge on speculation about audience viewing patterns and ratings, a measurement system which Sidney Sheinberg, MCA's president, calls a 'black art' because of the significant level of imprecision [**794] involved in the calculations." *Id.*, at 469. n35

n35 See also 480 F.Supp., at 451:

"It should be noted, however, that plaintiffs' argument is more complicated and speculative than was the plaintiff's in *Williams & Wilkins*... †Here, plaintiffs ask the court to find harm based on many more assumptions. ... †As is discussed more fully in Part IV *infra*, some of these assumptions are based on neither fact nor experience, and plaintiffs admit that they are to some extent inconsistent and illogical."

[***56]

There was no need for the District Court to say much about past harm. "Plaintiffs have admitted that no actual harm to their copyrights has occurred to date." *Id.*, at 451.

On the question of potential future harm from time-shifting, the District Court offered a more detailed analysis of the evidence. It rejected respondents' "fear that persons 'watching' the original telecast of a program will not be measured in the live audience and the ratings and revenues will decrease," by observing that current measurement technology allows the Betamax audience to be reflected. *Id.*, at 466. n36 It rejected respondents' prediction "that live television [*453] or movie audiences will decrease as more people watch Betamax tapes as an alternative," with the observation that "[there] is no factual basis for [the underlying] assumption." *Ibid.* n37 It rejected respondents' "fear that time-shifting will reduce audiences for telecast reruns," and concluded instead that "given current market practices, this should aid plaintiffs rather than harm them." *Ibid.* n38 And it declared that respondents' suggestion that "theater or film rental [***57] exhibition of a program will suffer because of time-shift recording of that program" "lacks merit." *Id.*, at 467. n39

n36 "There was testimony at trial, however, that Nielsen Ratings has already developed the ability to measure when a Betamax in a sample home is recording the program. Thus, the Betamax owner will be measured as a part of the

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live audience. The later diary can augment that measurement with information about subsequent viewing." *Id.*, at 466.

In a separate section, the District Court rejected plaintiffs' suggestion that the commercial attractiveness of television broadcasts would be diminished because Betamax owners would use the pause button or fast-forward control to avoid viewing advertisements:

"It must be remembered, however, that to omit commercials, Betamax owners must view the program, including the commercials, while recording. To avoid commercials during playback, the viewer must fast-forward and, for the most part, guess as to when the commercial has passed. For most recordings, either practice may be too tedious. As defendants' survey showed, 92% of the programs were recorded with commercials and only 25% of the owners fast-forward through them. Advertisers will have to make the same kinds of judgments they do now about whether persons viewing televised programs actually watch the advertisements which interrupt them." *Id.*, at 468. [***58]

n37 "Here plaintiffs assume that people will view copies when they would otherwise be watching television or going to the movie theater. There is no factual basis for this assumption. It seems equally likely that Betamax owners will play their tapes when there is nothing on television they wish to see and no movie they want to attend. Defendants' survey does not show any negative effect of Betamax ownership on television viewing or theater attendance." *Id.*, at 466.

n38 "The underlying assumptions here are particularly difficult to accept. Plaintiffs explain that the Betamax increases access to the original televised material and that the more people there are in this original audience, the fewer people the rerun will attract. Yet current marketing practices, including the success of syndication, show just the opposite. Today, the larger the audience for the original telecast, the higher the price plaintiffs can demand from broadcasters from rerun rights. There is no survey within the knowledge of this court to show that the rerun audience is comprised of persons who have not seen the program. In any event, if ratings can reflect Betamax recording, original audiences may increase and, given market practices, this

should aid plaintiffs rather than harm them." *Ibid.* [***59]

n39 "This suggestion lacks merit. By definition, time-shift recording entails viewing and erasing, so the program will no longer be on tape when the later theater run begins. Of course, plaintiffs may fear that the Betamax owners will keep the tapes long enough to satisfy all their interest in the program and will, therefore, not patronize later theater exhibitions. To the extent that this practice involves librarying, it is addressed in section V. C., *infra*. It should also be noted that there is no evidence to suggest that the public interest in later theatrical exhibitions of motion pictures will be reduced any more by Betamax recording than it already is by the television broadcast of the film." *Id.*, at 467.

