92-368 A

CRS Report for Congress

Digital Audio Recording Technology and American Copyright Law

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April 16, 1992



Congressional Research Service • The Library of Congress

DIGITAL AUDIO RECORDING TECHNOLOGY AND AMERICAN COPYRIGHT LAW

SUMMARY

American copyright law provides a means of stimulating intellectual development and protecting the ownership interests of the authors of the 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 permitted under the doctrine of fair use. The criteria for the application of this doctrine are flexible and are applied on a case by case basis. In addition, the doctrine appears to be a continuously evolving concept. The leading case which has examined the doctrine of fair use within the context of home recording was *Sony Corp. v. Universal City Studios, Inc.*, which examined the use of videocassette recorders within the context of home recording. The Supreme Court determined that under certain circumstances, home video recording was considered a fair use of copyrighted works. However, the effect of the *Sony* 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 factual and legal situations presented by digital audio recording technology ("DART").

New technologies such as compact discs ("CDs") and DART provide challenges for American copyright law. DART raises certain copyright issues in that it appears to be capable of producing nearly perfect copies of copyrighted work in the privacy of the DART owner's home. Thus, the questions appear to be whether DART use would be considered a fair use or whether it would be construed an infringement. However, these issues are somewhat speculative, as DART equipment is not widely available for consumer use in the United States.

In response to concerns about DART use and copyright law, legislation was introduced in the 101st Congress which addressed DART use. In part, because this legislation did not provide compensation--royalty payments--to the copyright owners, representatives of the copyright owners brought legal proceedings--a copyright infringement action--against DART manufacturers and importers in 1990. Following intense negotiation between all the parties to the dispute, a mutually satisfactory compromise was reached and the legal action was dismissed without judicial resolution in July 1991. Three bills have been introduced in the 102d Congress to address certain home recording issues presented by DART and which embody the compromise reached by the interested parties in July 1991. The current legislation embodies certain provisions: 1) an audio home taping exception to copyright law; 2) royalty provisions for the copyright owners; and 3) anti-copying devices installed in the DART recorders. Enactment of this legislation may provide the resolution of the continuing controversy concerning home audio recording and might also provide for the wide dissemination and use of DART recording. Some critics of the legislation have argued that definitional problems still remain in the bills. They also charge that it is unfair for consumers to have to pay a tax on all tapes/discs, as some of these tapes/discs may not be used for home taping.

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DIGITAL AUDIO RECORDING TECHNOLOGY AND AMERICAN COPYRIGHT LAW

INTRODUCTION

The concept of American copyright is a constitutionally sanctioned[1] and legislatively accorded form of protection for authors against the unauthorized copying of their "original works of authorship."[2] The owner of copyright is given by statute the exclusive right to use and to authorize the various uses of the copyrighted work: reproduction, derivative use, distribution, public performance, display, and other uses. The violation of any of the copyright owner's rights in the copyrighted work may result in a legal action for copyright infringement.[3]

The technological innovation of digital audio recording technology ("DART")[4] poses new challenges for American copyright law. A major copyright

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[1] The U.S. Constitution grants Congress the authority to regulate copyrights. This power is contained in the "copyright clause" of the Constitution which provides:

> The Congress shall have Power. . .To Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. (U.S. Const, art. I, § 8, cl. 8).

[2] 17 U.S.C. §§ 102, *et seq.* (1988). Such works include literary, dramatic, musical, artistic, and other intellectual works.

[3] However, the copyright owner's rights in the copyrighted work are neither absolute nor unlimited in scope. *See*, for instance, the fair use doctrine, codified at 17 U.S.C. § 107 (1988).

[4] Originally, the entire concept of digital audio technology was referred to by the acronym "DAT." However, recently the term--within the context of current legislative activity--has been narrowed to the concept of digital audio *recording* technology (italics added) and is generally referred to by the acronym "DART." DART is a more specific term than DAT, and refers to the digital audio recording capabilities, such as the ability of DART to create nearly perfect copies of prerecorded CDs. DAT may be used to refer to more than recording activities/capabilities. Also, digital audio technology is constantly developing. In this report, the term "DART" is used to describe digital audio recording technology. However, it should be noted that not all legal commentators have distinguished the subtle differences between the concepts of "DAT" and "DART."

issue which has been raised concurrently with the development and the potential marketing of DART equipment is DART's ability to reproduce nearly perfect copies of copyrighted musical works.[5] It has been argued that DART's reproduction capability may be used to reproduce copyrighted works on a wide scale basis, and such reproduction of the copyrighted work may be construed to violate the property rights of the copyright owner.[6] It appears that potential DART recording/copying could be carried out in the privacy of the DART owner's home. This possibility of "home" DART recording raises numerous copyright questions which are considered below.

This report examines the objectives of American copyright law, its development and its current day codification, and certain aspects of copyright law--such as the fair use doctrine and the concept of the "home" for copyright purposes--which appear to be relevant to the utilization of DART technology. The report considers the judicial proceedings and their subsequent settlement concerning DART, and also examines the various bills which have been introduced in the 102d Congress concerning DART and copyright law.[7]

OBJECTIVES OF AMERICAN COPYRIGHT LAW

A fundamental goal of American copyright is to promote the public interest and knowledge--the "Progress of Science and useful Arts." Another copyright objective is closely related: the promotion and the dissemination of knowledge to the public. While copyright is a property interest, its chief purpose was not conceived of as the collection of royalties or the protection of property. Rather, copyright was developed primarily for the promotion of intellectual pursuits and public knowledge. As the Supreme Court has observed:

> The economic philosophy behind the clause empowering the Congress to grant patents and copyrights is the conviction that

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[5] Currently, there are at least three DART formats available. Sony has a tape-based system (Rotary Head Digital Audio Tape or R-DAT) and a system based on compact disks (Mini-Disk). Philips has developed a tape-based system (Digital Compact Cassette--DCC) *See*, Hughes, *Digital Audio Recording: A Look at Proposed Legislation*, N.Y.L.J. 1 (1991)(cited to afterward as ("Hughes").

[6] However, DART recording equipment is not widely available for home use consumers in the United States. At the present time in the Washington, D.C. area, a standard Sony DART recorder retails for $599 plus tax at a large electronics store chain. However, according to the store's sales personnel, quantities are limited and the item must be special ordered. This is in contrast to a 1990 advertisement for a Sony DART recorder which listed the price for the Sony DTC-75ES model DART recorder at $949. NEW YORK TIMES, June 22, 1990, at A5.

[7] H.R. 3204, 102d Cong., 1st Sess. (1991); S. 1623, 102d Cong., 1st Sess. (1991); and H.R. 4567, 102d Cong., 2d Sess. (1992).

