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Digital Audio Recording Technology: Challenges to American Copyright Law.

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DIGITAL AUDIO RECORDING TECHNOLOGY: CHALLENGES TO AMERICAN COPYRIGHT LAW

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I. INTRODUCTION

American copyright is a constitutionally sanctioned[1] and legislatively accorded form of protection for authors against the unauthorized copyright of their "original works of authorship."[2] By statute, the copyright owner is given the exclusive right to use and to authorize the following uses of the copyrighted work: reproduction, preparation of derivative works, distribution, public performance, and

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1. *See* CONST. art. I, § 8, cl. 8. The Constitution grants Congress the authority to regulate copyrights. This power is contained in the "copyright clause" which provides that Congress shall have the power: "To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

2. 17 U.S.C. § 102 (1988). This general provision of the Copyright Act states that:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Id. Section 102's list of categories is not exhaustive. 1 P. GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 122 (1989). Congress did not intend to limit Congress' power to grant copyright only to "writings" and "authors." *Id.* The logic of this argument is illustrated by the language of § 101 and § 102. *See id.* Section 102(a) of the Copyright act, which lists the subject matter of copyright protection states that "[w]orks of authorship *include* the following categories." *Id.* (emphasis added); *see also* 17 U.S.C. § 102(a) (1988). Furthermore, § 101 of the Copyright Act defines "including" as "illustrative and not limitative." 1 P. GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 122 (1989); *see also* 17 U.S.C. § 101 (1988).

public display.[3] A violation of any of the copyright owner's rights in the copyrighted work may result in a legal action for copyright infringement.[4] However, the copyright owner's rights in the copyrighted work are neither absolute nor unlimited in scope.[5]

The inception of digital audio recording technology ("DAT") raises new challenges for American copyright law. A significant copyright issue which has been raised concurrently with the development and the potential marketing of DAT is the ability of DAT to reproduce nearly perfect copies of copyrighted musical works. DAT's reproduction capacity could be used to reproduce copyrighted works on a broad scale violating the property rights of the copyright owner.[6] It is conceivable that DAT recording and/or copying could be carried out in the privacy of the DAT owner's home. However, even the possibility of this "home" DAT recording raises various copyright questions which are considered below.

This article discusses the objectives of American copyright law, its development and its current day codification. The article further discusses certain aspects of copyright law, such as the fair use defense and the concept of "home" for the purposes of copyright protection. These concepts are particularly relevant to the utilization of DAT technology. The article also addresses possible conflicts which may arise with the marketing and use of DAT products within the context of existing copyright law. Finally, this article discusses pending DAT litigation.

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3. 17 U.S.C. § 106 (1988).

4. *See* 17 U.S.C. §§ 502-506 (1988) (remedies for copyright infringement). These remedies include injunctions, impoundment and disposition of infringing materials, monetary damages, costs and attorney's fees, and even criminal penalties. *See id.*

5. *See* 17 U.S.C. §§ 107-112, 119 (1988) (limitations on scope of copyright protection). These limitations allow limited reproduction by libraries and archives, the resale of authorized copies, performance for non-profit instructional purposes, performance of nondramatic musical or literary works, secondary transmission of certain works, ephemeral recordings, secondary transmissions of some televised works, and the "fair use" of the copyrighted work. *See id.*

6. DAT recording equipment is currently available for home consumers on the open market in the United States on a limited basis. DAT manufacturers planned extensive shipment and marketing of DAT equipment in June, 1990 and began an extensive marketing campaign. *See* N.Y. Times, June 22, 1990, at A5 (advertisement for introduction of Sony DAT recorders). However, a class action suit against Sony, one of the DAT industry leaders, has placed the future of DAT sales and use in the United States in uncertainty. *See Sony Sued Over Digital Recorders*, Washington Post, July 11, 1990, at B8, col. 6.

II. AMERICAN COPYRIGHT LAW OBJECTIVES

The "[p]rogress of [s]cience and useful [a]rts" is a fundamental goal of American copyright law.[7] A closely related objective of copyright law is the promotion and dissemination of knowledge to the public. Although copyright is a property interest, its chief purpose is not the collection of royalties or the protection of property. Instead, copyright was created primarily for the promotion of intellectual pursuits and public knowledge. As the Supreme Court observed:

> The economic philosophy behind the clause empowering the Congress to grant patents and copyrights is the conviction that encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."[8]

The congressionally authorized copyright grant to authors of a limited monopoly is based on a dualism that involves the public's benefit from the creativity of authors and the economic reality that a copyright monopoly is necessary to stimulate the greatest creativity of authors.[9] The Supreme Court recognized these competing values in the 1984 case of *Sony Corp. of America v. Universal City Studios, Inc.*:[10]

> As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interest of authors and inventors in the control and exploitation of their paintings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.[11]

The concept of American copyright protection creates a paradox, or contradiction, when considered within the context of the first amendment freedom-of-speech guarantees.[12] While the first amendment guarantees freedom of expression, copyright law restricts the use

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7. *See* U.S. CONST. art. I, § 8, cl.8.

8. Mazer v. Stein, 347 U.S. 201, 219 (1954).

9. M. NIMMER, 1 NIMMER ON COPYRIGHT § 103[A] at 1-32 (1990).

10. 464 U.S. 417 (1984).

11. *Id.* at 429.

12. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (quoting Harper & Row Publishers, Inc. v. Nation Enters., 723 F.2d 195, 203 (2d Cir. 1983)). The Supreme Court in *Harper & Row* stated that "copyright's idea/expression dichotomy 'strikes a

or dissemination of information.[13] However, copyright protection, to the degree that it stimulates expression and encourages writing and other efforts, advances first amendment expression values by encouraging the quality of "speech" that is created. In attempting to resolve these conflicting interests, American courts have adopted a test that balances the interests of freedom of expression and the property interests of the copyright holder to arrive at an acceptable balance.[14] A substantial body of case law has been developed that weighs, counterbalances, and considers first amendment freedom of expression concerns against the rights of the copyright holder.[15] Courts have balanced and assessed these seemingly conflicting elements, and Congress has considered these concerns over the years when it has enacted copyright legislation.

III. AMERICAN COPYRIGHT LAW

A. *Legislative Development*

A substantial portion of the legal theory underlying American copyright law was derived from its English statutory predecessors.[16] In 1783, after the conclusion of the American Revolution, the Continental Congress passed a resolution encouraging the various states to enact copyright legislation.[17] All of the states, except Delaware, enacted some form of copyright law, although each state's laws were quite different.[18] Due to the differences in the state laws, the framers

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balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.' " *Id.*

13. *Compare* U.S. CONST. amend. I ("Congress shall make no law. . .abridging the freedom of speech. . . .") *with* 17 U.S.C. § 102 (1988) ("[c]opyright protection subsists. . .in original works of authorship. . . .").

14. M. NIMMER, 1 NIMMER ON COPYRIGHT §§ 1.02-1.08 (1990).

15. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 569 (1985).

16. *See* L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 3-4 (1968) (English copyright act of 1709 served as model for America's state and federal copyright statutes). *See generally id.* at 180-202 (discussing early American copyright law).

17. *Id.* at 183.

18. *Id.* at 183-184. The various state acts fell "into two broad categories, those more or less patterned after the English [copyright] act, and those not so patterned." *Id.* at 184. The Massachusetts, New Hampshire, and Rhode Island statutes were not patterned after the English act and gave authors "the sole property" of their works as long as the author's name was located in the published work. *Id.* Virginia gave its citizens copyright protection against "the printing and re-printing" of those books or pamphlets registered with "the clerk of the council." *Id.* Connecticut, Georgia, Maryland, Pennsylvania, New Jersey, New York, North Carolina and South Carolina patterned their statutes after its English predecessor and gave authors

of the Constitution determined that the control of copyright should be vested in the legislative branch. This theory was ultimately adopted and Congress was granted the power to regulate copyrights.

Congress enacted several copyright statutes over the years.[19] These congressional mandates typically reflected technological and societal changes.[20] For instance, a 1971 amendment extended copyright protection to include certain sound recordings.[21] Throughout this evolution of American copyright law, the primary driving force underlying the revisions was the congressional intent to keep the legislation updated in order to respond to technological developments that affected the dissemination of knowledge.[22] The Supreme Court summarized this trend in the *Sony* decision:

> From its beginning, the law of copyright has developed in response to significant changes in technology. . . . Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection. . . . Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned new rules that new technology made necessary.[23]

The most recent comprehensive revision of the body of copyright law occurred in 1976.[24] The 1976 Act clearly sets out the rights of the copyright owner. These rights include but are not limited to: the reproduction of works in copies or phonorecords; creation of derivative works; distribution of copies of the work to the public by sale, rental, lease, or lending; public performance of copyrighted works; and pub-

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the exclusive right to print, reprint, publish or sell their works. *See id.* at 184-189. Some of these state statutes provided copyright protection for up to 21 years. *See id.* at 184; *cf.* 17 U.S.C. § 302 (1988) (copyright protection extends for life of author plus fifty years after author's death).

19. *See, e.g.*, Copyright Act of 1790, ch. 15, 1 Stat. 124; Copyright Act of 1870, ch. 230, 16 Stat. 198; Copyright Act of 1909, ch. 320, 35 Stat. 1075.

20. *See, e.g.*, 17 U.S.C. § 117 (1988) (providing limited protection for copies of computer programs).

21. Sound Recording Amendments, Pub. L. 92-140, 85 Stat. 391 (1971).

22. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984) (since its inception, copyright law has developed as response to changes in technology).

23. Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 430-431 (1984); *see also* R. WINCOR & I. MANDELL, COPYRIGHTS, PATENTS, AND TRADEMARKS: THE PROTECTION OF INTELLECTUAL AND INDUSTRIAL PROPERTY 25 (1980) (revisions of Copyright Act began in 1924 in response to unforeseen advances in technology).