[*454] [**795] After completing that review, the District Court restated its overall conclusion several times, in several different ways. "Harm from time-shifting is speculative and, at best, minimal." *Ibid.* "The audience benefits from the time-shifting capability have already been discussed. It is not implausible that benefits could also accrue [***60] to plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts." *Ibid.* "No likelihood of harm was shown at trial, and plaintiffs admitted that there had been no actual harm to date." *Id.*, at 468-469. "Testimony at trial suggested that Betamax may require adjustments in marketing strategy, but it did not establish even a likelihood of harm." *Id.*, at 469. "Television production by plaintiffs today is more profitable than it has ever been, and, in five weeks of trial, there was no concrete evidence to suggest that the Betamax will change the studios' financial picture." *Ibid.*

The District Court's conclusions are buttressed by the fact that to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits. In *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 508, n. 12 (1983), we acknowledged the public interest in making television broadcasting more available. Concededly, that interest is not unlimited. But it supports an interpretation of the concept of "fair use" that requires [***61] the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law.

When these factors are all weighed in the "equitable rule of reason" balance, we must conclude that this record amply [*455] supports the District Court's conclusion that home time-shifting is fair use. In light of the findings

of the District Court regarding the state of the empirical data, it is clear that the Court of Appeals erred in holding that the statute as presently written bars such conduct.
n40

n40 The Court of Appeals chose not to engage in any "equitable rule of reason" analysis in this case. Instead, it assumed that the category of "fair use" is rigidly circumscribed by a requirement that every such use must be "productive." It therefore concluded that copying a television program merely to enable the viewer to receive information or entertainment that he would otherwise miss because of a personal scheduling conflict could never be fair use. That understanding of "fair use" was erroneous.

Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests. The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative. Although copying to promote a scholarly endeavor certainly has a stronger claim to fair use than copying to avoid interrupting a poker game, the question is not simply two-dimensional. For one thing, it is not true that all copyrights are fungible. Some copyrights govern material with broad potential secondary markets. Such material may well have a broader claim to protection because of the greater potential for commercial harm. Copying a news broadcast may have a stronger claim to fair use than copying a motion picture. And, of course, not all uses are fungible. Copying for commercial gain has a much weaker claim to fair use than copying for personal enrichment. But the notion of social "productivity" cannot be a complete answer to this analysis. A teacher who copies to prepare lecture notes is clearly productive. But so is a teacher who copies for the sake of broadening his personal understanding of his specialty. Or a legislator who copies for the sake of broadening her understanding of what her constituents are watching; or a constituent who copies a news program to help make a decision on how to vote.

Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying. In a hospital setting, using a VTR to enable a patient to see programs he would otherwise miss has no productive purpose other than contributing to the

psychological well-being of the patient. Virtually any time-shifting that increases viewer access to television programming may result in a comparable benefit. The statutory language does not identify any dichotomy between productive and nonproductive time-shifting, but does require consideration of the economic consequences of copying.

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[*456]

In summary, the record and findings of the District Court lead us to two conclusions. First, Sony demonstrated a significant likelihood that substantial numbers of [**796] copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial noninfringing uses. Sony's sale of such equipment to the general public does not constitute contributory infringement of respondents' copyrights.

V

"The direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress." *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972).

One may search the Copyright Act in [***63] vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.

It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed.

It is so ordered.

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[*457] JUSTICE BLACKMUN, with whom JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

* * *

IV

Fair Use

The doctrine of fair use has been called, with some justification, "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (CA2 1939); see *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (CA5 1980); *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (CA2 1977), cert. denied, 434 U.S. 1013 (1978). Although courts have constructed lists of factors to be considered in determining whether a particular use is fair, no fixed criteria [*806] have emerged by which that [*476] determination can be made. This Court thus far has provided no guidance; although fair use issues have come here twice, on each occasion the Court was equally divided and no opinion [***95] was forthcoming. *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 487 F.2d 1345 (1973), aff'd, 420 U.S. 376 (1975); *Benny v. Loew's Inc.*, 239 F.2d 532 (CA9 1956), aff'd *sub nom. Columbia Broadcasting System, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958).

Nor did Congress provide definitive rules when it codified the fair use doctrine in the 1976 Act; it simply incorporated a list of factors "to be considered": the "purpose and character of the use," the "nature of the copyrighted work," the "amount and substantiality of the portion used," and, perhaps the most important, the "effect of the use upon the *potential* market for or value of the copyrighted work" (emphasis supplied). § 107. No particular weight, however, was assigned to any of these, and the list was not intended to be exclusive. The House and Senate Reports explain that § 107 does no more than give "statutory recognition" to the fair use doctrine; it was intended "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." 1976 House Report 66. See 1975 Senate Report 62; S. Rep. No. 93-983, p. 116 (1974); H. R. Rep. No. 83, 90th Cong., 1st Sess., 32 (1967); H. R. Rep. No. 2237, 89th Cong., 2d Sess., 61 (1966).

