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The Copyright Act of 1976: Home Use of Audiovisual Recording and Presentation Systems

I. INTRODUCTION

One of the important changes in technology to occur between the passage of the Copyright Act of 1909¹ and the current General Revision Act of 1976² has been the advent of various mechanical and electronic devices which have enabled individuals to copy works on a large scale for their own private use. The 1909 Act was not adequately equipped to deal with these technological changes, resulting in a great many problems in the copyright laws of the United States. One problem area is the copying of an entire work for private, noncommercial use. At the time of passage of the 1909 Act, this copying process was so tedious that the drafters did not need to deal with it with any particularity. During the drafting of the 1976 General Revision, many of the controversies concerned this ability of private parties to quickly, easily and inexpensively copy an entire copyrighted work, or substantial portions thereof. At the time of passage of the General Revision, probably the most debated problems of private copying, as witnessed by lengthy statutory provisions and corresponding legislative history,³ were those issues involved in the various photocopying controversies. But several other problem areas of importance involving private copying also exist. This comment will focus on questions relating to one of these other problem areas, the relation of copyright law to audiovisual recording and presentation systems.

These video tape recording (VTR)⁴ systems are currently being

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1. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 [hereinafter cited as the 1909 Act].
 2. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810) [hereinafter cited as the General Revision].
 3. See 17 U.S.C. § 108 (1976); H. R. REP. NO. 1476, 94th Cong., 2d Sess. 65-79, *reprinted in* [1976] U. S. CODE CONG. & AD. NEWS 5659, 5678-93; S. REP. NO. 473, 94th Cong., 1st Sess. 61-71 (1975).
 4. The term VTR will be used in referring to those systems described in note 5 and accompanying text *infra*. It was chosen primarily for its popularity in the trade magazines. The systems sell under several brand names, and other articles refer to words and phrases such as TV cartridge, audiovisual record-

mass produced and marketed for the private use of American consumers. This has resulted in questions concerning the rights of individuals to copy audiovisual works for their private use. Although much less discussed than photocopying when Congress drafted the General Revision, the questions associated with VTR systems nevertheless have ramifications potentially as great.

VTR systems have certain technological differences which make many of the brand name components incompatible with each other,⁵ but despite this all contain certain common and essential characteristics which are of importance in the copyright area. These characteristics include a component which, when connected in some manner with an ordinary television set, allows that television set to produce images on its screen from "software" (a tape, disk, cassette or cartridge) inserted in the unit. In addition, the components of major interest in the copyright area are capable of recording programs as they are broadcast over-the-air by a television station,⁶ and then preserving these recordings on the machine's software. This software can then be replayed at the owner's convenience, or re-recorded with a later program if desired.

VTR systems are being marketed with equal vigor essentially for three distinct consumer uses: (1) The companies are manufacturing and marketing pre-recorded programs, or "software" (both the program and the tape embodying it) to accompany the VTR systems in much the same way records and tapes currently accompany the use of audio stereo systems.⁷ (2) The machines are being marketed to stress the fact that the owner is able to record shows broadcast by television stations for later viewing at the owner's convenience. Current products on the market enable the owner to

ing and presentation systems, video cassette machines, videos, VCR, and other related names. VTR is chosen for its acceptance and brevity, and is not meant to diminish the important audio function of the machines.

5. Of the more than twenty brand name components on the market at the end of 1978, there currently exist at least four incompatible systems whose retail value on the market is below \$1,500. Incompatibility means that the "software" for one manufacturer's unit (the tape, cartridge, cassette, or disk) cannot be used in another manufacturer's unit. See Long, *VCRs: A Way-of-Life Revolution in the Making*, HIGH FIDELITY, Mar. 1978, at 61-65.
6. The fact that the "videodisk" machine cannot record is the major drawback to this particular machine, which was supposed to pioneer the field. See Comment, "Disk-Television": Some Recurring Copyright Problems in the Reproduction and Performance of Motion Pictures, 34 U. CHI. L. REV. 686 (1967); *Video Disks, The New Television*, FORBES, June 1, 1976, at 24. The first videodisk machines have just been made available to the general public, and it will sell for \$695, with pre-recorded disks ranging in cost from \$6-\$20. See BILLBOARD, Dec. 23, 1978, at 5.
7. The concept of stereo in video systems is considered a necessary element for the future. Long, *supra* note 4, at 62.

record a program on one channel while watching another, or, by the use of a timer, to record a show while he or she is not at home. (3) The makers of some of the systems are marketing compatible compact home-movie cameras so the systems will appeal to home-movie buffs.⁸ These first two functions result in potential conflicts with the copyright laws, and will be the major concern of this comment.

That VTR systems are going to be a way of life for many Americans is a fact which few observers in the area dispute.⁹ Just how far VTR systems will go in changing the motion picture, recording and television industries, and in turn the American lifestyle itself, is only speculation at this point, but the possibilities appear almost limitless.¹⁰

8. For the marketing strategies of VTR manufacturers, see various articles in *BILLBOARD*, Mar. 11, 1978 at 1, 52.

9. This was the general consensus of the 1978 convention of the International Tape Association. For several articles on different aspects of the industry discussed at the convention, see *BILLBOARD*, Mar. 11, 1978, Mar. 18, 1978, and Mar. 24, 1978. The articles also stated that the manufacturers expect to have sold 500,000 units by the end of 1978. Later figures showed that 375,432 units were sold during the period from January to September, 1978, compared to 115,411 units during the same period in 1977, an increase of over 225%. *BILLBOARD*, Dec. 9, 1978, at 58. Video software sales increased 70% during the same period. *Id.*

10. See, e.g., *Video Disks, the New Television*, *FORBES*, June 1, 1976, at 24; Fong-Torres, *Freedom of Video: The Battle Begins at Home*, *ROLLING STONE*, Sept. 8, 1977, at 61. Viewers may well purchase audiovisual software to experience their favorite pop idol or symphonic orchestra with two senses rather than only one. This appears very likely to become a reality if the software can be brought down to the projected price of ten dollars for a traditional length "album." Likewise, motion pictures, which are currently available for commercial sale on videotape only after their theater and television marketability have dropped, may some day be marketed in record and tape stores, or video "lending libraries" on a lease basis, greatly damaging or at least changing both the movie theater industry and the profitability of movies broadcast on television. Such a comprehensive video library has been set up in the United Kingdom, offering full length feature films, and features on subjects such as music, angling and chess. The software is available for sale or rental, the two day rental fee being \$11. *BILLBOARD*, Dec. 2, 1978, at 62. It is still too early to determine if the use of VTR systems will become so widespread that new release movies, like best sellers in the book industry and the top forty in the record industry, will be totally dependent upon retail sale or lease for their profits. Such an eventuality would appear more likely if it were not for the fact that the movie theater and television industries have been reluctant to accept this possibility. See generally Harmetz, *The Magic of Hollywood at Home—\$50 per Video Cassette*, *The Washington Star*, Mar. 2, 1978, at D-3, col. 1.