24. *See* Act of Oct. 19, 1976, Pub. L. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-810 (1988)).

lic display of copyrighted works.[25] Nevertheless, the statute does specify certain exceptions to the copyright owner's exclusive rights that are not infringing uses of the copyrighted works. These exceptions include reproduction by libraries and archives[26] and educational use.[27] In addition to these exceptions, the Copyright Act also provides for the defense of fair use.[28]

B. *The Fair Use Defense*

A precise understanding of the fair use defense is of importance, because the concept of "home use" is apparently a judicially created derivative of the fair use defense. The fair use defense has been applied when certain seemingly infringing uses of copyrighted works are defensible as a "fair use" of the copyrighted work.[29] This defense permits courts to avoid a rigid application of copyright law when, under

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25. 17 U.S.C. § 106 (1988).
26. 17 U.S.C. § 108 (1988).
27. 17 U.S.C. § 110 (1988).
28. 17 U.S.C. § 107 (1988).
29. The concept of "fair use" was developed in the common law. Until the fair use exception was codified in the 1976 revisions to the Copyright Act, courts recognized and applied the common law version of the exception. *See, e.g.*, Mathews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73, 85 (6th Cir. 1943) (fair use allowed in furtherance of science and useful arts); Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (use of another's material for purpose of fair and reasonable criticism not infringement); Estate of Hemingway v. Random House, Inc., 279 N.Y.S.2d 51, 57 (N.Y. Sup. Ct. 1967) (partial use of another's work, especially biographical, historical or scholarly permitted under federal constitution as fair use), *aff'd on other grounds*, 244 N.E.2d 250 (1968). In *Folsom*, one of the earliest reported cases discussing the concept of fair use, the plaintiffs published a book entitled "The Writings of George Washington," which contained Washington's correspondence, messages, addresses, official and private papers, and other writings. *Folsom*, 9 F. Cas. at 343. The defendants subsequently published a work entitled "The Life of Washington in the Form of an Autobiography" which consisted of, inter alia, Washington's own writings. *Id.* The court stated that while in some situations a copyright infringement is obvious, other situations require the courts to balance "the comparative use made in one of the materials of the other." *Id.* at 344. The court further explained that "no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism." *Id.* On the other hand, if the author uses another's material merely to supersede the value of the original work, such use constitutes "piracy." *Id.* at 344-345. In *Mathews Conveyor Co.*, the plaintiffs alleged that the defendants created black and white reproductions of two of the plaintiff's copyrighted photographs. *Mathews Conveyor Co.*, 135 F.2d at 84. The court stated, in dicta, that a "fair use" may be made of copyrighted material when such use would benefit the "progress of science and the useful arts." *Id.* at 85. "Fair use" is determined by considering all the circumstances of a particular case. As discussed in *Folsom*, one factor the courts consider is whether the subsequent use of copyrighted material has the effect of diminishing the profits or superseding the value of the original work. *Id.*

certain circumstances, it would impede the very creative activity that copyright law was intended to stimulate.[30] Various courts have adopted different approaches in their interpretation of the fair use defense. Some commentators have construed the flexibility of the defense as the "safety valve" of copyright law. Other commentators have considered the uncertainties of the fair use defense to be the source of unresolved ambiguities. Some commentators argue that the fair use defense is applied prematurely at times, such as in the case of the so-called "home use" concept, which is used as a defense to a claim of infringement. They assert that the application is premature because without a clear delineation or mandate of rights over private uses, it is uncertain as to whether any infringement has even occurred.[31] Over the years, jurists have grappled with balancing the exclusive rights of the copyright owner with the reasonable and the equitable uses of the copyrighted work.[32]

In its enactment of the fair use exception in the Copyright Act of 1976, Congress did not formulate a specific test for the determination of whether a particular use is a fair use. Instead, Congress created statutory recognition of a list of factors that courts should consider in making their fair use determinations. The four statutory factors are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and,
4. the effect of the use on the potential market and value of the copyrighted work.[33]

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30. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) (quoting Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980)).

31. U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, OTA-CIT-422, *Copyright & Home Copying: Technology Challenges the Law* 69 (1989). The Electronic Industries Association asserted that there is a "statutory exception" for home taping under the Copyright Act and that the legality of home taping does not depend on the fair use defense. *Id.*

32. *See, e.g.*, Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (fair use defense "most troublesome in whole law of copyright"); *accord* Universal City Studios Inc. v. Sony Corp. of Am., 659 F.2d 963, 969 (9th Cir. 1981) (citing *Dellar*); *see also* Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the "Betamax" Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1602-03 (1982) (courts must balance author's need for remuneration and control with society's need for access).

33. 17 U.S.C. § 107 (1988).

In enacting these fair use factors, Congress realized that they were in no case "definitive or determinative," but rather "provided some guage [sic] for balancing equities."[34] By creating such factors, Congress developed a flexible set of criteria for analyzing the particular circumstances surrounding each fair use case, allowing each case to be judicially analyzed on an ad hoc basis.[35] Thus, courts have considerable latitude in evaluating and applying the fair use factors.

In evaluating fair use decisions, courts have attributed varying weight and interpretation to the various fair use factors. For instance, in evaluating the first factor, the purpose and character of the use, the courts have not always held that the use "of a commercial nature" negates a fair use finding,[36] nor does a "nonprofit educational" purpose mandate a finding of fair use.[37] Hence, a court usually examines all of the circumstances involved in the use of a copyrighted work before determining whether the fair use defense is applicable. However, the fair use defense is generally not available when the copying is a nearly complete copy of the copyrighted work.[38] Courts take great care in applying the fair use defense. An examination of fair use copy-

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34. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5679; *see also* Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the "Betamax" Case and its Predecessors*, 82 COL. L. REV. 1600, 1603 (1982).

35. *See* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, OTA-CIT-422, *Copyright & Home Copying: Technology Challenges the Law* 69 (1989). The Electronic Industries Association asserted that the doctrine of fair use was sufficient to adapt to existing and developing recording technologies and was adequate to address the home taping issue.

36. *See* Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 455 n.40 (1984) (copying news broadcast may have stronger claim to fair use than copying motion picture); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 591-593 (1985)(Brennan, J. dissenting) (publisher's purpose of printing, for profit, newsworthy information before competition published same information will not defeat claim of fair use); Consumers Union of the United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983) (manufacturer's use of favorable Consumer Report evaluation in its advertising campaign alone not sufficient to defeat fair use defense).

37. Marcus v. Rowley, 695 F.2d 1171, 1175 (9th Cir. 1983). In *Marcus*, the defendant copied several pages of a cake decorating book originally copyrighted and published by the plaintiff. *Id.* at 1173. The defendant used the copies for an adult education class without giving proper credit to the plaintiff. *Id.* The fact that the defendant offered the booklet to her students at no charge was not alone sufficient to satisfy the fair use exception. *Id.* at 1175. The court weighed all the factors under the fair use doctrine and concluded that fair use was not an available defense. *Id.* at 1177.

38. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1978). The court in *Walt Disney* stated that the substantiality of the copying is merely a threshhold issue in determining whether the fair use defense is available. *See id.* at

right decisions illustrates the intense judicial scrutiny which courts exercise in its application.[39]

Despite the existence of statutory criteria and substantial case law interpretation of the fair use defense, substantial confusion still exists over the precise parameters and actual application of the defense.[40] An illustration of the uncertainties in the appropriate application of the fair use defense is in the area of unpublished writings. In a series of recent cases, courts have examined the use of unpublished materials within the context of the fair use defense and have, in effect, restricted the quotation of unpublished materials such as letters, diaries, and other unpublished materials.[41] In response to the potentially far-reaching effects of these cases, legislation was introduced in the 101st Congress to amend the fair use defense to specifically include unpublished works within the purview of fair use to the same extent as pub-

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756. A finding of substantial copying precludes the fair use defense but it does not automatically establish infringment. *See id.* at 756-757.

In *Walt Disney*, the defendants copied the images of several cartoon characters created by Walt Disney Productions and placed them in socially deviant situations. *See id.* at 753 (Disney characters portrayed as promiscuous, free thinking drug ingesters). Defendants asserted the fair use defense on the grounds that their use of the characters was simply a parody of the Disney characters. *Id.* at 756. The court held that despite their claim of parody, the defendant's copying "exceeded permissible levels." *Id.* at 758. In parody cases, courts usually rely on the substantiality of the copying to determine whether the fair use defense is available. *Id.* at 756; *see also* Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966) (fair use based upon reasonableness, and verbatim copying not reasonable), *cert. denied*, 385 U.S. 1009 (1967); Benny v. Loew's Inc., 239 F.2d 532, 536 (9th Cir. 1956) (fair use defense not applicable to substantial copy of dramatic work), *aff'd*, 356 U.S. 43 (1958), *reh'g denied*, 356 U.S. 934 (1958). However, one commentator states that some courts gauge infringement issues upon whether the subsequent use satisfies or reduces the demand for the original. Comment, *Piracy or Parody: Never the Twain*, 38 U. COLO. L. REV. 550, 567 (1966).

39. *See Videocassette Recorders: Legal Analysis of Home Use*, CRS Rept. 89-30 at 3-4 (1989).

40. Several legal commentators have examined the ambiguities in the fair use defense and the judicial anomalies that have resulted from its application. *See, e.g.*, Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990); Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137 (1990).

41. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546-547 (1985) (1976 Copyright Act confers property rights upon author at time of creation of original work); Salinger v. Random House, Inc., 811 F.2d 90, 95 (2d Cir. 1987) (author of letters entitled to same copyright protection as literary authors), *cert. denied*, 484 U.S. 890 (1987); New Era Publications Int'l, ApS v. Henry Holt & Co., 873 F.2d 576, 583 (2d Cir. 1989) (strong presumption against fair use of unpublished work), *cert. denied*, 110 S.Ct. 1168 (1990). The *New Era* case focused considerable attention on the fair use doctrine. *See* Edelman, *Copyright Case Not One for History Books*, 12 LEGAL TIMES 22, 22 (1990).

lished works.[42] While this legislation and its judicial background do not specifically relate to home DAT recording, they do illustrate the continually evolving concept of fair use and the attempt by Congress to revise copyright law to reflect current judicial decisions, as well as developments in literary trends and uses.[43]

C. *Copyright Infringement and Remedies*

Anyone who violates the exclusive rights of the copyright owner in the copyrighted work is considered an infringer of the copyright.[44] The provisions of the 1976 Act provide that the copyright owner may institute an action for infringement against the alleged infringer.[45] As a result of this action, a court may issue an injunction against the copyright infringer to prevent further infringement of the copyright.[46] Additionally, a copyright infringer may be required to pay the profits earned by selling the copyrighted item, plus any actual damages.[47] In some cases, the copyright owner may choose to receive specified statu-

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42. H.R. 4263, 101st Cong., 2d Sess. (1990). The bill was introduced by Rep. Kastenmeier on March 14, 1990 and was referred to the House Committee on the Judiciary. *Bill Would Apply Fair Use Equally to Unpublished Works and Published Works*, 39 Pat., Trademark & Copyright J. (BNA) No. 973, at 405 (1990). The proposed changes to the "fair use" defense located in 17 U.S.C. § 107 were brought about, at least in part, because of a concern that the courts are "unjustifiably limiting the First Amendment rights of biographers and historical writers." *Id.* Specifically, the proposed amendment to § 107 of the Copyright Act adds the phrase "whether published or unpublished" after the words "the fair use of a copyrighted work." *Id.* On March 19, 1990, the bill was referred to the House Subcommittee on Courts, Intellectual Property and the Administration of Justice.

43. However, a separate bill is pending which would require that DAT recorders include a limiting device, known as a "serial copying management system" (SCMS) which will allow first generation copying but will prevent copying from copies. *See Copyright Conference Examines Fair Use, DAT, Berne, and International Uses*, 39 Pat., Trademark & Copyright J. (BNA) No. 976, at 492 (1990).

44. 17 U.S.C. § 501(a)(1988); *see also id.* at §§ 106-118 (1988) (detailing exclusive rights of copyright owner). For a discussion of the remedies for copyright infringement, see generally H. HENN, COPYRIGHT PRIMER 251-68 (1979).

45. 17 U.S.C. § 501(b) (1988). The Copyright Act provides for both civil and criminal actions. *Id.* at §§ 502-506 (civil remedies include injunction, impoundment and disposition of infringing articles, monetary damages, court costs and attorneys fees); *see also id.* at § 506 (providing punishment for criminal infringement).

46. 17 U.S.C. § 502 (1988).

47. 17 U.S.C. § 504(b) (1988). The "profits" referred to in the statute are those gained by the alleged infringer. *Id.* These profits are not considered when determining actual damages. Instead, the copyright owner must present evidence of the alleged infringer's gross revenue. It is then the burden of the alleged infringer to come forward with evidence showing that he or she is entitled to deduct expenses and any other profit not attributable to the copyright infringement. *See id.*

tory damages instead of the actual damages and profits.[48] In addition to these remedies, the court may permit recovery of legal fees and related expenses involved in bringing the infringement action.[49] In some situations, criminal sanctions may be imposed for copyright infringement.[50]

D. *The "Sony VCR" Case—Judicial Analysis of "Home Recording"*

Sony Corp. of America v. Universal City Studios, Inc.,[51] resolved some copyright issues associated with the home use of VCRs to record televised programs. This case resolved of some of the questions concerning home recording and copyright law. Although the decision addressed some issues, it left numerous questions unanswered, as are discussed below. The *Sony* case is perhaps the decision most analogous to the home use of DATs, even though there are many significant legal and factual distinctions between the *Sony* decision and the current litigation surrounding DAT recording.[52]

After conflicting lower court decisions,[53] the Supreme Court in

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48. 17 U.S.C. § 504(c) (1988). At any time before reaching final judgment, a copyright owner can elect to recover pre-set statutory damages ranging from $500 to $20,000 for each infringing act. *See id.* at § 504(c)(1). In those instances where the copyright owner proves willful infringement, the court has discretionary authority to award statutory damages of up to $100,000. *Id.* at § 504(c)(2).

49. 17 U.S.C. § 505 (1988).

50. *See* 17 U.S.C. § 506 (1988). "Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18 [which provides the fines and penalties for copyright infringement]." *Id.* at § 506(a); *see also* United States v. Atherton, 561 F.2d 747, 749 (9th Cir. 1977) (defendant charged with criminal copyright infringement for buying, selling, and collecting motion picture prints). To prove wilful infringement of a copyright the government must prove: (1) copyright infringement; (2) the work was not subject to a "first sale;" (3) the infringement was done wilfully; (4) the infringer knew the work had not been through a "first sale;" and (5) the infringement was done for profit." *Id.*

51. 464 U.S. 417 (1984).

52. *See Videocassette Recorders: Legal Analysis of Home Use*, CRS Rept. 89-30 at 6-8 (1989); U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT OTA-CIT-422, *Copyright & Home Copying: Technology Challenges The Law* 70-74 (1989).

53. *See* Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 429 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963, 977 (9th Cir. 1981), *rev'd*, 464 U.S. 417, 456 (1984). The district court held that home-use recording of free television was not a copyright infringement. *Id.* at 469. The court went on to say that even if such action by consumers did constitute infringement, the defendant as a corporation would not be liable. *Id.* The Ninth Circuit Court of Appeals reversed the lower court decision, holding that such home copying was infringement. Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 969 (9th Cir. 1981),

Sony examined the home use of VCRs. In the action before the Supreme Court, Universal City Studios (the plaintiffs, and later respondents) did not seek relief against the actual users of the VCRs; instead, Universal sued the VCR manufacturers and suppliers, including Sony, on the basis of contributory infringement.[54] This action was based on the argument that the distribution and sale of VCRs encouraged and contributed to the infringement of the plaintiffs' copyrighted works.[55] The plaintiffs sought monetary damages and also requested an injunction that would prohibit Sony from manufacturing VCRs in the future.[56] This legal action was of considerable importance, as the Supreme Court had not previously examined and interpreted the issue of fair use within the context of home

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rev'd, 464 U.S. 417 (1984). The United States Supreme Court reversed the Ninth Circuit, holding that: (1) Sony proved that a substantial number of television broadcasters did not object to time shifting; (2) Universal failed to prove the likelihood of non-minimal harm to the market for copyrighted works; (3) the VCR is capable of non-infringing uses; and (4) Sony was not liable for contributory infringement due to their sale of VCR's. Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 456 (1984).

54. *See Sony*, 464 U.S. at 420. In the district court action, Universal also sought relief against an actual VCR user. *See* Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 433 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

Contributory infringement is not a statutory cause of action under the Copyright Act. However, it is defined under existing Patent and Trademark laws. *See* 35 U.S.C. § 271(c) (1988). This legislation provides that a party is liable for contributory infringement whenever that party

> sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use. . . .

Id. The plaintiffs in *Sony* argued by analogy that a party can be liable for contributory infringement of a copyright. *See Sony*, 464 U.S. at 439 (closest analogy to contributory infringement of copyright is patent law). It is appropriate to analogize patent law to copyright law because they have an "historic kinship." *Id.*; *see also* United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (both copyright and patent law make reward to owner secondary consideration); Fox Film Corp. v. Doyal, 286 U.S. 123, 131 (1932) (copyrights and patents granted same constitutional authority to promote science and useful arts); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657-658 (1834) (common law should afford equal protection to authors as well as inventors).

55. *Sony*, 464 U.S. at 420-421. The Court stated that it is "the taping of respondents' own copyrighted programs that provides them with standing to charge Sony with contributory infringement. To prevail, they have the burden of proving that users of the Betamax have infringed their copyrights and that Sony should be held responsible for that infringement." *Id.* at 434.

56. *Id.* at 420.

taping/recording. The Court concluded that the primary issue in this case was whether the sale of Sony's equipment to the public violated any of the rights given to the copyright owner (Universal Studios) by the Copyright Act.[57]

Initially, the Court considered the nature of the relationship between Sony and its purchasers.[58] The Court determined that, if vicarious liability were imposed upon Sony, such liability would have to be based upon Sony's constructive knowledge that its customers might use the equipment to create unauthorized copies of the copyrighted material.[59] The Court observed that there exists no precedent under copyright law for attribution of liability on the basis of such a theory.[60] The Court argued that the sale of such duplicating equipment is not considered contributory infringement if the product is capable of other uses that are non-infringing.[61] To evaluate this issue, the Court deliberated upon whether the VCR was capable of commercially significant non-infringing uses.[62] The Court held that the VCR could be used for non-infringing uses through private noncommercial time-shifting activities in the home.[63] Time-shifting is the term used to describe the taping of a televised broadcast for later viewing.[64] In arriving at this determination, the Court relied substantially on the determination of the district court and rejected the conclusions of the court of appeals.[65] The Court also found that, in bringing an action for contributory infringement against the seller of copying equipment, the copyright holder cannot succeed unless the relief affects only the holder's programs or unless the copyright holder speaks for substan-

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57. *Id.*

58. *See id.* at 438 (only contact between Sony and its customers occurred at point of sale). The Supreme Court agreed with the district court's finding that no employee of Sony had any direct contact with a Betamax purchaser who was engaging in copyright infringement. *Id.* Also, the Court stated that there was no evidence that any of the individuals who used the Betamax technology to copy protected works were encouraged to do so by Sony's advertisements. *Id.*

59. *Id.* at 439.

60. *Id.*

61. *Id.* at 440.

62. *See generally id.* at 442-54.

63. *See id.* at 454-55.

