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Bill –

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CBS

CBS Inc.,
1800 M Street, N.W., Suite 300N
Washington, D.C. 20036
(202) 457-4501

Donald D. Wear, Jr.
Vice President, Washington Affairs

Dear Mr. Uhlman: July 19, 1982

You were very kind to meet with Lloyd Cutler and me some time ago and to hear our views on the home taping question. It is an issue of enormous concern to CBS both as a matter of principle and because of its tangible economic impact.

CBS is engaged in a wide variety of businesses ranging from its television network to home entertainment to publishing and children's toys. What unites all these businesses is that they involve distributing creative materials to the consumer primarily for enjoyment in the home. That business depends on the continuing contributions of composers, writers, performers and other artists. The incentive for these creative efforts is a copyright system that rewards creative people by giving them royalties when their works are copied. That system is short-circuited by home taping. It is vital to the continued supply of creative product to preserve the integrity of the copyright system so that the reward to creators is not curtailed by technological developments.

Enclosed are two documents which further amplify our views. The first is a letter from Walter Yetnikoff, President, CBS Records Group, detailing the economic and creative impact of home taping. The second is a memorandum prepared by Wilmer, Cutler and Pickering, under the supervision of Mr. Cutler and his partner Louis Cohen, analyzing some of the issues you will confront in considering the proposed legislative solutions which are now pending in Congress.

We believe that the appropriate and fair solution is embodied in the Mathias Amendment to the DeConcini legislation S.1333: permit home taping (which is now jeopardized by the court ruling declaring it an infringement) but impose reasonable royaties on recording equipment and blank tapes to compensate copyright owners for the use of their property. We are also particularly concerned about the swift growth of commercial record rental stores which rent records for short periods so that home tapes can be made in lieu of purchases. This practice is addressed by the "first sale" provision of the pending

legislation, which will give the copyright owner control of commercial record rentals, again for the purpose of ensuring that they receive fair compensation for their work.

We appreciate your taking the time to meet with us and to consider this matter, and we are hopeful the Administration will take an interest in it.

Sincerely,

Mr. Michael Uhlmann
Special Assistant to the President
Office of Policy Development
Old Executive Office Building
Room 228
Washington, DC 20500

CBS

CBS Inc., 51 West 52 Street
New York, New York 10019
(212) 975-5383

Walter R. Yetnikoff, President
CBS/Records Group

CBS Records
CBS Records International
CBS Video Enterprises
Columbia House
CBS Songs

Dear Mr. Uhlmann: July 19, 1982

As President of CBS Records, I am writing to tell you about the critical economic importance of the audio home taping issue to CBS Records and to the composers and artists whose creative work we record and sell.

Our national and international manufacturing and distribution network (the largest in the world) gives us a firsthand view of the damage that home taping does--not only to our own record production and sales, but also to the many small record companies that come to us for various services.

Various studies indicate that home taping of albums and single records has grown dramatically in recent years and that home taping displaces record sales that are a principal source of income to creative people. Statistics show that:

- Industry record shipments declined from 727 million units in 1978 to 593 million units in 1981;
- Record companies released 32% fewer new albums in 1981 than in 1978;
- At the same time, factory shipments of blank audio cassettes nearly doubled between 1971 and 1981, from 125 million to 228 million units;
- In 1980, home tapers copied the equivalent of 455 million albums (vs. 491 million albums sold by the recording industry);
- Record companies lose $800 million to $1 billion of revenues each year at suggested lists prices to home taping.
- These losses seem likely to increase dramatically because of the swift growth of commercial record rental stores, which rent records for short periods so that home tapes can be made.

This decline in record sales has a direct effect on the incomes of composers and performers, who receive a royalty each time a record or prerecorded tape is sold, but nothing when their music is home-taped instead. The decline also has another serious effect: it reduces the ability of a major record company, like CBS Records, to take risks on new artists, or to subsidize the recording of songs and artists that might not be assured of commercial success. While we can be confident that a Billy Joel, Neil Diamond, Barbra Streisand, or Willie Nelson can be a safe risk, our ability to respond to new or more specialized musical tastes is not so clear.

In 1979 expenditures for new artists by our company alone were approximately $22MM. By 1981, despite the effects of inflation on recording costs, this expenditure had dropped to $14MM or a decline of 36%. Let me cite some specific examples:

- The CBS Record Group's worldwide classical music operation--Columbia Masterworks--makes many classical records that are not profitable. The ability to continue to subsidize series like Masterworks is threatened by the loss of sales from more commercially successful artists.

- During 1981, CBS Records launched a new gospel music label, Priority Records. Our ability to undertake such experiments and bring music to people with more specialized tastes is in increasing jeopardy.

- CBS is one of the leading recorders of high quality jazz music. Just like our classical records, these are not best-selling records, and the ability to continue to record them is diminished as home taping erodes our record sales.

Perhaps as important as the economic concerns, however, are the serious concerns we have about whether Congress will continue to support and reinforce this non-governmental economic incentive authorized by the Constitution for creative work. If the copyright system does not respond to new technologies and creators are therefore denied copyright compensation for their work, we could see a dramatic drying up of creative activity.

The trends that I have cited, and the many studies that provide data about these trends, are extremely disturbing to those of us who want to preserve the recorded music industry. Please

consider the implications of home taping on these quesions, and lend your support to the preservation of the copyright system that is reflected in the Mathias-Edwards proposals which we believe constitute a fair and balanced approach to the problem.

I hope these comments about the experiences and views of CBS Records are useful to you. Please do not hesitate to contact me if I can provide any further information.

Sincerely,

Walter Yetnikoff

Mr. Michael Uhlmann
Special Assistant to the President
Office of Policy Development
Old Executive Office Building
Room 228
Washington, DC 20500

Working Draft
6/4/82

WILMER, CUTLER & PICKERING
1666 K STREET, N. W.
WASHINGTON, D. C. 20006

PROPOSED LEGISLATION ON HOME TAPING OF AUDIO MATERIALS

The purpose of this memorandum is to set forth the reasons why the Administration should support legislation such as the Mathias-Edwards bill[1/] to amend the Copyright Act to deal clearly and fairly with "home taping" of audio materials. The legislation would do three things: (1) It would make it lawful for an individual to taperecord copyrighted audio materials, either "off-the-air" or from records or prerecorded tapes, in a private home for personal use. (2) It would establish a system of royalties on recording equipment and blank tape to compensate copyright owners for this use of their property. (3) It would confer on copyright owners the right to control, and hence charge royalties for, commercial (for-profit) rental of records that facilitates home taping.

This memorandum is in five parts:

Part one describes the purpose of copyright protection, to stimulate artistic creation, and the

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1/ Amendment No. 1333 to S. 1758 and H.R. 5705.

effect of home taping in undermining the effectiveness of the copyright system.

