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COMMENTS

Disc, DAT and Fair Use: Time To Reconsider?*

INTRODUCTION

The fate of the controversial digital audio tape (DAT) recorders, scheduled for release in the United States in 1988, was the subject of heated debate in the 100th Congress.¹ The main issue with DAT, as was the case with the analog² cassette in the 1960s and 1970s, is whether home taping or “piracy”³ of copyrighted sound recordings is at odds with the purpose of granting copyrights in the first place.⁴ This debate pits the interests of the re-

* This article was entered in the Nathan Burkan Memorial Competition.

1. Digital audio tape (DAT) is to the digital compact disc (CD) what the analog cassette tape is to the LP record. DAT recorders are a new generation of cassette tape recorders capable of digital recording; potentially, directly from CD's. DAT provides the extremely high quality sound of a CD, but in a cassette tape format. DAT is more convenient and better adapted to portable and auto players than are compact discs. For an excellent explanation of the technical workings of DAT recorders, *See* Birchall, *Digital Audio Tape: Issues and Answers*, STEREO REVIEW, Mar. 1987 at 56. *See also All You Need to Know About DAT (Except Marketing)*, AUDIOVIDEO INTERNATIONAL, June 1987 at 26. Release dates for DAT recorders are still in the future. Two companies, Marantz and Harman Kardon, have said they will introduce DAT machines in the United States sometime in 1988. Riggs, *Sony, CBS And Copy Code*, HIGH FIDELITY, Feb. 1988 at 6. DAT players for the car, however, have been on sale in the United States since February 1988. These car tape decks are player-only models and, thus, avoid the entire copyright issue. *DAT on the Road: Inauguration of a Technology*, AUDIOVIDEO INTERNATIONAL, Mar. 1988 at 23.

2. There are two ways to record musical information on magnetic tape—analogue and digital. Analogue recording involves transcribing a *continuous range of frequencies* onto the tape. Digital recording involves transcribing a *series of on/off pulses* which represent binary numbers (zeros and ones) like those used with computers. Put very simply, the range of frequencies which arrive at the analogue tape recorder can be diminished or distorted (i.e. other sounds are picked up in the signal) during transmission of the signal to the recorder. This means that the newly recorded tape is of a lower quality than the original recording from which the signal is taken. With the new digital recorders, the signal reaching the recorder is essentially identical to the original signal and so the recording is of almost identical quality as the original.

3. Piracy is defined as the unauthorized duplication of sound recordings; the term usually refers to such duplication in a commercial sense (i.e. for sale in competition with the original recording) as opposed to individual home duplication. *Goldstein v. California*, 412 U.S. 546 (1973).

4. U.S. CONST. art. I, § 8, cl. 8, authorizes Congress “to promote the Progress of Science and the useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” The Copyright Act has accomplished this by granting a limited monopoly to the copyright owner. The legislative

ording industry directly against the interests of DAT recorder manufacturers and consumers.

The recording industry fears huge losses of revenue⁵ because consumers will now be able to make “master” quality copies of CDs onto a digital cassette tape.⁶ The other side of the issue, maintained by the Home Recording Rights Coalition,⁷ asserts that the currently proposed anti-copy chip⁸ legislation interferes with an individual’s right to make private, noncommercial copies.⁹

committee report on the Copyright Act of 1909 states “the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors.” H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909).

5. Jason Berman, President of the Recording Industry Association of America (RIAA), reported that in 1983 alone Americans taped \$3.8 billion worth of music onto cassettes, compared to record and prerecorded tape sales revenue of \$1.5 billion. *Digital Audio Tape Recorders: Hearings on H.R. 1384 Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 33-34 (1987) [hereinafter *Digital Hearings*] (statement of Jason Berman, President of Recording Industry Association of America).

6. The recording industry argues that unchecked copying and the resulting loss of revenue will affect the recording companies’ ability to invest in new artists and will enable them to fund only proven artists. This, the industry asserts, will provide less incentive for future creativity and will result in a limitation of new consumer choices. According to Berman, the amount of new music released into the market in the last eight years has already declined by 40%. *Digital Hearings*, *supra* note 5, at 36. Record companies take a substantial risk in recording the majority of musical artists. Only 16-20% of all records ever recover the costs involved to make them. It is this small percentage that must subsidize the large numbers of releases that fail. The “break even point” is the number of copies of a record that have to be sold in order to recover the cost of making, packaging, and promoting the record. According to a 1980 study by Cambridge Research Institute, the breakeven point for 33rpm record albums in 1979 was 140,600 copies sold. Of the 3,575 record albums released during 1979, 84% failed to recover the costs, resulting in losses of more than \$200 million. In 1980-81, the breakeven point had risen to 200,000 copies sold. T. SELZ & M. SIMENSKY, *ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES* § 2.08 (1986). Recording artists themselves also fear the threat that DAT presents to their continuing royalties. “The simple truth is that they are choking off our livelihoods,” says Country singer Emmylou Harris. *Digital Hearings*, *supra* note 5, at 26 (statement of Emmylou Harris, recording artist).

7. The Home Recording Rights Coalition includes companies that are involved in the manufacture, sale, and distribution of audio cassette recorders, audio tape, and related equipment. Membership also includes many prominent trade associations and consumer groups. For a listing of members see *Digital Hearings*, *supra* note 5, at 89-90 (statement of Charles Ferris, Home Recording Rights Coalition).

8. The proposed legislation, discussed in more detail at section V *infra*, would require all DAT recorders entering the United States to contain an anti-copy chip. This anti-copy chip is designed to disable the DAT recorder when the user attempts to record specially encoded copyrighted works.

9. *Digital Hearings*, *supra* note 5, at 86 (statement of Charles Ferris, Home Recording Rights Coalition). Ferris says that home taping may actually help the record industry. “Home taping has the documented effect of encouraging purchases of prerecorded music. . . . [N]ew recording products [such as the VCR and DAT] . . . wind up creating even greater markets for new prerecorded material.” *Id.* The RIAA maintains that blank tape sales are up while prerecorded tape sales are declining. *Id.* at 33-35. Ferris denies that any evidence exists that positively links the sale of blank tapes to massive home copying. *Id.* at 87. The Coalition commissioned a study which found that home recorders who tape the most also buy the most records and CDs. Yankelovich, Skelly & White, Inc., *Why Ameri-*

Despite the magnitude of lobbying efforts by both sides, the home taping issue has never been satisfactorily resolved by the legislature or by the courts.¹⁰ This Comment provides a discussion of the basic issues surrounding copyright in sound recordings. It presents a brief history of copyright in sound recordings, leading to the present state of the law regarding home taping. It also discusses and analyzes the proposed anti-copy chip solution which was hotly debated in the 100th Congress. This Comment argues that anti-copy chip legislation is not the appropriate solution and proposes that a royalty applied to recorder and blank tape sales in return for an exemption of home taping from infringement will lead to a better result. Such a solution would compensate the copyright owner for use of the copyrighted work, yet provide the public with useful access to new technology. This solution, thus, fits well with the purpose of granting copyright.¹¹

I. HISTORY OF COPYRIGHT IN SOUND RECORDINGS

The Copyright Act of 1976¹² provides that sound recordings may qualify for copyright protection.¹³ Sound recordings are defined in the Act as: "works that result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as discs, tapes or other phonorecords¹⁴ in which they are embodied."¹⁵ Clearly, this definition would include the fixing of sounds on digital audio tape, thus entitling these tapes to copyright protection. However, sound

cans Tape, at 61-62 (1982). The study also found that very few home recorders use borrowed materials to tape. *Id.*

10. There have been many legislative solutions offered to combat home recording "piracy" but they have had little success in Congress. *See infra* notes 103-07, 112 and accompanying text. There have been no challenges in court specifically addressing home audio taping as copyright infringement. *But cf.* *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (addresses home video taping and copyright).

11. *See supra* note 4.

12. 17 U.S.C. §§ 101-810 (1982).

13. 17 U.S.C. § 102(a)(7) (1982). The owner of a copyright has certain exclusive rights with regard to the copyrighted material. In the case of sound recordings, these rights are listed in 17 U.S.C. § 114 and will be discussed in more detail *infra* notes 34-37 and accompanying text. Anyone who violates these exclusive rights is an infringer of the copyright. The copyright owner has certain remedies (prescribed by the Act) available to him/her against the infringer—usually damages. 17 U.S.C. §§ 501-10 (1982).

14. "Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed. 17 U.S.C. § 101 (1982).