64. *See id.* at 422.

65. *See id.* at 442. The Court's conclusions were based in part on the idea that Universal could not prevent other copyright holders from authorizing the taping of their programs, and on the finding of fact by the district court that the unauthorized home time-shifting of the respondents' programs was a legitimate fair use. *Id.*

tially all copyright holders with an interest in the outcome.[66] The Court determined that the copyright holders would not prevail, since the requested relief would affect other copyright holders who did not object to time-shifting recording.[67]

Following its examination of the unauthorized time-shifting use of VCRs, the Court held that time-shifting use was not necessarily infringing.[68] The Court, relying heavily on the district court's conclusions, determined that the potential harm from this time-shifting practice was speculative and uncertain.[69] The Supreme Court reached two conclusions. First, Sony demonstrated to the Court that certain copyright holders who license their work for broadcast on commercial television would not object to having their programs time-shifted by private viewers.[70] Second, Universal did not prove that time-shifting would cause the "likelihood of nonminimal harm to the potential market or the value of copyrighted works;"[71] therefore, the home use of VCRs could involve substantial non-infringing activities and the sale of VCR equipment to the public did not represent a contributory infringement of Universal's copyrights.[72] In arriving at its decision, the Court rejected the central conclusion of the court of appeals requiring that a fair use must be "productive."[73] Instead, the Court determined that under certain circumstances, taping a video work in its entirety for time-shifting purposes is permissible under the

66. *Id.* at 446.

67. *Id.*

68. *Id.*

69. *See id.* at 443-44. The Court in *Sony* pointed out that Universal Studios and the other plaintiffs involved in this suit constitute less than 10% of the television market. *Id.* at 443. If the plaintiffs had prevailed in this action, the decision would have had a significant impact on those television producers representing the other 90% of the market. *Id.*

70. *Id.* at 456. For example, Fred Rogers of "Mister Rogers' Neighborhood" testified that as the president of the corporation which both produces and owns the copyrights to the program, he had no objection to the time-shifting of his program for noncommercial use. *Id.* at 445. The Court reasoned that if producers such as Fred Rogers do not object to time-shifting, then the production and sale of video tape recorders should not prohibited "simply because the equipment is used by some individuals to make unauthorized reproductions of respondent's works." *Id.* at 446.

71. *Id.* at 456.

72. *See id.*

73. *Id.* at 455 n.40. The Court stated that although the "productivity" of the fair use is certainly a factor to be considered, it is not entirely dispositive of whether infringement has occurred. *Id.* The weight given to the "productive" nature of the use will vary from case to case. *See id.*

fair use defense.[74] The specific scope of the Court's holding was explicitly limited to video recording in the home, to over-the-air non-cable broadcasting, and to recording for time-shifting purposes.[75] The Sony decision did not address audio taping, the taping of cable or pay television, or building libraries of recorded programs.

Although the views of the majority and the dissent differed substantially, both sides suggested that Congress may wish to examine the home video taping issue.[76] As the majority opinion held: "It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written."[77] The Court in *Sony* did not wish to resolve the home taping issue by judicially expanding the fair use defense. Instead, the Court deferred to Congress.

E. *Copyright Law and Home Recording*

While the lower courts and the Supreme Court have provided some legal guidance for the interpretation of copyright law in home recording/taping instances, several questions and answers remain unresolved. The *Sony* case was a narrow holding, strictly limited to a very specific situation—home video recording of non-cable or "non-pay" television for the purposes of time-shifting.[78] The practical application of current copyright law and related judicial interpretations are considered within the context of either non-pay or time-shifting home recording situations.

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74. *See id.* at 449-450.

75. *See id.* at 456.

76. *Compare id.* at 456 (majority opinion) *with id.* at 500 (Blackmun, J., dissenting).

77. *Id.* at 456. *But cf. id.* at 500 (Blackman, J., dissenting). Justice Blackmun, in his dissent, agreed that Congress should respond to technological advancements before the courts can react satisfactorily to copyright issues involving such technology. *Id.* at 500. "But in the absence of a congressional solution, courts cannot avoid difficult problems by refusing to apply the law. We must 'take the Copyright Act . . . as we find it'. . . and 'do as little damage as possible to traditional copyright principles . . . until the Congress legislates.'" *Id.* (quoting Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 401-02, 404 (1968)).

78. The narrow scope of the Court's ruling was first adressed in the district court action. *See* Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 442 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984). Not only did the district court exclude pay and cable television issues, it also excluded from consideration video tape swapping, video tape duplication "within the home or outside, by individuals, groups or corporations," and off-the-air recordings used by classroom teachers or by corporations for their employees. *Id.*

A major consideration in the area of copyright law as it applies to the judicially created concept of the "home use" of recording equipment is the determination of precisely what comprises a "home." While current copyright law and regulations do not specifically provide a definition for what constitutes a "home," certain inferences can be drawn from the statutory definition for the public performance of a work:

> To perform or display a work "publicly" means—
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside a normal circle of a family or its social acquaintances is gathered.[79]

Arguably, the opposite of a "public" display of work might be a "home," or a private display of the work. Operating under that premise, a home would signify a place not open to the public and/or a place where only a family and/or its social acquaintances are gathered.

An analysis of the legislative history surrounding the enactment of the copyright legislation provides some insight into the congressional intent involving the concept of a "home." The legislative history accompanying the enactment of the Sound Recording Amendment of 1971 indicates that Congress meant the term "home" to include only the traditional, generally perceived concept of an individual's own home.[80] A statement in the 1971 House Report on audio recording gives some insight into the meaning of home recording "where home recording is for private use with no purpose of reproducing or otherwise capitalizing commercially on it."[81] The legislative history surrounding the 1976 revisions to the Copyright Act discusses the concept of "public performance" and also provides some insight on the concept of home use.[82]

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79. 17 U.S.C. § 101 (1988).

80. *See* H.R. REP. No. 487, 92d Cong., 1st Sess. 7, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 1566, 1572. "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." *Id.*

81. *Id.* In effect, the Sound Recording Amendment extended copyright protection to phonograph records. *See id.* Prior to its enactment, such works were not generally protected.

82. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 64, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5678.

> [T]he definition of "publicly" in section 101 [of the Copyright Act] makes clear that the

> One of the principal purposes of the definition [of "public performance"] was to make clear that, . . . performances in "semipublic" places such as clubs, lodges, factories, summer camps and schools are "public performances" subject to copyright control. The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of business and governmental personnel would be excluded because they do not represent the gathering of a "substantial number of persons."[83]

Therefore, it is apparent from the legislative history of both the 1971 and the 1976 copyright laws that the concept of a "home" is limited to the traditional understanding of the term and that certain other "semi-public" situations are considered "public" places for the purposes of copyright law.[84]

In the district court decision in the *Sony* VCR case, the court delineated some of the limits of "home use." The court found that in this "home use" instance the television programs involved were broadcast free to the public over the public airwaves.[85] In addition, the court stated that it was "not ruling on tape duplication within the home or outside, by individuals, groups, or corporations."[86] The district court's concept of home taping controls because it was not contradicted by either the court of appeals or the Supreme Court.

Subsequent to the *Sony* decision, courts have scrutinized different situations involving VCR home recording within the context of copyright law. For example, a series of cases has examined public performance and home use within the context of VCR viewing. This line of cases held that the viewing of copyrighted videocassettes in private rooms at video stores constitutes public performance,[87] even when

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> concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process.

Id.

83. *Id. reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5677-78.

84. *See id.*; *see also* H.R. REP. NO. 487, 92 Cong., 1st Sess., *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 1566, 1572.

85. Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 442 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

86. *Id.*

87. *See, e.g.*, Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 568 F. Supp. 494, 500 (W.D. Pa. 1983), *aff'd*, 749 F.2d 154 (3d Cir. 1984). The court in *Redd Horne* observed that the defendant's viewing rooms more closely resembled "mini-movie theaters" than "living

members of a single family view a cassette in a private room at the store.[88] The application of copyright law and relevant judicial guidance leads to various conclusions concerning home recording in certain circumstances. The *Sony* case affirmed the use of VCRs to record and replay commercially televised programs for personal use; thereby judicially approving the use of VCR recording for time-shifting purposes. The *Sony* case did not, however, address audio taping, or home taping of cable or "pay" television.

Since Congress may enact legislation dealing with the subject of home recording in light of recent technological advances, it is helpful to consider the criticism of the *Sony* decision raised by the late Professor Melville Nimmer, considered by many to be the dean of American copyright law. Nimmer interpreted the legislative history and congressional intent very differently than did the Supreme Court and the district court in *Sony*.[89] Professor Nimmer, in considering the legislative history underlying the 1971 Sound Recording Amendment, did not believe that it created an audio home recording exemption.[90]

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rooms away from home." *Id.* Specifically, the defendant's viewing rooms were open to the general public, access was limited to paying customers, seating capacity was limited, and the actual projection of the movies were handled by the defendant's employees. *Id.* The court reasoned that even though the defendant's viewing rooms were small (i.e. maximum of 4 viewers), the performance was still "public" because it was possible for a large segment of the public to view the copyrighted work over an extended period of time. *Id.*; *accord* 17 U.S.C. § 101 (1988) (defining public display/performance).

The Copyright Act defines public performance to mean:

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a *normal circle of a family and its social acquaintances is gathered*; or
>
> (2) to transmit or otherwise communicate a performance . . . 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 . . . *receive it at the same time or at different times.*

17 U.S.C. § 101 (1988) (emphasis added). Taking the statutory definition to its logical conclusion, public performance would result if the same copyrighted material was repeatedly performed over time even though no more than one person at a time could view the protected work. *See* 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.14[C][3], at 8-170 (1990).