Part two describes the growth of home audio taping to the point where it now constitutes a very large and still growing percentage of the recorded music acquired by consumers.

Part three describes the effect of this explosive growth on the composers and performers who are deprived of royalties for the enjoyment of their creative works, on the recording companies that make up a major American industry, and on consumers, who will have less music to enjoy as home taping reduces the incentive for artists to create or for recording companies to take risks.

Part four describes the present legal status of home taping: it is copyright infringement, theoretically subject to the remedial provisions of the Copyright Act, but no one believes that forbidding or monitoring taping in private homes is an acceptable solution to the problem.

Part five describes what CBS believes to be a fair and appropriate solution to the home taping problem: legislation such as the Mathias-Edwards Bill, which would make it legal to tape at home for private use but would impose royalties on the manufacture

of recording equipment and tape destined for use in home taping, and require the copyright owner's permission before a sound recording can be rented for commercial purposes.

Part One
The Copyright System

The philosophy of the copyright system is to promote creative effort by giving songwriters and other artists a property right in their creations, so that they may demand payment when those creations are copied.[2/] When the intended audience for a creative work is able to make copies without direct or indirect payment to the copyright owner, as is the case when listeners tape records at home, the economic incentive for creativity declines or disappears.

Part Two
The Growth of Home Taping

The development of modern audio recording equipment and audio cassettes has made it convenient to obtain a copy of a musical performance, without

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2/ Copyright protection is thus both a reward for the creator's labor and an incentive for future creativity. See, e.g., Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

paying royalties to those whose talent and effort created the music, by recording "off the air" or from a borrowed or rented record. In this way, one can build a library of recorded music without purchasing a record.

Many people appear to be doing just that. Home taping of prerecorded music has exploded in recent years. In the last decade, for example, factory shipments of blank audio cassettes nearly doubled, from 125 million to 228 million units.[3/] In 1980, almost half of all households owned at least one tape recorder.[4/] Today, there are 98 million home tape recorders in the United States.[5/]

Home tapers now are estimated to copy the equivalent of 455 million record albums a year, nearly as many as the recording industry sells.[6/] Home taping displaces record sales: most home tapers acknowledge

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3/ Billboard Magazine Tape Spotlight, August 26, 1972, at 44, 48; Merchandising Magazine Statistical Issue, March 1982, at 24.

4/ Warner Communications Inc., A Consumer Survey: Home Taping ("WCI Survey"), March 1982, at 5.

5/ Forbes, February 15, 1982, at 126.

6/ WCI Survey at 20.

that they tape to avoid buying records,[7] and an analysis by economist Alan Greenspan found that roughly 40% of all records would be purchased instead if home taping were not possible.[8]

The popularity of home audio taping has spawned a new problem that itself contributes to the growth of home taping -- the establishment of retail stores that rent sound recordings for individuals to tape at home. Record rental stores offer a wide variety of albums, at a modest price, for a few days' rental. The very purpose of such stores is to facilitate the taping of albums at home.

The record rental business began in Japan just two years ago.[9] By February 1982, there were

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7/ WCI Survey at 16; CBS Records Market Research, Blank Tape Buyers: Their Attitudes and Impact on Pre-Recorded Music Sales ("CBS Survey"), Fall 1980, at 11.

8/ Statement of Alan Greenspan re: Amendment 1333 to S. 1758 before the Senate Committee on the Judiciary ("Greenspan Analysis"), April 21, 1982, at 5. Accord, Warner Communications Inc., "1981 Estimate of Loss Due to Home Taping: Tapers' Reports of Replacement," April 1982, at 1, 6, 8.

It is not just teenagers who tape music; almost 90% of record album taping is done by persons over 20. WCI Survey at 26.

9/ See "Japanese Disc Production Off; Rental Blamed," Billboard, February 27, 1982, at 1.

more than 1,100 record rental outlets in that country,[10] and record sales by stores in the vicinity of the rental outlets had dropped by 30%.[11]

Record rental stores next appeared in Canada, and the phenomenon quickly spread to the United States where rental outlets have been established or are planned in most major cities.[12] These commercial rental outlets promise to have a substantial impact on record sales by encouraging home taping. Indeed, the first of such outlets in the United States not only rents albums but also sells blank tape and, during its opening week, handed out free cassettes to its customers.[13]

Part Three
The Harm Done by Home Taping

The price of a record or prerecorded tape includes compensation to the songwriters, lyricists, musicians and vocalists who make the music the public likes to hear. The home taper pays nothing to these

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10/ Letter from J. Kamei, Executive Director, Japan Phonograph Record Association to the President of the Recording Industry Association of America, Inc., March 9, 1982.

11/ "Japanese Disc Production Off; Rental Blamed," Billboard, February 27, 1982, at 1. In 1981, Japanese record production fell, for the first time in 25 years, by 15%. Id.

12/ See "Rent-A-Record Bows Unit in U.S.," Billboard, August 19, 1981, at 3.

13/ Id. The outlet has been a smash success. Id.

creators and artists. Every time a home taper uses their property for nothing, these people are deprived of compensation that is rightfully theirs. Without this compensation, the continuing efforts of these talented people and their contributions to American music can no longer be assured. And as the sources of new music dry up, all those who make music and all those who enjoy music, both those who tape and those who do not, are hurt.

Home taping hurts consumers in another way as well. Fewer record sales mean that recording company fixed costs must be spread over a smaller number of units. As a result, those consumers who buy records pay more so that those who tape can pay nothing.

Record sales lost to home taping also translate into a real and substantial economic loss for recording companies. Record shipments have declined from 736 million units (with a value of $4.13 billion) in 1978 to 594 million units (with a value of $3.6 billion) in 1981.[14/] Estimates are that the recording

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14/ The Wall Street Journal, February 18, 1982, at 31.

industry loses $800 million to $1 billion of revenues to home taping each year.[15/] These losses have hurt not only the recording companies themselves but also their employees, suppliers, distributors and retailers.

The loss of record sales to home taping also leaves recording companies with fewer resources to experiment and diversify their product. Recording companies can no longer afford the risks of experimentation and diversification. In 1981, the industry released 32% fewer new albums than in 1978.[16/] Recording companies have been forced to take fewer chances on new talent and to reduce their subsidization of

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15/ Greenspan Analysis at 5; The Wall Street Journal, February 18, 1982, at 31; CBS Survey at 15.

The explosive growth of home taping comes at a very bad time for the recording industry, which is already suffering from the combined effects of record piracy and counterfeiting and a generally sluggish economy. In 1979, for example, the industry lost more than $200 million on domestic sales. Cambridge Research Institute, Economic Study of the Recording Industry, April 7, 1980.