Furthermore, the television industry faces the immediate problem of loss in value of programs it wishes to reshow, which of course is current industry practice. Those who wish to watch a program again, or who missed the program, will have recorded it and will watch it again at their leisure, rather than waiting for the network to reschedule it at some unknown future time. This in turn will affect the advertisers of such programs, who will be unwilling to

Many of the copyright problems presented by this relatively new industry are as speculative as the economic problems.¹¹ There has been very little case law in this area, and the General Revision has been accused of creating as many questions as it answers,¹² but it does solve many of the problems of the 1909 Act simply by recognizing the existence and copyrightability of audiovisual works. This is not to imply that these works were not protected prior to the General Revision, but the 1909 Act was often unclear or silent in this area. The major portion of this comment will concern itself with the copyright implications of private home use of the VTR. This discussion of the effect of the copyright law on VTR systems is not intended to detail their use by institutions in an educational setting, their use by or possible use in libraries, or use by taverns, hotels, clubs and other "semi-public" users. The provisions of the General Revision dealing with public, cable, or pay television systems are not within the scope of this discussion except as they directly relate to the VTR system as defined.¹³

II. THE NATURE OF COPYRIGHT PROTECTION AFFORDED AUDIOVISUAL WORKS USED IN VTR SYSTEMS

Before any decision can be made regarding possible copyright infringements by the use of VTR systems, the initial issue to be determined is whether video works are protected under the American copyright laws. In addition, if they are copyrightable, the extent of the rights a copyright owner has must be examined. While a discussion of the copyrightability of VTR software may seem academic, unfortunately it is not. There was a great deal written about whether copyright protection extended to such works under the 1909 Act. It will be helpful to briefly recount that controversy

maintain their current television advertising budgets if they suspect the viewers are watching a recorded program or movie during prime time viewing. Additionally, these systems are capable of recording the programs and leaving out the commercials, or they contain fast forward features which run through the advertisements, further reducing the sponsors' willingness to pay the current large sums spent on television advertising. It has also been noted that most television shows today count on their rerun capabilities to make a profit. Fong-Torres, *supra*, at 60.

11. See note 10 *supra*.

12. BILLBOARD, Mar. 24, 1978, at 134.

13. It has been noted that VTR systems have a competitive advantage over Pay-TV and cablecasting (CATV) systems in that by not involving communication by wire or radio they are not subject to the jurisdiction of the Federal Communications Commission (FCC). For a general discussion of how VTR systems do relate to these other television forms, see Meyer, *TV Cassettes—A New Frontier for Pioneers and Pirates*, 19 BULL. COPYRIGHT SOC'Y 16, 44-47 (1971).

and then examine whether the 1976 General Revision resolved the issue.

A. Protection Under the 1909 Act

The odd quirk in copyright law development in the United States which left the copyright protection of VTR software questionable under the 1909 Act has been dealt with at length elsewhere¹⁴ and need not be presented in great detail here. The problem originated with a Supreme Court case decided prior to the 1909 Act, *White-Smith Music Publishing Co. v. Apollo Co.*¹⁵ There, the Court held that perforated piano rolls manufactured by the defendant were not "copies" and consequently did not infringe the composer's copyright in the underlying work. This result was reached because the rolls were "parts of a machine" which conveyed "no meaning . . . to the eye of even an expert musician, and they [were] wholly incapable of use save in and as a part of a machine especially adapted . . ."¹⁶ This reasoning served as the basis for denying a copyright in material embodied in phonograph records,¹⁷ which in turn necessitated the Sound Recording Amendment of 1971.¹⁸ The obvious reasoning of the *White-Smith* Court was that to be a "copy" within the meaning of the statute,¹⁹ it had to be visibly intelligible. Given only these facts it is easy to see how a videotape could be considered not a "copy" and therefore not copyrightable.²⁰ Videotape does not make the copyrighted work intelligible to the naked eye, "save in and as a part of the machine especially adapted." Of course motion picture film is generally recognized as visible to the naked eye and therefore does

14. See, e.g., M. NIMMER, NIMMER ON COPYRIGHT § 25.3, at 114 to 118.1 (1976); Holland, *The Audiovisual Package: Handle With Care*, 22 BULL. COPYRIGHT SOC'Y 104, 105-08 (1974); Nimmer, *Proprietary Rights, Residual Rights, and Copyright in Cartridge TV in the United States and Canada*, 3 PERF. ARTS. REV. 3-6 (1972); Painter, *Proprietary Rights in Video Tape*, 7 BEV. HILLS B.J. 24 (May-June 1973); Comment, *supra* note 6, at 687-93.

15. 209 U.S. 1 (1908).

16. *Id.* at 13.

17. Of course the underlying music was still copyrightable; it was only the copyright in the phonorecord itself that was denied. This result had been assumed by a number of courts since the adoption of the 1909 Act. See M. NIMMER, NIMMER ON COPYRIGHT § 35.21 n.57 (1976) (collecting cases). And in *Capitol Records Inc. v. Mercury Records*, 221 F.2d 657 (2d Cir. 1955), the court so suggested, relying on committee reports and *White-Smith*.

18. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972, until Jan. 1, 1975).

19. The statute in effect at the time of *White-Smith* was the Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106.

20. It must be remembered, however, that *White-Smith* dealt with what was a copy for infringement purposes, not with a copy for purposes of copyrightability, so the result did not necessarily follow that videotape was not copyrightable.

not raise this problem.²¹

There were, however, several other factors which might have made the *White-Smith* doctrine inapplicable to the videotape question. First, some observers have pointed out that the legislative intent of the 1909 Act was not to codify the *White-Smith* doctrine,²² and second, there are practical differences between piano rolls and videotape.²³ Moreover, the motion picture amendment to the 1909 Act, which went into effect in 1912,²⁴ coupled with the above reasoning, convinced the Copyright Office to register magnetic videotape as a motion picture under sections 5(I) and 5(m) of the 1909 Act, beginning in 1961.²⁵

Legislative history of the Sound Recording Amendment of 1971 also shows that Congress, at that time, felt videotape was protected under the 1909 Act. The Sound Recording Amendment excluded "sounds accompanying a motion picture" under its provisions protecting phonograph records. The Committee Reports illustrated the reason for this distinction with the following example:

[I]f there is an unauthorized reproduction of the sound portion of a copyrighted television program fixed on videotape, a suit for copyright infringement could be sustained under section 1(a) of title 17 rather than under the provisions of this bill, and this would be true even if the television producer had licensed the release of a commercial phonograph record incorporating the same sounds.²⁶

Therefore, although still not unanimous, most observers²⁷ concluded that videotape, like that used in VTR systems, had some degree of protection under the 1909 Act.

B. Protection Under the General Revision Act of 1976

It was this cloud of confusion²⁸ that faced the drafters of the General Revision. The new law goes a long way toward clarifying many of these copyright problems as they affect the VTR systems.

21. See *Rohauer v. Friedman*, 306 F.2d 933 (9th Cir. 1962); *Independent Film Distrib., Ltd. v. Chesapeake Indus., Inc.*, 250 F.2d 951, 953-54 (2d Cir. 1957); *Universal Pictures Co. v. Harold Lloyd Corp.* 162 F.2d 354, 359 (9th Cir. 1947); *Cardinal Films, Inc. v. Republic Pictures Corp.*, 148 F. Supp. 156, 157 (S.D.N.Y. 1957).

22. See, e.g., *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955) (L. Hand, J., dissenting).

23. See M. NIMMER, *supra* note 17, § 25.3, at 116-17.

24. Act of Aug. 24, 1912, ch. 356, 37 Stat. 488.

25. See Colby, *An Historic "First"—Copyright Office Accepts Magnetic Video Tape for Registration*, 8 BULL. COPYRIGHT SOC'Y 205 (1961).

26. H. R. REP. NO. 487, 92d Cong., 1st Sess. 6, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 1571; S. REP. NO. 72, 92d Cong., 1st Sess. 5 (1971).

27. See note 14 *supra*.

28. See § II-A of text *supra*.

The first improvement concerns the subject matter of copyright protection under the General Revision. Section 102 is much clearer and more flexible than the 1909 Act:

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 there can be perceived, reproduced, or otherwise communicated either directly or *with the aid of a machine or device*. Works of authorship include the following categories:

. . . .