88. *See* Columbia Pictures Indus., Inc. v. Aveco, Inc., 612 F. Supp. 315, 319 (M.D. Pa. 1985) (viewing movie in defendant's small room constitutes public performance even though family renting room can exclude other members of public), *aff'd*, 800 F.2d 59, 64 (3d Cir. 1986).

89. *See* 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.05[C][1]-[3], at 8-90.6 (1990). *See generally* Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the "Betamax" Myth*, 68 VA. L. REV. 1505, 1508-1520 (1982).

90. Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the "Betamax" Myth*, 68 VA. L. REV. 1505, 1508-1509 (1982).

Nimmer's interpretation of the legislative history was that no special home audio exemption was created and, in addition, that Congress never intended to create such an exemption.[91] He also disagreed with the Court's construction of the hearings on the 1971 Amendment.[92]

Professor Nimmer's interpretations can be summarized as follows. The language of the reports and statements of the 1971 Amendment and the statements of interested individuals indicate that the legislators did not intend to create a special exemption from copyright liability for home audio/visual recording. The most that can be inferred is that home recording is defensible under the existing judicial defense of fair use.[93] In addition, Nimmer argued that, even if the 1971 Amendment had created a home-use exemption, there was no basis for the assumption that this exemption survived the general revision of the copyright laws in 1976.[94] Nimmer reached this conclusion from the reasoning that the Copyright Act provides specific and narrowly-drawn exemptions for certain kinds of recording, and he found it unlikely that the legislators also intended that the Act contain an im-

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91. *See id.* at 1508-1511.

92. *See id.* Nimmer criticized the *Sony* district court's interpretation of legislative intent as overbroad. *See id.* Nimmer argued that the 1971 Sound Recording Amendment limited copyright protection of sound recordings and did not extend to television broadcasts. *See id.* at 1509; *see also* H.R. REP. NO. 487, 92d Cong., 1st Sess. 7, *reprinted in* 1971 U.S. CONG. & ADMIN. NEWS 1566, 1572. The pertinent language of the House report is as follows:

> In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited 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, or 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 positions from that of the owner of copyright in recorded musical compositions over the past 20 years.

H.R. REP. NO. 487, 92d Cong., 1st Sess. 7, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 1566, 1572. Nimmer further criticizes the House's opinion that home recording does not infringe upon the copyright in the underlying work by stating that the "statement is nothing more that the House's view in 1971 of the meaning of the 1909 Act. The observation does not have the force of a statement of legislative intent." Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the "Betamax" Myth*, 68 VA. L. REV. 1505, 1509-1510 (1982); *accord* United States v. Price, 361 U.S. 304, 313 (1960) (opinion of subsequent Congress forms "hazardous basis" for inferring intent of previous Congress); United States v. United Mine Workers, 330 U.S. 258, 282 (1947) (statements made by Senators in 1943 will not change Congressional intent expressed in 1932).

93. *See* Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the "Betamax" Myth*, 68 VA. L. REV. 1505, 1517 (1982).

94. *Id.* at 1516.

plied home recording exemption of indeterminate scope.[95] Nimmer also noted that the legislative history of the 1976 Copyright Act gave no indication that it intended to exempt home audio recording from copyright liability.[96] Professor Nimmer concluded his argument by quoting from the House Report on the 1976 Act: "it is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use."[97] Finally, Nimmer asserted that, if home audio recording transcends copyright laws, it must be done exclusively through the fair use provisions of section 107 of the Act.[98]

IV. HOME TAPING AND TECHNOLOGICAL INNOVATIONS

Certain innovations in recording technology in the 1980's generated considerable interest in home copying. Of these numerous technological developments, the two most significant are the audio compact disc ("CD") and the digital audio tape technology ("DAT"). Concern developed regarding copyright laws and their possible impact upon the actual and potential uses of CDs and DAT. The actual operation of these technologies in the context of home taping is briefly examined.

A. *CD*

The CD was introduced to the consumer public in 1982 in Japan and in 1983 in the United States and Europe.[99] This technology provides considerable improvement over longplaying vinyl discs (LP records).[100] While LP records provide high tonal quality, they are subject to damage, background interference, and other problems.[101] CD technology uses digital information recorded on the surface of a compact disc.[102] This information is a sampling of an audio signal

95. *See id.*

96. *Id.* at 1517.

97. *See* 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.05[C][3], at 8-90.7 (1990) (quoting H. R. REP. NO. 1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5679).

98. *Id.*

99. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, OTA-CIT-422, *Copyright and Home Copying: Technology Challenges the Law* 45 (1989).

100. *Id.*

101. *Id.*

102. *Id.*

which the CD player reads using a laser-optical scanning system which requires no physical contact with the disc itself.[103] In addition, the player's digital signal processing system is not dependent upon the rotational speed of the disc.[104] CD technology results in a nearly perfect reproduction of sound that will not deteriorate after repeated use.[105] At the present time, CD technology does not ordinarily provide for a home copying or recording capacity. However, music contained on a CD player could be recorded using another recording device such as a conventional tape recorder, although the quality of the recording would not equal the quality of a DAT recording.

B. *DAT*

DAT is an excellent medium for computer data storage.[106] DAT also has entertainment capabilities which involve high quality digital recording and playback of CD recordings.[107] DAT has the capability of producing nearly perfect copies of CD recordings as well as the ability to make unlimited near-perfect copies of other copies.[108] Some prerecorded DAT tapes and CDs have digital "copy-protect" signals or flags concealed within the music or recording which are "read" by the consumer-model digital recorders.[109] These flags prevent the copying of the tape or disc; however, the DAT hardware must be able to read the copy inhibiting instruction on the CD or DAT recordings in order for these "flags" to be effective.[110]

Technological innovations raise numerous legal questions and policy considerations. CD and DAT technology has revolutionized the home taping industry and the recording industry. The superior copy-

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103. *Id.*

104. *Id.*

105. *Id.* The OTA Report provides precise details of the actual operation of a CD player. *See id.*

106. *See id.* at 43 (DAT cassettes have greater storage capacity than regular computer-tape cartridges). In fact, a niche market for DAT storage technology is its use as a backup tape for "high capacity, hard-disk personal computers or work stations where floppy diskettes are impractical." *Id.* at 42.

107. *Id.*

108. *See id.* The DAT tapes themselves can be "duplicated directly or 'cloned' without further degradation or noise." *Id.* This perfect-copy ability contrasts with traditional reproduction technology. For example, a photocopy machine or a VCR recorder produces successive copies of diminishing quality and clarity.

109. *Id.* at 42.

110. *Id.* Factual questions may arise concerning the ability of the DAT hardware and software to utilize such digital codes or "flags" to inhibit recording.

ing capability associated with these technologies are problematic because the technologies were developed and introduced into the commercial market subsequent to the last substantial revision of the copyright laws in 1976. It is, therefore, uncertain what ramifications CD and DAT technology will have on existing copyright law. Congress now stands at the precipice, deciding whether to strengthen or weaken the rope of copyright protection, while the opponents of unlimited DAT capability nervously cling to the existing strands.

The American recording industry is greatly concerned with the development and the potential marketing of DATs in this country. The Recording Industry Association of America ("RIAA") argues that the technological change represented by DAT recording will greatly increase home copying, thereby threatening the recording industry's economic future.[111]

V. LEGAL DEVELOPMENTS CONCERNING DAT

Due to the legal ambiguity involving the copyright implications of DAT use, the DAT industry has been plagued with market uncertainty. For instance, in 1987 the RIAA threatened copyright infringement actions against the first manufacturer to sell consumer-model DAT recorders in the United States.[112] Many observers believe that this threat was primarily responsible for the withholding of consumer-model DATs from the American market until 1989, when one manufacturer began a very limited importation and sale of DAT recorders.[113] Currently in the United States, DAT recorders equipped with a copy-limiting feature are available for consumer purchase on a limited basis.[114] However, in July of 1990, a songwriter and four music publishing companies filed a class-action suit against the Sony Corporation to prohibit the sale of its newly introduced DAT recorders.[115] The plaintiffs in that action claim that by selling

111. *Id.* at 38.

112. *Id.* at 41.

113. *Id.*; *see also supra* note 6.

114. *See Class Action is Filed to Block U.S. Sales of DAT Recorders & Tapes*, 40 Pat., Trademark & Copyright J. (BNA) No. 989, at 243 (July 19, 1990) (Sony began distributing DAT recorders in U.S. market in June of 1990); *see also Digital Audio Tape Decks*, CONSUMER REPORTS 660-61 (October 1990) (evaluating DAT recorders currently available to consumers); N.Y. Times, June 22, 1990, at A5 (local advertisement for Sony DAT recorders).

115. *Sony Sued Over Digital Recorders*, Washington Post, July 11, 1990, at B8, col. 6. The suit also asks for a ban on the sale of the blank digital tapes used by the DAT recorders. *Id.* at B10, col 3.

DAT recorders, Sony is introducing a "new era in unauthorized home taping of copyrighted musical compositions" that will "rob them of their royalties."[116] Clearly, the final outcome of this lawsit will have far reaching effects on both the DAT industry and the recording industry.

A. *The Memo of Understanding (MOU)*

As a consequence of a legal and marketing understanding, the international recording-industry and numerous consumer-electronics manufacturers executed a Memo of Understanding (MOU) the ultimate goal of which was to encourage the mass introduction of DAT recorders with copy-limiting features into the United States market.[117] Such copy-limiting features would hopefully limit the ability of DAT recorders to make multiple copies of copyrighted works.[118] The MOU recommended that Congress enact legislation which would require copy-limiting circuitry in all DAT machines sold in the United States.[119] DAT machines equipped with the proposed "serial copy management system" (SCMS) would permit consumers to create copies of original materials such as prerecorded DAT tapes, CDs and digital broadcasts.[120] However, they would be prevented by the digital coding from making subsequent copies from the first copy.[121] This agreement was signed by twelve Japanese and three European manufacturers and two recording industry trade groups from the United States.[122] The MOU did not deal with the issue of royalties for recording artists.