16/ Recording Industry Association of America, Inc., 1981 Release Survey, April 1982.

classical, jazz, gospel, ethnic and other specialty recordings. This means fewer opportunities for songwriters and performing artists to get recorded and less musical diversity for the listening public.

Finally, home taping has a negative impact on the nation's balance of trade. The United States has traditionally exported far more phonograph records and prerecorded tapes than it has imported. Most home taping equipment and blank tape bought in the United States has been imported, principally from Japan. Home taping thus replaces a primarily American product with a primarily imported product.

Part Four
The Present Legal Status of Home Taping

The Copyright Act of 1909 protected composers against the unauthorized mechanical reproduction of their musical works. The Sound Recording Amendment of 1971 created an additional copyright protecting performing artists, record companies and others against the unauthorized reproduction of a particular recorded rendition of a musical work. Home audio taping violates both the 1909 copyright that protects the song itself and the 1971 copyright that protects the particular rendition of a song embodied in the sound recording.

Relying on language that appeared in the House Report after the 1971 Amendment passed the Senate, proponents of "free" home audio taping claim that home taping is exempt from the proscriptions of the 1976 Copyright Act or, even if not exempt, that it is a "fair use" of the copyrighted material embodied in a record.[17/] Neither argument is correct. As Professor Melville B. Nimmer, America's leading copyright scholar, has concluded, "[t]here is not and never has been an exemption from copyright liability for home audio taping" and home audio taping of copyrighted works does not constitute fair use.[18/]

17/ In Universal City Studios, Inc. v. Sony Corporation of America, 480 F. Supp. 429 (C.D. Cal. 1979), rev'd in part and aff'd in part, 659 F.2d 963 (9th Cir. 1981), the district court, relying on this legislative history, found in the 1976 Act an unstated exemption for home copying of audio materials, which it then extended to the audiovisual materials involved in the case before it. The court of appeals disagreed. It held that home recording of copyrighted works is an infringement of copyright. The Sony case, now pending before the Supreme Court, does not involve audio material; it involves only the off-the-air, video taping of copyrighted television programming. It should be noted, however, that the implied-exemption argument on which the district court relied was wrong: there is no unstated exemption for home copying of audio materials.

18/ See "The Legal Status of Home Audio Recording of Copyrighted Works" by Melville B. Nimmer, attached hereto, at 1.

As Professor Nimmer points out, remarks in the House Report that form the basis for the home taping exemption argument were never joined in by the Senate, and they contain no hint of an intention to amend the composer's copyright that had existed since 1909 or to carve out any special exemption from the new sound recording (rendition) copyright.[19] Nor is there any hint that Congress intended to enlarge the definition of fair use to cover a type of copying that would not previously have qualified as fair use under established principles.

This conclusion is reinforced by the 1976 Copyright Act. The 1976 Act preserved both the musical copyright and the sound recording copyright. There is nothing in the legislative history[20] or the language of

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19/ As David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services, notes, these remarks "were made in the context of granting new protection to sound recordings against tape piracy; home taping was not the focus of [the 1971] legislation." Statement of David Ladd before the Senate Committee on the Judiciary, April 21, 1982, at 37.

20/ While the legislative history of the 1976 Act incorporates verbatim much of the language of the House Report accompanying the 1971 Amendment, it omits the passage referring to home taping.

the statute to suggest that home taping enjoys any special exemption from the general proscriptions of the copyright law.[21/]

Nor does home audio taping fall within the fair use exception to copyright liability. Under the 1976 Act and case law fair use is limited to incidental use of copyrighted works for productive purposes such as research, news reporting, criticism and teaching. The home taping of an entire record album for personal enjoyment and to save money is not an incidental, productive and hence "fair" use of that album; it is an infringement of copyright.[22/]

21/ To the contrary, the 1976 Act was "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." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5679. See generally 3 Nimmer on Copyright § 13.05 [F][5], at 13-95-96, n.159 (1981).

22/ Moreover, the 1976 Act protects in separate subsections the copyright owner's exclusive right to "reproduce" his work and his right to "distribute copies or phonorecords," making it clear that unauthorized reproduction is infringement even if there is no distribution.

Part Five
A Legislative Solution to the Problem of Home Taping

While home audio taping constitutes copyright infringement under current law, there is now no available mechanism by which copyright owners whose works are appropriated thereby can be compensated. Monitoring or prohibiting taping done in private homes is neither desirable nor practical. Suing individual home tapers for damages resulting from their infringement is equally undesirable. But the inability to monitor and collect damages for home audio taping does not mean that the copyright owner should be denied recompense for the use of his property; it means only that special means have to be created to assure proper compensation under the conditions that technology has created.

These special means cannot be created by piecemeal litigation. Indeed, even the courts agree that "[t]he choices involve economic, social and policy factors which are far better sifted by a legislature."[23/]

23/ Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. at 469. See also Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d at 971.

It will require legislation to assure that the copyright law accomodates itself to the technological developments that have made home taping possible by ensuring the public the benefits of the new technology while protecting the right of copyright owners to fair compensation.[24/] Only through comprehensive legislation can an equitable, workable and enforceable royalty system be developed.

The Mathias-Edwards bill is a fair and sensible solution to the problem of home audio taping.[25/] It accomodates the property interest of the copyright owner by establishing a royalty system to compensate copyright owners whose intellectual property is appropriated by home taping, and it accomodates the privacy right of the individual by exempting home tapers from liability for copyright infringement.

Under the bill, royalty fees would be payable by the importers and manufacturers of audio recording equipment and blank tapes. The royalties would be paid into an interest-bearing pool. The pool would then be

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24/ Legislative responses have been developed in the past to accomodate the conflicting rights of creators of intellectual property and the consuming public as, for example, in the cases of cable T.V. systems and computer software use.

25/ These bills are currently sponsored by 24 Senators and 76 members of the House, respectively.

allocated among the copyright owners whose works were available to the public for taping during the relevant period. The allocation would be by voluntary agreement among the copyright owners, either individually or through trade groups like ASCAP, or, failing agreement, by the Copyright Royalty Tribunal which has similar responsibility for allocating among copyright-owner claimants the pools of royalties paid by cable T.V. systems and by jukebox operators.

The Mathias-Edwards bill also tackles the problem posed by the growing number of commercial record rental stores by amending the so-called "first sale" doctrine so as to require the copyright owner's permission before the owner of a particular copy of a sound recording may rent that recording for commercial purposes.[26/] This provision would not apply to non-commercial rentals or to private lending and borrowing.

26/ Under the "first sale" doctrine, a copyright owner's exclusive right to distribute copies of his creative work to the public is (unlike the other exclusive rights granted to copyright owners) exhausted after the first sale of a particular copy of the work to an individual. Thus, under current law, the purchaser of a record, such as a rental store, is free to dispose of the record by sale, rental, lease or lending without copyright liability.

