# COPYRIGHT LAW: LEGALIZING HOME TAPING OF AUDIO AND VIDEO RECORDINGS

ISSUE BRIEF NUMBER IB82075

AUTHOR:

Paul S. Wallace, Jr.

American Law Division

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DATE ORIGINATED 07/08/82
DATE UPDATED 02/03/83

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## ISSUE DEFINITION

Various Members of Congress have proposed amendments to the Copyright Act that would provide a blanket exemption for noncommercial home audio and video off-air recording. The major thrust of the copyright owners' opposing position is if you cannot protect what you own, or at least receive some compensation for its use, you own nothing. This is countered by those who feel the purpose of the copyright law is to promote broad public availability of artistic products and when the copyright owners decide to use the distribution mechanism of the public airwaves, they have to accept the premises of the public airwaves.

There is a general consensus among all groups that no one seeks to forbid anyone from taping either audiovisual works or sound recordings, whether copyrighted or not. The main concern at this time is whether copyright owners shall in some way be reasonably compensated for the home taping use of their copyrighted works.

## BACKGROUND AND POLICY ANALYSIS

In November 1975, the Sony Corporation began marketing the Betamax, a videotape recorder (VTR) that enables television owners to record broadcasts and replay them on their own sets, and -- using a "pause switch" during recording or a "fast-forward switch" during playback -- to eliminate commercials. Universal City Studios and Walt Disney Productions, both owners of copyrighted films that Betamax owners can tape from television broadcasts, sued to enjoin the manufacture and sale of the videotape, alleging copyright infringement, for which Sony was said to be directly, contributorily, or vicariously liable. Universial City Studios, Inc. v. Sony Corp., 480 F. Supp. 429, 432 (C.D. Cal. 1979). The defendants argued that home-use videorecording did not infringe the plaintiff's copyright and that even if it did, the VTR manufacturer could not be held liable for infringement under any theory of liability. Id. at 432.

The District Court first addressed the question of whether home videotaping constitutes infringement, characterizing its inquiry as a search for the proper balance between "the need for wide availablity of audiovisual works against the need for monetary reward to authors to assure production of these works." Id. After reviewing the legislative history of the copyright protection accorded sound recordings in 1971, the court determined that "Congress did not intend intend to restrain the home use [video] copying at issue here." Id. at 447. In 1971 Congress dealt with the growing problem of record piracy (see S.Rept. 92-72, 92d Congress, 1st session, 7-8 [1971]) by amending the 1909 law to give sound recordings limited copyright protection. Sound Recording Amendment of 1971, P.L. 92-140, section 1 (a), 85 Stat. 391 (amending 17 U.S.C. 1 (1970) (current version at 17 U.S.C. 114(b) [Supp. II 1978]). The District Court found that the legislative history of this amendment indicates that Congress did not intend to give the holders of sound recording copyrights protection against non-commercial home recording, because granting such protection was not "worth the privacy and enforcement problems (480 F. Supp. at 446) which restraint of home-use recording would create." 480 F. Supp. at 446. Reasoning that the home-use sound-recording exemption was carried over to the Ommibus 1976 Copyright Act (Id. at 444-45), the court extended the rationale of that exclusion to home videorecording and

they found an implied exception to section 106 for such non-commecial use.

The District Court also was convinced that the challenged practices in the case, qualify as a "fair use" exemption under the "fair use" criteria set forth in section 107 of the 1976 Copyright Act, 17 U.S.C. 107.

On Oct. 19, 1981, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed four of the five conclusions of law of the District Court. Universal City Studios v. Sony Corp. of America, 659 F.2d 963 (9th Cir. 1981). It affirmed only the holding that retail store demonstration recording was a "fair use." The appellate court's conclusions were decided on the basis of two questions: (a) whether the District Court committed error in finding an implied videorecording exception in the exclusive rights given to copyrighted owners under section 106 of the Copyright Act of 1976, and (b) whether home videorecording constitutes "fair use."

The Ninth Circuit found, among other things, that the "fair use" doctrine that allows use of copyrighted materials for news reporting, teaching, scholarship and research when such use does not compete with the reasons for which the material was made is not applicable to unauthorized home videotapes of copyrighted material.

While the District Court was heavily influenced by the fact that in-home taping of sound recordings had not been halted by the copyright laws and therefore concluded that there was a similarly implied home videorecording exception (apart from the fair use doctrine), the Court of Appeals stated that this conclusion was erroneous. "While the sound recording situation is analogous, there are a number of reasons why sound recordings should receive different judicial treatment... First, the copyright statute treats sound recordings and audiovisual works as separate categories of protected materials.... Second, much of the underlying rationale for the home recording of sound recordings is simply not applicable to videorecording." 659 F.2d 966-67.

The Ninth Circuit Court of Appeals ruled that it could find no explicit exemption from copyright law for home videorecording in the Copyright Act of 1976 (P.L. 94-533).

Following the decision by the Court of Appeals in Universal City Studios v. Sony Corp. of America, congressional reaction was swift. Several bills have been introduced to overturn the ruling by exempting home off-air videotaping from copyright liability.