[*477] A

Despite this absence of clear standards, the fair use doctrine plays a crucial role in the law of copyright. The purpose of copyright protection, in the words of the Constitution, is to "promote [***97] the Progress of

Science and useful Arts." Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create, and that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954). The monopoly created by copyright thus rewards the individual author in order to benefit the public. *Twentieth Century Music Corp. v. Aiken*, 422 U.S., at 156; *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-128 (1932); see H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

There are situations, nevertheless, in which strict enforcement of this monopoly would inhibit the very "Progress of Science and useful Arts" that copyright is intended to promote. An obvious example is the researcher or scholar whose own work depends on the ability to refer to and to quote the work of prior scholars. Obviously, no author could create a new work if he were first required to repeat the research of every author who had [***98] gone before him. n28 [*807] The scholar, like the ordinary user, of course could be left to bargain with each copyright owner for permission to quote from or refer to prior works. But there is a crucial difference between the scholar and the ordinary user. When the ordinary user decides that the owner's price is too high, and forgoes use of the work, only the individual is the loser. When the scholar forgoes the use of a prior work, not only does his own [*478] work suffer, but the public is deprived of his contribution to knowledge. The scholar's work, in other words, produces external benefits from which everyone profits. In such a case, the fair use doctrine acts as a form of subsidy -- albeit at the first author's expense -- to permit the second author to make limited use of the first author's work for the public good. See Latman Fair Use Study 31; Gordon, Fair Use as Market Failure: A Structural Analysis of the *Betamax* Case and its Predecessors, 82 *Colum. L. Rev.* 1600, 1630 (1982).

n28 "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.'" Chafee, Reflections on the Law of Copyright: I, 45 *Colum. L. Rev.* 503, 511 (1945).

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A similar subsidy may be appropriate in a range of areas other than pure scholarship. The situations in which fair use is most commonly recognized are listed in § 107 itself; fair use may be found when a work is used

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"for purposes such as criticism, comment, news reporting, teaching, ... scholarship, or research." The House and Senate Reports expand on this list somewhat, and other examples may be found in the case law. Each of these uses, however, reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work. The fair use doctrine, in other words, permits works [*479] to be used for "socially laudable purposes." See Copyright Office, Briefing Papers on Current Issues, reprinted in 1975 House Hearings 2051, 2055. I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use. [***102]

The making of a videotape recording for home viewing is an ordinary rather than a productive use of the Studios' copyrighted works. The District Court found that "Betamax owners use the copy for the same purpose as the original. They add nothing of their own." 480 *F.Supp.*, at 453. Although applying the fair use doctrine to home VTR recording, as Sony argues, may increase public access to material broadcast free over the public airwaves, I think Sony's argument misconceives the nature of copyright. Copyright gives the author a right to limit or even to cut off access to his work. *Fox Film Corp. v. Doyal*, 286 U.S., at 127. A VTR recording creates no public benefit sufficient to justify limiting this right. Nor is this right extinguished by the copyright owner's choice to make the work available over the

airwaves. Section 106 of the 1976 Act grants the copyright owner the exclusive right to control the performance and the reproduction of his work, and the fact that he has licensed a single television performance is really irrelevant to the existence of his right to control its reproduction. Although a television broadcast may be [***103] free to the viewer, this fact is equally irrelevant; a book borrowed from the public library may not be copied any more freely than a book that is purchased.

It may be tempting, as, in my view, the Court today is tempted, to stretch the doctrine of fair use so as to permit unfettered use of this new technology in order to increase access [*481] to television programming. But such an extension risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create. n34 [**809] Even in the context of highly productive educational uses, Congress has avoided this temptation; in passing the 1976 Act, Congress made it clear that off-the-air videotaping was to be permitted only in very limited situations. See 1976 House Report 71; 1975 Senate Report 64. And, the Senate Report adds, "[the] committee does not intend to suggest ... that off-the-air recording for convenience would under any circumstances, be considered 'fair use.'" *Id.*, at 66. I cannot disregard these admonitions.