* * *

Home taping undermines the copyright system by depriving creators and artists of the compensation that is the impetus for their efforts and, in so doing, it imperils the continued availability of new musical works to the public and the economic health of a major American industry. Legislation has been proposed that provides a fair solution to the taping problem. We believe that this legislation merits the support of the Administration.

STATEMENT OF
RECORDING INDUSTRY ASSOCIATION OF AMERICA
AND
NATIONAL MUSIC PUBLISHERS' ASSOCIATION

In January 1982, the Recording Industry Association of America and the National Music Publishers' Association requested Professor Melville Nimmer to prepare a comprehensive legal memorandum expressing his views under the copyright laws concerning audio home taping, and to appear as an expert witness at the Congressional hearings on this subject. Professor Nimmer agreed to do so, and in accordance with that agreement, he prepared the Memorandum reproduced here as Appendix Seven. That Memorandum reflects the legal views previously expressed by Professor Nimmer in his treatise, Nimmer on Copyright.

On Friday, April 9, 1982, Professor Nimmer informed us that, because of a potential conflict with other clients of Sidley & Austin, the law firm to which Professor Nimmer is Of Counsel, the firm had decided that he could not testify as an expert witness at the Congressional hearings, and that he had to withdraw his authorization to submit his Memorandum of Law. He expressly reaffirmed his views on the legal issues set forth in the Memorandum, however, explaining that the withdrawal of authorization related solely and entirely to the wishes of his law firm.

Counsel for RIAA and NMPA have carefully considered the claim of conflict of interest perceived by Sidley & Austin, and have concluded that there is no conflict which would bar Professor Nimmer from appearing as an expert witness. In any event, owing to the lateness of the action taken by Sidley & Austin, it was neither possible nor fair to RIAA and NMPA that the Memorandum be withheld from Congress. Accordingly, the Memorandum of Law prepared by Professor Nimmer is being submitted herewith.

THE LEGAL STATUS OF HOME AUDIO RECORDING OF COPYRIGHTED WORKS

by Melville B. Nimmer

THE LEGAL STATUS OF HOME AUDIO RECORDING OF COPYRIGHTED WORKS

by Melville B. Nimmer[1]

INTRODUCTION

The recent decision in Universal City Studios, Inc. v. Sony Corporation[2] (referred to as the Betamax case) held that the vidéo recording of copyrighted works in the home for private use constitutes copyright infringement. Those opposed to this decision have argued that since there is an exemption for audio recording, there is no justification for a different rule as to video recording. This Memorandum, based upon the analyses contained in my treatise Nimmer on Copyright, is intended in the first place to dispel the premise contained in that argument: There is not and never has been an exemption from copyright liability for home audio recording. This Memorandum further maintains that an otherwise infringing reproduction of a copyrighted work will not be subject to the defense of fair use simply because such reproduction is made by the process of audio taping, or other recording, and is

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[1] Professor of law, U.C.L.A. School of Law. (These are the personal views of the writer, and do not imply any institutional endorsement.)

[2] 659 F.2d 963 (9th Cir. 1981).

intended for the private use of the person engaged in such audio recording. Finally, it will be argued that problems of enforceability and privacy may be met through the imposition of a royalty on manufacturers of audio equipment and tape.[3]

II

THERE IS NO EXEMPTION FOR AUDIO HOME RECORDING UNDER THE CURRENT COPYRIGHT ACT

The district court decision in the Betamax case,[4] although later reversed upon appeal,[5] is the source of a widely voiced assumption that audio home recording is subject to a special exemption under the Copyright Act. The district court decision, in holding video home recording to be noninfringing, rested its decision in part on a supposed exemption for audio home recording, which it then concluded was applicable to video home recording as well. Specifically, it held that notwithstanding the apparently contrary wording of Section

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[3] The issue of video home taping presents certain different questions which are not here considered, as they are beyond the scope of this Memorandum.

[4] Universal City Studios, Inc. v. Sony Corporation, 480 F. Supp. 429 (C.D. Cal. 1979).

[5] 659 F.2d 963 (9th Cir. 1981).

106(1) of the Copyright Act,[6] "the Congressional intent [vis-a-vis Section 106(1)] was that home-use sound recording was not prohibited." Then, as an alternative holding, the district court concluded that, in any event, the defendants' activities were defensible as "fair use" under Section 107.[7] The fair use defense is considered later in this Memorandum.[8] Focusing now on the supposed exemption, the district court's conclusion in this regard rests on two premises, each of which is in error. The first erroneous premise is that an audio home recording exemption was created as a part of the Sound Recording Amendment of 1971. The second erroneous premise is that such an exemption was incorporated in the current Copyright Act of 1976. We now proceed to an analysis of each of these premises.

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6 "Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords . . . ." 17 U.S.C. § 106.

7 The district court found that "the legislative history of the new Act shows that Congress did not intend to restrain the home-use copying at issue here." 480 F. Supp. at 447. It then added that "even if this finding were erroneous," the doctrine of fair use would constitute a defense. Id.

8 See ¶ III infra.

A. The Sound Recording Amendment of 1971 Did Not Create an Exemption for Audio Home Recording

The Sound Recording Amendment of 1971[9] amended the Copyright Act of 1909 so as to provide for the first time copyright in sound recordings.[10] The text of the Amendment itself contained no special mention of audio home recording, nor was there any such mention in the Senate proceedings which preceded its enactment of the Amendment. After Senate enactment, the measure went to the House Judiciary Committee, and its Report on the Amendment included a passage which was heavily relied upon by the district court in the Betamax case, and is the main source of the claim that a statutory exemption for audio home recording was adopted in the 1971 Amendment. That passage reads as follows:

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9 Act of October 15, 1971; P.L. 92-140, 85 Stat. 391.

10 This is to be contrasted with copyright in the musical or other underlying works which may be the subject of such recording. Copyright in such underlying works had been recognized under the 1909 Act since its inception (as well as under prior copyright laws). Those not familiar with copyright are sometimes puzzled by the distinction between a copyright in a musical work and a copyright in a sound recording of such musical work. The copyright in the musical work inheres in the composer of the music, whose rights may be acquired by a music publisher. The copyright in a sound recording inheres in those responsible for the artistic rendition of such musical work as captured in phonorecord (e.g., phonograph record or tape) form. This includes the orchestra, the singer, the record company, etc. See generally Nimmer on Copyright, § 2.10[A][2] (1981).