- 6) motion pictures *and other audiovisual works*; and
- 7) sound recordings.²⁹

The General Revision defines audiovisual works in terms which apparently include VTR systems by providing that they 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.³⁰

1. *Ownership of Copyright in a Video Program*

Before examining the type and degree of copyright protection the General Revision affords the owner of a copyright in a video program, it must be determined who owns the copyright or copyrights in the program. Section 201(d)(2) contains explicit statutory recognition of the divisibility of copyright, that is that each of the enumerated exclusive rights, or any subdivision of them, may be owned separately and transferred³¹ separately. A video work could be a "joint work," as defined in the act,³² which has the legal effect of making the various authors involved co-owners of a copyright, and as a result treating them similar to tenants in common.³³ More likely, however, the professional work will be done by people working for hire and the employer will be the sole copyright owner.

The video program itself will likely be a "derivative work," as defined in the Act,³⁴ which means there are two separate copyrights to keep in mind: (1) the copyright in the underlying work, and (2) the copyright in the actual video program, which is distinct from that in the underlying work. The copyright in the derivative

29. 17 U.S.C. § 102 (1976) (emphasis added).

30. *Id.* § 101. "A 'device', 'machine', or 'process' is one now known or later developed." *Id.*

31. "Transfer of copyright ownership" is defined as any "conveyance, alienation, or hypothecation," including assignments, mortgages, and exclusive licenses. *Id.*

32. *Id.*

33. *See id.* § 201(a). *See also* H. R. REP. NO. 1476, 94th Cong., 2d Sess. 120-21, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5736-37.

34. 17 U.S.C. § 101 (1976).

work does not extend to those copyrighted parts of the underlying work, but only to the adaption of that work to the video program, and the new creations accompanying that adaption.³⁵

2. *Type and Degree of Copyright Protection*

It is important to note that the definitions in the General Revision of both "sound recordings" and "phonorecords" exclude "the sounds accompanying a motion picture or other audiovisual work."³⁶ This is important to remember as the type and degree of copyright protection afforded audiovisual works are examined. Such an examination must begin with section 106 of the General Revision, which, in conjunction with the definitions of section 101, specifically grants any and all rights of the copyright owner:

Subject to sections 107 through 118, the owner of copyright under this section has the *exclusive rights* to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies of 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.³⁷

The first and the fourth exclusive rights provided in section 106 are of primary importance in the VTR situation. It is important to note that each of these enumerated rights may be subdivided, and each right or subdivision of that right may be owned and enforced separately.³⁸ Therefore, the right to reproduce the copyrighted work will be examined separately from the right to perform it publicly. Section 501 of the General Revision provides that "anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . is an infringer of the copyright."³⁹ Analysis consequently turns to the possible infringements of the exclusive rights of the copyright owner in VTR software, both pre-

35. For a judicial discussion of the operation of copyright ownership in derivative works of video programs, see *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 19-22 (2d Cir. 1976).

36. 17 U.S.C. § 101 (1976).

37. *Id.* § 106 (emphasis added).

38. H. R. REP. NO. 1476, 94th Cong., 2d Sess. 61, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5674. See notes 31-35 & accompanying text *supra*.

39. 17 U.S.C. § 501(a) (1976).

recorded software and software individually recorded from a network broadcast.⁴⁰

III. INFRINGEMENTS OF THE COPYRIGHT IN AUDIOVISUAL WORKS BY VTR USE UNDER THE GENERAL REVISION

A. Infringement of the Right to Reproduce the Copyrighted Work

As will be discussed later,⁴¹ there is little doubt that a home "performance" on a VTR system, whether recorded from a network broadcast or not, does not infringe the copyright owner's right to *perform the work publicly*. However, it is not clear whether an individual has the right to *reproduce* a copyrighted work from a program broadcast by a television station and received on his or her television set, or copy someone's lawfully obtained pre-recorded software, a capability which if not already present, will surely arise in the future.

It appears obvious that such copying is, by the plain terms of section 106(1), a violation of the copyright owner's exclusive right to reproduce his work. But this exclusive right is limited by, or subject to, the provisions of sections 107 through 118. Therefore, it is an infringement only if an exception does not exist in those latter sections. The most obvious doctrine which may apply here is that of "fair use."⁴²

There was no fair use provision in the 1909 Act. It was a judicially created doctrine, necessitated because there existed some uses of copyrighted works which, although potential infringements, were thought by judges to be fair. It was thus an equitable doctrine, and this concept of fair use was left intact by the General Revision. Section 107 is a codification of the common law. The House Report stated:

[T]here 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. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.⁴³

To determine if VTR recording of copyrighted works for home use is a fair use of the work, section 107 must be carefully studied. The section provides:

40. It should be repeated that "software" is used to mean both the tape and the copyrighted audiovisual work embodied in the tape. See text accompanying note 4 *supra*.

41. See notes 87-97 & accompanying text *infra* (discussion of what is meant by "public performance").

42. 17 U.S.C. § 107 (1976).

43. H. R. REP. NO. 1476, 94th Cong., 2d Sess. 65, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5680.

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies of 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 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 non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portions 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.⁴⁴

Despite the speculation of some observers,⁴⁵ it would appear that home recording use of VTR systems is probably not a fair use within the meaning of the statute. Aside from possible educational uses, the purposes listed in the first paragraph of section 107 (criticism, comment, news reporting, etc.) are not involved in recording for one's own convenience. Even though these purposes are not all inclusive, the four enumerated factors which section 107 provides for consideration also weigh against a finding of fair use. The first factor, the commercial nature of the work, is the only one which does not weigh against the VTR user. And since the home recorder's use may not be educational, this factor would likely not be considered to weigh heavily in the user's favor. The second factor, the nature of the work, does not support a fair use finding because the nature of programs broadcast by television networks is such that the profitability of the work depends upon its successful rerun capabilities, and the rerun capabilities of a video work are reduced by home copying. The third factor weighs heavily against the home recorder because an entire copyrighted work is usually taken. While this is not to suggest that an entire work can never be taken under the fair use doctrine, it is likely that all of the other factors would also have to favor fair use, which is certainly not the case here. The fourth factor has been considered the most important,⁴⁶ and in many ways can be viewed as a collection and restatement of the first three factors. That "the potential market for or

44. 17 U.S.C. § 107 (1976).

45. See, e.g., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW, PRINTED FOR THE HOUSE COMMITTEE ON THE JUDICIARY, 87TH CONG., 1ST SESS. 29-30 (House Comm. Print 1961) [hereinafter cited as REPORT OF THE REGISTER OF COPYRIGHTS]; Taylor, *Off-the-Air Video Taping for Educational Purposes—Fair Use or Infringement*, 12 A.F. JAG L. REV. 90, 94 (1970).

46. M. NIMMER, *supra* note 17, § 145, at 646; Holland, *supra* note 14, at 123; Taylor, *supra* note 7, at 97.

value of the copyrighted work"⁴⁷ will be greatly affected has already been discussed.⁴⁸ While the overall market for the work may not be altered greatly *in fact*, there can be no question that there is *potential* for a great loss in value of the copyrighted work. This resulting danger to the economic well being of the state of the art, it can be argued, is counter-productive to a major goal of copyright law, that of promoting the useful arts by securing authors financial incentives through exclusive rights. Still, it cannot be conclusively stated that such home recording will not be found to constitute fair use.⁴⁹ Privacy interests and the fact that fair use is an "equitable rule of reason"⁵⁰ might make the courts allow such use.

Assuming that home recording through VTR systems of television network transmissions is an infringement of the copyrighted work, there remain two other considerations: (1) there already exists widespread and growing copying by home video owners; and (2) enforcement of the copyright law against these owners who are recording in their own home for their private use is a virtual impossibility. Nor would it be in the best interest of protecting personal privacy to try and make an example of a few individual infringers by imposing statutory damages in hope of curbing the practice.⁵¹ Therefore, a determination that home recording is an infringement of the copyrighted work only defines the problem; it does not resolve it.