15. *Id.*

recordings have not always enjoyed copyright protection.¹⁶

The Copyright Act of 1909¹⁷ contained no provision recognizing copyrights in sound recordings. Moreover, the congressional committee report on the 1909 Act shows that Congress intended that sound recordings be excluded from copyrightability.¹⁸ The committee stated:

It is not the intention of the committee to extend the right of copyright to mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices.¹⁹

The rationale behind denial of copyright to sound recordings was that Congress could only grant copyrights for “writings.”²⁰ At the time of the 1909 Act, sound recordings were not considered “writings” within the meaning of the Constitution.²¹

That sound recordings were not copyrightable remained the view of the courts²² and the Copyright Office²³ until 1945 when Professor Chafee reasoned to a different conclusion.²⁴ He argued

16. Copyright in the sound recording should be distinguished from copyright in the underlying musical work that is the subject of the sound recording. Copyright in the *underlying musical work* belongs to the composer of the music and was recognized even prior to the 1909 Copyright Act. Copyright in the *sound recording* belongs to those who put the recording together in the “phonorecord”—this can include the orchestra (band), the vocalists, or the producers.

17. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075. The Copyright Act of 1909 was the first comprehensive statute enacted by Congress under its power to grant copyright deriving from article I, section 8, clause 8 of the Constitution.

18. H.R. REP. No. 2222, 60th Cong., 2d Sess. 9 (1909).

19. *Id.*

20. The congressional power to grant copyright is derived from article I, section 8, clause 8 of the Constitution: “To promote the Progress of . . . the useful Arts, by securing for limited Times to *Authors* . . . the exclusive Right to their respective *Writings* . . .” (Emphasis added). U.S. CONST. art. I, § 8, cl. 8.

21. “By writings in that clause is meant the literary productions of . . . authors, and Congress very properly has declared these [writings] to include all forms of writing, printing, engravings, etchings, etc., by which the ideas of the mind of the author are given *visible expression*.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (emphasis added). See also *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908) and *Victor Talking Mach. Co. v. Armstrong*, 132 F. 711 (C.C.S.D.N.Y. 1904).

22. See, e.g., *Aeolian Co. v. Royal Music Roll Co.*, 196 F. 926 (W.D.N.Y. 1912); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937); *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940); *Jerome v. Twentieth Century-Fox Film Corp.*, 67 F. Supp. 736 (S.D.N.Y. 1946) *aff’d*, 165 F.2d 784 (2d Cir. 1948).

23. Ringer, (Barbara A.) *The Unauthorized Duplication of Sound Recordings*, U.S. Copyright Office Study No. 26, Feb. 1957.

24. Chafee, *Reflection on the Law of Copyright*, 45 COLUM. L. REV. 719, 734 (1945). Chafee saw that orchestras and other musical performers were losing earnings from potential ticket buyers to recordings made of their performances. *Id.* at 733. The persons selling these recordings did not compensate the musicians and were benefitting at the musicians’ expense. *Id.* The use of common law theories of unfair competition (See, e.g., *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969); *Capitol Records, Inc. v. Spies*, 167 U.S.P.Q. (BNA) 489 (Ill. App. 1970); *Columbia*

that the interpretation of "writings" as "visible expressions"²⁵ was outdated and that the Copyright Act needed to be drafted to accommodate "the progress of invention."²⁶ He asserted that sound recordings should be construed as "writings" within the meaning of the Constitution and should be copyrightable.²⁷

Ten years after Chafee's article, the Court of Appeals for the Second Circuit embodied his conclusion in its decision of *Capitol Records, Inc. v. Mercury Records Corp.*²⁸ The court in *Capitol Records* expressly held that sound recordings were excluded from copyright under the 1909 Act, but that they may be capable of copyright under the Constitution as a "writing."²⁹ Such views, favoring copyright in sound recordings, eventually led to the 1971 amendment to the Copyright Act of 1909³⁰ and finally the 1976

Broadcasting Sys., Inc. v. Spies, 167 U.S.P.Q. (BNA) 492 (Ill. Cir. Ct. 1970)) to recover such lost earnings were not always viewed very favorably by the courts. *RCA Manufacturing Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940). Chafee felt some form of statutory protection was needed for the musicians. Chafee, *supra*, at 734.

25. See *supra* note 21.

26. Chafee, *supra* note 24, at 737. Chafee wrote: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Id.* at 735 (quoting Justice Holmes in *Towne v. Eisner*, 245 U.S. 418, 425 (1918)).

27. "The copyright clause in the Constitution should be construed so as to permit Congress to protect by appropriate devices any literary or artistic work deserving of copyright protection." Chafee, *supra* note 24, at 735-36.

28. 221 F.2d 657 (2d Cir. 1955).

29. *Id.* The Supreme Court has since interpreted the copyright clause in the Constitution: "These terms have not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles." *Goldstein v. California*, 412 U.S. 546, 561 (1973). The word "writings" may be interpreted "to include any physical rendering of the fruits of creative intellectual or aesthetic labor." *Id.* Congress has the power to determine whether a "particular category of 'writing' is worthy of national protection." *Id.* at 559. As technology has expanded, Congress has responded by providing protection for new categories of "writings":

In 1790—the first congressional copyright statute governed only books, maps, and charts. Act of May 31, 1790, ch. 15, 1 Stat. 124.

In 1802—prints were given protection. Act of April 29, 1802, ch. 36, 2 Stat. 171.

In 1831—musical compositions and cuts in connection with prints and engravings were added to the list of protected works. Act of Feb. 3, 1813, ch. 16, 4 Stat. 436.

In 1865—photographs and photographic negatives were added as protected works. Act of Mar. 3, 1865, ch. 126, 13 Stat. 540.

In 1870—the list was expanded to protect paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of fine art. Act of July 8, 1870, ch. 230, 16 Stat. 198.

In 1909—Copyright Revision provided for eleven protected categories of works. Act of March 4, 1909, ch. 320, 35 Stat. 1075.

In 1912—the list was expanded to protect motion pictures. Act of Aug. 24, 1912, ch. 356, 37 Stat. 488.

In 1971—the list was finally amended to protect sound recordings. Pub. L. No. 92-140, 85 Stat. 391 (1971).

30. Sound Recording Amendment of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

Copyright Act,³¹ each of which recognized copyright in sound recordings.³²

II. PROTECTION UNDER THE COPYRIGHT ACT

The Copyright Act grants a copyright holder “exclusive rights” to use and to authorize the use of his work in five qualified ways.³³ However, the exclusive rights in sound recordings given to copyright owners by the 1976 Act are limited to three:³⁴ 1) reproduction,³⁵ 2) derivation,³⁶ and 3) distribution.³⁷ Anyone who violates any of the exclusive rights of the copyright owner without permission is an infringer of the copyright.³⁸ The owner is entitled to certain remedies against an infringer as prescribed by the Act.³⁹ Home audio taping, being a reproduction of copyrighted sound recordings without permission of the copyright owner, violates the copyright owner’s exclusive right to reproduction. There is no question, then, that home audio recording is infringement. Or, is there?

It has always been taken for granted that home audio taping is not infringement.⁴⁰ In fact, there is evidence to suggest that Congress, in 1971, when it amended the 1909 Act, did not consider home audio taping to be infringement. The House Report to the amendment states:

31. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-810).

32. 17 U.S.C. § 102(a)(7) (1982).

33. 17 U.S.C. § 106 (1982) lists the five exclusive rights:

- 1) the right to reproduce the work;
- 2) the right to make derivative works;
- 3) the right to distribute copies of the work;
- 4) the right to perform the work; and
- 5) the right to display the work.

34. 17 U.S.C. § 114 (1982).

35. Reproduction refers to the right to duplicate a sound recording in the form of phonorecords or of copies of motion pictures and other audio visual works that directly or indirectly recapture the *actual sounds* fixed in the recording. *Id.*

36. A derivative work is a work based on a preexisting work. The exclusive right to make derivative works of a sound recording is limited to the right to prepare a derivative work in which the *actual sounds* fixed in the sound recording are rearranged, remixed or otherwise altered in sequence or quality. The limited right does not extend to the making of another sound recording which merely imitates or simulates sounds in the copyrighted recording. *Id.*

37. This refers to distribution of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. *Id.*

38. 17 U.S.C. § 501(a) (1982).

39. Remedies for infringement under the Act include injunctions, impoundment and other disposition of infringing articles, damages, profits made by the infringer, and court costs and attorney’s fees. 17 U.S.C. §§ 502-05 (1982).

40. There have been no court challenges to home audio taping as infringement. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) was the only related challenge but *Sony* spoke to home video taping. This case will be discussed at length at part IV *infra*.

Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.⁴¹

The Copyright Act does provide for several specific exemptions from infringement for certain uses,⁴² but there is no specific exemption from infringement for home audio recording. Rather, it appears that the authors of the amendment intended that such home recording should be defensible as a fair use.⁴³ Assuming the

41. H.R. REP. NO. 487, 92d Cong., 1st Sess. 7, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 1566, 1572. That home audio recording was not considered to be infringement is further supported by colloquy on the floor of the House between Rep. Kastenmeier (Chairman of House subcommittee responsible for the 1971 Amendment) and Rep. Kazen:

Mr. Kazen: Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?