> "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years."[11]

Does the above passage justify the conclusion of the Betamax district court that an audio home recording exemption (apart from the general doctrine of fair use) was contained in the Sound Recording Amendment of 1971? There are several different reasons which compel the contrary conclusion that no such exemption was created. There is first the fact that the 1971 Amendment was itself legislation limited to the creation of copyright in sound recordings, and did not (in this context) purport to affect the copyright in musical or other works which may be contained in such sound recordings. Therefore, the purported noninfringing status of "home recording" referred to in the House Report could at most be applicable to the sound recording copyright, not to the copyright in any underlying works which may be contained

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11 H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 7 (1971).

therein. It is true that the House Report offers the opinion that home recording would not infringe the copyright in any such underlying works, but this could be nothing more than the 1971 Congress' opinion as to the meaning of the 1909 Act, and as such not a statement of legislative intent.[12]

In addition there is the fact that the above-quoted statement in the House Report was never joined in by the Senate. As far as that body is concerned, there is only the language of the statutory amendment itself, which certainly on its face carries no implication of any form of exemption. Even if one assumed that all of the voting members from the House side intended that a home recording exemption should be regarded as implicit in the statutory language, without evidence of a similar intent upon the part of those voting on the Senate side there is no justification for reading the exemption into the 1971 Amendment.

Finally, and perhaps most fundamentally, the above-quoted statement in the House Report in itself does not purport to create an exemption apart from the general doctrine of fair use. The Committee statement that "it is not the intention . . . to restrain . . . home recording" must be read within

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12 United States v. Price, 361 U.S. 304, 313 (1960); Rainwater v. United States, 356 U.S. 591, 593 (1958).

the context of the preceding and succeeding sentences. The preceding sentence states that "it is the intention of the Committee that this limited [sound recording] copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17." The succeeding sentence makes the point even more explicit: "the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." This, then, directly contradicts the Betamax district court's assumption that the 1971 Amendment created a special home recording exemption. To the contrary, sound recording copyright owners are to be "in no different position" than other copyright owners had been prior to the 1971 Amendment. Since there is no basis whatsoever for a claim (and no one appears to make a claim) that pre-1971 there was, apart from the doctrine of fair use, any basis for exempting home recording of copyrighted works from the reach of the Copyright Act, it follows that no such exemption was created under the 1971 Amendment.

If there were any disparity in this regard as between the House Committee Report and the individual statements of legislators and others, the Report would, of course, prevail. It will be seen, however, that the Betamax district court's further reliance upon such individual statements by Chairman

Kastenmeier (see 480 F. Supp. at 446) and by Assistant Register of Copyrights Barbara Ringer (see 480 F. Supp. at 445) is also ill-based. Consider first the colloquy on the House floor as between Chairman Kastenmeier and Representative Kazen:

> "Mr. Kazen: Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?
>
> Mr. Kastenmeier: Yes.
>
> Mr. Kazen: In other words, if your child were to record off of a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?
>
> Mr. Kastenmeier: This is not included in the bill. I am glad the gentleman raises the point. On page 7 of the report, under "Home Recordings," Members will note that under the bill the same practice which prevails today is called for; namely, this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes. This is made clear in the report."[13]

The underlined portion of the above statement by Chairman Kastenmeier makes it very clear that he did not view the 1971 Amendment as creating any separate exemption, but that to the contrary he was referring to, and only to, the doctrine of fair use.

The statements of Miss Ringer relied upon by the Betamax district court occurred in a colloquy with Representative Beister. It proceeded as follows:

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[13] 117 Cong. Rec. 34, 748 (1971) (emphasis added).

"Mr. Beister: I do not know that I can add very much to the questions which you have been asked so far.

I can tell you I must have a small pirate in my own home.

My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set. Now, he may retrieve in addition something else onto his recording, but nonetheless, he does retrieve the basic sound, and this legislation, of course, would not point to his activities, would it?

Miss Ringer: I think the answer is clearly, "No, it would not."

I have spoken at a couple of seminars on video cassettes lately, and this question is usually asked: "What about the home recorders?"

The answer I have given and will give again is that this is something you cannot control.

You simply cannot control it.

My own opinion, whether this is philosophical dogma or not, is that sooner or later there is going to be a crunch here. But that is not what this legislation is addressed to, and I do not see the crunch coming in the immediate future.

Other countries have felt it more directly than we, partly because record prices are lower here than, say, in Germany. In that situation there is a range of legal devices for trying to keep the practice under reasonable control. But I do not see anybody going into anyone's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping."[14]

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14 Hearings on S.646 Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 1st Sess. 22 (1971).

It will be seen that in the above-quoted statement, Miss Ringer is careful not to claim that the then proposed legislation would create a home recording exemption, or even that it would constitute fair use. Rather, she states that such legislation would not "point to" home recording in that "this is something you cannot control." That is, her remarks were directed simply to the practicality of enforcement, not to the theoretical reach of the 1971 Amendment. (For further on the practicality of enforcement, see ¶ IV infra.) Indeed, Miss Ringer's statement further suggests that the need for "reasonable control" of home recording (what she refers to as "philosophical dogma") may be reconciled with the practicalities of enforcement by the possible application of a royalties system such as that adopted by West Germany. She suggests that without such a reconciliation "sooner or later there is going to be a crunch here," but in 1971 she did "not see the crunch coming in the immediate future." Given the current devastating impact of home recording upon the music and recording business (see ¶ III.B.4. infra), it is obvious that "the crunch" is now upon us.

The Betamax district court relied upon an additional statement by Miss Ringer in a manner which displayed a misunderstanding of its significance. The statement appeared in the following further exchange between Representative Beister and Miss Ringer:

> "Mr. Beister: Secondly, with respect to video cassettes, are we approaching an additional problem, not with respect to private use, but with respect to public distribution after it has been retrieved over a home set?
>
> Miss Ringer: The answer is very definitely "yes."
>
> For years the motion picture industry has been faced with bootlegging problems, much of it deriving from the 10 mm prints that were distributed to the Armed Forces and got out of control. The film industry has had a very active policing activity for years.
>
> I think that this problem is going to undergo a quantum increase when video cassette recorders are freely available. But I would say that there is a big difference, and I think it is something that you might consider. In that area, they have got copyright protection, and in this area, who knows? It is certainly not protectable under the Federal statute."[15]

In this context, Miss Ringer's statement "It is certainly not protectable under the Federal statute" referred only to the noncopyrightability of sound recordings (as compared with the protected status of motion pictures, including video cassettes) prior to enactment of the 1971 Amendment. Indeed, it was the fact that sound recordings were "not protectable under the Federal statute" which created the need for the 1971 Amendment. This statement does not remotely imply that once such protected status was accorded by the 1971 Amendment, it would then be subject to a home recording exemption.

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[15] Id. at 22-23 (emphasis by Betamax district court).

