

464 U.S. 417
104 S.Ct. 774
78 L.Ed.2d 574

SONY CORPORATION OF AMERICA, et al., Petitioners

v.

UNIVERSAL CITY STUDIOS, INC., etc., et al.

No. 81-1687.

Argued Jan. 18, 1983.

Reargued Oct. 3, 1983.

Decided Jan. 17, 1984.

[...]

[419] Justice STEVENS delivered the opinion of the Court.

Petitioners manufacture and sell home video tape recorders. Respondents own the copyrights on some of the tele [420] vision programs that are broadcast on the public airwaves. Some members of the general public use video tape recorders sold by petitioners to record some of these broadcasts, as well as a large number of other broadcasts. The question presented is whether the sale of petitioners' copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act.

Respondents commenced this copyright infringement action against petitioners in the United States District Court for the Central District of California in 1976. Respondents alleged that some individuals had used Betamax video tape recorders (VTR's) to record some of respondents' copyrighted works which had been exhibited on commercially sponsored television and contended that these individuals had thereby infringed respondents' copyrights. Respondents further maintained that petitioners were liable for the copyright infringement allegedly committed by Betamax consumers because of petitioners' marketing of the Betamax VTR's.^[1] Respondents sought no relief against any Betamax consumer. Instead, they sought money damages and an equitable accounting of profits from petitioners, as well as an injunction against the manufacture and marketing of Betamax VTR's.

After a lengthy trial, the District Court denied respondents all the relief they sought and entered judgment for petitioners. 480 F.Supp. 429 (1979). The United States Court of Appeals for the Ninth Circuit reversed the District Court's judgment on respondent's copyright claim, holding petitioners liable for contributory infringement and ordering the District Court to fashion appropriate relief. 659 F.2d 963 [421] (1981). We granted certiorari, 457 U.S. 1116, [...](1982); since we had not completed our study of the case last Term, we ordered reargument,

463 U.S. 1226

[...](1983). We now reverse.

An explanation of our rejection of respondents' unprecedented attempt to impose copyright liability upon the distributors of copying equipment requires a quite detailed recitation of the findings of the District Court. In summary, those findings reveal that the average member of the public uses a VTR principally to record a program he cannot view as it is being televised and then to watch it once at a later time. This practice, known as "time-shifting," enlarges the television viewing audience. For that reason, a significant amount of television programming may be used in this manner without objection from the owners of the copyrights on the programs. For the same reason, even the two respondents in this case, who do assert objections to time-shifting in this litigation, were unable to prove that the practice has impaired the commercial value of their copyrights or has created any likelihood of future harm. Given these findings, there is no basis in the Copyright Act upon which respondents can hold petitioners liable for distributing VTR's to the general public. The Court of Appeals' holding that respondents are entitled to enjoin the

distribution of VTR's, to collect royalties on the sale of such equipment, or to obtain other relief, if affirmed, would enlarge the scope of respondents' statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection. Such an expansion of the copyright privilege is beyond the limits of the grants authorized by Congress.

I

The two respondents in this action, Universal Studios, Inc. and Walt Disney Productions, produce and hold the copyrights on a substantial number of motion pictures and other audiovisual works. In the current marketplace, they can exploit their rights in these [422]

works in a number of ways:

by authorizing theatrical exhibitions, by licensing limited showings on cable and network television, by selling syndication rights for repeated airings on local television stations, and by marketing programs on prerecorded videotapes or videodiscs. Some works are suitable for exploitation through all of these avenues, while the market for other works is more limited.

Petitioner Sony manufactures millions of Betamax video tape recorders and markets these devices through numerous retail establishments, some of which are also petitioners in this action.^[2] Sony's Betamax VTR is a mechanism consisting of three basic components: (1) a tuner, which receives electromagnetic signals transmitted over the television band of the public airwaves and separates them into audio and visual signals; (2) a recorder, which records such signals on a magnetic tape; and (3) an adapter, which converts the audio and visual signals on the tape into a composite signal that can be received by a television set.