> 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 the useful Arts.[8]

Thus, it can be argued that the congressionally mandated copyright grant to authors of a limited monopoly is based on a dualism that involves the public's benefits from the creativity of authors and the economic reality that a copyright monopoly is necessary to stimulate the greatest creativity of authors. The Supreme Court seems well aware of these competing values and expressed its recognition of them in the 1984 *Sony* case:

> 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 printings 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....[9]

The concept of American copyright presents an apparent paradox or contradiction when considered within the context of the First Amendment freedom-of-speech guarantees: while the First Amendment guarantees freedom of expression, it can be argued that copyright seems to restrict the use or dissemination of information. It can be argued, however, that copyright, to the degree that it stimulates expression and encourages writing and other efforts, furthers First Amendment expression values by encouraging the quality of "speech" that is created. In trying to resolve these conflicting interests, the 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.[10] A large body of case law has been developed that weighs and counterbalances First Amendment freedom of expression concerns and the rights of the copyright holder.[11]

Therefore, the American copyright system is founded on two seemingly competing interests: intellectual promotion and property rights. Combined with these factors is the First Amendment freedom-of-expression concern. Courts have balanced and assessed these apparently conflicting elements, and Congress

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

[9] *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

[10] Nimmer, NIMMER ON COPYRIGHT §§ 1.03-1.08 (1988).

[11] *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

has considered these concerns over the years when it has enacted copyright legislation.

AMERICAN COPYRIGHT LAW

Legislative Development

Much of the legal theory underlying American copyright law was derived from its English statutory predecessors.[12] Following the American Revolution, the Continental Congress passed a resolution in 1783 encouraging the various states to enact copyright legislation. All of the states, except Delaware, enacted some type of copyright law, although these laws differed greatly.[13] However, because of the differences in state laws, the Framers of the Constitution asserted 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.

Over the years, Congress enacted various pieces of copyright legislation.[14] These legislative enactments reflected technological and societal changes. For example, a 1971 amendment extended copyright protection to include certain sound recordings.[15] The most recent comprehensive revision of the body of copyright law occurred in 1976.[16]

During the evolution of American copyright law, the central driving force behind the revisions appears to have been the desire of Congress to keep the legislation updated in order to respond to the technological developments that affected the dissemination of knowledge.[17] The theory was summarized by the Supreme Court in the *Sony* decision.

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[12] Patterson, COPYRIGHT IN HISTORICAL PERSPECTIVE, 13 (1968).

[13] *Id.*

[14] Copyright Act of 1790, Ch. 13, 1 Stat. 12; Copyright Act of 1870, Act of July 8, 1870, ch. 230, 16 Stat. 198; Copyright Act of 1909, Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

[15] Sound Recording Amendments, Pub. L. 92-140, Oct. 15, 1971, 85 Stat. 391.

[16] Pub. L. 94-553, Oct. 19, 1976, 90 Stat. 2541, codified at 17 U.S.C. §§ 101, *et seq.* (1988).

[17] Wincor & Mandell, COPYRIGHT, PATENTS, AND TRADEMARKS: THE PROTECTION OF INTELLECTUAL PROPERTY 25 (1980).

> 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.[18]

The 1976 Act explicitly sets forth the rights of the copyright owner, which 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 work; and display of copyrighted work publicly.[19] However, 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 the "fair use" of the work,[20] reproduction by libraries and archives,[21] educational use,[22] and certain other uses.

The Fair Use Exception

It is of considerable importance to have a clear understanding of the fair use exception, as it appears that the so-called concept of "home use" may be a judicially created derivative of the fair use doctrine. The fair use doctrine has been applied when certain uses of copyrighted works are defensible as a "fair use" of the copyrighted work.[23] This doctrine allows the courts to bypass an inflexible application of copyright law, when under certain circumstances, it would impede the creative activity that the copyright law was supposed to

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[18] 464 U.S. 417, 430-431 (1984).

[19] 17 U.S.C. § 106 (1988).

[20] 17 U.S.C. § 107 (1988).

[21] 17 U.S.C. § 108 (1988).

[22] 17 U.S.C. § 110 (1988).

[23] Prior to the codification of the fair use exception in the 1976 copyright law, the fair use concept was upheld in a common law copyright action in *Hemingway v. Random House, Inc.*, 53 Misc.2d 462, 270 N.Y.S.2d, 51 (Sup. Ct. 1967), *aff'd on other grounds*, 23 N.Y. 2d 341, 296 N.Y.S. 2d 771 (1969). The common law concept of "fair use" was developed over the years by the courts of the United States. *See* for instance, *Folsom v. Marsh*, 9 F.Cas. 342 (N. 4901)(C.C.D. Mass. 1841); *Matthews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943).

stimulate.[24] Courts have adopted different approaches to interpret the fair use doctrine or exception. Some commentators have viewed the flexibility of the doctrine as the "safety valve" of copyright law. Others have considered the uncertainties of the fair use doctrine the source of unresolved ambiguities. Some commentators contend that the fair use doctrine has been applied prematurely at times, such as in the case of the so-called "home use" concept, where the doctrine is used as a defense to a claim of infringement. They claim 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 had ever occurred.[25] However, over the years jurists have grappled with balancing the exclusive rights of the copyright owner with the reasonable and equitable uses of the copyrighted work.[26]

In codifying the fair use exception in the Copyright Act of 1976, Congress did not formulate a specific test for determining whether a particular use was to be construed as a fair use. Rather, Congress created statutory recognition of a list of factors that courts should consider in making their fair use determinations. These four factors which are set out in the statute 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;
>
> 4. the effect of the use on the potential market and value of the copyrighted work.[27]

By enacting these fair use factors, Congress realized that they were in no case "definitive or determinative," but rather "provided some guage [*sic*] for balancing

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[24] See, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Iowa State University Research Foundation, Inc. v. American Broadcasting Co.*, 621 F.2d 57 (2d Cir. 1980).

[25] Office of Technology Assessment, *Copyright & Home Copying*, 69 (1989)(cited hereafter as "OTA Report"). The Electronic Industries Association asserts that there is a "statutory exemption" for home taping under the Copyright Act and that the legality of home taping does not depend on the fair use doctrine.

[26] Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the "Betamax" Case and its Predecessors*, 82 COL. L. REV. 1600, 1602-03 (1982).

[27] 17 U.S.C. § 107 (1988).

equities."[28] It seems that Congress developed a flexible set of criteria for analyzing the particular circumstances surrounding each fair use case, and that each case would be judicially analyzed on an ad hoc basis.[29] Hence, courts appear to have substantial flexibility in applying and evaluating fair use factors.

The courts, in evaluating fair use decisions, have given varying weight and interpretation to the individual fair use factors. For example, 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,[30] nor does a "nonprofit educational" purpose mandate a finding of fair use.[31] Thus, the court usually examines all of the circumstances involved in the use of a copyrighted work before determining whether the fair use doctrine is applicable. However, the fair use doctrine is usually not considered to be a defense when the copying is nearly a complete copy of the copyrighted work.[32] It can be observed that courts take great care in the application of the fair use doctrine and this doctrine's application is on a case-by-case basis. An examination of the fair use copyright decisions demonstrates the intense judicial scrutiny which courts exert in their application of the fair use doctrine.[33]

Although there are statutory criteria and substantial caselaw interpretation in existence concerning the implementation of the fair use exception, confusion still occurs over the precise parameters and the actual application of the doctrine.[34] This uncertainty in the appropriate application of the fair use doctrine has been recently demonstrated in the area of unpublished writings.