Mr. Kastenmeier: Yes.

Mr. Kazen: In other words, if your child were to record off of a program that comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this use would not be included under the penalties of this bill?

Mr. Kastenmeier: This is not included in the bill. I am glad the gentleman raises the point.

On page 7 of the report, under "Home Recordings," members will note that under the bill the same practice which prevails today is called for; namely, *this is considered both presently and under the proposed law to be fair use*. The child does not do this for commercial purposes. This is made clear in the report.

117 CONG. REC. 34, 748-49 (1971) (emphasis added).

42. 17 U.S.C. §§ 107-18 (1982).

Section 107—exemption for reproduction for purposes such as criticism, comment, news-reporting, teaching, scholarship or research.

Section 108—exemption for reproduction by libraries and archives.

Section 109—exemption for transfer of particular copy or phonorecord.

Section 110—exemptions of certain performances and displays.

Section 111—exemption of certain secondary transmissions.

Section 112—exemption for ephemeral recordings.

Section 113—scope of exclusive rights in pictorial, graphic and sculptural works.

Section 114—scope of exclusive rights in sound recordings.

Section 115—scope of exclusive rights in nondramatic musical works: compulsory license provisions.

Section 116—public performances by means of coin operated phonorecord players.

Section 117—computer programs.

Section 118—use of certain works in connection with noncommercial broadcasting.

43. 117 CONG. REC. 34, 748-49 (1971). The Copyright Act grants specific rights to the copyright owner. The public may use a copyrighted work in a manner which does not infringe upon these rights. In certain situations, however, potentially infringing uses are allowed because they are reasonable under the circumstances. These special situations comprise what is known as the doctrine of fair use. Thus, fair use is actually a defense to a charge of infringement. *See* 17 U.S.C. §§ 106-07 (1982). Fair use will be discussed in greater detail *infra* at section III.

framers of the Act intended audio recording to be defensible as a fair use, the question of whether home audio recording really is a fair use of the copyrighted work still remains.

III. FAIR USE

The U.S. Supreme Court in *Sony Corp. v. Universal City Studios Inc.* stated, “[a]nyone . . . who makes a fair use of the work is not an infringer of the copyright with respect to such use.”⁴⁴ In other words, fair use allows an individual to use an author’s original work without that author’s permission under certain conditions. What these certain conditions are, however, is often difficult to determine.⁴⁵

The judicial doctrine of fair use⁴⁶ was first given statutory recognition and is now partially codified in section 107 of the 1976 Copyright Act.⁴⁷ Section 107 of the Copyright Act specifies criticism, comment, newsreporting, teaching, scholarship and research as possible fair uses.⁴⁸ The Supreme Court has said, however, that this list “was not intended to be exhaustive . . . or to single out any particular use as presumptively a fair use.”⁴⁹ Whether a particular use is a fair use will depend upon the facts of the particular case⁵⁰ as well as a consideration of the four factors listed in the

44. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

45. 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 (2d Cir. 1939). It has also been called a doctrine “so flexible as virtually to defy definition.” *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

46. The term “fair use” first appeared in *Lawrence v. Dana*, 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8136). But twenty-eight years earlier, Justice Story in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (no. 4901) spoke of a “nice balance” of interests that settles the question of infringement.

47. 17 U.S.C. § 107 (1982). House and Senate reports explain that § 107 does no more than give statutory recognition to the long-standing judicial doctrine of fair use; the statute was not intended “to change, narrow or enlarge it in any way.” H.R. REP. NO. 1476, 94th Cong., 2d Sess., at 66, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5680.

48. 17 U.S.C. § 107 (1982). Section 107 provides in pertinent part: 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.

49. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985) (The Court looked to § 101 of the 1976 Act for definitions of “including” and “such as”). “The endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute.” H.R. REP. NO. 1476, 94th Cong., 2d Sess., at 66, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5680.

50. The doctrine of fair use has been termed an “equitable rule of reason.” *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 454-55 (1984). Thus, “each case raising the question must be decided on its own facts.” H.R. REP. NO. 1476, 94th Cong., 2d

second sentence of Section 107.⁵¹ The four factors⁵² are: (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit, educational purposes;⁵³ (2) The nature of the copyrighted work;⁵⁴ (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole;⁵⁵ and (4) The effect of the use upon the potential market for or value of the copyrighted work.”⁵⁶

Sess. 65, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5679.

51. H.R. REP. NO. 83, 90th Cong., 1st sess., at 62 (1967).

52. Listed in 17 U.S.C. § 107 (1982).

53. Two sub-issues are considered under this factor. The first is whether the use is commercial, and the second is whether the use is productive.

A commercial use is presumptively an unfair use. *Sony*, 464 U.S. at 449, 451. But a commercial, for-profit, nature does not necessarily negate a fair use determination. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (Brennan, J., dissenting); *Consumers Union of U.S., Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980). In this regard, the Supreme Court has stated that “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Harper & Row*, 472 U.S. at 562, 563.

Distinguishing between a productive and an unproductive use may also be helpful in determining the balance, but such a distinction “cannot be wholly determinative” of a fair use. *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984). When a person “reproduces an entire work and uses it for its original purpose, with no added benefit to the public,” this is a non-productive use and “the doctrine of fair use usually does not apply.” *Sony*, 464 U.S. at 480 (Blackmun, J., dissenting) (emphasis added).

54. Courts have been more willing to recognize the defense of fair use when the original work is a product “of diligence” such as a catalog, index or other compilation. *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977). Conversely, the courts are less willing to recognize fair use if the work copied is “creative, imaginative, and original.” *MCA, Inc., v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981). This is because the law generally recognizes a “greater need to disseminate factual works than works of fiction or fantasy.” *Harper & Row*, 471 U.S. at 563. Thus, where an original work is intended for entertainment uses, as opposed to informational purposes, it is less likely that courts will accept a claim of fair use. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 (9th Cir. 1981). If a work is no longer in production and thus no longer available for purchase at a fair price, there may be a valid reason to deem copying of such a work a fair use. 17 U.S.C. § 108(e) (1982). See also *Meeropol v. Nizer*, 560 F.2d 1061 (1977).

55. Copying the copyrighted work in total is generally not a fair use. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Encyclopedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978). In addition to quantity, the court will look to the quality of what was taken from the original work. *Harper & Row*, 471 U.S. at 564, 565.

56. This area is where the largest part of the controversy lies and where most courts seem to place emphasis when deciding if a use is fair or not. “This last factor is undoubtedly the single most important element of fair use.” *Harper & Row*, 471 U.S. at 566. Fair use “is limited to copying by others which does not materially impair the marketability of the work which is copied.” *Id.* (quoting 1 M. NIMMER, COPYRIGHT § 1.10[D], at 1-87 (1984)). “If the defendant’s work adversely affects the value of any of the rights in the copyrighted work the use is not fair.” *Id.* at 568.

The Supreme Court stated that 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 [the creation of useful works] for the general public good.” *Twentieth Century*

How much weight each factor carries in a fair use analysis, as well as what other factors may be considered, has never been clear. Congress has failed to provide any definitive rules.⁵⁷ Nor have any fixed criteria emerged from the courts.⁵⁸

After considering the four factors listed in Section 107, the court next applies a balancing test weighing the public's interest in the particular use against the interest of the copyright owner.⁵⁹ If the public's interest in the use is important, and if the use does not severely injure the copyright owner, then it will probably be considered a fair use.⁶⁰

IV. *SONY CORP. V. UNIVERSAL CITY STUDIOS, INC.*

There is no case law specifically addressing the issue of home *audio* recording as a fair use. But the Supreme Court in *Sony* did address the issue of home *video* recording as a fair use.⁶¹ In *Sony*, Universal City Studios (Universal) filed an infringement action against Sony Corporation alleging that consumers were infringing on Universal's copyrighted works by using videotape recorders (VTRs) to record these works from commercially sponsored television.⁶² Universal did not seek damages from the individual, allegedly infringing, consumers. Rather, Universal alleged that Sony was liable as a contributory infringer⁶³ because Sony marketed the VTRs knowing that consumers would use them to infringe.⁶⁴

Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). In this light, the Court has stated that a use for the work "that has no 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." *Sony*, 464 U.S. at 450.

57. Congress recognizes that these factors are "in no case definitive or determinative" but only provide "some gauge [sic] for balancing the inequities." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5679.

58. "Courts have constructed lists of factors to be considered in determining whether a particular use is fair, [but] no fixed criteria have emerged by which that determination can be made." *Sony*, 464 U.S. at 475-76.

59. *Id.* at 454-55. "Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests." *Id.*

60. *Id.* at 454. See also *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).

61. *Sony*, 464 U.S. at 455.

62. *Id.* at 419.

63. "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer.'" *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971).