There are at least three fairly simplistic alternatives which might be suggested as solutions to the problem. The first would be to admit that private use is a violation of the law, but that the law is totally unenforceable and leave it at that. Such a "solution," though very probable, is highly undesirable. Policy argues against having statutes which are not enforced and which are frequently violated. The second solution is simply to amend the copyright law so that private use is not an infringement. While this would solve the problem of enforcement, it, like the first solution, may work an economic hardship on those who own the copyright in the work. The third solution does not involve the world of copyright, but rather the world of science. Television networks and others have stated that there is a method by which they can make their broadcasts nonrecordable by current commercial recorders by using a

47. 17 U.S.C. § 107(4) (1976).

48. See note 10 & accompanying text *supra*.

49. Some observers would find such copying to be allowed by the related idea of a "home use" exception. See notes 72-75 & accompanying text *infra*.

50. H. R. REP. NO. 1476, 94th Cong., 2d Sess. 65, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5679.

51. Nimmer, *Proprietary Rights, Residual Rights, and Copyright in Cartridge TV in the United States and Canada*, 3 PERF. ARTS REV. 12 (1972).

"blocking" device.⁵² While this may appear to be the answer to the problem, given technological advancements, it is likely a system would be developed that would be unaffected by the device. A detailed discussion of this potential technological conflict will not be attempted, since a more sound result would be to find a workable solution in the law.⁵³

One possible legal solution is to enforce the General Revision by holding the manufacturer of the VTR system responsible for the infringement committed by the consumers who purchase the product. This is one of the ideas behind a suit⁵⁴ by two movie makers, Walt Disney Productions and Universal City Studios, a subsidiary of MCA. They have joined together in a lawsuit against Sony Corporation, the makers of Betamax, currently the largest selling VTR System.⁵⁵ The suit alleges copyright infringement, unfair competition, interference with contractual and advantageous business relationships, and violations of the Lanham-Trademark Act of 1946.⁵⁶ Both sides have expressed a willingness to exhaust their judicial remedies in this matter,⁵⁷ and if there is a final judicial resolution of these questions it will come at a time when VTR systems are well entrenched in American life. In addition to arguing that there is no infringement at all, Sony appears to have a strong argument that it is not the infringer, and that it should not be responsible for the actions of its consumers.⁵⁸

52. Fong-Torres, *supra* note 10, at 61.

53. Another technological response which has been mentioned is a tape that erases itself the first time it is played. This would allow the time shift convenience, but not allow individuals to collect recordings into "libraries." Brill, *Will Betamax Be Busted?*, *ESQUIRE*, June 20, 1978, at 22.

54. Universal City Studios, Inc. v. Sony Corp., No. CV 76-3520-F (pending C.D. Cal.).

55. Brill, *supra* note 53, at 19.

56. A motion to dismiss the alleged violations of section 43(a) of the Lanham Trademark Act of 1946, 15 U.S.C. § 1125(a) (1970), was granted in Universal City Studios, Inc. v. Sony Corp., 429 F. Supp. 407 (C.D. Cal. 1977). The remainder of the case went to trial January 29, 1979, and there was no decision at the time this comment went to print. It might be noted that many observers of this litigation consider the MCA subsidiary, Universal City Studios, Inc., to be participating in the suit because MCA/Phillips is launching its "videodisk" systems, which show pre-recorded material on a disk, but are not capable of recording. See, e.g., Marcos, *MCA v. Sony*, *HIGH FIDELITY*, April 1977, at 4. See also note 6 *supra*.

57. Brill, *supra* note 53, at 22; Fong-Torres, *supra* note 10, at 61; *TIME*, April 11, 1977, at 64.

58. An analogy can be drawn to the photocopying industry. No longer is it seriously contended that Xerox, for example, should be held responsible for the infringing use of its machines by private parties over whom it can exert little, if any, control. But see Brill, *supra* note 53, at 19. And, under 17 U.S.C. § 108 (1976), a library is not responsible for a patron's infringing use of a copying machine on its premises, as long as adequate notice is given. An additional

Before contesting inducement to infringe, however, defendants have the opportunity to show that private recording is a fair use or is otherwise exempt. In addition to the statutory interpretations previously discussed, it is imperative that the case law also be examined, since fair use is a judicial creation, and the legislative history of the fair use provision states that the doctrine should be examined on a case-by-case basis.⁵⁹ A case which aids in this discussion is *Encyclopedia Britannica Educational Corp. v. Crooks*,⁶⁰ which differs from the Sony litigation mainly in that it arose in an educational setting and did not involve private use. The plaintiffs owned copyrighted films which the defendant, Board of Cooperative Educational Services of Erie County, New York (BOCES), had videotaped and distributed to schools for delayed classroom viewing. The copying was substantial—ten thousand videotapes were duplicated in the 1976-1977 school year alone. "Viewed solely in reference to the copyright law, BOCES' videotaping activities would seem to constitute blatant violation of the plaintiffs' exclusive rights to copy and perform their films,"⁶¹ the court noted. But it also said the requirements of fair use demand a balancing process.⁶² BOCES naturally relied upon *Williams & Wilkins Co. v. United States*⁶³ to justify its massive educational copying. In *Williams & Wilkins*, a government research facility was permitted to copy articles for researchers on a massive scale for scientific and educational use. However, it appears the federal district court in the BOCES case felt *Williams & Wilkins* was the outer bounds of fair use, and that BOCES' copying, because it was substantial and affected plaintiffs' potential market, exceeded the limits of *Williams & Wilkins*.⁶⁴ The court then granted plaintiffs' request for a preliminary injunction, but noted several questions of fair use remained at issue for trial on the merits.⁶⁵ While the issue in this case is easy compared to individual copying for private use, it does

argument against Sony, however, is that although it is warning purchasers of possible copyright infringement, it is allegedly inducing consumers to infringe copyrighted works in its advertising.

59. H. R. REPORT NO. 1476, 94th Cong., 2d Sess. 65, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5678-79.

60. 447 F. Supp. 243 (W.D.N.Y. 1978).

61. *Id.* at 249.

62. *Id.*

63. 487 F.2d 1345 (Ct. Cl. 1973) *aff'd by an equally divided Court*, 420 U.S. 376 (1975). In that case a publisher of medical journals sued a medical research facility of the federal government. Defendants copied articles on a massive scale for researchers, though normally they gave researchers only one copy of a single article of 50 pages or less. On the basis of fair use, considering the noncommercial use of science and education, the Court of Claims (4-3) concluded there was no infringement.

64. 447 F. Supp. at 251.

65. *Id.* at 252.

demonstrate that limits are being placed on the fair use doctrine and suggests that *Williams & Wilkins* is as far as courts will go in the educational use area.

The other case which may shed some light on whether videotaping network broadcasts is an infringement is *Walt Disney Productions v. Alaska Television Network, Inc.*⁶⁶ In that case, defendant took segments of plaintiff's television series, put them on videotape, and then broadcast them to its viewers in Juneau, Alaska, about a week later. The court first discounted defendant's reliance upon *Fortnightly Corp. v. United Artists Television, Inc.*,⁶⁷ which dealt with community antenna television, and found copyright infringement in both the preparation of the videotapes⁶⁸ and in the dissemination of the programs through defendant's cable system.⁶⁹ The court did not deal with fair use, and it is unclear if it held the recording of the shows an infringement *per se*, or held that the recording coupled with the possible effects of its use was an infringement. The decision seemed to be addressing factor four of fair use when it stated:

While the defendants did not make the video tape available on a wide-spread basis, the tapes were *capable* of being sold to any cable television system with the proper equipment. Such a distribution could and no doubt would, be in direct competition with the owner of the copyrighted material contained, albeit hidden, therein.⁷⁰

Therefore, in words which if taken literally would likely mean that all copying of videotape is an infringement, at least under the old act, the court concluded:

The preparation of the video tapes of the copyrighted materials infringed upon the rights of the copyright owner under 17 U.S.C. § 1(d), and the dissemination of the programs through the defendants' cable system also constitutes an infringement. Whether or not the dissemination constitutes a "performance" as the word is used in the above section is immaterial.⁷¹

Another argument has been made by the defendants in the

66. 310 F. Supp. 1073 (W.D. Wash. 1969).