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28 H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976).

29 *See* OTA Report *op. cit.*, note 23. The Electronic Industries Association asserts that the existing doctrine of fair use is sufficient to adapt to existing and developing recording technologies and is adequate to address the home taping issue.

30 *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 593 (1985)(Brennan, J. dissenting): *Consumers Union of U.S., Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983).

31 *See Marcus v. Crowley*, 695 F.2d 1171 (9th Cir. 1983).

32 *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1978).

33 *See Videocassette Recorders: Legal Analysis of Home Use*, CRS Rept. 89-30 at pp. 3-4.

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

In a series of recent cases, courts have examined the use of unpublished materials within the context of the fair use doctrine[35] and have in effect restricted the quotation of unpublished materials such as diaries, letters, and other unpublished materials.[36]

In response to the potentially far-reaching effects of these cases, a bill has been introduced in the 102d Congress to amend the fair use doctrine to provide that the unpublished nature of a work is to be but one of the many considerations to be utilized by a court when determining whether copyrighted material may be used without the permission of the copyright owner.[37] Although this legislation and the judicial background do not specifically relate to home DART recording, they do illustrate the continually evolving concept of fair use and how Congress has attempted to revise copyright law to reflect current judicial decisions, as well as developments in literary trends and uses.[38]

Copyright Infringement and Remedies

Anyone who violates the exclusive rights of the copyright owner in the copyrighted work is considered to be an infringer of copyright.[39] The provisions of the 1976 Act provide that the copyright owner may institute an action for infringement against the alleged infringer.[40] In response to this action, a court may issue an injunction against the copyright infringer to

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35 *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (1985); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987); *New Era Publications International, ApS v. Henry Holt and Company, Inc.*, 873 F.2d 576 (2d Cir. 1989), *rehearing en banc denied*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1168 (1990).

36 The *New Era* case caused considerable attention to be focused on the fair use doctrine. *See* Edelman, *Copyright Case Not One for History Books*, 12 LEGAL TIMES 22 (1990).

37 S. 1035, 102d Cong., 1st Sess. (1991). This bill passed the Senate without amendment by voice vote and was sent to the House on September 30, 1991. To date, the bill has not emerged from the House Committee on Judiciary, Subcommittee on Intellectual Property and Judicial Administration.

38 *Copyright Conference Examines Fair Use, DAT, Berne, and International Uses*, 39 PATENT, TRADEMARK & COPYRIGHT J. (BNA) 492 (1990).

39 17 U.S.C. § 501(a)(1988). For a complete discussion of the remedies for copyright infringement, *see* Henn, COPYRIGHT PRIMER 245-267 (1979)(cited hereafter as "Henn").

40 17 U.S.C. § 502(b) (1988).

prevent further infringement of the copyright.[41] An infringer of a copyright may be subject to the payment of the actual damages and profits to the copyright owner.[42] In some instances, the copyright owner may elect to receive specified statutory damages in lieu of the actual damages and profits.[43] In addition to this recourse, the court may permit the recovery of legal fees and related expenses involved in bringing the action.[44] In some cases, criminal sanctions may be imposed for copyright infringement.[45]

Analysis of Home Recording--the "Sony" Case

In 1984 the Supreme Court had to resolve copyright issues involving the use of videocassette recorders (VCRs). *Sony Corp. v. Universal City Studios, Inc.*[46] concerned the home use of VCRs and resulted in the resolution of some of the questions concerning home recording and copyright law. However, the decision has left numerous questions unanswered, as are discussed below. The *Sony* case seems to be the most analogous decision which can be related to the home use of DARTs, although there are numerous significant factual and legal differences between the *Sony* decision and DART recording which are discussed below.[47]

Following the conflicting lower court decisions,[48] the Supreme Court examined the home use of VCRs. In the Court action, Universal City Studios (the plaintiffs/respondents) did not seek relief against the actual users of the VCRs; instead Universal sued the VCR manufacturers and suppliers, primarily, Sony, on the basis of contributory infringement.[49] This action was based on the theory or argument that the distribution and sale of VCRs encouraged and

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41 17 U.S.C. § 502 (1988).

42 17 U.S.C. § 504(b) (1988).

43 17 U.S.C. § 504(c) (1988).

44 17 U.S.C. § 506 (1988).

45 *Id.*

46 464 U.S. 417 (1984).

47 See, CRS Rept. 89-30, *supra* note 34, at 6-8; OTA Report at 70-72.

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

49 In the district court action, Universal had also sought relief against an actual VCR user.

contributed to the infringement of the plaintiffs' copyrighted works.[50] The plaintiff sought monetary damages and also an injunction that would prohibit Sony from manufacturing VCRs in the future. This legal proceeding was of considerable importance, as the Supreme Court had not previously interpreted the issue of fair use within the context of home taping/recording. The Court determined that the primary issue to be resolved was whether the sale of Sony's equipment to the public violated any of the rights given to Universal by the Copyright Act.[51]

First, the Court considered the particular nature of the relationship between Sony and its purchasers. The Court ascertained that if vicarious liability was to be imposed upon Sony, such liability had to be based upon the constructive knowledge that Sony's customers might use the equipment to make unauthorized copies of copyrighted material. The Court observed that there exists no precedent under copyright law for attribution of liability on the basis of such a theory.[52] It was argued that the sale of such duplicating equipment is not considered to be contributory infringement if the product is capable of other uses that are noninfringing. To respond to this issue, the Court deliberated whether the VCR was capable of commercially significant noninfringing uses. The Court held that the VCR was able to be used for noninfringing uses through private noncommercial time-shifting activities in the home. In reaching this conclusion, the Court relied heavily on the determination of the district court and rejected the conclusions of the court of appeals.[53] In addition, the Court 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 nearly all copyright holders with an interest in the outcome.[54] The Court determined that the copyright holders

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50 464 U.S. 417, 420-421. "It is, however, the taping of respondents' own copyrighted programs that provides them with the 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."

51 *Id.* at 423.

52 *Id.* at 439.

53 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.* at 442.

54 *Id.* at 466.

would not prevail, since the requested relief would affect other copyright holders who did not object to time-shifting recording.[55]

Following its examination of the unauthorized time-shifting use of VCRs, the Court determined that time-shifting use was not necessarily infringing.[56] Relying extensively on the district court's conclusions, the Court determined that the potential harm from this time-shifting practice was speculative and uncertain. 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. Second, Universal did not prove that time-shifting would cause the likelihood of nonminimal harm to the potential market or the value of the copyrighted works.[57] Thus, home use of VCRs could involve substantial noninfringing activities and the sale of VCR equipment to the public did not represent a contributory infringement of Universal's copyrights. The scope of the Court's holding was expressly limited to video recording in the home, to over-the-air non-cable broadcasting,[58] and to recording for time-shifting purposes. The *Sony* decision did not address audio taping, the taping of cable or pay television, or the issue of "library building" of recorded programs. In arriving at its conclusions, the Court rejected the central finding of the court of appeals that required that a fair use had to be "productive."[59] Rather, the Court determined that under certain circumstances, the taping of a video work in its entirety for time-shifting purposes would be permissible under the fair use doctrine.[60]

While the views of the majority and the dissent differed substantially, both opinions inferred that Congress may wish to examine the home video taping issue.[61] 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

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55 *Id.*

56 *Id.* at 446.