Several capabilities of the machine are noteworthy. The separate tuner in the Betamax enables it to record a broadcast off one station while the television set is tuned to another channel, permitting the viewer, for example, to watch two simultaneous news broadcasts by watching one "live" and recording the other for later viewing. Tapes may be reused, and programs that have been recorded may be erased either before or after viewing. A timer in the Betamax can be used to activate and deactivate the equipment at predetermined [423] times, enabling an intended viewer to record programs that are transmitted when he or she is not at home. Thus a person may watch a program at home in the evening even though it was broadcast while the viewer was at work during the afternoon. The Betamax is also equipped with a pause button and a fast-forward control. The pause button, when depressed, deactivates the recorder until it is released, thus enabling a viewer to omit a commercial advertisement from the recording, provided, of course, that the viewer is present when the program is recorded. The fast forward control enables the viewer of a previously recorded program to run the tape rapidly when a segment he or she does not desire to see is being played back on the television screen.

The respondents and Sony both conducted surveys of the way the Betamax machine was used by several hundred owners during a sample period in 1978. Although there were some differences in the surveys, they both showed that the primary use of the machine for most owners was "time-shifting,"—the practice of recording a program to view it once at a later time, and thereafter erasing it. Time-shifting enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a broadcast that they desire to watch. Both surveys also showed, however, that a substantial number of interviewees had accumulated libraries of tapes.^[3] Sony's survey indicated [424] that over 80% of the interviewees watched at least as much regular television as they had before owning a Betamax.^[4] Respondents offered no evidence of decreased television viewing by Betamax owners.^[5]

Sony introduced considerable evidence describing television programs that could be copied without objection from any copyright holder, with special emphasis on sports, religious, and educational programming. For example, their survey indicated that 7.3% of all Betamax use is to record sports events, and representatives of professional baseball,

football, basketball, and hockey testified that they had no objection to the recording of their televised events for home use.[6]

[425] Respondents offered opinion evidence concerning the future impact of the unrestricted sale of VTR's on the commercial value of their copyrights. The District Court found, however, that they had failed to prove any likelihood of future harm from the use of VTR's for time-shifting. [...]

II

Article I, Sec. 8 of the Constitution provides [...]

"The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

[429] The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

"The copyright law, like the patent statute, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 [...] Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, 'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius." *United States v. Paramount Pictures*, 334 U.S. 131, 158,

(1948).

[...]

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 interests of authors and inventors in the control and exploitation of their writings 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.[10]

[430] From its beginning, the law of copyright has developed in response to significant changes in technology.[11] 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.[12] Repeatedly, as new developments have [431] occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. Thus, long before the enactment of the Copyright Act of 1909, 35 Stat. 1075, it was settled that the protection given to copyrights is wholly statutory. *Wheaton v. Peters*, [...] (8 Peters) 591, 661-662, [...] (1834). The remedies for infringement "are only those prescribed by Congress." *Thompson v. Hubbard*, 131 U.S. 123, 151, [...] (1889).

The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. See, e.g., *Teleprompter Corp. v. CBS*, 415 U.S. 394, [...] (1974); *Fortnightly Corp. v. United Artists*, 392 U.S. 390, [...] (1968); *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, [...] (1908); *Williams and Wilkins v. United States*, [...] 487 F.2d 1345, 203 Ct.Cl. 74 (1973), affirmed by an equally divided court, 420 U.S. 376, [...] (1975). Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new

technology.

In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests. In doing so, we are guided by Justice Stewart's exposition of the correct approach to ambiguities in the law of copyright:

"The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be [432] encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. 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. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.' *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 [...] See *Kendall v. Winsor*, 21 How. 322, 327-328 [...] *Grant v. Raymond*, 6 Pet. 218, 241-242 [...] When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156,

(1975)

[...](footnotes omitted).

Copyright protection "subsists . . . in original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a).

(1982 ed.)

This protection has never accorded the copyright owner complete control over all possible uses of his work.^[13] Rather, the Copyright Act grants the [433] copyright holder "exclusive" rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies. [...] § 106.^[14] All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a "fair use;" the copyright owner does not possess the exclusive right to such a use. Compare [...] § 106 with *id.*, § 107.

"Anyone who violates any of the exclusive rights of the copyright owner," that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, "is an infringer of the copyright." [...] § 501(a). Conversely, anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute or who makes a fair use of the work is not an infringer of the copyright with respect to such use.

The Copyright Act provides the owner of a copyright with a potent arsenal of remedies against an infringer of his work, including an injunction to restrain the infringer from violat [434] ing his rights, the impoundment and destruction of all reproductions of his work made in violation of his rights, a recovery of his actual damages and any additional profits realized by the infringer or a recovery of statutory damages, and attorneys fees. [...] §§ 502-505.^[15]

The two respondents in this case do not seek relief against the Betamax users who have allegedly infringed their copyrights. Moreover, this is not a class action on behalf of all copyright owners who license their works for television broadcast, and respondents have no right to invoke whatever rights other copyright holders may have to bring infringement actions based on Betamax copying of their works.^[16] As was made clear by their own evidence, the copying of the respondents' programs represents a small portion of the total use of VTR's. It is, however, the taping of respondents own copyrighted programs that provides them with standing to charge Sony with contributory

infringement. To prevail, they have the burden of proving that users of the Betamax have infringed their copyrights and that Sony should be held responsible for that infringement.