64. *Sony*, 464 U.S. at 419. The *Sony* case began as *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429 (C.D. Cal. 1979). The district court denied Universal the relief it sought and entered judgment for Sony. Universal appealed and the Ninth Circuit reversed the district court's judgment. It held that Sony was liable for contributory infringement and ordered the district court to fashion appropriate relief. *Universal City*

The Supreme Court in *Sony* determined that the sale of copying equipment did not constitute contributory infringement because the product was capable of “substantial noninfringing uses.”⁶⁵ The Court in *Sony* did not, however, resolve the issue of whether home video recording in general constitutes a fair, and thus, noninfringing use.⁶⁶ Rather, the holding in *Sony* was a very narrow one. The Court held only that *home video* recording for purposes of “time-shifting”⁶⁷ was a fair use. The Court did not speak to the issue of home recording for other purposes, for example, building a library of movies or television shows.⁶⁸ The Court has left these issues to be decided at a later time.⁶⁹ *Sony* is, thus, not controlling with

Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963 (9th Cir. 1981). The Supreme Court granted *certiorari* (*Sony Corp. v. Universal City Studios, Inc.*, 457 U.S. 1116 (1982)) and reversed the finding of the Ninth Circuit. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

65. *Sony*, 464 U.S. at 456. The Court in *Sony* looked to the doctrine of contributory infringement in patent cases as there was no precedent in the law of copyright for such an imposition of vicarious liability. The Court stated that “when a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe . . . , the public interest in access to that article of commerce is necessarily implicated.” *Id.* at 440. “[A] sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce.” *Id.* at 441 (citing *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), overruled on other grounds; *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917)). “Accordingly, the sale of copying equipment . . . does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.” *Sony* 464 U.S. at 442.

66. By enacting the Sound Recording Amendment of 1971 . . . 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 . . . 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.* *Sony*, 464 U.S. at 430 n.11 (emphasis added).

67. “Time shifting” involves using a videotape recorder to make a home recording of a television program which one cannot view as it is being televised, and then watching this recording at a later time. *Id.* at 421.

68. *See supra* note 66.

69. Even if *Sony* had addressed the issue of home video taping in general, a finding of fair use is questionable. The decision in *Sony* was 5-4, with Justices Marshall, Blackmun, Powell and Rehnquist dissenting. The majority based a large part of its decision on the findings of the district court. Yet, even the district court was hesitant to speculate as to the effects of home video taping. Referring to the harm claimed by Universal, the district court stated, “[b]ecause this prediction of harm is based on so many assumptions and on a system of marketing which is rapidly changing, this court is hesitant to identify ‘probable effects’ of home use copying.” *Universal City Studios*, 480 F. Supp. at 452. “This litigation leaves many issues undecided. . . [but] [t]his court is bound by the factual context of this litigation. The facts do not show harm to plaintiffs *even if infringing activity has occurred.* . . . [T]his court does not minimize plaintiff’s concerns. The new technology of videotape recording does bring uncertainty and change which, quite naturally induce fear.” *Id.* at 469 (emphasis added).

Had the issue in *Sony* not been so narrow, perhaps the outcome would have been different. The issue addressed by the courts was whether *Sony* was liable for contributory infringement and the relief sought was an injunction against the sale of the VCRs by *Sony*.

regard to the home audio recording issue for several reasons. First, the holding in *Sony* referred only to home recording for purposes of time-shifting. Most home audio recording is not done for purposes of time-shifting but, rather, is done to build a library of tapes to be used many times over. Second, even if home audio tapers recorded music off-the-air for purposes of time-shifting, the differences with regard to compensation of the copyright owners may disallow a finding of fair use.⁷⁰ Third, the protection offered to motion pictures and other audiovisual works have been accorded full copyright protection since 1912,⁷¹ while sound recording copyrights have not enjoyed such protection.⁷²

Since *Sony* is not controlling with regard to home audio taping,

The Court, however, seems to confuse the question of liability with the question of fashioning an appropriate remedy. "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." *Sony*, 464 U.S. at 446. The Court cites no authority for this statement. Since *Sony* was not a class action suit, and Universal did not speak for all interested copyright holders, the Court did not allow the injunction. Thus, the case was decided based on the relief requested and not on the issue of infringement or fair use. "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 non-infringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law." *Id.* at 444 (citing the district court, 480 F. Supp. at 468). Justice Blackmun in his dissent recognized, however, that "[r]emedies may well be available that would not interfere with authorized time-shifting at all." *Id.* at 494. In fact the court of appeals had also mentioned alternative relief be considered when it remanded the case to the district court. *Id.*

70. In the context of public television broadcasting, 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 is predicated upon the assumption that compensation for the value of displaying the works will be received in the form of advertising revenues. *Sony*, 464 U.S. at 446 n.28. In the case of sound recordings, there is no similar route for payment to copyright owners. Copyright owners are paid based on how much radio air-time a particular sound recording receives and is paid by the radio station through a licensing arrangement with The American Society of Composers, Authors and Publishers (ASCAP) or the Broadcast Music, Inc. (BMI). Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth*, 68 VA. L. REV. 1505, 1532-33 (1982).

71. See Act of Aug. 24, 1912, 37 Stat. 488.

72. "Unlike the sound recording rights created by the 1971 amendment, the reproduction rights associated with motion pictures under § 106(1) are not limited to reproduction for *public* distribution; the copyright owner's right to reproduce the work exists independently, and the mere duplication of a copy may constitute an infringement even if it is never distributed." *Sony*, 464 U.S. at 474 (Blackmun, J., dissenting). Section 106 grants the copyright owner the exclusive right to control the performance *and* reproduction of his work. "[T]he fact that he has licensed a single television performance is really irrelevant to the existence of this right to control its reproduction. Although a television broadcast may be 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." *Id.* at 480 (Blackmun, J., dissenting). "These persons are willing to pay for the privilege of watching copyrighted work at their convenience, as is evidenced by the fact that they are willing to pay for VTR's and tapes; undoubtedly, most also would be willing to pay some kind of royalty to copyright holders." *Id.* at 485 (Blackmun, J., dissenting).

it provides little guidance as to what is a fair use of a copyrighted audio recording. An application of the fair use factors⁷³ to home audio taping tends to lead to the conclusion that, in general, home audio taping is not a fair use of copyrighted sound recordings.⁷⁴

73. See *supra* notes 52-56 and accompanying text.

74. An application of the fair use factors shows that home audio taping, in general, should not be considered a fair use of copyrighted sound recordings. 1) *Purpose and Character of the Use*: The phrase "home taping" most commonly implies copying for personal, non-commercial use. Yankelovich, Skelly & White, Inc., *Why Americans Tape* 18-20 (1982) (study commissioned by the Home Recording Rights Coalition). Yet, the home audio tapper is "profiting" in a limited commercial sense in that he is gaining a new program of music as well as portability, convenience and quality without paying the customary price of compensation to the copyright owner usually included in the cost of prerecorded music. Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 562-63 (1985). The home audio recorder generally tapes the copyrighted work to be put to the same use as the original work (for entertainment) and, thus, is adding no productive use for the work. For these reasons, fair use would probably not be found under this factor. See *supra* note 53.

2) *Nature of the Copyrighted Work*: The complex, creative nature of the production of a sound recording, combined with the fact that the work produced is for entertainment purposes, as opposed to dissemination of information, tends to suggest that a fair use would not be found under this second factor. A possible exception might exist where the album or tape is no longer in production. See *supra* note 54.

3) *Amount and Substantiality of the Portion Used*: Either taping entire albums or tapes or just the hit songs on those albums can be considered copying in the entirety because each individual selection on an album is a work that is copyrightable in itself. Copying in total, as such, would not be considered a fair use under this factor. See *supra* note 55.

4) *Effect of Use on Potential Market for or Value of Copyrighted Work*: Various studies have been done to determine the effect of home audio taping on the prerecorded music market. The Roper Organization, Inc., *A Study on Tape Recording Practices Among the General Public* (1979). Copyright Royalty Tribunal, *Report of the Committee on Home Taping* (1979). CBS Records Market Research, *Blank Tape Buyers—Their Attitudes and Impact on Pre-Recorded Music Sales* (1980). Warner Communications, Inc., *Home Taping: A Consumer Survey* (1982). The amount of loss to the recording industry caused by home taping is not precisely known due to the ambiguous nature of the harm and because it involves an activity occurring inside private homes. But, viewing the conclusions of these studies as a whole, it can safely be said that the recording industry does suffer a substantial loss of prerecorded album and tape sales at the hands of home tapers. This detrimental effect of home audio taping on the market for pre-recorded music would demand that such copying be denied as a fair use under this factor. See *supra* note 56. A problem with the above studies, however, is that they assume that if home taping were not available, tapers would purchase more records and prerecorded tapes. This assumption has not been substantiated and *might* preclude a finding of potential harm to the recording industry. Also, these studies use blank tape sales as the basis for determining loss. Loss is difficult to establish from blank tape sales because blank tapes have many uses besides taping pre-recorded music. For example DAT is useful in the computer industry. DAT can store digital computer data and is easier to update and cheaper to duplicate than other methods of computer data storage which are available. A determination of fair use under this factor would turn on whether some "meaningful likelihood of future harm exists" from the particular use in question. *Sony*, 464 U.S. at 451. If, under the first factor, the use is commercial, this "likelihood" of harm may be presumed. *Id.* Since home audio taping can be considered a commercial use (as above) a presumption of harm arises and fair use is not likely to be found under this fourth factor. Because home audio recording does not meet any of the fair use criteria as set forth in § 107 of the Copyright Act, such activity should not be exempt from infringement.