57 *Id.* at 456.

58 The *Sony* decision did not address the taping of "cable" programs or other "pay" or "subscription" televised programs.

59 *Id.* at 454-455.

60 *Id.* at 449-450.

61 *Id.* at 456 (majority); at 500 (dissenting).

past. But it is not our job to apply laws that have not yet been written.[62]

Copyright Law and Home Recording

Although lower courts and the Supreme Court have provided some legal guidance for the interpretation of copyright law in home recording/taping situations, numerous questions and issues remain unresolved. The *Sony* case was a narrow holding, strictly limited to a very specific situation--home video recording of noncable or "nonpay"[63] television for the purposes of time-shifting. The practical application of current copyright law and the related judicial interpretations are considered within the context of typical home recording situations.

A primary consideration in copyright law as it applies to the judicially created concept of "home use" of recording equipment is the determination of precisely what constitutes a "home." Although current copyright law and regulations do not specifically define what constitutes a "home," certain inferences can be drawn from the statutory definition provided 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.[64]

It can be concluded from this language that the opposite of a "public" display of a work might be a "home," or a private display of the work. In evaluating this proposition, it could be inferred that 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 examination of the legislative history surrounding the enactment of the copyright legislation provides some insight into the congressional intention involving the concept of a "home." The legislative history accompanying the enactment of the Sound Recording Amendment of 1971 seems to indicate that Congress meant the term "home" to include only the traditional, generally perceived concept of an individual's own home. 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

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62 *Id.* at 456.

63 *See* note 58.

64 17 U.S.C. § 101 (1988).

reproducing or otherwise capitalizing commercially on it."[65] The legislative history of the 1976 copyright revision discussed the concept of "public performance" and also provides some illumination on the concept of home use.

> One of the principal purposes of the definition ["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 businesses and governmental personnel would be excluded because they do not represent the gathering of a "substantial number of people."[66]

Therefore, it would seem 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 to be considered as "public" places for the purposes of copyright law.[67]

In the district court decision in the *Sony* case, the court delineated some of the limits of "home use." The court noted in this "home use" instance that the television programs involved were broadcast free to the public over the public airwaves.[68] The court further observed that it was "not ruling on tape duplication within the home or outside, by individuals, groups, or corporations."[69] Neither the court of appeals or the Supreme Court contradicted the district court's concept of home taping.

Following the *Sony* decision, different courts have scrutinized various 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 has held that the viewing of copyrighted videocassettes in private rooms at video stores constitutes public

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[65] H.R. Rep. No. 487, 92d Cong., 1st Sess. 7 (1971). In effect, the Sound Recording Amendment extended copyright protection to phonograph records. Prior to its enactment, such works were not generally protected.

[66] H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976).

[67] Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the "Betamax" Myth,* 68 VA. L. REV. 1505 (1982)(cited hereafter as "'Betamax' Myth").

[68] 480 F.Supp. 429, 442 (C.D. Cal. 1979).

[69] *Id.*

performance,[70] even when members of a single family viewed a cassette in a private room at the store.[71]

Application of copyright law and the pertinent judicial guidance can lead to various conclusions about home recording in certain circumstances. The *Sony* case affirmed the use of VCRs to record and replay commercially televised programs for personal use. The concept of VCR recording for time-shifting purposes appears to be judicially acceptable. The *Sony* case did not, however, address audio taping, or home taping of cable or "pay" television.

As Congress may wish to enact legislation dealing with the subject of home recording, in light of recent technological advances, it may be instructive to examine 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 the Supreme Court and the district court did.[72] Professor Nimmer, in analyzing the legislative history underlying the 1971 Sound Recording Amendment, did not believe that it created an audio home recording exemption.[73] His 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. Nimmer also disagreed with the Court's construction of the hearings on the 1971 Amendment.[74] 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 appear to indicate that the legislators did not intend to create a special exemption from copyright liability for home audio recording, and at the most, it can be inferred that home recording should be defensible under the existing judicial doctrine of fair use. Nimmer argued further 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.[75] Nimmer arrived at this conclusion from the reasoning that the Copyright Act provides specific and quite narrowly drawn exemptions for certain kinds of recording and he found it unlikely that the legislators also intended the

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[70] *Columbia Pictures Indus. v. Redd Horne Inc.*, 568 F.Supp. 494 (W.D. Pa. 1983), *aff'd.*, 797 F.2d 154 (3rd Cir. 1984).

[71] *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 612 F.Supp. 315, 319 (N.D.Pa. 1985), *aff'd.*, 800 F.2d 59 (3rd Cir. 1986).

[72] Nimmer, NIMMER ON COPYRIGHT § 8.05[C] (1989)(cited hereafter as "Nimmer"). *See* "Betamax" Myth, *supra* note 68.

[73] *Id.*

[74] *Id.*

[75] *Id.*

Act to contain an *implied* home recording exemption of indeterminate scope.[76] He 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. Professor Nimmer concluded his argument by quoting from the House Report on the 1976 Act: [I]t 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."[77] In conclusion, 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.[78]

HOME TAPING AND TECHNOLOGICAL INNOVATIONS

Innovations in recording technology in the 1980's have generated substantial interest in home copying. Of these various technological developments, the two most significant have been the audio compact disc ("CD") and the digital audio recording technology ("DART").[79] Concern has developed concerning copyright laws and their possible impact upon the actual and potential use of CDs and DART. The actual operation of these technologies in the context of home taping is briefly examined.

CD

The CD was introduced in 1982 in Japan and in 1983 in the United States and Europe. This technology provides considerable improvement over the longplaying vinyl discs (LP records).[80] Although LP records may provide high tonal quality, they are subject to damage, background interference, and other problems. CD technology involves digital information recorded on the surface of a CD. This information is a sampling of an audio signal which the CD player reads with a laser-optical scanning system involving no physical contact. Also, the player's digital signal processing system is not dependent on the rotational speed of the disc. This technology results in a nearly perfect reproduction of

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[76] *Id.*

[77] H. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976).

[78] Nimmer did not recognize the so-called "home use" home video recording exception derived from the *Sony* case. The Court seemed to create such an exception for the specific home recording situation in *Sony*. Nimmer believed that each instance of recording must be evaluated on the basis of the Section 107 "fair use" factors and that there was neither a home video nor a home audio recording exception.

[79] *See* note 4.