The comparative analysis regarding the judicial treatment of sound recordings and audiovisual works by the Court of Appeals gave rise to discussions which suggested that the unauthorized home audio recording of copyrighted works also was subject to protection under the 1976 Copyright Act. The answer to this question is not clear and legislation has been proposed to permit noncommercial audio, as well as video recording in private homes.

## General Review

Within days of the Appellate Universal City Studios, Inc. v. Sony Corp. of America (Betamax) decision, two bills were introduced to overturn the ruling by exempting home videotaping from copyright liability. First to propose legislation (Oct. 21, 1981) were Senator De Concini (S. 1758) and

Representative Parris (H.R. 4808).

These bills would protect owners of video recorders (estimated at 3 million in the U.S.) from being charged with copyright violations as long as they record television programs for their own use.

The bills provide that the recording of copyrighted works on a video recorder is not an infringement of copyright if "the recording is made for private use and the recording is not used in a commercial nature."

Supporters of S. 1758 and H.R. 4808 argued that home video recorders are not used to create movie libraries, but rather to enable owners to view programs at a time other than that scheduled by the television station. This is commonly referred to as "time shifting."

Opponents of S. 1758 and H.R. 4808 argued that opposition was most visible from segments of the entertainment industry with direct interest in creative property; legislation expressive of their case was soon forthcoming.

On Dec. 16, 1981, Senator Mathias introduced an amendment (Amendment No. 1242) to S. 1758, which included Senator De Concini's language protecting individual tapers but would require the manufacturers of video recorders and blank tape to pay a royalty on each machine and blank tape sold. The amount of the royalty would be set by the Copyright Royalty Tribunal, which was established under the 1976 Copyright Act. The Tribunal would also be responsible for distributing the royalty fees to those who own the copyrighted material.

On Feb. 9, 1982, Representative Edwards introduced H.R. 5705, which was similar to S. 1758. On Mar. 3, 1982, H.R. 5705 was amended to include audio machines (tape recorders). On Mar. 4, 1982, Senator Mathias' legislation was similarly amended (Amendment No. 1333). Both of these proposals were the focus of hearings held on Apr. 12-14, and on June 24, before the House Subcommittee on Courts, Civil Liberities, and the Administration of Justice.

In hearings before the House subcommittee, as reported in the Patent, Trademark and Copyright Journal, No. 576, Apr. 22, 1982, at p. 1, Jack Valenti, President of the Motion Picture Association of America, Inc., testified that his membership vigorously supports H.R. 5705. According to Mr. Valenti, H.R. 5705 "is a compromise to complex legal and legislative problems and is thoroughly hospitable to the Constitution itself." The bill, he said, would permit home use of audio and video cassette recorders (VCRs) and protect the property rights of authors and entrepreneurs in their creations. It achieves these dual goals, Mr. Valenti stated, with six key provisions:

First, it provides an exemption for individuals from any liability for infringement of copyright if the audio or video recording is made for private use of family members and others in their immediate household;

Second, it requires that importers or manufacturers of audio and video recording devices and audio tapes register with the U.S. Copyright Office and thereafter on a semi-annual basis deposit with the Register of Copyrights information relating to the number of recorders and blank tapes imported, manufactured and distributed;

Third, it directs the Copyright Royalty Tribunal to determine appropriate and reasonable royalty fees to be paid by the manufacturers and importers who

distribute audio and video recorders and tapes in order to provide copyright owners of motion pictures, other audiovisual works and musical works with fair compensation for the use of their creations;

Fourth, it establishes a system for the distribution of the royalty fees to copyright owners on a yearly basis through the Copyright Royalty Tribunal;

Fifth, it imposes penalties for violation of these provisions consistent with existing copyright law; and

Sixth, it allows owners of (1) phonorecords of sound recordings or (2) copies of motion pictures or other audiovisual works to dispose of such phonorecords or copies by rental, lease or lending for commercial advantage, only with the permission of copyright owners. This is called the "fair marketing" amendment.

Mr. Valenti indicated that legislation such as H.R. 4808 and S.1758 not only fail to recognize the property rights of copyright owners, but they also fail to compensate the owners of copyrighted programs for unjust taking of their property, thus clearly violating the Fifth Amendment.

According to Mr. Stanley M. Gortikov, President of the Recording Industry Association of America (RIAA), H.R. 5705 establishes a copyright royalty system that will create a fair incentive for the recording of music.

Other organizations that testified in support of H.R. 5705 included the Directors Guild of America, Inc., the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, the American Guild of Authors and Composers, and the National Music Publishers' Association, Inc.

Opposition to the compulsory license (statutory license permitting use of the copyrighted work without the express permission of the copyright owner in exchange for payment of royalties and fulfillment of the statutory terms) provision of H.R. 5705 was led by attorney Charles D. Ferris, who appeared on behalf of the Home Recording Rights Coalition. In summary, Mr. Ferris stated that the Coalition believed the tremendous service VCRs provide the American people in the video marketplace is one important factor in determining whether their home use should be viewed as a "fair use" exemption to the copyright laws. The ultimate goal of the copyright law is to promote the First Amendment value of increased access to diverse speech. This same goal is furthered by the unfettered availability and use of VCRs. According to the coalition, copyright holders are not harmed by such use, as was noted by the District Court. In light of their benefits and the absence of harm, Congress should follow the reasoning of the District Court in the Betamax case and grant an exemption to the copyright laws for the home use of VCRs.