67. 392 U.S. 390 (1968). This case dealt with community antenna television (CATV). The Court found no infringement because there was a simultaneous transmission, and therefore, no "performance." *Id.* at 400-01.

68. The violation was of § 1(d) of the 1909 Act, which provided in part that the copyright owner had the exclusive right "to make or to 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, performed, represented, produced, or reproduced."

69. The dissemination was found to be an infringement despite the court's making no ruling on whether the dissemination constituted a "performance." 310 F. Supp. at 1075.

70. *Id.* at 1075 (emphasis in original).

71. *Id.*

Sony litigation, and by at least one other commentator.⁷² This argument is that United States copyright law has developed another equitable exception to copyright infringement, called the "home use" exception. Home use is a separate doctrine from fair use, according to those who believe such an exception exists. The requirements of a home use exception are based roughly on the following factors: (1) the copying must not be for a commercial purpose; (2) there must exist practical impossibility or great difficulty in enforcing against the infringement; (3) the home copying by each individual, as opposed to that by the entire class of copiers, must not greatly damage the copyright holder; (4) the copying must be for personal use only. The underpinnings for a home use exception are extremely complex and, because they have been dealt with at length elsewhere,⁷³ will not be given in detail. Whether or not there should be a home use exception is subject to debate, but if there is such an exception, it would probably cover the home user and recorder of television broadcasts. The negative aspect of such an exception would be the economic effect on the copyright holders resulting from the aggregate use by the entire class of home copiers. Perhaps this aspect has not been given sufficient consideration under the "home use" formula. Of greater practical significance is the fact that no court has ever expressly recognized such an exception,⁷⁴ and there is no mention of the "home use" exception in the General Revision. Only the legislative history of the 1971 Sound Recording Act supports a home use exception,⁷⁵ and it would be unlikely that the courts would find such an exception absent a greater legislative mandate.

Even if it is assumed that courts will determine that home VTR recording is an infringement under the General Revision, there is another and arguably more equitable solution than those previously mentioned. This alternative is to establish a type of compulsory licensing system, operated in a fashion similar to others in the copyright area. A license would automatically be given for private, noncommercial home recording whenever a VTR system is purchased. In exchange for this compulsory license, a royalty

72. See Comment, *Betamax and Infringement of Television Copyright*, 1977 DUKE L. J. 1181.

73. *Id.*

74. Brill, *supra* note 53, at 19. But see Comment, *supra* note 72, at 1207 (student author claims that two cases, *Goldstein v. California*, 412 U.S. 546 (1973), and *Elektra Records v. Gem Elec. Distrib., Inc.*, 360 F. Supp. 821, 824-25 (E.D.N.Y. 1973), either through dicta or implication, support the existence of a home use exception). While *Elektra Records* does impliedly recognize a "home recording" exception based on House Committee Reports, see notes 81-86 & accompanying text *infra*, *Goldstein's* dicta stressing the importance of the commercial nature of the copying does not seem to go so far as to recognize a "home use" exception.

75. See notes 81-86 & accompanying text *infra*.

would be established and paid by the purchaser at the time of purchase. This royalty could be collected and distributed to the proper recipients by an association of authors and copyright owners, in a manner similar to that in which the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) operate in the musical and sound recordings field.⁷⁶ The royalty rate could be adjusted over time so that the rewards and incentives to the creators would remain commensurate with that of the industry. This appears to be an equitable solution to the problem, for it places the economic burden of recording on the purchaser, who is the probable infringer, and will increase the reward for the creator of the work, whose need for economic well-being caused the concern initially. A system roughly equivalent to the one just described has existed in West Germany since 1965,⁷⁷ and applies to both sound recordings and audiovisual systems. It has been suggested,⁷⁸ and it logically follows, that such a royalty system should also apply to the purchase of blank tapes, in addition to the VTR system itself. This would make the system even more equitable, placing a greater burden on those who record a great deal, and relieving the burden on the consumer who does not use the VTR to record but only to play lawfully obtained pre-recorded software.⁷⁹ Such a push for a royalty on blank tapes is currently being made in the United Kingdom, where research results indicate that the British tape industry is losing twenty percent of its market to home tape recording.⁸⁰

76. A commission could be established or the Copyright Royalty Tribunal used to determine the proper royalty figure, whether it is easier to collect the royalty at the retail or wholesale level, and similar technical problems. The most difficult of these problems is that the purchaser does not report what he or she intends to record, so the distribution system would have to be based on viewer ratings or some other means to approximate which shows are being recorded, and royalty distributions made accordingly.

77. Copyright Statute of the German Federal Republic, Act of Sept. 9, 1955, Article 53(1)-(5). The law has been described as one which specifically permits the making of "single copies of a work for personal use," and applies to visual as well as sound recordings. Remuneration to copyright proprietors is provided by a five percent tax on "equipment suitable for making such reproductions," payable through collecting societies to owners of works which, by their "nature," are expected to be reproduced.

Holland, *supra* note 14, at 126 (footnotes omitted). A German expert in the field has expressed the view that this statute has been successful. Reimer, *Copyright Problems of the New Audiovisual Media*, 5 INT'L REV. INDUS. PROP. & COPYRIGHT L. 180, 191 (1971), translated from 1973 GRUR INT'L 315.

78. Holland, *supra* note 14, at 126.

79. *Id.* The problem mentioned in note 73 *supra* would also exist in distributing the proceeds of this royalty system.

80. BILLBOARD, Mar. 24, 1978, at 3. The resulting increase in price to the consumer of blank tapes would also serve to help increase the sales of pre-re-

While it has been suggested that the fair use section does not by its terms save the home recorder from infringement for the recording of television broadcasts, others have stated that regardless of this interpretation such private use is or should be a fair use⁸¹ or alternatively, a separate "home use" exception should be judicially recognized.⁸² This idea will now be examined in conjunction with the example usually given in support of the no infringement position, that of home recording of sound recordings for private use. There is some oft-quoted legislative history which states that home recording of radio broadcasts is not an infringement of the copyright laws. The language is from the House Report on the Sound Recordings Amendment of 1971 under a section entitled, "Home Recording," and should be examined in full:

In approving the creation of a limited copyright in sound recordings it is the intention of this Committee that this copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, *it is not the intention of the Committee to restrain the home recording from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing on it.* This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.⁸³

From this passage it is easy to draw the initial conclusion that in drafting the copyright laws Congress did not intend to prohibit home recordings of audio, or by analogy, audiovisual works. But this is not the only possible conclusion. The Sound Recording Amendment of 1971, like the sound recording provisions adopted by the General Revision, expressly excluded motion pictures and other audiovisual works from its scope. Therefore, although paradoxical on the surface, an argument can be advanced that Congress intended to allow private recordings of phonorecords and audio broadcasts for home use, but did not intend to do the same for audiovisual recordings of broadcasts by television stations. There is even some validity in the reasoning behind such a distinction. The argument is made that when a song or album is recorded and stored by the listener, and he or she hears that musical piece again on the radio, that person will nevertheless still listen to the song and consequently his or her act of recording will not greatly hurt the broadcasting station or that piece of music economically or popularly.⁸⁴ However, a viewer tires much more quickly watch-

corded audiovisual works, since it would make the two products similar in price.