[80] OTA Report, *supra* note 25 at 45.

sound that does not deteriorate after repeated use.[81] At the present time, CD technology does not provide for a home copying or recording capacity.[82]

DART

DAT/DART is a mechanism for computer-data storage.[83] DART also has entertainment capabilities which involve very high quality digital recording and playback of CD recordings--DART. DART has the capability of producing nearly perfect copies of CD recordings and the ability of making almost unlimited nearly perfect copies of other copies.[84] Some prerecorded DART tapes and CDs have digital "copy-protect" signals or flags which are not part of the music or recording which are "read" by the consumer-model digital recorders. These flags are to prevent the copying of the tape or disc. However, the DART hardware must be able to read the copy inhibiting instruction on the CD or DART recordings.[85]

The implications of these technological innovations raise numerous policy and legal questions. These technologies have revolutionized the recording and the home taping industries and they have been developed since the last substantial revision of the copyright laws in 1976. This technology has the ability of creating nearly perfect copies of copyrighted works. Copies can be made of copies without loss of sound quality.[86]

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[81] *Id.* The OTA Report provides precise details for the actual operation of a CD player.

[82] However, music played 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 DART recording.

[83] *See* Hack & Rishell, *Digital Audio Tape (DAT) Recording*, CRS Issue Brief 90004 (1990)(cited hereafter as "Hack").

[84] In comparison to other recording and reproduction devices, DART has the ability to continue producing nearly perfect copies from copies. This contrasts with traditional reproduction technology i.e., a photocopy machine or a VCR recorder which produces copies of diminishing quality and clarity.

[85] *Id.* Factual questions may arise regarding the ability of the DART hardware and software to utilize such digital codes or "flags" to inhibit recording. *See*, Hack, *supra* note 79, at p. 16. For a further discussion of the technical operation of DART and its capabilities, *see* Hughes at 7.

[86] In addition, copies could be made using conventional recording technology, although not with DART's excellent recording quality.

LEGAL PROCEEDINGS AND RELATED ACTIONS INVOLVING DART

The recording industry in the United States has been concerned with the development and the potential marketing of DART recorders in this country. The Recording Industry Association of America ("RIAA") has argued that the technological change represented by DART recording would greatly increase home copying, so as to seriously threaten the recording industry's economic future.[87]

Because of the legal ambiguity involving copyright implications of DART use, market uncertainty has developed in the DART industry. For example, in 1987, the RIAA threatened copyright infringement actions against the first manufacturer to sell consumer-model DART recorders in the United States.[88] Many observers believe that this threat was responsible for consumer model DARTs being withheld from the American market until 1989 when one manufacturer began a very small importation and sale of DART recorders.[89] It appears at the present time that DART recorders are not widely available for consumer purchase.[90]

As a consequence of a legal and market understanding in 1989, a Memo of Understanding (MOU) was entered into between the international recording industry and numerous consumer-electronics manufacturers with the apparent intent being the mass introduction of DARTs with copy-limiting features. Such copy-limiting features would apparently limit the ability of DARTs to make multiple copies of copyrighted work.[91] The MOU recommended that Congress enact legislation that would require copy-restricting circuitry in all DART machines sold in the United States. Under the proposed "serial copy management system," ("SCMS"), the DART machines would permit consumers to make copies of original materials such as prerecorded DART tapes, CDs and digital broadcasts. However, the SCMS-equipped DART recorders would be prevented, through the digital coding, from making subsequent copies from the first copy. This agreement was signed by twelve Japanese and three European

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87 OTA Report, at 38.

88 OTA Report, at 41.

89 *See* note 6.

90 *Id.*

91 The effect of this device is to prevent the DART recorder from making copies of copies. However, it is unclear whether or not such copy-limiting features could actually be circumvented or bypassed on DART equipment. This issue has been a major policy concern throughout the entire DART recording debate.

manufacturers and two recording industry trade groups.[92] The MOU did not deal with the issue of royalties for recording artists.

A DAT/DART promotional sales campaign began in late June 1990, concurrent with congressional consideration of legislation designed to deal with the copyright implications of DART recording.[93] This sales campaign was led in part by the Sony Corporation ("Sony"). The promotional campaign involved the sale of the copy-limiting-equipped consumer DART recorders. Unlike professional model DART recorders, the consumer DART machines were not capable of recording by means of a microphone.[94] Following the commencement of the sales campaign, a class action lawsuit[95] was initiated by a songwriter and four music publishing companies against Sony which sought a ban on the U.S. sale of digital recorders and blank digital tapes.[96] It is significant to consider the various claims put forward in this legal action. Although the interested parties involved in this proceeding are currently in accord on these issues, it is conceivable that the current agreement may not last and that these claims and counterclaims could be raised and argued again.

The complaint stated that home taping by the traditional "analog" technology--tape recording--is prevalent. The plaintiffs alleged that over one billion infringing tapes were made in 1989 and that such taping resulted in lost royalties to songwriters and publishers. The plaintiffs also argued that the public also suffers, since the result of home taping is a smaller number of new musical compositions.[97] The plaintiffs argued that by marketing the "new-generation" machines, which are able to record music from compact discs with nearly the same sound quality, Sony was commencing a new era of unauthorized home taping of copyrighted musical works, thereby denying the songwriters of their royalties.[98] The complaint also accused Sony of contributory

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92 *Wall Street Journal*, July 28, 1989, at B2, col. 5.

93 H.R. 4096, 101st Cong., 2d Sess. (1990); S. 2358, 101st Cong., 2d Sess. (1990).

94 *Class Action is Filed to Block U.S. Sales of DAT Recorders & Tapes*, 40 PATENT, TRADEMARK & COPYRIGHT J. (BNA) 243 (1990)(cited to afterward as "BNA").

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

96 WASHINGTON POST, July 11, 1990, at B8, col. 6 (Cited to afterward as "POST"). *Cahn v. Sony Corp.*, SDNY, No. 90 Civ. 4537, 7/9/90.

97 This theory seems to be based on the argument that, because fewer recordings are sold, there is less incentive for composers to produce a larger volume of works.

98 40 BNA at 243.

infringement by promoting the ability of DART recorders to create perfect digital copies of compact discs.

The plaintiffs in the action targeted the leading DART producer, Sony, rather than the individual consumers. The plaintiffs conceded in their complaint that it would be unfeasible to try to stop home taping on equipment currently owned by consumers, or to bring actions against individual DART purchasers. Rather, the plaintiffs directed the action against Sony and the DART recorders that Sony was introducing into the American market.

> 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 prerecorded 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.[99]

The plaintiffs further asserted that Sony knew and intended that purchasers of DART would use the DART recorders and the blank cassettes for unauthorized taping activities. The plaintiffs alleged that Sony was contributorily infringing the plaintiffs' copyrights through the distribution of records and cassettes and hence was inducing, causing, encouraging, and permitting consumers to tape copyrighted musical compositions. While the plaintiffs acknowledged that the DART recorders were equipped with the SCMS, the plaintiffs argued that, even if the SCMS could not be disabled, the DART equipment would permit an unlimited number of unauthorized perfect copies to be made from the original disc. The plaintiffs argued that the inclusion of the SCMS affirmed the defendant's knowledge that the DART recorders would be used to copy prerecorded copyrighted music.[100]

The defendant Sony, in its press statements, reported that the suit was without merit and that the corporation would continue selling DART machines.[101] The defendant further asserted that the action sought to "hold hostage" the latest digital technology from American consumers.[102]

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99 *Id.*

100 *Id.*

101 *Id. See also* POST at B8.