Rewarding artists, Mr. Ferris maintained, "is not the sole, nor even the dominant, purpose of the copyright statute." Balanced against the need to compensate authors, he stated, "is the public need for access to their works."

Economist Nina W. Cornell indicated that the mechanisms for collection and disbursment of the royalties would themselves "require the establishment of a new, continuous, and costly regulatory program within an agency that has not been notably successful at running the programs already entrusted to its ca[r]e."

With respect to the proposed abolition of the "first sale" doctrine, Ms. Cornell argued that such a proposal, if enacted, would raise the rental price to consumers significantly and greatly increase the costs of enforcing the copyright laws. "If the first sale doctrine was abolished," she stated, "anyone who sells or rents a cassette without permission would be liable [for infringement]."

Also testifying against the compulsory license, Mr. Eugene H. Kummel, Chairman of the Board of McCann-Erickson Worldwide, an advertising agency, maintained that most people will not cut out the commercials when they tape programs. "Therefore," he said, "we will continue to sponsor free TV and to pay for audiences that include tapers."

Legislators and lobbyists on both sides believe that some type of legislation will pass the 97th Congress, but no one is sure of what form it will take.

On Mar. 12, 1982, the Supreme Court was called upon to resolve the question of whether in-home videotaping of copyrighted works constitutes a copy right infringement. Sony Corp. of America v. Universal City Studios, Inc., 659 F.2d 963 (9th Cir. 1981), cert. granted, June 14, 1982 (No. 81-1687). According to the petitioners, the Ninth Circuit erred in ruling that a finding of "fair use" is not justified where the copies made by home videorecording are used for the same purpose as the original. This "intrinsic use" argument, petitioners contend was rejected by the U.S. Court of Claims in Williams & Wilkens Co. v. U.S., 487 F. 2d 1345 (Ct. Cls. 1973), aff'd by an equally divided Court, 420 U.S. 376 (1975).

The petitioners also challenge the Ninth Circuit's conclusion that the manufacturers of VCRs are liable, per se, as contributory infringers.

Finally, the petitioners protested the Ninth Circuit's suggestion that "a judicially created compulsory license" might resolve the conflict. "[T]here is no statutory provision nor decisional precedent for compulsory licensing as a remedy for any copyright infringement", they argue.

While the petitioners noted that the Ninth Circuit's decision prompted instant congressional reaction, they contend that only the Supreme Court "can settle the question of whether home videorecording has been, now is, or will be...infringement."

## LEGISLATION

H.R. 175 (Foley)

Amends the copyright law to exempt the home recording of copyrighted works on home video recorders for private home, noncommerical use from copyright infringement. Introduced Jan. 3, 1983; referred to the Committee on the Judiciary.

## HEARINGS

U.S. Congress. Senate. Committee on the Judiciary. Copyright infringements (audio and video recorders). Hearings, 97th Congress, 1st and 2d sessions, on S. 1758. Nov. 30, 1981, and Apr. 21, 1982. Washington, U.S. Govt. Print. Off.,

1982. 1384 p.

CHRONOLOGY OF EVENTS

01/18/83 -- The Supreme Court heard oral arguments in Sony Corp. of America v. Universal City Studios Inc. (Case No. 81-1687).

06/24/82 -- House Subcommittee on Courts, Civil Liberties, and Administration of Justice held a hearing on H.R. 5705, Home Recording Act of 1982.

06/14/82 -- The Supreme Court granted cert. in Sony Corp. of America v. Universal City Studios, Inc.

04/21/82 -- Senate Committee on Judiciary held hearings on S.1758.

04/14/82 -- House Subcommittee on Courts, Civil Liberties, and the Administration of Justice held hearings on several copyright audio/video bills.

03/12/82 -- The Supreme Court was asked to review the Sony Corp. of America v. Universal City Studios, Inc.= (Betamax) decision.

10/19/81 -- The U.S. Court of Appeals for the Ninth Circuit pronounced its decision in Sony Corp. of America v. Universal City Studios, Inc., which reversed the U.S. District Court for Central California.

10/02/81 -- The U.S. District for Central California decided in Sony Corp. of America v. Universal City Studios that noncommercial home use video recording of material broadcast over the airwaves does not constitute infringement.

ADDITIONAL REFERENCE SOURCES

Bara, J. All's Fair in Love and Private Video Recording -- The Copyright Infringement Issues in the Sony Case. Catholic University Law Review, v. 30, 1981: 621-651.

C.H.R., III. Universal City Studios, Inc. v. Sony Corp.: "Fair Use" Looks Different on Videotape. Virginia Law Review, v. 66, 1980: 1005-1027.

Gilstrap, R. Videotape Recorders: Copyright Infringement? Baylor Law Review, v. 33, 1981: 695-706.

Ladd, D. Home Recording and Reproduction of Protected Works. American Bar Association Journal, v. 68, 1982: 42-45.