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116. *Sony Sued Over Digital Recorders*, Washington Post, July 11, 1990. The suit was filed in the Southern District of New York. *See Class Action is filed to Block U.S. Sales of DAT Recorders & Tapes*, 40 Pat., Trademark, & Copyright J. (BNA) No. 989 at 243 (July 19, 1990) at B8, col. 6.

117. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, OTA-CIT-422 *Copyright and Home Copying: Technology Challenges the Law* 41 (1989).

118. *See id.* at 28. However, it is unclear whether or not such copy-limiting features could actually be circumvented or bypassed on DAT equipment. *See id.* at 28-29.

119. *See id.* at 56. The agreement contained in the memo of understanding is not enforceable unless legislation is passed. *Id.* at 57. In fact, without legislation manufacturers and distributors who adhere to the MOU may face serious antitrust problems. *See id.*

120. *See id.* at 28-29.

121. *See id.*

122. *Digital Audio Tape Accord Clears Way for Use in U.S.*, Wall Street Journal, July 28, 1989, at B2, col. 5.

B. *DAT Litigation*

A DAT promotional sales campaign began in late June 1990. This sales campaign was led by the Sony Corporation (Sony). The promotional campaign involved the sale of the SCMS-equipped consumer DAT machines. Unlike professional model DAT recorders, the consumer DAT machines are not capable of recording by means of a microphone.[123] Following the commencement of the sales campaign, a class action lawsuit[124] was initiated by a songwriter and by four music publishing companies against Sony which seeks a ban on the U.S. sale of digital recorders and blank digital tapes.[125] The action was filed on July 9, 1990, at the U.S. District Court for the Southern District of New York.[126]

The complaint states that home taping by the traditional "analog" technology, i.e., tape recording, is prevalent.[127] The plaintiffs further allege that over one billion infringing tapes were made last year and that such taping results in lost royalties to songwriters and publishers.[128] In addition, the plaintiffs argue that the public also suffers, since the result of home taping is a smaller number of new musical compositions.[129] The plaintiffs in the action argue that by marketing the "new-generation" machines, which can record music from compact discs without significant reduction in sound quality, Sony is commencing a new era of unauthorized home taping of copyrighted musical works, thereby denying the songwriters their royalties.[130] The complaint accuses Sony of contributory infringement by promoting the ability of DAT recorders to create perfect digital copies of compact discs.[131]

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123. *Class Action is Filed to Block U.S. Sales of DAT Recorders & Tapes*, 40 Pat., Trademark & Copyright J. (BNA) No. 989, at 243 (July 19, 1990).

124. *Id.* The plaintiffs in the action claimed to represent a class of approximately 40,000 copyright owners who hold over 450,000 copyrights. *Id.*

125. *Sony Sued Over Digital Recorders*, Washington Post, July 11, 1990, at B8, col. 6. The actual case is styled: Cahn v. Sony Corp., SDNY, No. 90 Civ. 4537, 7/9/90. *Class Action is Filed to Block U.S. Sales of DAT Recorders & Tapes*, 40 Pat. Trademark & Copyright J. (BNA) No. 989, at 243 (July 19, 1990).

126. *Class Action is Filed to Block U.S. Sales of DAT Recorders & Tapes*, 40 Pat. Trademark & Copyright J. (BNA) No. 989, at 243 (July 19, 1990).

127. *Id.*

128. *Id.*

129. *Id.* This theory may be based on the argument that, because fewer recordings are sold, there is less incentive for composers to produce a larger volume of works. *See id.*

130. *Id.*

131. *Id.*

The plaintiffs targeted the leading DAT producer, Sony, rather than the consumers. The plaintiffs concede in their complaint that it is unfeasible to try to stop home taping on equipment currently owned by consumers or to seek action against DAT purchasers themselves.[132] Rather, their action is directed toward the DAT recorders that Sony is introducing into the American market.[133] The complaint asserts that:

> DAT recorders have been designed and are intended by defendants to enable copying of copyrighted musical compositions, especially sound recordings fixed in compact discs but also sound recordings fixed in vinyl records and pre-recorded cassette tapes or broadcast on the radio. The only plausible, overwhelmingly predominant use for DAT recorders is for infringing taping activities. Currently, there are virtually no pre-recorded DAT cassettes. Purchasers of DAT recorders are using them, or will use them, to copy the copyrighted musical compositions controlled by plaintiffs and by members of the plaintiff class.[134]

The complaint also asserts that Sony knew and intended that purchasers of DAT would use the DAT equipment and the blank cassettes for unauthorized taping activities.[135] The plaintiffs allege that Sony is contributorily infringing the plaintiffs' copyrights through the distribution of DAT recorders thereby inducing, causing, encouraging, and permitting consumers to tape copyrighted musical compositions.[136] While the complaint acknowledges that DAT recorders are equipped with the SCMS, they argue that, even if the SCMS cannot be disabled, DAT equipment will still permit the creation of an unlimited number of unauthorized perfect copies from a single CD.[137] The plaintiffs argue that the inclusion of the SCMS illustrates the defendant's knowledge that the DAT recorders will be used to copy prerecorded copyrighted music.[138]

Defendant Sony, in its press statements, reported that the suit was without merit and that the corporation would continue selling DAT machines.[139] Sony further claims that the action seeks to "hold hos-

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132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Sony Sued over Digital Recorders*, Washington Post, July 11, 1990, at B8, col. 6.

tage" the latest digital technology from American consumers.[140]

Copyright observers are carefully watching this action, as the judicial outcome will have a tremendous impact on copyright law, the electronics industry, and home taping. As previously mentioned, DAT recording is distinguishable from the previously decided *Sony* VCR case. The pending action explores uncharted terrain[141] by applying copyright law to DAT which, necessarily involves copyright and policy issues.

VI. CONGRESSIONAL RESPONSE

Legislation was introduced on February 22, 1990, which would require that DAT recorders marketed in the United States be equipped with an SCMS feature limiting DAT's copying capacity.[142] On March 28, 1990, an identical bill was introduced in the Senate and was referred to the Senate Committee on Commerce.[143] The proposed Digital Audio Tape Recorder Act of 1990 would require the inclusion of SCMS circuitry to prevent unrestricted copying.[144] In addition, the bills specifically state that the legislation "does not address or affect the legality of private home copying under the copyright laws."[145] Also, neither bill addresses the issue of royalties for the copyright owners of the music or other recorded works.[146] The bills provide civil remedies for violations of the legislation.[147] These remedies include injunctions against the sale of non-SCMS-equipped DAT recorders and monetary fines.[148]

Following the introduction of the legislation and in response to the absence of royalty provisions in the legislation, the Copyright Coalition, a group representing copyright owners of musical compositions,

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140. *Id.*

141. *Id.* at B10, col. 3.

142. H.R. 4096, 101st Cong., 2d Sess. (1990). The bill was referred to the House Committee on Energy and Commerce and on March 5, 1990, was referred to the House Subcommittee on Commerce, Consumer Protection and Competitiveness. *Id.*

143. S. 2358, 101st Cong., 2d Sess. (1990).

144. H.R. 4096, 101st Cong., 2d Sess. § 2(5) (1990). Under the proposed legislation, one or more recordings could be made of a copyrighted tape; however, the SCMS would prevent making copies of copies. *See id.* at § 2(6). Hence, copies could only be made from "original" recordings. *See id.*

145. H.R. 4096, 101st Cong., 2d Sess. § 2(13) (1990).

146. *Id.* at § 2(14).

147. *See id.* at § 5.

148. *See id.*

threatened legal action against DAT importers/distributors.[149] In addition, the National Music Publishers Association threatened legal action to bar DAT importation and sales in the United States "if recorders enter the American market before adequate steps are taken to protect music copyright owners."[150] The National Music Publishers Association is working with the plaintiffs involved in the current action against Sony.[151]

On June 14, 1990, the Senate Subcommittee on Communications of the Senate Commerce Committee held hearings on Senate Bill 2358.[152] Two major issues were discussed at the hearings. The hearings addressed the issue of royalties for copyright owners whose musical works are copied using DAT technology.[153] Another issue involved the reliability of the copy-limiting features of DAT and the possibility of circumventing those copy-limiting features.[154]

VII. DAT AND COPYRIGHT LAW CONSIDERATIONS

At the outset, it should be noted that any consideration of DAT use and copyright law is somewhat conjectural, as DAT technology is not widely available or used by consumers in this country. In addition, there are somewhat limited current uses for DAT.[155] However, DAT capabilities and uses are rapidly developing.

A. *Home Audio Taping*

As previously stated, there is a running controversy as to whether a home audio taping exception exists under current copyright law.[156] Proponents of such a home taping exception cite the legislative his-

149. *See DAT Bill Introduced by 13 Congressmen*, TV DIGEST 10 (Feb. 26, 1990). The Copyright Coalition includes the American Society of Composers and Publishers, (ASCAP), the Songwriters Guild of America, (SGA), and the National Music Publishers Association, (NMPA). *Id.* at 11.

150. *Id.*

151. *Sony Sued Over Digital Recorders*, Washington Post, July 11, 1990, at B10, col. 3.

152. *Class Action is Filed to Block U.S. Sales of DAT Recorders & Tapes*, 40 Pat., Trademark & Copyright J. (BNA) No. 989, at 243 (July 19, 1990).

153. *Id.*

154. *Id.*; *see also* S. 2358, 101st Cong. 2d Sess. § 2 (1990) (senate bill recommends worldwide implementation of SCMS copy-limiting device in DAT recorders).

155. *See* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, OTA-CIT-422, *Copyright and Home Copying: Technology Challenges the Law* 42 (1989) (most common current uses for DAT are copying copyrighted CDs and computer data storage).