102 POST, at B10.

The initiation of this action effectively postponed the further congressional consideration or action on the DART legislation in the 101st Congress.[103] For the balance of 1990 and the first half of 1991, there was no specific congressional activity concerning DART. During this time, the various parties--recording artists and their representatives, the DART producers, and the representatives of home recording/consumer groups were attempting to resolve their differences and arrive at a mutually agreeable solution.

On July 11, 1991, representatives of the electronics and music industries announced that they had reached an agreement to seek legislation that would require DART manufactures to pay royalties to cover noncommercial home taping of copyrighted music by consumers.[104] Entering into this agreement were the Electronics Industries Association, Recording Industry Association of America, Copyright Coalition of the National Music Publishers Association, and others. They collectively agreed to request Congress to enact legislation to clarify the position that home DART taping was legal, but that DART machine and tape makers would have to pay a royalty based upon the price of their products.[105] The parties agreed that the royalties would be administered by the Copyright Office and the Copyright Royalty Tribunal and that the royalties would be distributed to copyright owners based on the sales and the airplay of their recordings. A concurrent effect of this "peace treaty" was defendant Sony's announcement, also on July 11, that it had reached an agreement with the plaintiffs in the abovementioned legal action, and that the case had been dismissed without prejudice.[106]

CONGRESSIONAL RESPONSE

Legislation in the 101st Congress

Legislation was introduced on February 22, 1990 to require that DART recorders marketed in the United States have an SCMS to limit DART copying

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[103] The House Subcommittee on Commerce, Consumer Protection, and Competitiveness of the House Committee on Energy and Commerce had scheduled a hearing on DART for July 1990. However, these hearings were indefinitely postponed with the commencement of the DART legal proceedings.

[104] *Legislation, Copyrights*, 42 PATENT, TRADEMARK & COPYRIGHT J. (BNA) 262-263 (1991).

[105] *Id.*

[106] *Id.* at 263. *See* Hughes at 1, 7. *See* WALL STREET JOURNAL, July 12, 1991, at B5.

capacity.[107] On March 28, 1990, an identical bill was introduced in the Senate and was referred to the Senate Committee on Commerce.[108] The proposed Digital Audio Tape Recorder Act of 1990 required SCMS circuitry to prevent unrestricted copying.[109] Also, the bills specifically stated that the legislation "does not address or affect the legality of private home copying under the copyright laws."[110] The bills did not address the issue of royalties for the copyright owners of the music or other works which may be recorded.[111] Civil remedies were provided for violations of the legislation. Proposed remedies involved injunctions against the sales of non-SCMS-equipped DARTs and monetary fines.

In response to the absence of royalty provisions in the legislation introduced in the 101st Congress, the Copyright Coalition, a group representing the copyright owners of musical compositions,[112] threatened legal action against DART importers.[113] In addition, the National Music Publishers Association threatened legal action to bar DART importation and sales in the United States "if recorders enter the American market before adequate steps are taken to protect music copyright owners."[114] As discussed above, legal action was taken against DART producers/importers. As a result of these pending legal proceedings, neither of these bills emerged from committee consideration. It appeared that Congress wished to await the judicial outcome in this proceeding before taking legislative action on the issue.

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[107] 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.

[108] S. 2358, 101st Cong., 2d Sess. (1990).

[109] Under this system, one or more recordings could be made of a copyrighted tape; however, the SCMS would prevent taping copies of copies. Hence, copies could only be made from "original" recordings.

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

[111] *Id.*, § 2(14).

[112] 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).

[113] *DAT Bill Introduced by 13 Congressmen*, TV DIGEST 10 (Feb. 26, 1990).

[114] *Id.* at 11.

Legislation in the 102d Congress

As previously mentioned, the interested parties in the home recording controversy reached an agreement in July 1991. This industry accord was quickly translated into legislation. Two identical bills were introduced in early August 1991 which incorporated the industry compromise or "peace treaty."[115] The significance of these bills is that they would prohibit infringement actions for home audio taping of copyrighted sound recordings. In addition, the legislation would impose royalties on the sale of DART recorders and blank tapes which would be distributed among songwriters, music publishers, record artists, and record companies by the Copyright Royalty Tribunal.[116]

The proposed legislation--the "Audio Home Recording Act of 1991" would add a new Chapter 10 to Title 17 (Copyrights), which would be entitled: "Digital Audio Recording Devices and Media." The key provision of the bills is section 1092(a)(1) which provides that no action may be brought for copyright infringement based upon the "manufacture, importation, or distribution of a digital audio recording device or a digital audio recording medium, or an analog audio recording device or analog audio recording medium, or the use of such a device or medium for making phonorecords." It is significant to consider that this proposal would appear to deal with a broad spectrum of issues concerning home audio taping. It encompasses analog taping, as well as digital audio taping. This exception is limited to noncommercial situations. A definitional section of the bill outlines the statutory limits of the legislation. A significant portion of the bill language is devoted to the requirements and the procedures for the payment of royalties by importers and manufacturers of DART devices and media. Royalty payments based upon product prices would be collected by the Copyright Office and distributed by the Copyright Royalty Tribunal. The bills also provide allocation formulas for the royalties which are collected. Another significant provision of the bills is that they require that DART recorders imported into or manufactured in the United States be equipped with the SCMS anti-copying devices to prevent the making of digital copies of copies. Penalty provisions for the violation of royalty payment and the SCMS requirement include statutory damages, actual damages, costs and attorney's fees, in addition to equitable remedies such as injunctions, impoundments, and destruction of offending goods. Binding arbitration of disputes in certain cases is provided by the bills.

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[115] S. 1623, 102d Cong., 1st Sess. (1991); H.R. 3204, 102d Cong., 1st Sess. (1991).

[116] *Bills Would Permit Home Audio Taping with Royalties on Digital Audio Copying*, 42 PATENT, TRADEMARK & COPYRIGHT J. (BNA) 329 (1991).

Following the introduction of the DART legislation, the bills were scrutinized by the public[117] and by Congress.[118] One concern which was expressed in this stage of the legislative process was the issue of the scope of the bills' statutory definitions encompassing the various aspects of DART recording. Significant concern was expressed about the potentially broad coverage of the definitions and that the legislation might cover technology other than DART. Particular concern was expressed regarding the definitional section of the legislation and the potential impact that it could have on various database products.[119] Some commentators expressed the belief that computer software and audiovisual works might be construed to be included under the bill language, as introduced, although such concern was not universal.