81. See note 43 *supra*.

82. See notes 72-75 & accompanying text *supra*.

83. H. R. REP. NO. 487, 92d Cong., 1st Sess. 7, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 1572 (emphasis added).

84. But see note 80 & accompanying text *supra*.

ing the same thing repetitiously, the argument goes, so when the viewer sees a program or movie that he or she has previously recorded and stored, that viewer will tune that program out, thereby economically damaging both the copyright holder of the individual movie or program, and the network which has broadcast it.

Since a major purpose of copyright law is to offer incentives to "authors" by protecting their "writings," the above analysis demonstrates that audio recording for home use does not jeopardize that purpose, but video recording does sufficiently damage that goal and must be prohibited. Or to state the argument in terms of section 107(4) of the General Revision, the potential market for the audio recording is not greatly affected by home recording so it constitutes a fair use. But, as previously noted, the potential market for VTR prerecorded software and for broadcast television programs is affected and so does not come within the fair use exclusion. This view is of course speculative in that it presupposes facts about the private consumers/users' habits which may in fact not be totally accurate. Similarly, it ignores the fact that although radio airplay may not be negatively affected, the value of the copyright will be hurt by a reduction in sales of phonorecords and prerecorded tapes. It also assumes a rather narrow and specific dividing line between fair use and infringement. Judging by past decisions, the courts may not agree with these assumptions when they decide the issue.

There are other facts about the legislative history which point to a third possible view on the subject. Not only is the 1971 House Report not the law, but it likely does not represent Congress' true intent on this matter when it passed the General Revision in 1976. First of all, similar language is not found in the Senate Report on the Sound Recordings Amendment of 1971.⁸⁵ Moreover, that specific language or any similar to it is completely absent from the entire legislative history of the 1976 General Revision, which superceded the Sound Recording Amendment of 1971, and adopted much of the language of the Sound Recording Act concerning this issue. Therefore, on this basis, one could discern a Congressional intent to withdraw from that position, which logically could show an intent to withdraw any special exception from infringement for either audio or visual reproduction in the home for private use. But it is always difficult, and sometimes dangerous, to determine what is meant by legislative silence; thus it appears that any of the three conclusions discussed could be adopted by the courts. In summary, these conclusions are (1) that both audio and video recordings for private, noncommercial use in the home are infringe-

85. S. REP. NO. 72, 92d Cong., 1st Sess. (1971).

ments of the exclusive right to reproduce the work; (2) that both uses meet the fair use or home use exception, and are allowed by the General Revision; or (3) that audio recordings meet the fair use, or home use exception, and VTR recordings are an infringement. The latter view seems the least likely, for if it becomes law, the anomalous result would be that persons could record radio broadcasts, but not television broadcasts, even if they were only recording the sound.⁸⁶

B. Infringement of the Exclusive Right to Perform the Copyrighted Work Publicly

1. In General

In addition to the exclusive right to reproduce a copyrighted work, the exclusive right to perform that work publicly must be analyzed.

The General Revision provides in section 106(4) that the copyright owner has the exclusive right to perform audiovisual works publicly.⁸⁷ In determining the extent of this right the definitions in section 101 again become important. "To 'perform' a work means . . . in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sound accompanying it audible."⁸⁸ Thus, there appears to be little doubt but that the physical act of placing the VTR software into the unit for viewing on the screen would be a "performance" under the definition.⁸⁹ The question to resolve consequently becomes what constitutes "publicly" in the context of the exclusive right to perform the work publicly. Section 101 provides:

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or any place where a substantial number of persons outside of a normal circle of a family and its social acquaintance is gathered; or

86. This is because the sound accompanying an audiovisual work is excluded from sound recordings and included in audiovisual works by the definitions in the General Revision Act, 17 U.S.C. § 101 (1976). Another issue not addressed by the House Committee is the fact that private recording would not only allegedly infringe the copyright in the sound recording, but the underlying musical composition as well. Arguably the House Committee Report only concerns the copyright in the sound recording, and not the underlying music. Perhaps one would still have to pay a compulsory license to the owners of this copyright, even if the taping of the sound recording itself was considered fair use. But apparently, by the language of the report, it was felt neither would be infringed.

87. See notes 37-38 & accompanying text *supra*.

88. 17 U.S.C. § 101 (1976).

89. The House Committee felt this was true in the analogous area of putting a phonorecord on an audio stereo for playing and listening. H. R. REP. NO. 1476, 94th Cong., 2d Sess. 63, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5676-77.

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.⁹⁰

One important change section 106(4) makes in the 1909 Act is removing a "for profit" limitation on the performance rights of some copyright owners.⁹¹ The distinction between nonprofit and commercial was difficult to make under the 1909 Act. Additionally, the drafters of the General Revision worried that such a limitation on the exclusive rights "could not only hurt authors but could dry up their incentives to write."⁹²

The definition of public performance under the General Revision also cleared up several questions plaguing the old law which were caused by some lower court interpretations of the term "public" under the 1909 Act. In *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt & Maryland Yacht Club*,⁹³ the court held that where a motion picture was shown at a social club for members and their guests, it was not a public performance within the old statute. The Register of Copyrights had taken exception to the holding in this case,⁹⁴ and the law on this subject was largely in doubt.⁹⁵ The committee reports for the General Revision made it "clear that, contrary to the *Maryland Yacht Club* decision, performances in 'semipublic' places such as clubs, lodges, factories, summer camps, and schools are 'public performances' subject to copyright control."⁹⁶ Since the Act itself stated this proposition

90. 17 U.S.C. § 101 (1976).

91. A distinction in the 1909 Act was made between dramatic works, which need not be performed for profit, and non-dramatic works, which had the for profit requirement before infringement could be found. See § 1 of the 1909 Act. But see 17 U.S.C. § 110(4) (1976), which retains this distinction for some purposes.

92. H. R. REP. NO. 1476, 94th Cong., 2d Sess. 63, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5676; S. REP. NO. 473, 94th Cong., 1st Sess. 59 (1975).

93. 21 Copyright Office Bull. 203 (D. Md. 1932). Compare this case, in which the court reasoned that a private nonprofit showing was no different than in one's own home, and *Lerner v. Schectman*, 228 F. Supp. 354, 358 (D. Minn. 1964), in which the court ruled that the showing in question took place at a commercial club, rather than the more private club setting in the *Maryland Yacht Club* case and thus was a commercial performance. Cf. *Chappell & Co. v. Middletown Farmers Market & Auction Co.*, 334 F.2d 303 (3d Cir. 1964) (finding of public performance where defendants piped music through their merchandise mart).

94. REPORT OF THE REGISTER OF COPYRIGHTS, *supra* note 45, at 29-30.

95. On the problem of what was meant by public performance under the 1909 Act, see Meyer, *supra* note 13, at 30-31; Taylor, *supra* note 45, at 96; Comment, *supra* note 6, at 694-96.