B. In Any Event, There Is No Exemption for Audio Home Recording Under the Copyright Act of 1976

Even if the preceding reasoning were rejected, and it be assumed that an audio home recording exemption were somehow contained in the 1971 Amendment, it must be concluded that any such exemption was not carried over into the general revision of copyright law as embodied in the Copyright Act of 1976. The Betamax district court in finding such a home recording exemption relied primarily upon the "Home Recording" statement in the House Report relating to the 1971 Amendment. Without that statement even the pretense of a home recording exemption would dissipate. Nothing in the statutory language of the 1971 Amendment suggested any such exemption. Yet, when that statutory language was incorporated into the Act of 1976, it is most significant that neither the House nor Senate Judiciary Committees saw fit to incorporate in their respective committee reports the commentary on "Home Recording" as contained in the 1971 Committee report. This omission cannot be ascribed to an assumption by the Judiciary Committees that their commentaries upon the 1971 statutory language would be assumed to be applicable to the same language as incorporated in the 1976 Act. If that were the case it would have been unnecessary to repeat in the 1976 Committee Reports any of the commentary

that had been contained in the 1971 Reports. Yet, in fact much of the 1971 House Report commentary is incorporated verbatim in the 1976 House Report.[16] The failure to include in the 1976 Report the "Home Recording" statement from the 1971 Report is doubly significant in view of the fact that whereas the 1971 Amendment did not by its terms affect copyright in musical works, the 1976 Act clearly did. Thus while the "Home Recording" statement in the 1971 Report could not constitute a statement of legislative intent regarding home recording of musical works,[17] such a statement in the 1976 Report would have had such an impact.

Finally, any question as to whether the Copyright Act of 1976 includes an exemption (not based upon fair use) for home recording would seem to be definitively set at rest by the following passage from the House Report for the 1976 Act: "it is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use."[18] This

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16 Compare, for example, H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 6 (1971) (bottom paragraph) with H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 56 (1976) (second full paragraph).

17 See text at footnote 10.

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

conclusion is further bolstered by the fact that Congress did specifically consider audio and video tape recorders and the problem of off-the-air taping in connection with the current Copyright Act, and approved certain narrow exemptions while withholding approval for a general home recording exemption.[19]

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[19] For example, Congress explicitly provided an exemption for off-the-air video taping of audio-visual news programs by nonprofit libraries for distribution to scholars and researchers. See 17 U.S.C. § 108(h) and the House Report commentary:

> "It is intended to permit libraries and archives subject to the general conditions of this section, to make off-the-air video tape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 77 (1976) (hereinafter "H. Rep.").

An exemption was also provided for audio or video off-the-air taping taken from public broadcasting entity transmissions of published nondramatic musical works as well as video taping of published pictorial, graphic and sculptural works by governmental and other nonprofit bodies for use in classroom teaching activities provided the tapes are destroyed within seven days of initial broadcast. See 17 U.S.C. § 118(d)(3) and the House Report Commentary: "It is the intent of the Committee that schools be permitted to engage in off-the-air reproduction to the extent and under the conditions provided in 118(d)(3)." H. Rep. at 120. The Conference Committee report also expressed the view that "as long as clear-cut restraints are imposed and enforced, the doctrine of fair use is broad enough to permit the making of an off-the-air fixation of a television program within a nonprofit, educational institution for the deaf and hearing impaired . . . ." Remarks of Representative Kastenmeier at page H10875 of the Congressional Record of September 22, 1976, adopted in H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. 70 (1976). It is clear, then, that Congress did specifically consider the issue of off-the-air tape recording by audio and video cassette recorders, and provided an exemption only in these explicit areas. Beyond that, the House Report stated that "It is not intended to give

[Footnote continued on following page.]

The Copyright Act provides for a broad reproduction right under Section 106(1), subject to certain express exemptions in Sections 107-18. To conclude that in addition to these express exemptions there is also an implied home recording exemption would be exactly contrary to what the Supreme Court has said "must" be presumed. In Tennessee Valley Authority v. Hill,[20] the Court observed: "In passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus [the statute in certain cited sections] creates a number of limited 'hardship exceptions,' none of which would even remotely apply to the [present case]. . . . [U]nder the maxim expressio unius est exclusio alterius, we must presume that these were the only 'hardship cases' Congress intended to exempt."[21]

[Footnote 19 continued from preceding page]
[taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use." H. Rep. at 66.

20 437 U.S. 153 (1978).

21 437 U.S. at 188.

III

AUDIO HOME RECORDING DOES NOT CONSTITUTE FAIR USE

If, as argued in Paragraph II, there is no special home recording exemption under the Copyright Act, may it be said that this conduct is nevertheless defensible as fair use? That inquiry must be responded to on two different levels. First, does the "Home Recording" statement in the House Report relating to the 1971 Amendment determine the fair use issue in relation to audio home recording, and if not, do the general fair use factors as set forth in Section 107 of the current Act justify a conclusion of fair use?

A. The "Home Recording" Statement in the 1971 House Report Does Not Determine the Fair Use Issue

It may be argued that the "Home Recording" statement as contained in the 1971 House Report[22] constitutes an opinion that audio home recording constitutes fair use.[23] As a matter of law it can constitute no more than a statement of opinion,

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22 See ¶ II.A. above.

23 Alternatively, the statement may be read as merely an observation that the statutory prohibition against unauthorized recording is unenforceable as against individual home duplicators. On the issue of enforceability, see ¶ IV below.

and not an expression of legislative intent, as regards the copyright in musical works.[24] But even as to the copyright in sound recordings, which was the subject of the 1971 Amendment, the statement itself at most merely equates the fair use status of sound recordings with that of other copyrighted works. That is, if (but only if) audio home recording of other copyrighted works is fair use (an issue as to which the House Report on the 1971 Amendment may claim no special competence), then by reason of the 1971 Statement audio home duplication of sound recordings would have the same status. This leaves open the issue of the general status of audio home recording under fair use principles, a subject which is discussed below.

But even if the 1971 Statement were read as creating under the 1909 Act an absolute fair use rule vis-a-vis home duplication of sound recordings,[25] for several different reasons this does not determine the fair use issue under the Copyright Act of 1976. There is first the significant fact that the "Home Recording" statement was not repeated in the

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24 See the text to footnote 10 above.

25 The statement of Chairman Kastenmeier quoted in the text to footnote 11 above may be read as assuming such an absolute rule. There was, of course, no similar statement from the Senate side.

Committee Reports for the Current Copyright Act.[26] Of even greater significance is the manner in which the general issue of fair use is treated under the Copyright Act of 1976. Section 107 of the current Act states certain general criteria to be taken into account in the determination of whether a given use is "fair." There is no attempt to define fair use, nor to determine on the legislative level whether any particular act of duplication would or would not constitute fair use. This approach is summed up in the Committee Reports with the statement:

> "The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, <u>especially during a period of rapid technological change</u>. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present <u>judicial</u> doctrine of fair use, <u>not to change, narrow, or enlarge it in any way</u>."[27]

Thus, it is the <u>judicial</u> doctrine of fair use that had been developed under the 1909 Act which was adopted by the 1976 Act, not any prior legislative directives, including a directive that home recording shall be regarded as fair use, even if such

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26 <u>See</u> ¶ II.B. <u>supra</u>.