Yet this conclusion does not settle the issue. With a case by case analysis,⁷⁵ it would take many years to establish any kind of reliable pattern of what constitutes a fair versus an unfair use with regard to home audio taping. Should home audio taping be denied status as a fair use, it would certainly be unreasonable to expect individual home audio tapers to bargain individually with copyright owners over the right to tape each desired program. It would be equally unfair to the recording industry to expect it to enforce a prohibition on home audio recording. Enforcement proceedings would cost the recording industry more than any profit it would gain from such a prohibition on home audio taping. Also, the problem of attaching a remedy if infringement is proven is very difficult.⁷⁶ An alternative solution is needed concerning the issue of home audio taping, especially considering the rapid growth in recording equipment technology and the high costs of marketing new prerecorded formats.

V. THE ANTI-COPY SOLUTION

Recently, the issue of home audio taping reached a new level of attention in Congress⁷⁷ with the pending release of DAT recorders on the United States market.⁷⁸ The advent of DAT recorders brings no new issues to the home audio taping controversy.⁷⁹ However, the recording industry fears greater losses than ever to home taping because of the higher recording quality of DAT and the near perfect copies that can be made of CDs.

In response to concerns expressed by the recording industry about DAT, an international committee consisting essentially of audio equipment manufacturers suggested several electronic anti-copying provisions to be applied toward manufacturers of DAT recorders.⁸⁰ The committee's chief provision called for the use of different sampling rates,⁸¹ for example, 48- or 32-kHz for DAT as

75. See *supra* note 50.

76. This is exemplified by the *Sony* case, see *supra* note 69.

77. See *infra* notes 87-88. DAT has also received considerable attention in the California legislature. A California bill, SB 1560 (1987), would have banned DAT machines in California unless they contained the "anti-copy" chip. (Discussed *infra* at notes 85-86 and accompanying text.) The California State Assembly Economic Development and New Technologies Committee rejected the bill for lack of support. *Manufacturing Update*, AUDIOVIDEO INTERNATIONAL Sept. 1987, at 38.

78. Marantz DAT recorders were originally due on United States markets in October of 1987. A parts supply problem has delayed its release. *DAT Delay*, STEREO REVIEW, Dec. 1987 at 4. See *supra* note 1.

79. Consumers will not use DAT recorders any differently than they do other recorders (cassette and VCRs).

80. Feldman, *Issues*, AUDIO RETAILER, Nov. 1986 at 20.

81. DAT players measure sound levels intermittently. The sampling rate, in cycles per second (Hz), is how often these measurements are taken. Simplified, a 44.1 kHz sam-

opposed to 44.1-kHz for a CD.⁸² This different sampling rate would make it impossible to directly copy CDs to DAT in a “digital-to-digital” mode.⁸³

The recording industry, not satisfied with the international committee’s anti-copying provisions, went on to develop its own anti-copy technology rendering the committee’s provisions useless.⁸⁴ A device called a “copy-code scanner chip” can now be built into the recording mechanism of a DAT recorder.⁸⁵ This device scans pre-recorded discs (or records or tapes) for a special “copy-code.”⁸⁶ If the code is encountered, the chip will temporarily stop (for twenty-five seconds) the recorder from taping.

This copy-code scanner chip was the subject of a number of different bills introduced in Congress in 1987.⁸⁷ Each of these bills

pling rate means that every second of sound is represented by 44,100 measurements. See Burton, *Tech Talk: Digital Audio Basics*, AUDIOVIDEO INTERNATIONAL, Sept. 1987 at 55.

82. Feldman, *Issues*, AUDIO RETAILER, Nov. 1986 at 20.

83. It would be possible by electronic means, however, to convert the digital message at 44.1-kHz from a CD to an analog message and then change this analog message back into a digital message of 48-kHz, which a digital audio tape would accept. This, though, would not be equal to making a true “master” quality copy. While this multiple translation process does degrade the quality it is suggested that even this indirect mode of copying (digital-to-analog and analog-back-to-digital) would probably not produce any noticeable or detectable noise and distortion. Birchall, *Digital Audio Tape: Issues and Answers*, STEREO REVIEW, Mar. 1987 at 56, 58-59. See also *All You Need to Know About DAT (Except Marketing)*, AUDIOVIDEO INTERNATIONAL, June 1987 at 26, 36 (edited by Christopher Greenleaf). In any event, direct digital-to-digital copying from another DAT would be possible if both tapes have the same sampling rate because there would be no need to translate the message. Harrell, *DAT Finally Released*, STEREO REVIEW, Apr. 1987 at 18.

84. Although the first DAT recorders to come onto the market will have a sampling rate of 48-kHz, DAT recorder manufacturers will most likely return to the same sampling rate of CDs [44.1-kHz] so as to maintain a networking standard for the industry. Birchall, *Digital Audio Tape: Issues and Answers*, STEREO REVIEW, Mar. 1987 at 56, 59.

85. CBS has developed a prototype “copy-code scanner chip.” No such chip yet exists in production form, but the technical schematics have been developed. Slovic, *DAT Update*, AUDIOVIDEO INTERNATIONAL, June 1987 at 38 (provides a good discussion of how this chip works).

86. The “copy-code” consists of the removal of a “notch” of inaudible sound. That is, a removal of sound signals within the audio frequency range of 3500 to 4100 hertz. “Encoding” consists of an intermittent notch centered at 3,838 Hz, about 90 dB down and 125 Hz wide. *Bulletin*, STEREO REVIEW, Apr. 1987 at 1. Proponents of the anti-copy chip system (mostly from the recording industry) maintained that the notch would not distort the sound quality of an encoded recording, but this was disputed by the Home Recording Rights Coalition. Slovic, *DAT Update*, AUDIOVIDEO INTERNATIONAL, June 1987 at 38. As a result of this discrepancy, Congress requested The National Bureau of Standards to investigate whether the anti-copy chip 1) achieved its stated purpose—the prevention of DAT machines from recording; 2) diminished the quality of prerecorded material bearing the notch; and 3) could be easily bypassed. The anti-copy chip failed on all three points. *World News: Copycode for DAT Damned in NBS Report*, AUDIOVIDEO INTERNATIONAL, Mar. 1988 at 8. The Home Recording Rights Coalition hopes that this finding will kill any further attempts at anti-copy legislation, but this remains to be seen. *Id.*

87. One such bill was attached to the Trade and International Economic Policy Reform Act of 1987 (H.R. 3, 100th Cong., 1st Sess. (1987)) but was dropped from the Act as it advanced to final consideration. The measure was dropped from the Trade bill primarily

demanded that a copy-code scanner be inserted into all digital audio recording equipment placed on the United States market.⁸⁸ The main difference between the bills was the length of time the provision would remain effective. For example, H.R. 1384/S. 506 contains a three-year sunset provision.⁸⁹ On the other hand, H.R. 1155/S. 539 contains no sunset provision and would be a permanent bar to the introduction of non-decoder equipped DAT recorders.

There are several reasons why this anti-copy chip legislation is not the appropriate solution to the home audio taping controversy. First, even if anti-copy chip legislation were the appropriate means to deal with home audio recording, such legislation should be considered as an amendment to the Copyright Act. DAT legislation should not be disguised by attaching it to miscellaneous trade bills.⁹⁰ Congress should face the issue for what it is: a copy-

because it was seen as too product specific. The House speaker felt the trade legislation should apply a broad remedy rather than address the problems of a specific industry. *Legislation*, 33 Pat. Trademark & Copyright J. (BNA) 720, 721 (1987).

See also H.R. 1155, 100th Cong., 1st Sess. (1987) and S. 539, 100th Cong., 1st Sess. (1987) (introduced 2/19/87); H.R. 1384, 100th Cong., 1st Sess. (1987) and S. 506, 100th Cong., 1st Sess. (1987) (introduced 2/5/87); H.R. 1603, 100th Cong., 1st Sess. (1987) and S. 635, 100th Cong., 1st Sess. (1987).