In response to these concerns, certain amendments were made to the Senate bill. Notable among these changes was the inclusion of the new term: "audiogram."

> (1) An "audiogram" is a material object (i) in which are fixed, by any method now known or later developed, only sounds (and not, for example, a motion picture or other audiovisual work even though it may be accompanied by sounds), and material, statements or instructions incidental to those fixed sounds, if any, and (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[120]

This amendment may modify the scope of the legislation's coverage. It appears to eliminate certain instances when particular works embody a combination of both audio and visual elements. Hence, the covered works would be material objects on which are fixed "only sounds."

S. 1623 was polled out of the Subcommittee on Patents Copyrights and Trademarks on November 20 and on November 21, 1991, the Senate Judiciary Committee ordered S. 1623 favorably reported with technical changes.[121] The

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117 *See* Hughes.

118 The Senate Subcommittee on Patents, Copyrights and Trademarks held hearings on S. 1623 on October 29, 1991. *See Witnesses Hail Compromise Bill on Home Audio Taping and Dat Royalties*, 42 PATENT, TRADEMARK & COPYRIGHT J. (BNA) 613-614 (1991) for a summary of the hearings.

119 *See* Hughes.

120 S. 1623, 102d Cong., 1st Sess. *as amended*, Nov. 26, 1991, § 2 (1991).

121 *Legislation, Intellectual Property*, 43 Patent, Trademark & Copyright J. (BNA) 71 (1991)

amended bill was reported to the Senate by Senator Biden with an amendment in the nature of a substitute on November 27, 1991.[122]

H.R. 3204 was the subject of February 19, 1992 hearings before the House Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary. The bill which was examined by the Subcommittee was in the form that it was originally introduced and incorporated none of the changes made to S. 1623. Some witnesses suggested incorporating the Senate amendments into the House bill.[123] Representatives of the recording industry, composers, songwriters, and the electronics manufacturers appeared to support the enactment of the legislation. Criticisms of the legislation focused on the issue that three federal administrative bodies would implement different aspects of the legislation--the Commerce Department, the Copyright Office, and the Copyright Royalty Tribunal.[124] Another criticism which had been previously raised about the legislation was the potentially broad scope of coverage of the bill--which might encompass various elements of computer hardware and software and multi-media works.

Following these deliberations on H.R. 3204, a new House bill, H.R. 4567, the "Home Audio Taping Act of 1992,"[125] was introduced on March 25, 1992, which incorporated the amendments made to the Senate bill and proposed to narrow the scope of coverage and the potential technology that the legislation would cover.[126] The bill contains the key definitional provisions concerning "audiograms." On March 31, 1992, the Subcommittee on Energy and Commerce of the Subcommittee on Commerce, Consumer Protection and Competitiveness held hearings on the bill.[127] Most of the witnesses supported the legislation and criticism on the legislation focused on policy, rather than precise legal problems or deficiencies of the legislation.[128]

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122 The bill has been placed on the Senate Legislative Calendar under General Orders. (Calendar No. 389).

123 *Digital Audio Taping Bill Gets Enthusiastic Reception at House Hearing*, 43 PATENT TRADEMARK & COPYRIGHT J. (BNA) 343-344 (1992).

124 *Id.*

125 H.R. 4567, 102d Cong., 2d Sess. (1992).

126 The bill was referred jointly to the House Committee on Energy and Commerce, the House Judiciary Committee, and the House Committee on Ways and Means.

127 *Legislation, Copyright*, 43 PATENT, TRADEMARK & COPYRIGHT J. (BNA) 491-492 (1992).

128 *Id.*

COPYRIGHT LAW CONSIDERATIONS AND DART

At the outset, it should be noted that the consideration of DART use and copyright law is somewhat conjectural, as DART technology is not widely available or used in this country. In addition, there are somewhat limited current uses for DART.[129] However, DART capabilities and uses are rapidly being developed and it is anticipated that once the legal uncertainties concerning DART use are resolved, it will become a major consumer electronics item.[130]

Home Audio Taping

As this report has previously considered, there is a running controversy as to whether there exists a home audio taping exception under current copyright law. Proponents of such a home taping exception cite to the legislative history of the Audio Recording Amendments of 1971 which discussed the preservation of home taping rights. 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.[131] 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 exception that home audio taping would fall under would be the fair use criteria of Section 107 of copyright law.[132] Therefore, it is unclear whether courts would be persuaded by a defense of a home audio taping exception to charges of DAT copyright infringement.

The unique aspect of the current legislation[133] is that each of these bills creates a specific home audio taping exception. Section 1002 of each of these bills creates a noncommercial taping exception for both analog and digital taping. If enacted, this legislation would appear to resolve many aspects of the long-running controversy concerning home audio taping. It is also significant in that the exception encompasses both analog and digital technology. However, one consideration of this legislative exception is that *future* recording technology may incorporate devices which are neither analog or digital. Hence, it is conceivable that future recording technology might be outside of this statutory exemption. However, it should be noted that the definitional section of the bills

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[129] For example, it appears that the most common use for DART would be the copying of CDs, many of which may be copyrighted.

[130] Hughes at 1.

[131] Nimmer, *supra* note 68, § 13.05[F]. *See also,* Comment, *Disc, Dat and Fair Use*, 25 CAL. W.L. REV. 103 (1988).

[132] *Id.*

[133] S. 1623, 102d Cong., 1st Sess. (1991); H.R. 3204, 102d Cong., 1st Sess. (1991); and H.R. 4567, 102d Cong., 2d Sess. (1992).

which deal with DART technology use the phrase "now known or later developed."[134]

Another issue related to the home audio taping exception is the imposition of royalty payments for digital audio recording devices and equipment contained in the bills. The royalty payments are based upon a percentage of purchase costs.[135] However, it is also conceivable that technology and related materials will be subsequently developed which would fall outside the statutory definitional coverage provided by the bills. In considering the definitional coverage provided by the bills, it should also be considered that a definition which could be totally encompassing might cover materials which are not specifically related to home audio recording and might encroach into other areas of computer technology.

Fair Use Exception[136]

The doctrine of fair use, as set forth in the copyright statute provides certain specific criteria which are to be balanced in a determination of whether the use of a copyrighted work is a "fair" use, i.e., noninfringing use, or whether such use constitutes an infringement. The application of these four criteria to the DART recording situation is instructive in determining whether DART recording could be construed as a fair use.[137] In evaluating DART recording, a court would examine the factual circumstances surrounding the use, apply the statutory criteria, and then evaluate the situation as to whether the use was infringing or noninfringing.[138] The courts appear to be given great flexibility in the application and in the 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 may constitute fair use.[139] After evaluating the four factors which would be used in the determination of whether a use is to be considered a "fair" use, and hence not subject to claims of copyright infringement, a court could arguably determine that DART recording

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134 *Id. See* §§ 1001(2), (3).

135 *Id.* § 1012.

136 *See* discussion, at pp. 5-8.

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

138 *See* Abramson, *Copyright Law*, 61 TEMPLE L. REV. 133-96 (1988).