III

The Copyright Act does not expressly render anyone liable for infringement committed by another. In contrast, the [435] Patent Act expressly brands anyone who "actively induces infringement of a patent" as an infringer, 35 U.S.C. § 271(b), and further imposes liability on certain individuals labeled "contributory" infringers, [...]§ 271(c). The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity.[17] For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.

Such circumstances were plainly present in *Kalem Co. v. Harper Brothers*, 222 U.S. 55, [...] (1911), the copyright decision of this Court on which respondents place their principal reliance. In *Kalem*, the Court held that the producer of an unauthorized film dramatization of the copyrighted book *Ben Hur* was liable for his sale of the motion picture to jobbers, who in turn arranged for the commercial exhibition of the film. Justice Holmes, writing for the Court, explained:

"The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act. It is liable on principles recognized in every part of the law."

Id., at 62-63.

[...]

The use for which the item sold in *Kalem* had been "especially" made was, of course, to display the performance that had already been recorded upon it. The producer had personally appropriated the copyright owner's protected work and, as the owner of the tangible medium of expression upon which the protected work was recorded, authorized that use by his sale of the film to jobbers. But that use of the film was not his to authorize: the copyright owner possessed the exclusive right to authorize public performances of his work. Further, the producer personally advertised the unauthorized public performances, dispelling any possible doubt as to the use of the film which he had authorized.

Respondents argue that *Kalem* stands for the proposition that supplying the "means" to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement. This argument rests on a gross generalization that cannot withstand scrutiny. The producer in *Kalem* did not merely provide the "means" to accomplish an infringing activity; the producer supplied the work itself, albeit in a new medium of expression.

Sony

[...]in the instant case do not supply Betamax consumers with respondents' works; respondents do.

Sony supplies

[...]a piece of equipment that is generally capable of copying the entire range of programs that may be televised: those that are uncopyrighted, those that are copyrighted but may be copied without objection from the copyright holder, and those that the copyright holder would prefer not to have copied. The Betamax can be used to [437] make authorized or unauthorized uses of copyrighted works, but the range of its potential use is much broader than the particular infringing use of the film *Ben Hur* involved in *Kalem*. *Kalem* does not support respondents' novel theory of liability.

Justice Holmes stated that the producer had "contributed" to the infringement of the copyright, and the label

"contributory infringement" has been applied in a number of lower court copyright cases involving an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred. In such cases, as in other situations in which the imposition of vicarious liability is manifestly just, the "contributory" infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner.^[18] This case, however, plainly does not fall ^[438] in that category. The only contact between Sony and the users of the Betamax that is disclosed by this record occurred at the moment of sale. The District Court expressly found that "no employee of Sony, Sonam or DDBI had either direct involvement with the allegedly infringing activity or direct contact with purchasers of Betamax who recorded copyrighted works off-the-air." 480 F.Supp., at 460. And it further found that "there was no evidence that any of the copies made by Griffiths or the other individual witnesses in this suit were influenced or encouraged by [Sony's] advertisements." *Ibid.*

[439] If vicarious liability is to be imposed on

Sony

[...]in this case, it must rest on the fact that they have sold equipment with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory. The closest analogy is provided by the patent law cases to which it is appropriate to refer because of the historic kinship between patent law and copyright law.^[19]

[440] In the Patent

Act

[...]both the concept of infringement and the concept of contributory infringement are expressly defined by statute.^[20] The prohibition against contributory infringement is confined to the knowing sale of a component especially made for use in connection with a particular patent. There is no suggestion in the statute that one patentee may object to the sale of a product that might be used in connection with other patents. Moreover, the Act expressly provides that the sale of a "staple article or commodity of commerce suitable for substantial noninfringing use" is not contributory infringement.