88. H.R. 1155 (*Trade, Employment & Productivity Act of 1987* Title III—Subtitle C—Regulation of Commerce in Digital Audio Recording Devices Act of 1987) is representative of all three bills and provides:

Section 3302 (b) Digital Audio Recording Devices.—1) No person shall import into the United States, or manufacture, assemble, distribute, sell, resell, or lease, or offer for sale, resale, or lease in commerce:

(A) any digital audio recording device which does not contain a copy-code scanner; or

(B) any device, product, or service which has the primary purpose or effect of bypassing, removing, or deactivating a copy-code scanner.

2) No person shall bypass or deactivate a copy-code scanner.

3) No person shall produce encoded phonorecords unless:

(A) the encoded phonorecords so produced are protected under title 17, United States Code, and

(B) that person is a copyright owner or is authorized by the copyright owner to produce the encoded phonorecords.

89. The "sunset provision" provides that the manufacturer will be required to insert the anti-copy chip for three years to maintain the status quo while Congress comes up with a permanent solution to the problem of unauthorized home recording.

90. See *supra* notes 87-88. Congress has never blocked the entry of new technology into the United States unless there was a "danger" to the American public. National security is not at issue with DAT and the recording industry has not proven that there will be "serious economic damage" if DAT is allowed on the United States markets. In denying access of unaltered DAT recorders to the United States it might set precedent that we will come to regret in the future. Rep. Dan Rostenkowski (D-Ill.), chairman of the House Ways and Means Committee expressed his thoughts in this regard when he stated, "I think the picture of a nation trying to lock out a new technology is not a pretty one." *Quoted in Marantz To Market DAT In Fall; Other Producers Unsure About U.S.*, VARIETY, June 1987 at 94.

right issue.⁹¹

Second, sunset provisions, designed to maintain the status quo until Congress devises a better solution are not acceptable.⁹² Such provisions in the case of DAT recorders would have the same basic effect as a preliminary injunction against the sale of DAT recorders. No one will want to buy a recorder that cannot record, or even play, any prerecorded music.⁹³

Finally, use of anti-copy chips may be unconstitutional. The purpose of copyright is to secure a monopoly for the author for a *limited* time.⁹⁴ With the anti-copy chip, recordings would be encoded to prevent copying of them during the term of their copyright.⁹⁵ But after the term of protection expires, the obstacle to copying would still remain. The effect would be an extension of copyright protection for works long after they should have entered the public domain.

Anti-copy chips may not be as helpful to the record industry as appears at first glance.⁹⁶ Experience with anti-copy schemes for

91. The DAT legislation provides only band-aid therapy to the much larger issue of home recording in both audio and video modes, and does not allow the kind of flexibility that will be needed as technology gives rise to new formats for home recording devices.

92. The argument could be made that the anti-copy chips in the DAT recorders are not preventing the copying of all recordings; and that they are only preventing the best copies (i.e. digital copies) from being made. Concern has been expressed, however, that should the proposed legislation pass, additional legislation would likely follow with similar provisions making such a device mandatory in all other recording equipment, including analog cassette and videotapes. *Esse, It Can't Happen Here*, HIGH FIDELITY, Apr. 1987 at 11.

93. One should note that the pending legislation contains provisions for the encoding of phonorecords, and is not limited to encoding CDs. *See supra* note 88. This means the recording industry could encode all phonorecords, including records, prerecorded tapes and CDs, rendering the recording capacity of the DAT recorders useless except for off-the-air taping or taping from older recordings. Since there are no prerecorded DATs available, nor does it appear that the record industry intends to make them available immediately, even the playing capacity of the DAT recorders would be useless. The recording industry contends that it is unable to exploit DAT technology with prerecorded tapes because a commercially feasible system for high speed DAT duplication has not yet been developed. Contrary to what has been claimed by the record industry, however, there is a commercially feasible method of duplicating digital tapes called "contact-printing method" that is fast (seven feet per second, i.e. 270 times the normal playing speed) and inexpensive. Birchall, *Digital Audio Tape: Issues and Answers*, STEREO REVIEW, Mar. 1987 at 56-59.

94. "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." U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

95. In general, copyright in a work subsists from its creation and endures for a term consisting of the life of the author and fifty years after the author's death. 17 U.S.C. §§ 302-05 (1982). Once the term of protection expires, the work enters the public domain which means that anyone may copy it without having to compensate the author for the right to copy. In the case of a sound recording, the author is generally the record publishing company.

96. It is interesting to note that not all factions of the recording industry are behind anti-copy legislation. Stevie Wonder (recording artist on Tamla/Motown) has stated his objections to the encoding process in written testimony saying that, "the process has the

computer programs⁹⁷ demonstrates that most anti-copy schemes are eventually defeated.⁹⁸ A bootleg market for the products used to defeat the anti-copy scheme is usually created. Then the recording industry will likely end up spending more money on enforcement of the anti-copy provision than it stands to gain from it.⁹⁹ There is also a problem in that the only way to effectively enforce the use of the anti-copy chip would be to monitor the actions of private individuals in their own homes. This raises insurmountable practical enforcement problems as well as serious privacy concerns.¹⁰⁰ The anti-copy chip solution, as discussed above, is very problematic.

VI. TIME TO RECONSIDER?

Legislatively, there are two less problematic approaches in addressing the issues surrounding home audio taping. First, Congress could by statute expressly exempt home audio recording from infringement. Ever since the Court of Appeals for the Ninth Circuit in the *Sony Case*¹⁰¹ found home copying to be an infringement of copyright,¹⁰² Congress has been trying to exempt home taping from infringement. Within days of the Ninth Circuit's decision, bills were introduced in Congress to specifically exempt noncommercial home videotaping from copyright liability.¹⁰³

effect of distorting the music. . . . [T]he integrity of my music will be compromised." Joe Jackson (recording artist), speaking at A & M Record's 25th Anniversary Convention stated that he supported the DAT format and that "the thought of people borrowing my records from their friends and taping them has never bothered me. . . . [M]y concern is that as many people as possible hear the music." Russ Solomon, President of Tower Records retail chain, supported Jackson's position on DAT. *The DAT Debate*, STEREO REVIEW, Sept. 1987 at 4.

97. *Encryption: Can Spies and Thieves Break It? A Better Encryption Technique*. *Maybe*, TECHNOLOGY REVIEW, Nov./Dec. 1982 at 72-74.

98. At one point in the *Sony* trial in 1979, it was proposed that Sony install a "jamming device" in its VCRs to prevent recording. Judge Warren Ferguson addressed this proposal by stating that it would not help because "[a]s sure as you and I are sitting in this courtroom today, some bright young entrepreneur, unconnected with Sony, is going to come up with a device to unjam the jam. And then we have a device to jam the unjamming of the jam, and we all end up like jelly." Boundas, *Speaking My Piece*, STEREO REVIEW, July 1987 at 4, (citing J. LARDNER, *FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE ONSLAUGHT OF THE VCR* (1987)).

99. For discussion of similar problems with computer anti-copy schemes, see generally Peterson, *Computer Hacking and Security Costs*, 124 SCIENCE NEWS, Nov. 1983 at 294.

100. *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969) (right to be free of unwarranted governmental intrusion into the privacy of one's home).

101. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981).

102. The Supreme Court later granted *certiorari* in the *Sony* case and held that home taping of television programs off the air for the purpose of "time-shifting" was a fair use. See *supra* note 64 and accompanying text.

103. The court of appeals decided the *Sony* case on October, 19, 1981. H.R. 4808,

These first bills dealt solely with videotaping and sought only to overturn the *Sony* decision.

The Home Recording Act of 1982¹⁰⁴ and the Home Recording Act of 1983,¹⁰⁵ sought to exempt in-home taping of *audio and visual* works from copyright liability.¹⁰⁶ Finally, in 1985, the Home Audio Recording Act¹⁰⁷ which exempted only home *audio* taping from copyright liability was introduced.¹⁰⁸ This 1985 bill was approved by a Senate Subcommittee; but by the end of the 99th Congress in October 1986 there had been no further action on the bill. However, in view of the fact that Congress has seriously considered anti-copy chip legislation,¹⁰⁹ such a blanket exemption will not likely be favored.¹¹⁰ Also, such an exemption ignores the interests of the sound recording copyright owners.

A second solution is to establish a system of royalty payments to copyright owners in return for an exemption or a compulsory license¹¹¹ to record copyrighted works. An example of such a bill was the Home Audio Recording Act introduced in the U.S. Senate in the 99th Congress.¹¹² This bill provided that home audio

96th Cong., 2d Sess. (1981) and S. 1758 96th Cong., 2d Sess. (1981) were both introduced on October, 21, 1981. S. 1758 suggested the following amendment to the Copyright Act:

Section 119. Limitation on exclusive rights:

Exemption for certain video recordings notwithstanding the provisions of section 106, it is not an infringement of copyright for an individual to record copyrighted works on a video recorder if—

- (1) the recording is made for a private use; and
- (2) the recording is not used in a commercial nature.