96. H. R. REP. NO. 1476, 94th Cong., 2d Sess. 64, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5677-78.

clearly, this explanation in the committee reports is probably superfluous.⁹⁷

2. *Pre-recorded VTR Software*

A viewer may lawfully procure pre-recorded VTR software and still face infringement questions concerning the public performance right in the software. The similarities between this pre-recorded material—especially pre-recorded musical videotapes, disks, and cassettes⁹⁸—and the current audio stereo market and corresponding record and tape industry are readily apparent. Nevertheless, with regard to current United States copyright law, there is a great difference between the exclusive rights given copyright owners of audiovisual works, and those given the copyright owners of sound recordings. The General Revision does not significantly limit the enumerated rights of section 106 respecting audiovisual works, but by section 114 of the Act, a copyright owner in a sound recording is not given the performance rights granted to other works in section 106(4). However, there is a copyright in the underlying music as well as the sound recording, and there is an exclusive performance right given to the owner of the copyright in the music. Therefore, public performance of a phonorecord is an infringement of the copyright in the music, although not in the copyright of the sound recording, something made clear by section 114(c). Judging from the similarities between audio and audiovisual works, a strong argument can be made that no difference should exist in copyright treatment of the two types of works.⁹⁹ If

97. Concerning VTR use, the language in clause two of the public performance definition appears at first glance to prohibit the unauthorized broadcasting of pre-recorded video programs transmitted to individual viewers who are, for instance, in hotel rooms or subscribers to a pay or cable television service. However, the complex provisions of 17 U.S.C. § 111 (1976) must be considered.

Section 111(a)(1) provides:

The secondary transmission of a primary transmission embodying a performance . . . of a work is not an infringement of the copyright if—

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station . . . to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission.

98. With respect to pre-recorded software, disks can be included in the discussion. Moreover, if they live up to their expectations of being much less expensive than the videocassettes currently being used, they may well be able to compete on the market with other software, despite their incapability to record television broadcasts. See note 6 *supra*. Here again, software means both the tape and the copyright of the audiovisual work embodied in the tape. See text accompanying note 7 *supra*.

99. For such an argument that VTR software, with respect to those works where the music predominates, and sound recordings, should be given equal treatment under the copyright laws, see Holland, *supra* note 14, at 111.

it is assumed, arguendo, that for the sake of consistency both sound recording and VTR software in which the music predominates should be treated identically, the problem still exists of discerning whether the video work is to be stripped of its performance rights, or the sound recording is to be afforded performing rights.¹⁰⁰

Of the three possible treatments of VTR systems under copyright law,¹⁰¹ however, it is not at all clear that the distinction made between audiovisual works and sound recordings in the General Revision is wrong. It is quite obvious from the definitions and language used throughout the General Revision that a distinction was expressly desired by Congress. It probably felt that attempting to distinguish between audiovisual works which were predominantly cinematographic works and those in which the music predominated would be much more difficult and that perhaps the distinction between sound recordings and audiovisual works would at least have the advantage of easy application.

At this time it should be emphasized that this discussion only concerns a person's exclusive right to "publicly perform" and to reproduce his or her copyrighted audiovisual work as it relates to a home video user's private recording. The General Revision potentially differs in its treatment of users of audiovisual works and

100. See 43 Fed. Reg. 12763 (Copyright Office recommendation to Congress that performance rights be given sound recordings) (in accordance with 17 U.S.C. § 114(d) (1976)). The House has held hearings on a bill, H.R. 6063, introduced by Rep. Danielson, which would give a performance right in sound recordings. 372 PAT., T.M. & COPYRIGHT J. (BNA), at A-1 (Mar. 30, 1978). It is interesting to note that earlier versions of the copyright revision contained provisions establishing a performance right in sound recordings. If the prior proposals for performance rights for sound recordings were to be adopted, however, there would be the anomalous result that sound recordings and audiovisual works in which the music is predominant would still not have equivalent copyright treatment under the General Revision. This is because proposals for sound recordings contained a clause establishing a compulsory license, something which does not now exist with respect to performance rights in audiovisual works. For a discussion of how compulsory licensing might be applied to audiovisual works, see Holland, *supra* note 14, at 119-20.
101. This division into three different theories was advanced by the Subcommittee of the Copyright Council investigating problems associated with video systems in Japan. The following theories have been advanced:

- (1) video-programs constitute cinematographic works in the traditional copyright sense;
- (2) there exist two kinds of video-programs, one constituting cinematographic works and the other constituting audio-visual works other than cinematographic works;
- (3) video-programs constitute special works *sui generis*, different from cinematographic works or phonograms.

Klaver, *The Legal Problems of Video-Cassettes and Audio-Visual Discs*, 23 BULL. COPYRIGHT SOC'Y 152, 156 (1976).

other nonprivate or semipublic users, such as libraries,¹⁰² educational institutions,¹⁰³ and "jukebox" operators.¹⁰⁴

102. Section 108 is the general provision dealing with library copying. Among the rights given a library is the limited right to reproduce a single copy of a work. However, motion pictures and other audiovisual works not dealing with news are expressly excluded from the section by 17 U.S.C. § 108(h) (1976), making this use by libraries more restricted than their right to photocopy. Therefore, it appears that library audiovisual use is no greater than that allowed for the private home user, except that the library may fare better under the balancing of the fair use factors, especially the first factor. 17 U.S.C. § 108(f)(3) makes a special exception to allow reproduction of "a limited number of copies and excerpts by a library or archives of an audiovisual news program." This is true only if there is no commercial purpose, the copy is available to the public or general researchers, and there is a notice of copyright. The sponsor of that clause of section 108 stated that

the purpose of that clause was to prevent the copyright law from precluding such operations as the Vanderbilt University Television News Archives, which makes videotape recordings of television news programs, prepare indexes of the contests [*sic*], and leases copies of complete broadcasts or compilations of coverage of specified subjects for limited periods upon request from scholars and researchers.

. . . [I]t is not intended to limit the types of programs that can be reproduced or distributed under this clause to daily network newscasts. Programs that would come within the scope of the clause include local, regional, or network newscasts, interviews concerning current news events, and on-the-spot coverage of news events.

- 122 CONG. REC. S17252 (daily ed. Sept. 30, 1976) (remarks of Sen. Baker).
103. The video technology has been hailed for the advancement possibilities it offers to the educational and research fields. See, e.g., Klaver *supra* note 101, at 175-76, 185; Reimer, *supra* note 77, at 191-93; Taylor, *supra* note 45, at 90. Limits for educational uses are provided for in section 110, and they generally favor nonprofit educational establishments. The instructors or pupils, in a face-to-face teaching activity, may perform the copyrighted motion picture or other audiovisual work. At first glance, this would appear to give the educational institution much greater rights through section 110 than it would get under the fair use provision. However, this is a limitation on the performance right only, and does not apply to the recording right. In fact section 110(1) states that such use will be an infringement if "in the case of a motion picture or other audiovisual work, the performance . . . is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe the copy was not lawfully made." This use will avoid the "semi-public" performance problem involving lawfully obtained software. See notes 92-96 *supra*. However, if the program was taped from a network broadcast, whether or not that activity is an infringement will be determined by an application of fair use standards. Again, the fact that it is a nonprofit educational use may give it a better chance of meeting this criteria than simple home use. However, that educational use alone is not sufficient is seen in the recent case of *Encyclopedia Britannica Educational Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978), though the copying there was done on a massive scale. See notes 60-65 & accompanying text *supra*.

For a detailed discussion of the face-to-face teaching issues involved in the General Revision, see Billings, *Off-the-Air Videorecording, Face-to-Face Teaching, and the 1976 Copyright Act*, 4 N. KY. L. REV. 225 (1977).