156. *See infra* notes 151-159 and accompanying text.

tory of the Sound Recording Amendments of 1971 which discussed the preservation of home taping rights.[157] Commentators have stated that there was a universal feeling that home audio taping was not an infringement and that there have been no court challenges for home taping as an infringement.[158] Opponents of such a theory, notably the late Professor Melville Nimmer, contend that there is no exception for home audio taping and that the only defense that home audio taping would fall under is the fair use criteria of section 107 of the Copyright Act.[159] Therefore, it is unclear whether courts will be persuaded by a defense of a home audio taping exception to charges of DAT copyright infringement.

B. *Fair Use Defense for DAT Technology*

The defense of fair use, as set forth in the copyright statute, provides certain specific criteria which are balanced in a determination of whether the use of copyrighted work is a "fair" use (i.e., a noninfringing use), or whether such use constitutes an infringement.[160] Application of these four criteria to the DAT recording situation is instructive in determining whether DAT recording is a fair use.[161] In evaluating DAT recording, a court would examine the specific factual circumstances surrounding the use, apply the statutory criteria, and then decide whether the use was infringing or noninfringing.[162] The courts have great flexibility in the application and evaluation of each factor in their fair use analysis. Each fair use determination is made on a case-by-case basis and there is frequent disagreement among the courts as to what constitutes fair use.[163]

The first statutory factor for fair use determination involves the purpose and the character of the use. In the *Sony* VCR case, the Court discussed the time-shifting theory at length and found that some broadcasters did not object to such taping. DAT use, by com-

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157. *See* Sound Recording Amendments, Pub. L. No. 92-140, 85 Stat. 391 (1971).

158. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[F][5] (1990).

159. 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.05[C][3] at 8-90.7 (1990).

160. *See* 17 U.S.C. § 107 (1988).

161. *See*, Fleischmann, *The Impact of Digital Technology on Copyright Law*, 8 COMPUTER L.J. 9-10 (1987) (reprinted in 70 J. PAT. & TRADEMARK OFF. SOC'Y. 5 (1988), and 23 NEW ENG. L. REV. 45, 52-55 (1988)).

162. *See generally*, Abramson, *How much Copying under Copyright? Contradictions, Paradoxes, Inconsistencies, Copyright Law*, 61 TEMPLE L. REV. 133, 133-96 (1988).

163. *See supra* note 53.

parison, would primarily involve the home recording of purchased or borrowed copyrighted CD recordings. As previously discussed, copyright owners and their representatives object to home DAT recording of their copyrighted works. Opponents of DAT could argue that the purpose and character of this use are to create copies of copyrighted works without having to purchase an original copy of the work. Furthermore, copyright owners assert that DAT taping of copyrighted works does not fall within any of the statutorily enumerated exceptions to infringement, such as educational use. Hence, DAT taping should not quality as a fair use under the "purpose and character of the use" factor.

The second fair use factor involves the nature of the copyrighted work. Often this criterion is not given strong weight by the courts and is considered vague.[164] At times, distinctions are made between informational works and creative works, the creative work being given greater copyright protection. Copyright owners could argue that CDs of musical works involve a creative work and should be given a higher degree of protection.[165]

The amount and the substantiality of the portion of the copyrighted work used constitute the third fair use factor. In home audio taping, it is probable that the home taper would copy the entire musical composition rather than just a portion of the work. Therefore, if the composition is copied in its entirety, a claim of fair use on the part of the home taper would not be compelling since a substantial, if not the entire amount, of the copyrighted work had been copied.

The final factor in the fair use criteria, the effect of copying on the market for the copyrighted work, is an element of considerable importance. Simply stated, home taping substantially reduces revenue.[166] Using DAT technology, a home taper could make many high-quality copies of a copyrighted work without purchasing even one copy of that work.[167] Therefore, because the market value of the copyrighted

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164. H. HENN, COPYRIGHT PRIMER 156-157 (2d ed. 1979); *see also* Note, *Digital Audio Tape Machines: New Technology or Further Erosion of Copyright Protection?*, 77 KY L. J. 441, 457 (1989).

165. Note, *Digital Audio Tape Machines: New Technology or Further Erosion of Copyright Protection?*, 77 KY L.J. 441, 457 (1989).

166. *Id.*; *see also* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, OTA-CIT-422 *Copyright and Home Copying: Technology Challenges the Law* 38 (1989) (digital home copying seriously threatens recording industry's economic viability).

167. Using a DAT recorder to make a digital copy of an analog signal transmitted over

work may diminish due to DAT recording, a court could use this factor to support a finding of infringement.

After evaluating the four "fair use" factors, a court could justify a finding that DAT recording is not a fair use and, therefore, DAT recording constitutes infringement of the copyright owner's rights.[168] However, a court would also examine the actual circumstances of each case in determining whether such use was an infringement or "fair" use.

C. *DAT Recording as Distinguished from the "Sony VCR" Case*

The *Sony* VCR case is often cited as the stronghold of home taping. However, there are numerous and significant elements concerning the case which legally and factually distinguish the *Sony* VCR case from the *Sony* DAT case. First and most significantly, the VCR case was a very narrow holding involving home video recording.[169] DAT recording involves audio recording, whether in the home or in a commercial setting. Second, a significant feature of the VCR case was its use of VCRs for "time-shifting" purposes. It is unlikely that DAT technology will be used for such purposes, since the primary use for DAT is the copying of already recorded works. Third, various broadcasters did not object to VCR recording of their televised programs. Conversely, producers of recorded works have strenuously objected to the potential DAT recording of their copyrighted materials. Fourth, there is a significant difference in the recording quality of DAT and VCRs. DAT can continue to produce nearly perfect copies from the original recording. VCR recording, on the other hand, deteriorates over continued use. Fifth, the VCR case did not address several issues which may be involved in DAT copying: swapping of DAT tapes and CDs; library building of copies of copyrighted material; and mass quantity taping of copyrighted materials. Sixth, the Court in the

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radio airwaves is one example. *See Digital Audio Tape Decks*, CONSUMER REPORTS 661 (October 1990).

168. *But see* Comment, *Digital Audio Tape: New Fuel Stokes the Smoldering Home Taping Fire*, 37 UCLA L. REV. 733, 744-761 (1990). In this comment, the author applied the four fair use factors to DAT recording and concluded that DAT recording would constitute a fair use. The author concluded that the purpose of the DAT recording was for personal use; that the nature of the work was to provide for the dissemination of information to the public; that recording in its entirety did not preclude fair use; and that DAT would not cause substantial harm to the copyright holder. *Id.*

169. *See supra* note 70.

Sony VCR case took judicial notice of the fact that a VCR could be used for numerous noninfringing uses (i.e., renting and playing tapes from a video club; playing self-created tapes). However, at this time, DAT recording has less capability for non-infringing uses than VCRs.[170] The number of non-infringing uses for DAT, if any, will certainly be relevant in a court's evaluation of the issue of contributory infringement. Thus, if there is only one use for DAT, which is an infringing use, contributory infringement might be attributable to the entire chain of DAT manufacturers, distributors, and users. However, on the basis of the *Sony* VCR decision, if there are numerous non-infringing uses for DAT, these non-infringing uses diminish the strength of a contributory infringement claim.

VIII. DAT Development and Use In The United States

While DAT technology provides the capability of producing nearly perfect reproductions of audio works, it also creates a challenge to existing copyright law. This challenge must be faced by either Congress or the courts because American consumers will demand access to DAT technology. Due to the concurrent legal uncertainties surrounding DAT use, DAT technology may not be developed at the present time. However, this is a doubtful outcome because both DAT producers and potential DAT consumers will wish to exploit the resource to its fullest extent.[171] This section discusses several alternative actions concerning DAT use and development: legislative action, non-infringing uses, market adjustments and possible infringement actions.

A. *Possible Legislative Action*

Should Congress choose to address the copyright issues surrounding the implementation of DAT technology, several legislative courses of action are available. Congress could require that DAT technology include SCMS or another copy limiting feature.[172] However, serious

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170. For a discussion of possible non-infringing uses of DAT technology, *see supra* notes 168-172 and accompanying text.

171. *See Class Action is Filed to Block U.S. Sales of DAT Recorders & Tapes*, 40 Pat. Trademark & Copyright J. No. 989, at 243 (July 19, 1990).

172. *See* S. 2358, 101st Cong., 2d Sess. § 3(a) (1990) (requiring implementation of SCMS in any DAT recorder); H.R. 4096, 101st Cong., 2d Sess. § 3(a) (1990) (requiring implementation of SCMS in any DAT recorder).

factual questions remain regarding the protection that SCMS provides. SCMS would almost certainly come under the attack of enterprising innovators determined to demonstrate their ability to defeat any copy limiting device in spite of possible Congressional prohibition of such attempts.[173] Even with statutory authority the courts may not support a successful attack on SCMS.[174]

A tax on blank digital audio tapes with the revenue going to copyright owners is another possible solution. However, the government would have to devise a formula to govern the distribution of the proceeds.[175] Another tax alternative involves a tax or surcharge on DAT machines, with the proceeds benefiting copyright owners whose works are copied by DAT recorders.[176] This, in effect, would require the general public to pay for the anticipated infringement practiced by comparatively few individuals.

Yet another solution is to have a mechanism on DAT recorders which would require the consumer to purchase a token or other device to activate the DAT recorder. The revenue generated from token sales would be channeled back to copyright owners as royalties. This option raises at least two questions regarding the feasibility of the to-

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173. *See* S. 2358, 101st Cong., 2d Sess. § 3(b) (1990); *cf.* H.R. 4096, 101st Cong., 2d Sess. § 3(b) (1990). The two bills are equivalent in this section and read:

> No person shall manufacture or distribute any device, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any program or circuit which implements, in whole or in part, the serial copy management system in a digital audio tape recorder or digital audio interface device.

H.R. 4096, 101st Cong., 2d Sess. § 3(b) (1990).