104. H.R. 5705, 97th Cong., 1st Sess. (1982) (introduced 3/3/82).

105. H.R. 1030, 98th Cong., 1st Sess. (1983) (introduced 1/27/83), and S. 31, 98th Cong., 1st Sess. (1983) (introduced 1/26/83).

106. Unlike S. 1758 (*supra* note 103) which sought only to overturn *Sony*, these bills contained compulsory licensing provisions with royalty payments to be paid to and distributed by the Copyright Royalty Tribunal. *See supra* notes 104-05.

107. H.R. 2911, 98th Cong., 2d Sess. (1985) (introduced 6/27/85) and S.1739, 98th Cong., 2d Sess. (1985) (introduced 10/7/85).

108. This bill also contained a compulsory license provision with royalty payments to be made to and distributed by the Copyright Royalty Tribunal. *Id.* (The bill will be discussed further at *infra* notes 112-116 and accompanying text, and section VII).

109. H.R. 1384, with a change in the sunset provision to one year, was approved by a House subcommittee on Commerce, Consumer Protection and Competitiveness on August 3, 1987. *See supra* note 87.

110. In fact, all of the previous bills in favor of a blanket exemption failed in Congress for lack of action.

111. The exclusive rights granted to copyright owners is currently modified by compulsory licensing provisions of the Copyright Act in four situations: § 111(d) Compulsory License for Secondary Transmissions by Cable Systems; § 115 Compulsory License for Nondramatic Musical Works (refers to works per se and not to copyrighted phonorecords); § 116 Compulsory License for Public Performance on Coin-operated Phonorecord Players; and § 118 Compulsory License in Connection with Noncommercial Broadcasting. 17 U.S.C. §§ 111, 115, 116 & 118 (1982).

112. S. 1739, 99th Cong., 1st Sess. (1985). *See supra* notes 106-07 and accompanying text. S. 1739 provides:

§ 119. Limitation of Liability: Audio Recording

(a) **AUDIO RECORDING.**—Notwithstanding the provisions of section 106(1), an individual who makes an audio recording of a musical work or a sound recording is exempt from any liability for infringement of copyright if the recording made is for the private use of that individual or members of his or her immediate household; *Provided, however,* That nothing in this section shall exempt from liability a person who, for purposes of direct or indirect commercial advantage, induces, causes or materially contributes to the making of audio recordings by any individual or entity.

(b) **Compulsory License for Audio Recording Devices and Media.**—

(1) **AVAILABILITY OF COMPULSORY LICENSE.**—Notwithstanding the provisions of section 106(1), the importation into and distribution in the United States, and the manufacture and distribution in the United States, of any audio recording device or audio recording medium shall be subject to compulsory licensing if the importer or manufacturer of the device or medium records the notice, and deposits the statement of account and total royalty fees, specified by this paragraph.

(2)(A) **INFRINGEMENT.**—Notwithstanding the provisions of paragraph (1), the importation into and distribution in the United States, or the manufacture and distribution in the United States, of any audio recording device or audio recording medium is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, 509 and 511, if the notice, statement of account, or total royalty fee specified by paragraph (1) has not been recorded or deposited, or if the statement of account or royalty fee does not materially comply with the requirements of paragraph (1) or any regulations prescribed thereunder.

(3) **DEPOSIT OF ROYALTY FEES.**—The Register shall receive all fees deposited under this section and, after deducting reasonable administrative costs, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury shall direct. All funds held by such Secretary shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal (hereinafter in this section referred to as the "Tribunal") as provided by this title. The Register shall promptly submit to the Tribunal a compilation of all statements of account covering the pertinent periods provided by paragraph (1).

(4) **COPYRIGHT OWNERS ENTITLED TO ROYALTY FEES.**—The royalty fees deposited pursuant to this section in connection with audio recording devices and media shall, in accordance with the procedures specified in paragraph (5), be distributed to the owners of copyrights in musical works and sound recordings that were included in radio or television transmissions, or distributed to the public in the form of phonorecords or copies, during the period to which such fees pertain.

(5) **DISTRIBUTION OF ROYALTY FEES.**—The royalty fees deposited pursuant to this section shall be distributed in accordance with the following procedures:

(A) During the 30-day period specified by the Tribunal for each year in which this section becomes effective, every person claiming to be entitled to compulsory license fees under paragraph (4) of this subsection shall file a claim with the Tribunal for fees covered by all statements of account for periods during the preceding year in accordance with requirements that the Tribunal shall prescribe by regulation. All such claimants shall negotiate in good faith among themselves in an effort to agree to a voluntary proposal for the distribution of royalty fees.

(c) **ROYALTY FEES.**—

(1)(A) **AUDIO RECORDING DEVICES.**—The royalty fee payable under subsection (b) for each audio recording device imported into or distributed in the United States, or manufactured and distributed in the United States, shall be five per centum of the price charged for the first domestic sale of such device.

(B) **DUAL AUDIO RECORDING DEVICES.**— The royalty fee payable under subsection (b) for each dual audio recording device imported into and distributed in the

recording for private use would be exempt from copyright.¹¹³ In return for this exemption, royalty fees, payable to the Copyright Royalty Tribunal,¹¹⁴ were to be imposed on manufacturers of recording equipment and recording media.¹¹⁵ These fees would then be distributed to copyright owners by the Copyright Royalty Tribunal.¹¹⁶ This second approach, as exemplified in the Home Audio Recording Act of 1985, is the better approach. A royalty payment in return for exemption is preferable over an unqualified exemption because it provides a better balance between the right of the copyright owners to be compensated and the right of the public to have access to new technology.

VII. ROYALTY SOLUTION REVISITED

There are several sections of the Home Audio Recording Act of 1985 (S. 1739, "the Act") which may have been the cause of its failure in Congress and which, if corrected, would present a more

United States, or manufactured and distributed in the United States, shall be twenty-five per centum of the price charged for the first domestic sale of such device.

(C) AUDIO RECORDING MEDIA.—The royalty fee payable under subsection (b) for each audio recording medium imported into and distributed in the United States, or manufactured and distributed in the United States, shall be one cent per minute of the maximum playing time or fraction thereof for such medium.

(D) EXEMPTIONS.—The Tribunal shall by regulation exempt from royalty fees particular kinds of audio recording devices or audio recording media . . . that the Tribunal finds . . . are unsuitable for making audio recordings by individuals for private use.

(2)(A) ADJUSTMENT OF ROYALTY FEES.—The fees specified in paragraph (1) shall be subject to adjustment by the Tribunal in the fifth calendar year after the date this section becomes effective, and in each subsequent fifth calendar year

113. *Id.*

114. The Copyright Royalty Tribunal was created to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in §§ 111, 115, 116, & 118 of the Copyright Act. *See* 17 U.S.C. §§ 801-10 (1982).

115. S. 1739, *supra* note 112. Payment of these royalty fees would exempt the manufacturers from contributory infringement claims. This cost would, of course, be passed along to the consumer, so that the allegedly infringing consumer ultimately pays for the privilege of copying copyrighted sound recordings.

116. *Id.* Currently, the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) control performance copyrights to most musical works produced in the United States. ASCAP and BMI are private enterprises and are not associated with the Copyright Royalty Tribunal. A copyright owner of a song licenses his performance right to one of these organizations, which in turn issues a blanket license to radio and television stations. These stations may then broadcast any title in the ASCAP or BMI catalogue. The fee these stations pay is usually based on a percentage of the station's gross receipts. ASCAP and BMI then distribute these fees, minus their commission, to the original copyright owners based on the frequency with which the copyrighted work is broadcast. Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth*, 68 VA. L. REV. 1505, 1532-33 (1982).

acceptable form of the bill. The first problem area is in the use of the term “compulsory licensing.”¹¹⁷ The idea behind this compulsory licensing provision is that owners of copyrights in sound recordings will be required to give recording equipment manufacturers a license to sell their equipment (capable of reproducing the copyrighted works) upon payment of a royalty fee.¹¹⁸ The manufacturers, however, are not conducting the actual infringing activity; consumers are.¹¹⁹ Giving copyright owners such control over a separate industry goes well beyond the original purpose of granting these copyrights.¹²⁰ A royalty fee based on, and added to, the cost of the recording equipment at the time of sale, thus paid by the consumer directly, would be a more fitting solution.¹²¹ The cost of this solution falls directly upon the actual infringer and the infringer pays only for the quality of the recording equipment he desires.¹²²

117. S. 1739, *supra* note 112, at § 119(b)(1). *See also supra* note 111. As discussed previously, the use of a copyrighted work that violates any of the exclusive rights of the copyright holder is an infringement of the copyright. A copyright owner may grant permission to others to use the copyrighted work in a manner that would otherwise constitute infringement. Usually this permission is granted in the form of a license to the user in return for a royalty fee paid by the user.