104. 17 U.S.C. § 116 (1976) establishes limitations on the exclusive right to perform nondramatic musical works through a coin-operated phonorecord player. It

IV. OTHER CONSIDERATIONS FOR THE COPYRIGHT OWNER IN VIDEO MATERIAL

A very important principle of copyright law is that ownership of the material object, here the software, is completely different than ownership of the copyright itself, which goes only to the intellectual content. This principle is found in the General Revision at section 202.¹⁰⁵ In fact, this section creates the presumption that in a transfer of the material object, the copyright itself is not transferred. This is accomplished by establishing that a conveyance of the copyright must be made in writing. This principle is important to keep in mind as section 109 of the General Revision¹⁰⁶ is examined with regard to its application to VTR systems. Considering the dangers that exist for the copyright owner in today's mass copying situation, a basic premise must be that the copyright owner will try to keep as much control over the eventual use of the VTR software as is possible. In the case of pre-recorded software, any wholesaler or retailer who lawfully purchases the software has the right to dispose of it by sale, rental or any other means, according to section 109(a). This is allowed despite the fact that the copyright stays with the original holder.¹⁰⁷ This would allow retailers, for example, to set up leasing libraries or similar operations which might prohibit the original copyright owner from obtaining all the profit he or she otherwise could have obtained.¹⁰⁸ One possible so-

sets up a compulsory license system for "jukebox" operators, who, by paying a prescribed royalty to the Copyright Royalty Tribunal, have the right to play or "perform" the copyrighted works in coin-operated phonorecord players in public places. If coin-operated VTR systems were to become a possibility, the exact same use would constitute infringement. This is because of the definition of "phonorecord," which specifically excludes audiovisual works. See *id.* § 101. Therefore, a proprietor or operator of any coin-operated VTR would have to search out all the copyright holders of each video performance, and personally try to make licensing agreements with those people. Such a procedure would make the growth of this video use highly impracticable. It is another area where arguably musical video programs and sound recordings should be treated consistently under the copyright laws. See note 99 & accompanying text *supra*.

105. 17 U.S.C. § 202 (1976).

106. *Id.* § 109.

107. Note that section 109 does not allow the lawful owner of the work to publicly perform the audiovisual work, however.

108. For example, suppose a movie, which is sold to a "video" retail shop for, say \$25, is then rented out by that retailer for \$3 for a 24-hour period. If the demand is high for that movie, the retailer could make \$90 on the video in a month, and still own the software. The original owner of the copyrighted software is in the position of making only a set fee for his software, no matter how often it is seen. That person's only control over how many people do see the film for that original sales figure is the limitation of public performance. Even if he or she tries to contractually alleviate this problem, section 109(a)

lution would be for the copyright owner not to sell his or her software to the retailer, but rather to lease it to the retailer. Under section 109(c), this would give the retailer no right to rent or sell the software other than with the owner's consent, similar to the manner in which motion picture companies currently lease their films to theaters. This would make it much easier for the copyright owner to establish guidelines and set the prices at which he or she would allow the leasing retailer to further rent, sell or otherwise dispose of the software.¹⁰⁹ However, such a rental operation would run the risk of violating the anti-trust laws.¹¹⁰

Related to the above discussion are a group of mixed copyright and contractual problems which occur with the advent of any new technology. These questions include whether audiovisual rights belong with prior licenses and other contractual agreements for motion pictures rights, or instead with licenses for television rights, or neither. Or if they are works in which the music predominates, perhaps the rights belong with the license for sound recordings. These issues are not unlike those which existed when silent movies became "talkies," or when motion pictures came to television, or many other similar changes of technology. As this topic has been extensively discussed elsewhere,¹¹¹ nothing more will be detailed here other than to emphasize that the problem exists and must be dealt with carefully through the drafting of contracts. The problem is further complicated by the fact that the terms used in the industry, such as VTR, video, videocassette, cartridge television, disk television and countless others, are not consistent with the wording in the copyright statute.¹¹²

puts the copyright owner in a disadvantageous position. See generally Nimmer, *supra* note 51, at 11.

109. It has even been suggested that to control the number of performances possible during each individual lease to a private user, cassettes or cartridges be developed which do not have a rewind feature, and hence can be played only once before needing to be returned to the distributor for rewinding. Nimmer *supra* note 51, at 10. Whether this would create less demand for rentals and therefore be financially worse for the copyright owner is arguable, but such features would certainly make sales to the ultimate consumer unattractive.
110. See Comment, *supra* note 6, at 698-99.
111. See, e.g., de Freitas, *Audio Visual Systems*, 18 BULL. COPYRIGHT SOC'Y 304, 310-11 (1971); Harris & Mirisch, *Video Cassettes and the Law*, 4 BEV. HILLS B.J. 16 (Summer 1970); Holland, *supra* note 14, at 136; Meyers, *supra* note 13, at 39-41; Nimmer, *supra* note 51, at 12-17.
112. See Collyer, *Motion Pictures and Television Under the New Copyright Statute*, in PRACTICING UNDER THE COPYRIGHT LAW OF 1976, 151, 163-64 (PLI 1977). See also Weisbond, *Motion Pictures, Television Programs and Other Audio Visual Works Under the Copyright Law*, in CURRENT DECISIONS IN COPYRIGHT LAW 1977, 545, 555-56 (PLI 1977).

V. REMEDIES

The remedies available to the copyright owner for infringement of the copyrighted video work should be briefly mentioned. The alleged home use infringements could result in civil actions, the remedies for which are contained in sections 502 to 505 of the General Revision.¹¹³ The statute provides, as one might imagine, for both injunctive relief, and actual damages to the copyright owner, plus additional profits made by the infringer. Additionally, there are provisions providing for impoundment of illegal copies, and if the owner is successful at trial, for the eventual destruction of those copies. Discretion is also given to the judge to award costs and attorneys' fees to either party.¹¹⁴ But none of these provisions should concern the private VTR recorder and possible infringer, nor are the criminal penalties of the section likely applicable to him or her.¹¹⁵ The real danger the alleged home infringer might face is section 504(c) which allows for statutory damages instead of actual damages. The section provides that statutory damages are a minimum of \$250 and a maximum of \$10,000, as the court considers just. Statutory damages are available for each individual work that is infringed.

VI. CONCLUSION

Whether or not the type of VTR recording described in this comment is eventually considered to be an infringement of the copyrighted work is an issue much in doubt. What is likely is that the various recording practices of home recorders are likely to grow as the price of VTR systems declines,¹¹⁶ and as a result, nothing short of injunctive relief calling for a withdrawal of the units from the market, or technological changes,¹¹⁷ is going to stop the growing videotaping by the American public. There are two major public interests which should be preserved as the industry, the courts, and Congress grapple for a resolution to this issue. The first is that of the private American to be secure in the privacy of his or her home, and to be allowed to take advantage of a tremendous, revolutionary new industry. The second goal is the basic foundation of all copyright law, that of securing to "authors," in the constitutional sense, financial incentive through exclusive rights in

113. 17 U.S.C. §§ 502-505 (1976).

114. *Id.* § 505.

115. *See id.* § 506 (stating the requirement that the copyright must be infringed "willfully and for purposes of commercial advantage").

116. Executives at Sony have stated that prices for VTR machines with recording and playback capabilities should eventually stabilize at around \$600 to \$700. Fong-Torres, *supra* note 10, at 61.

117. *See* note 53 & accompanying text *supra*.

their work. Unfortunately, there has been little legislative interest in the United States for enacting the proper laws to help alleviate the problem,¹¹⁸ and it is unlikely that the industries involved will get together and establish licensing agreements privately, in which the VTR manufacturers would pass on this cost to their appropriate consumers.¹¹⁹ It is hoped the problem involving home videotaping for private, noncommercial use is speedily resolved, so that attention can be directed to the criminal violation in this area, that of record and videotape piracy for great commercial gain.¹²⁰

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118. See notes 76-80 & accompanying text *supra*.

119. No one could be expected to pay a fee until it was clearly established what the current statute means with respect to these issues.

120. See, e.g., BILLBOARD, Mar. 18, 1978, at 3 (reports that authorities have found \$150 million of illegal duplicating and pressing machines, and destroyed 2.2 million bootleg 8-track tapes worth \$1.3 million, and 40,000 reels of film and/or videotapes).