174. *Cf.* Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 261 (5th Cir. 1988). In *Vault*, the plaintiff produced and sold computer diskettes designed to prevent users from copying the software stored on the disk. *Id.* at 256. The defendant analyzed the plaintiff's protective device and developed software that defeated it. *Id.* at 257. The plaintiff sued claiming that the defendant had made an unauthorized copy of the protective device for the sole purpose of analyzing and defeating it. *Id.* at 261. The plaintiff claimed that such a copy was in violation of 17 U.S.C. § 117 (1988) which allows a program's owner to copy the program as long as the copy "is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner." *Id.* The court, in finding for the defendant, construed the provision narrowly holding that the language did not require that the copy be made for the use the copyright owner intended. *Id.*

The language in the proposed statute prohibiting circumvention of SCMS is considerably stronger, see *supra* note 163, but *Vault* provides a model for imaginative advocacy in this area.

175. *Cf.* 37 C.F.R. § 307.3(a)-(e) (1989) (formula for distribution of royalty proceeds from juke-boxes).

176. *Cf.* 17 U.S.C. § 116(b)(1)(A) (1988) (juke-box statute). The owner of a juke-box receives a compulsory license to publicly perform recorded works by paying a royalty fee to the Copyright Royalty Tribunal. *Id.*

ken system. First, this device would be open to the attack of entreprenuers who will find a way to bypass the token device. Second, and more importantly, introducing a product which not only requires the consumer to purchase the DAT recorder itself but also requires the consumer to, in effect, continue to pay for the use of the product will have a detrimental effect on sales.

While these suggested courses of action provide some suggestions for Congressional action, they do not provide a complete solution. Questions remain about the adequacy of the proceeds which could be raised through these remedies and how the royalties would be distributed. These potential remedies may also create substantial bureaucracy and confusion.

Congress could provide a special exemption for home DAT taping, but such an action could create an undesirable precedent. For instance, with each new technological advance, Congress would have to either amend the fair use defense or devise a statutory exception for each emerging technology. Either course of action would require considerable congressional consideration and study before such legislation would be enacted, thereby imposing a substantial time lag between the introduction of the product and its legislative counterpart.

B. *Possible Non-Infringing DAT Uses*

At the current time, DAT technology does not have any substantially non-infringing uses. The most obvious use of DAT technology is to copy existing copyrighted works.[177] However, other uses of DAT technology are conceivable.[178] For example, prerecorded digital tapes could be produced and sold containing copyrighted works with royalties flowing back to the copyright owners.[179] Another use of DAT technology could be to record original works created by the

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177. *Digital Audio Tape Decks*, CONSUMER REPORTS, Oct. 1990 at 661. The Sony DAT recorder was evaluated by inserting a test signal through the analog input which bypassed the SCMS. *Id.* A possible use for a DAT recorder would be to use it to archive a record or tape collection. *Id.* Thus, even the SCMS would not protect a copyright holder whose work is found on a record or conventional audio tape. *Id.*

178. Comment, *Digital Audio Tape: New Fuel Stokes the Smoldering Home Taping Fire*, 37 UCLA L. REV. 733, 742-43 (1990). Possible non-infringing uses of DAT technology include: "live recording of original music, computer data storage, business dictation, or taping school lectures." *Id.*

179. *See Digital Audio Tape Accord Clears Way for Use in U.S.*, Wall Street Journal, July 28, 1989, at B2, col. 5. The agreement between the recording industry and the consumer

DAT owner.[180] DAT technology might also find uses in areas with no connection to the recording industry, such as the storage of computer data[181] or video information.[182]

Numerous non-infringing uses for DAT technology have been identified in this and other articles. With time, new uses for this new and powerful technology will be developed. With each development of non-infringing uses the analogy between DAT technology and VCR technology will become stronger, therefore, the more DAT technology will evolve into a product entitled to protection under the fair use defense.

C. *Possible Market Adjustments to DAT Development*

The DAT copying problem, if handled correctly, could disappear of its own accord. An example of this phenomena is found in the software industry where early vendors of high-priced software found that consumers were infringing their software copyrights by copying and distributing the software to other consumers.[183] The industry's

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electronics industry does not resolve all differences between the two industries because it does not include a royalty provision for the recording artists. *Id.*

180. *See* H.R. 4096, 101st Cong. 2d Sess. § 3(c) (1990). This bill, entitled "Digital Audio Tape Recorder Act of 1990" includes an exception for professional DAT recorders. *See id.* The bill defines a "professional model digital audio tape recorder" as a device

> (A) . . .which is capable of sending a digital audio interface signal in which the channel status block flag is set as a "professional" interface, in accordance with the standards and specifications set forth in the technical reference document or established under an order issued by the Secretary of Commerce under section 4;
>
> (B) which is clearly, prominently, and permanently marked with the letter "P" or the word "professional" on the outside of its packaging, and in all advertising, promotional, and descriptive literature, with respect to the recorder, that is available or provided to persons other than the manufacturer, its employees, or its agents; and
>
> (C) which is designed, manufactured, marketed, and intended for use by recording professionals, in the ordinary course of a lawful business.

Id. However, such mechanical features will not create a presumption that the device is a professional model. *Id.* at § 3(c)(2). In addition to the mechanical attributes of the device, a court must consider several factors regarding the use of such a device. *See id.* at § 3(c)(3) (list of factors).

181. *See* Press, *Simple Complexity and COMDEX*, Communications of the Association for Computing Machinery, July 1990, at 21 (suggesting use of DAT to archive data for local area network servers).

182. *See* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, OTA-CIT-422, *Copyright and Home Copying: Technology Challenges the Law* 48 (1989) (Digital Video Interactive combines video images, motion or still, with digital sound and text).

183. *See* Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 256 (5th Cir. 1988) (describing device developed to prevent consumers from making unauthorized copies of computer program).

first response was to "copy protect" the software to make it difficult to copy.[184] Consumers quickly discovered mechanisms to defeat the copy protection which at least one court found to have substantial non-infringing uses.[185] The software industry responded by lowering prices on their products and by licensing instead of selling the software to consumers. With lower prices, consumers were less likely to copy software and were more likely to buy it from the copyright holder. The consumer could then expect support and updates from the copyright holder as the product was improved.

The same reasoning is applicable to the music industry. As long as the prices of DAT products remain high, consumers will be tempted (perhaps even justified in their minds) to make infringing copies of copyrighted works. As DAT prices are dropped, they will eventually reach the point where the consumers' underlying sense of morality and fairness will overcome their desire to avoid paying for a copyrighted work. As prices are dropped, consumers will also find it more efficient, in terms of time spent and results achieved, to purchase rather than copy DAT works.

D. *Possible Practical Problems with DAT Infringement*

Individual DAT infringers will be difficult to locate and sue. When they are found, they will probably invoke the fundamental right of privacy in the home to protect their home taping activities. The difficulty of overcoming this hurdle was illustrated in *Sony* where an individual, originally joined as a defendant accused of home taping, was dropped from the action. Significantly, no individual consumers are charged with infringement in the current Sony DAT case.[186] Thus infringement actions against individual consumers for their home taping activities will be very difficult, if not impossible to maintain.

IX. CONCLUSION

American copyright law provides a means of stimulating intellectual development and protecting the ownership interests of the au-

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184. *Id.*

185. *See id.* at 267. The *Vault Corp.* court found that the Quaid software used to defeat the copy-preventing mechanism allowed the consumer to make "fully functional archival copies." *Id.* Since the copy-preventing mechanism protected only against electrical or mechanical failures, the court held that the Quaid software had substantial non-infringing uses. *Id.*

186. *See Sony Sued Over Digital Recorders*, Washington Post at B8, B10 (July 11, 1990).

thors of copyrighted works. Over the years, American copyright law has evolved in order to respond to societal and technological changes. The most recent overall revision of copyright law was in 1976.

A copyright owner's rights in his/her work are not absolute. Under the copyright statute, certain uses of a copyrighted work are allowed under the defense of fair use. The criteria for the application of this defense are flexible and are applied on a case by case basis. In addition, this defense is a continuously evolving concept. The leading case which examined the defense of fair use within the context of home recording was *Sony Corp. of Am. v. Universal City Studios, Inc.*. Sony examined the use of videocassette recorders (VCRs) within the context of home recording. The Supreme Court determined that under certain circumstances home video recording constituted a fair use of copyrighted works. However, the effect of the *Sony* VCR case is quite limited in that the Supreme Court addressed video recording under very specific circumstances. The holding in the *Sony* case is distinguishable from the current factual and legal situations presented by DAT recording.

New technologies such as compact discs and DAT provide challenges for American copyright law. DAT raises several copyright issues because it is capable of producing nearly perfect copies of copyrighted works in the privacy of the DAT owner's home. Thus, the question arises as to whether DAT use is considered a fair use or whether it constitutes an infringement. A class action has been filed by various song writers against the Sony Corporation, the leading DAT manufacturer, to block the U.S. distribution of DAT tape and recorders in the U.S. District Court for the Southern District of New York. Copyright observers are awaiting the outcome of this litigation to clarify various copyright issues involving home use, fair use, and related issues.

In response to concerns regarding DAT use and copyright law, legislation was introduced in the 101st Congress which addresses DAT use. Congressional hearings were held on the subject of DAT use and existing copyright law, but no definitive action has been taken in this area. Instead the courts must apply current copyright laws.

Application of the existing copyright law to DAT recording poses certain concerns. The most significant of these issues is that DAT recording may not fall within the fair use exception of copyright law, and therefore, issues of infringement may arise with the sale and use of DAT. However, Congress has the power to either create a statu-

tory exception for DAT recording in the home, or expand the fair use doctrine to accommodate DAT technology. Furthermore, as illustrated by the wide sale of VCR and the success rental movies, manufacturers and copyright owners can both profit from the development and distribution of this new technology.