139 For instance, in the "fair use" *Sony* case, the court of appeals reversed the decision of the district court. However, in reversing the decision of the court of appeals, the Supreme Court did not accept *all* of the legal and factual conclusions of the district court.

was not a fair use and that DART recording may be an infringement of the copyright owner's rights.[140] However, a court would examine the actual circumstances of each case in determining whether such use was an infringement or whether such use was a "fair" use.

If the current legislation is enacted, the fair use analysis would not be necessary in most judicial evaluations. Fair use is a defense against actions of copyright infringement and the bills provide for the prohibition against infringement actions for most cases of home audio taping. Hence, it would appear, that if enacted, a court would not have to proceed with the fair use analysis in most cases. If the circumstances concerning the DART recording fit within the statutory framework, an infringement action would be prohibited. However, if the particular factual situation involving DART recording did not fall within the guidelines of the statutory criteria for the home audio taping exception, a court might then have to proceed with the fair use analysis to determine whether the DART use was a "fair" use, and hence not subject to an infringement action, or determine that the DART use was infringing.

DART Recording as Distinguished from the 'Sony' Case

The *Sony* case has often been cited as the stronghold of home taping. However, there are numerous and significant elements concerning the case which legally and factually distinguish the *Sony* case from DART recording. First, and most significantly, the *Sony* case was a very narrow holding involving home *video* recording. DART recording involves *audio* recording, whether in the home, or in a commercial setting. Second, a significant feature of the *Sony* case was its use of VCRs for "time-shifting" purposes. It seems unlikely that DART technology would be used for such purposes. Third, various broadcasters did not object to VCR recording of their televised programs. As has already been demonstrated, copyright holders have strenuously objected to potential DART recording of the copyrighted materials, unless royalty compensation was provided to the copyright holders. Fourth, there is significant difference in the recording quality of DART and VCRs. DART can continue to produce nearly perfect copies of copies indefinitely. VCRs generally do not have the perfect quality copy ability. VCR recording may deteriorate over continued use, and VCR copying of copies is of diminishing quality. Fifth, the *Sony* case did not address several issues which may be involved in DART copying: swapping of DART tapes of CDs; library building of copies of copyrighted material; and mass quantity taping of copyrighted materials. Sixth, the *Sony* case took judicial

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[140] However, *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 DART recording and concluded that DART recording would probably constitute a fair use. The author concluded that the purpose of the DART recording was for a 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 DART would not cause substantial harm to the copyright holder.

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, etc.). However, it seems at this time that DART recording has less capability for noninfringing uses than VCRs.[141] The number of noninfringing uses for which the DART may be utilized may be relevant in a court's evaluation of the issue of contributory infringement. Thus, if there is only one use for the DART--which would be considered infringing--it seems that contributory infringement might be attributable to the entire chain of DART manufacture/distribution/use. However, on the basis of the *Sony* decision, if there are numerous noninfringing uses for DART, these noninfringing uses may diminish the strength of a contributory infringement claim.

Hence, it would seem unlikely that the *Sony* case could be held as the precedent for permitting unrestricted home recording of DART. The *Sony* case is distinguishable on many areas of law and fact from potential DAT recording.

Scope of Coverage of the Proposed Legislation

As originally introduced, the current DART legislation raised concern as to the scope of its potential coverage and the possibility that the legislative provisions could unintentionally cover various elements of computer software and hardware. There was also concern that the legislation could cover mixed media works, such as certain audio-visual works. As a result of these concerns, the Senate bill was amended and H.R. 4567 was introduced which appears to narrow the scope of coverage of the legislation. The crucial definition is that of "audiogram." According to the proposed definition, an audiogram involves *only* sounds. The definition provides an express exclusion for motion pictures and other audiovisual works, even through the works may be accompanied by sounds. This appears to clarify some of the confusion surrounding the scope of the bills' coverage.

Another issue related to the scope of the legislation is how broad the coverage *should* be. If the legislation attempted to cover every possible audio situation, it could possibly encroach on other works. Also, if it tried to foresee every future technological development, it could also encroach on other works which are not intended to be covered by the legislation. The proposed definition appears to provide an seemingly adequate scope of coverage. However, courts may have to be called upon to interpret and to apply the definition in particular circumstances.

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[141] At the current time, the primary purpose for DART appears to be recording which may be an infringing use. However, in the future DART could be used for the playing of copyrighted pre-recorded DART tapes. Such a use would probably be considered a noninfringing use. It appears that the uses of DAT are constantly expanding.

CONCLUSION

American copyright law provides a means of stimulating intellectual development and protecting the ownership interests of the authors 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 permitted under the doctrine of fair use. The criteria for the application of this doctrine are flexible and are applied on a case by case basis. In addition, this doctrine appears to be a continuously evolving concept. The leading case which examined the doctrine of fair use within the context of home recording was *Sony Corp. v. Universal City Studios, Inc.*, which examined the use of videocassette recorders (VCRs) within the context of home recording. The Supreme Court determined that under certain circumstances, home video recording was considered a fair use of copyrighted works. However, the effect of the *Sony* 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 factual and legal situations presented by DART recording.

New technologies such as compact discs and DART provide challenges for American copyright law. DART raises several copyright issues in that it appears to be capable of producing nearly perfect copies of copyrighted works in the privacy of the DART owner's home. Thus, the questions appear to be whether DART use would be considered a fair use or whether it would be construed as infringement. However, these issues are somewhat speculative, as DART equipment is generally not available in the United States. In response to concerns regarding DART use and copyright law, legislation had been introduced in the 101st Congress which addresses DART use.

In July 1990, a group of songwriters brought an infringement action against the manufacturers of DART equipment. Following extended negotiations, the legal differences were resolved without a judicial analysis of the situation. As part of the compromise or peace treaty--the DART manufacturers, home recording advocates, and the representatives of the songwriters--sought legislative affirmation of their agreement. The compromise has been embodied in three separate bills which have been introduced in the 102d Congress. These bills provide: 1) a home audio taping exception which includes both digital and analog taping; 2) a royalty collection and distribution procedure; and 3) a requirement for the installation of the SCMS anti-copying technology in DART machines. If enacted, the proposed home audio taping exception would preclude a fair use analysis of DART taping, in most cases. Concern raised about the scope of coverage of the legislation resulted in the modification of the bill language to provide more precise definitional language concerning the coverage of the bills. In ambiguous situations, courts may have to apply the statutory criteria to the particular situation at hand to determine

whether the recording situation is: 1) covered by the home audio recording exception; 2) a "fair use;" or 3) infringing.

The proposed legislation in the 102d Congress may provide an opportunity to clarify the unsettled home audio taping controversy. In addition, it could encourage the development and dissemination of recording technology, while simultaneously providing royalties to the holders of music copyrights. Some critics of the legislation have argued that definitional problems still remain in the bills. They also charge that it is unfair for consumers to have to pay a tax on all tapes/discs, as some of these tapes/discs may not be used for home taping.

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