27 H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976) (emphasis added). <u>See also</u> S. Rep. No. 94-473, 94th Cong., 1st Sess. 62 (1975).

a directive had in fact been articulated in the 1971 Amendment. The point is further amplified in the House Report, which states that" it is not intended to give [taping] any special status under the fair use provision . . . ."[28] The conclusion is, then, inescapable that audio home recording was not singled out by Congress for special fair use treatment under the Copyright Act of 1976. The question remains as to whether, applying the general judicial doctrine of fair use as codified in the Section 107 criteria, the defense of fair use is nevertheless applicable to audio home recording. We turn now to that topic.

B. Audio Home Recording Does Not Constitute Fair Use

Section 107 of the Copyright Act lists the following four criteria, codified from prior fair use cases, which are intended to give guidance to the courts in determining whether a given use is "fair":

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

1. The Purpose and Character of the Use[29]

The preamble to Section 107 specifies certain "purposes" which fall within the core of fair use. These are: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." It will be seen that in each of these instances the use is to be within the context of a further commentary or exposition by the person making the "use."[30] Thus, as the court of appeals in the Betamax case observed, fair use involved "the use by a second author of a first author's work."[31] It is only when the user is himself an author, and is using a portion of

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[29] In referring to "the purpose and character of the use," Section 107(1) adds: "including whether such use is of a commercial nature or is for nonprofit educational purposes." Nevertheless, the fact that a given use is not "commercial" but is rather for "nonprofit educational purposes" does not necessarily mean that such use if "fair." See, e.g., Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962) (nonprofit reproduction for school and church purposes held not fair use). In any event, audio home recording for fair use purposes may be regarded as "commercial." This point is explored in ¶ II.B.4. below.

[30] Such commentary or exposition will ordinarily be set forth in a writing which accompanies the reproduction of the copyrighted work. In the case of "teaching" this may not be the case, but even then the teacher will virtually always add an oral commentary or exposition.

[31] Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963, 970 (9th Cir. 1981), quoting Seltzer, Exemptions and Fair Use in Copyright 24 (1978).

a prior work in order to formulate more effectively his new work that the scope of copyright in the prior work may be limited under the doctrine of fair use. In such circumstances the public benefit from the dissemination of the new work may be said sometimes to outweigh the earlier author's interest in the full enforcement of his copyright.[32] The doctrine of fair use as applied by the courts has been limited to those instances where the purpose of the copier is to further his own authorship.[33] The Betamax court of appeals properly found that the established judicial doctrine of fair use is not applicable where the user makes a reproduction merely for his own "convenience" or "entertainment."[34] Yet, it is precisely

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32 "The doctrine of fair use, originally created and articulated in case law, permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), quoted in Rubin v. Boston Magazine Co., 645 F.2d 80, 83 (1st Cir. 1981) (emphasis added).

33 The court of appeals in the Betamax case cited as the one case which did not conform to this principle that of Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), which held library photocopying to be fair use. The Betamax court disapproved of Williams & Wilkins for its failure to comply with this "productive use" principle. In fact, however, Williams & Wilkins may conform to the "productive use" principle in that photocopies were furnished only for the purpose of "study and research," which implies a use that it is hoped will result in further scientific authorship.

34 See 659 F.2d at 970.

an "entertainment" use, and only that, which is involved in most home audio recording. It can hardly be said, then, that the "purpose and character" of a home recording use comports with fair use requirements.

2. The Nature of the Copyrighted Work

The defense of fair use is less applicable when the work which is copied is "creative, imaginative, and original"[35] than it is when the work is one "more of diligence than of originality or inventiveness,"[36] such as a catalog, index, or other compilation. The Betamax court of appeals was, thus, correct in its conclusion that "the scope of fair use is greater when informational type works, as opposed to more creative products are involved . . . . If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted."[37] Musical works, and the sound recordings thereof, which constitute the subject matter of most audio home recording, obviously fall within the "entertainment" characterization. As such, the doctrine of fair use is most constricted in these circumstances.

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35 MCA, Inc. v. Wilson, 211 U.S.P.Q. 577 (2d Cir. 1981).

36 New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217 (D.N.J. 1977).

37 Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963, 972 (9th Cir. 1981).

3. The Amount and Substantiality of the Portion Used

Audio home recording of musical works and of the sound recordings thereof almost always involves the reproduction of an entire work. It is the song itself, and not merely a particular passage from it, which the home recorder wishes to reproduce. It is obvious, then, that the application of this third fair use factor militates against a fair use defense. Indeed, it is generally held that the defense of fair use is never available to immunize copying of an entire work.[38]

4. The Effect upon the Plaintiff's Potential Market

This fourth fair use factor, which is often said to be the most significant of all,[39] most dramatically negates any claim that audio home recording may constitute fair use.

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38 Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978); Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962); see Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966); Encyclopaedia Britannica Educational Corp. v. Crooks, 447 F. Supp. 243 (W.D.N.Y. 1978).

39 Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980); H.C. Wainwright & Co. v. Wall Street Transcript Corp., 418 F. Supp. 620 (S.D.N.Y. 1976), aff'd, 558 F.2d 91 (2d Cir. 1977); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973).

Although the precise numerical amount of lost sales of phonograph records and pre-recorded tapes which annually occur by reason of audio home recording practices may be the subject of debate, the Roper Organization concluded in a 1979 study that "there is no doubt that substantial record and pre-recorded tape sales are lost through taping."[40] The Hamilton Study, prepared for the Copyright Royalty Tribunal, concluded that "consumers taping music does have an impact on their purchases of prerecorded music."[41] The CBS Records Market Research Study, released in Fall, 1980, found that audio home taping costs the pre-recorded music industry up to 100 million units annually, which at list prices amounts to an annual loss of 700 to 800 million dollars.[42] It further concluded that pre-recorded sales would be 20% greater without blank taping.[43] And the most recent study on home taping released by Warner Communications Inc. found that "during the 1980

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40 A Study on Tape Recording Practices Among the General Public (The Roper Organization, June 1979), Summary and Conclusions, at 3.

41 Report of the Committee on Home Taping (Copyright Royalty Tribunal, 1979), at 3.

42 Blank Tape Buyers -- Their Attitudes and Impact on Pre-Recorded Music Sales (CBS Records Market Research, Fall, 1980), at 15.