118. S. 1739, *supra* note 112, at § 119(b)(1). Distribution of such equipment without payment of the royalty fee would constitute infringement and would entitle the copyright owner to remedies as prescribed by the statute. *Id.* at § 119(b)(2)(A).

119. True, but sound recording equipment manufacturers are benefitting because consumers purchase this sound recording equipment, which in turn enables the consumer to conduct the infringing activity; but so are the copyright owners benefitting from the new technology that the manufacturers provide because consumers buy sound recordings in new formats to use with this new technology.

120. U.S. CONST. art. I, § 8, cl. 8, authorizes Congress “to promote the Progress of Science and the useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” The Copyright Act has accomplished this by granting a limited monopoly to the copyright owner. “The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. . . . 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.” *Sony Corp. v. Universal City Studios, Inc.* 464 U.S. 417, 429 (1984). “The copyright law . . . makes reward to the owner a secondary consideration.” *Unites States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

121. That the public is willing to pay for the ability to listen to high quality audio entertainment is evidenced by the enormous amount of money spent on audio equipment.

122. If manufacturers were required to pay royalties based on the cost of the total amount of high quality sound recording equipment they sell (as per S. 1739), then a manufacturer can spread this cost among all of its retail items. Thus, a manufacturer could assign some of the cost to those tape players used for recording conversations, lectures, phone messages, computer data, etc. (i.e. those not intended for high quality taping). A reason for doing this lies in the fact that in order to keep sales of high quality audio equipment up a manufacturer will want to try to keep the retail cost of such products down. Distributing the costs as such makes certain business sense, but ignores the very purpose for imposition of such a royalty fee (i.e. to charge infringers for a license to copy). Purchasers of the lesser quality items would be unwittingly paying for the benefit of the purchaser of the high quality equipment, though he (the purchaser of lesser quality items)

A second problem with the Act is that it names the Register of Copyright and the Copyright Royalty Tribunal as administrators of the statute.¹²³ Collection and distribution of copyright royalties is sure to be an expensive undertaking because of the formalities and paperwork involved.¹²⁴ The Register of Copyrights and Copyright Royalty Tribunal are currently responsible for the collection and distribution of royalties under sections 111 and 116 of the Copyright Act.¹²⁵ For all other copyrights, it is up to the owner of the copyright to monitor the uses made of his copyrighted work and the collection of his own royalty fees. A better mechanism for administration may be the use of private enterprises such as ASCAP and BMI.¹²⁶ These agencies have long been accepted by the recording industry and have a wealth of past experience in the collection and distribution of copyright royalties. Private enterprises, being of a for-profit nature, are also more likely to be cost efficient which is beneficial to all parties involved in the process.

The final area of the Act in need of revision concerns the amount of royalty fees to be imposed.¹²⁷ Sound recording copyright owners and private enterprises in charge of administration will need to negotiate the amount of royalties. Final approval by the Copyright Royalty Tribunal or Congress¹²⁸ should be required

probably will not use such equipment for infringing uses.

123. S. 1739, *supra* note 112, at § 119(b)(3).

124. *Id.*

125. Collection and distribution of royalties is now conducted by these two agencies under § 111 (cable television systems) and § 116 (jukeboxes) of the Copyright Act. The agencies are each permitted to deduct reasonable costs incurred by them in conducting their designated tasks. *See* 17 U.S.C. §§ 111, 116 (1982). Yet, it seems the royalties paid are themselves barely enough to cover the cost of completing the paperwork involved. For example, a person desiring a license for a jukebox must file an application with the Register of Copyrights and pay a royalty fee of eight dollars. § 116(b)(1)(A). After the Register receives this fee, reasonable costs are deducted and the rest is placed in the Treasury of the United States. § 116(c)(1). The Register must submit an annual detailed statement of account covering all fees received by the Copyright Royalty Tribunal. *Id.* In order to receive royalties from the Copyright Royalty Tribunal, a copyright owner must file a claim with the Tribunal. § 116(c)(2). If everything is in order the Tribunal, after deducting reasonable administrative costs, will distribute the appropriate royalties to the copyright owner. § 116(c)(3). Eight dollars paid cannot possibly cover all the administrative costs involved in this process. Both the Register of Copyright, as director of the Copyright Office, and the Copyright Royalty Tribunal, as an independent legislative agency, are government (and thus taxpayer) funded. Are government funds (taxpayer dollars) used to assist copyright owners to collect their royalties? Also, evidence of the inefficiency of the system currently used is a two-year delay in distribution of cable royalties. This has led some experts to urge a return to a "free market system to avoid complexities, needless bureaucracy, and unfairness to copyright owners." Leaffer, *The Betamax Case: Another Compulsory License in Copyright Law*, 13 U. Tol. L. Rev. 651, 686 n.164 (1982).

126. Discussed previously *supra* note 116.

127. S. 1739, *supra* note 112, at § 119(c).

128. Between the two, the Copyright Royalty Tribunal seems the more qualified. The Tribunal was created with this kind of purpose in mind. 17 U.S.C. § 801 (establishment and purpose of Tribunal).

to see that this royalty serves only the purposes of granting the copyright and protecting the consumer. Reconsideration of these fees should be made every two years as opposed to every five years as suggested by the bill¹²⁹ because of the rapid changes occurring in the audio field. The five percent royalty on audio recording devices suggested by the Act seems reasonable at this time,¹³⁰ but the twenty-five percent royalty on dual recorders seems quite high.¹³¹ The proposed rate of one cent for each minute of playing time on a blank tape is also quite high.¹³² Another consideration is that not all blank tapes are used to record copyrighted sound recordings.¹³³ It would be more reasonable to place a royalty only on high quality blank tapes, because these are more often used for taping sound recordings.¹³⁴ Overall, it would be much better to err on the low side with respect to royalty fees until it can be determined how the system will be tolerated.

CONCLUSION

Home audio recording of copyrighted works presents some difficult issues. These issues cannot be satisfactorily resolved by the traditional application of the fair use analysis. An alternative legislative solution is in order. The proposed anti-copy chip is a quick answer but it does not square well with the purpose of granting a copyright to the author. The enforcement problems involved with the anti-copy chip are also great. Moreover, the anti-copy chip denies the public access to useful applications of new technology.

129. S. 1739, *supra* note 112, at § 119(c)(2)(A).

130. For example, a consumer can purchase a good quality cassette recorder for \$200. A five percent royalty would equal \$10. If this recorder had an average life of 10 years, this means that the consumer is paying \$1 per year for the privilege of recording as many copyrighted works for his personal use as he wishes.

131. Dual recorders are certainly built to make it convenient for the home recorder to make copies of other tapes, but it cannot be said that the home recorder is always making copies of copyrighted music. Also, such recorders for home use, are more often used to listen to, rather than to record music. It must be remembered that the purpose of imposing this royalty is not to damage audio equipment sales. Rather, the purpose is to provide some compensation to sound recording copyright owners for infringing uses made of their works.

132. This would add \$.90 to the cost of a 90-minute blank tape. Assume the cost of a tape were \$1.50, and sold at retail for \$2.00 (in actuality, probably less). Adding \$.90 to the \$2.00 retail price gives the consumer an actual retail price of \$2.90 for the tape. This is almost 50% more than the consumer would pay without the royalty fee added. The market for blank tapes is very cost sensitive and such a high royalty might place too great a burden on blank tape manufacturers.

133. For example, those tapes used to record lectures, phone messages, computer programs, etc.

134. The proposed bill also provided some exemptions from royalties for recording devices (for example, small tape recorders used mainly to record conversations, lectures, etc.) and media that are *not used for the purpose of recording from copyrighted sound recordings*. S. 1739, *supra* note 112, at § 119(b).

A royalty solution seems to best represent the needs and concerns of all parties involved. It compensates the copyright owners for their works, it avoids the enforcement problems involved with the anti-copy devices, and it provides the public with useful access to new technology. Also, such a solution is more easily adaptable to new technology as it arises. Congress should seriously consider these advantages, along with the suggestions made in this Comment, when it decides the fate of DAT.

Would it be too much to hope that, recognizing that they are all part of the same process, the users of copyrighted sound recordings could accept the principle of performance royalties, and could sit down with the performers and record makers to work out a reasonable compulsory licensing system? The alternative, no one need be told, is years more of wrangling in the legislative arena, with people pitted against each other who should be working together for their mutual profit.¹³⁵

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135. S. REP. NO. 1, 94th Cong., 1st Sess. (1975) (statement of Barbara Ringer, Register of Copyrights).

** This Comment is dedicated to my wonderful parents, Donald and Janice Larson. A special thanks, also, to my husband, Steve, for his love and support.