43 Id. at 16.

survey year, over $600 million worth of blank tape was used by some 39 million people to bring over $2.85 billion worth of music (and other professional entertainment) into their homes."[44] The study concluded: "Were home taping not possible, tapers would be spending hundreds of millions of additional dollars on records and prerecorded tapes."[45]

The above studies merely confirm what is empirically obvious. There can be no doubt that audio home recording does have a devastating impact upon the potential market for music and sound recordings. If ever this fourth fair use factor were to militate against application of the fair use defense, it must do so in this case. It further demonstrates the fallacy of those who argue that audio home recording should be regarded as fair use because it is "noncommercial." The individual who in his home engages in audio home recording may not be seeking a "commercial advantage" in that he is not in the business of selling such recordings. His motivation is nevertheless "commercial" for fair use purposes in the sense that by home recording he thereby avoids the cost of purchasing records or pre-recorded tapes. In this sense, what occurs in the home

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44 Home Taping: A Consumer Survey, Warner Communications Inc., March, 1982, p. 2.

45 Id.

is no less "commerce" than that which occurs in the record shop.[46]

IV

ENFORCEABILITY, PRIVACY AND CONTRIBUTORY LIABILITY

Opposition to the application of the Copyright Act to audio home recording is often based upon two general themes which should now be considered. First, it is argued that a rule of law rendering audio home recording copyright infringement would be entirely unenforceable, since there is no way of policing what goes on in the privacy of the home. The second frequently voiced theme (which somewhat contradicts the first) is that to enforce such a rule of law would be to create an intolerable invasion of the privacy of the home. Standing alone, one must agree that there is merit in both of these concerns. Unquestionably, the fact that copyright infringement actions have not been brought against individuals who engage in audio home recording for their own use attests to both the difficulty of enforcement as against the individual, and to the shield of privacy that might properly

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46 See Wickard v. Filburn, 317 U.S. 111 (1942), which held that since wheat grown for home consumption has "a substantial economic effect" on the amount of wheat sold in interstate commerce, it is thereby subject to interstate commerce regulation.

be invoked if this were attempted.[47]

There is a response that meets both of these concerns, and which nevertheless adequately protects the copyright interest. Before suggesting that response, it should first be made clear that the problems of enforceability and privacy do not convert that which would otherwise constitute copyright infringement into fair use. If given conduct is unlawful, as for example the unlawful possession of firearms,[48] the fact that such conduct occurs in the privacy of the home may make it very difficult to enforce the law, and in some instances enforcement might require unacceptable invasions of privacy, but this does not in itself make possession of firearms in the home lawful. Likewise, enforceability and privacy problems may deter civil copyright infringement actions for audio home recording, but that in itself does not make such recording fair use.[49]

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47 See Stanley v. Georgia, 394 U.S. 557 (1967).

48 The example constitutes criminal conduct. Despite some common misconceptions, home recording for home use, whether audio or video, gives rise to only civil, not criminal liability. See 17 U.S.C. § 506(a). The point made in the text is equally applicable, however, whether the law in question creates civil or criminal liability.

49 This assumption that property rights of others somehow cease to operate within the confines of one's home is plainly fallacious. Would anyone argue that I may destroy a book borrowed from a library if I do so within the four walls of my house? Does a library lose its property right in the tangible book because it has consented to its being brought

[Footnote continued on following page]

Copyright owners of musical works and of sound recordings may be protected against the wholesale dilution of their property rights fostered by the new technology of home recording without confronting either the enforcement or privacy problems referred to above. This may occur through the approach suggested by the court of appeals in the Betamax case. The court there held that the defendant manufacturers and sellers of videotape recorders and tapes were liable as contributory infringers. This was based upon such defendants' knowledge that the equipment sold would be "used to reproduce copyrighted materials."[50] The Betamax case, of course, involved video rather than audio home recording. But such knowledge by the sellers of intended infringing use of audio equipment is surely no less than it is in the case of sales of video equipment.[51]

[Footnote 49 continued from preceding page]
into my house? Are utility companies without recourse if within my house I turn off the gas and electric meters and proceed to appropriate their property without paying for it?

[50] 659 F.2d at 975.

[51] For analogous holdings in the case of audio equipment see Stewart v. Southern Music Distributing Co., Inc., 503 F. Supp. 258 (M.D. Fla. 1980) (owner-lessor of juke boxes said to be liable as contributory infringer where lessee used the juke box for infringing performances); Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir. 1972) (recording machines and blank cassettes held subject to seizure as "means for making . . . infringing copies").

The Betamax court of appeals remanded to the district court for determination of the appropriate remedy. In doing so, the court of appeals suggested that instead of the imposition of an injunction, a court could "when a great public injury would result from an injunction . . . award damages or a continuing royalty."[52] In a broad hint, the court of appeals added: "This may very well be an acceptable resolution in this context."[53] This pregnant statement of direction from the appellate court strongly suggests that in its view a proper resolution of the dispute will be found not in an injunction banning use of the machines but rather in a court-imposed compulsory license royalty as against the machine and tape manufacturers and sellers.

Note that this approach solves both the enforceability and privacy problems adverted to above. There is no longer a problem of enforcement as against the individual who engages in home recording since the payment of the court-imposed royalty by the manufacturer relieves from infringement liability the subsequent recording activities of those who purchase equipment from such manufacturer. Application of the

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52 659 F.2d 976.

53 Id.

royalty decree as against the manufacturer by reason of its sales presents no problems of enforceability. Similarly, the privacy problem is resolved since there is no longer a need to determine whether the home user is recording in the privacy of his home since such recording is, in any event, validated by the manufacturer's royalty payment. This is what the Betamax court of appeals had in mind when it stated: "It seems more appropriate to address the privacy concerns raised by the District Court in fashioning the appropriate relief."[54]

There remains the problem of apportioning the royalty funds collected among the claimant copyright owners. This presents a complex, but by no means insuperable problem. Indeed, it is just such a royalty mechanism, imposed by statute rather than by a court, which has been adopted in the current Copyright Act in connection with cable television.[55] All of this could be done in the audio home recording context by judicial decree. It is obvious, however, that it would be far more efficient if such a procedure were adopted by legislation.

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54 659 F.2d at 972.

55 Under Section 111(d) of the Copyright Act a compulsory license is imposed upon operators of cable television systems whereby they are required to pay a percentage of their gross receipts into a fund which is disbursed by the Copyright Royalty Tribunal among copyright claimants. The procedure for determining the identity and participation of such claimants has worked reasonably well.

The proposed Mathias Amendment No. 1333 and Edwards Bill H.R. 5705 would accomplish exactly such a salutary objective.

CONCLUSION

Audio home recording is not the subject of any special exemption. Neither does it constitute fair use under the Copyright Act of 1976. Problems of enforceability and of consumer privacy will be avoided by a recognition that the manufacturers of recorders and tapes are contributory infringers, and should be subject to a royalty payment. If the copyright system is to function effectively in concert with the new recording technology such a royalty system is essential.