35 U. S. C. § 271(c)

When a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe a patent, the public interest in access to that article of commerce is necessarily implicated. A ^[441] finding of contributory infringement does not, of course, remove the article from the market altogether; it does, however, give the patentee effective control over the sale of that item. Indeed, a finding of contributory infringement is normally the functional equivalent of holding that the disputed article is within the monopoly granted to the patentee.^[21]

For that reason, in contributory infringement cases arising under the patent laws the Court has always recognized the critical importance of not allowing the patentee to extend his monopoly beyond the limits of his specific grant. These cases deny the patentee any right to control the distribution of unpatented articles unless they are "unsuited for any commercial noninfringing use." *Dawson Chemical Co. v. Rohm & Hass Co.*, 448 U.S. 176, 198, [...](1980). Unless a commodity "has no use except through practice of the patented method,"

Id at 199

[...]the patentee has no right to claim that its distribution constitutes contributory infringement. "To form the basis for contributory infringement the item must almost be uniquely suited as a component of the patented invention." P. Rosenberg, Patent Law Fundamentals § 17.02^[2]

(2d ed. 1982)

[...] "[A] sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce." *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48, [...] (1912), overruled on other grounds, [442] *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517, [...] (1917).

We recognize there are substantial differences between the patent and copyright laws. But in both areas the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

IV

The question is thus whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore *all* the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the district court a significant number of them would be non-infringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home. It does so both (A) because respondents have no right to prevent other copyright holders from authorizing it for their programs, and (B) because the District Court's factual findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use.

[443] A. *Authorized Time Shifting*

Each of the respondents owns a large inventory of valuable copyrights, but in the total spectrum of television programming their combined market share is small. The exact percentage is not specified, but it is well below 10%.^[22] If they were to prevail, the outcome of this litigation would have a significant impact on both the producers and the viewers of the remaining 90% of the programming in the Nation. No doubt, many other producers share respondents' concern about the possible consequences of unrestricted copying. Nevertheless the findings of the District Court make it clear that time-shifting may enlarge the total viewing audience and that many producers are willing to allow private time-shifting to continue, at least for an experimental time period.^[23]

The District Court found:

"Even if it were deemed that home-use recording of copyrighted material constituted infringement, the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording.

[444] "Defendants introduced considerable testimony at trial about the potential for such copying of sports, religious, educational and other programming. This included testimony from representatives of the Offices of the Commissioners of the National Football, Basketball, Baseball and Hockey Leagues and Associations, the Executive Director of National Religious Broadcasters and various educational communications agencies. Plaintiffs attack the weight of the testimony offered and also contend that an injunction is warranted because infringing uses outweigh noninfringing uses."

"Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law." 480 F.Supp., at 468.

Although the District Court made these statements in the context of considering the propriety of injunctive relief, the statements constitute a finding that the evidence concerning "sports, religious, educational, and other programming" was sufficient to establish a significant quantity of broadcasting whose copying is now authorized, and a significant potential for future authorized copying. That finding is amply supported by the record. [...]

[446] If there are millions of owners of VTR's who make copies of televised sports events, religious broadcasts, and educational programs such as *Mister Rogers' Neighborhood*, and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents' works. The respondents do not represent a class composed of all copyright holders. Yet a finding of contributory infringement would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting.

Of course, the fact that other copyright holders may welcome the practice of time-shifting does not mean that respondents should be deemed to have granted a license to copy their programs. Third party conduct would be wholly irrelevant in an action for direct infringement of respondents' copyrights. But in an action for *contributory* infringement against the seller of copying equipment, the copyright holder may not prevail unless the relief that he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome. In this case, the record makes it perfectly clear that there are many important producers of national and local television programs who find nothing objectionable about the enlargement in the size of the television audience that results from the practice of time-shifting for private home use.^[28] The seller of the equipment that expands those producers' audiences cannot be a con [447] tributary infringer if, as is true in this case, it has had no direct involvement with any infringing activity.

B. Unauthorized Time-Shifting

Even unauthorized uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute.

Twentieth Century Music Corp. v. Aiken, 422 U.S.

at 155

[...]154-155, [...]Moreover, the definition of exclusive rights in § 106 of the present Act is prefaced by the words "subject to sections 107 through 118." Those sections describe a variety of uses of copyrighted material that "are not infringements of copyright notwithstanding the provisions of § 106." The most pertinent in this case is § 107, the legislative endorsement of the doctrine of "fair use."^[29]

[448] That section identifies various factors^[30] that enable a Court to apply an "equitable rule of reason" analysis to particular claims of infringement.^[31] Although not conclusive, the first [449] factor requires that "the commercial or nonprofit character of an activity" be weighed in any fair use decision.^[32] If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity. Moreover, when one considers the nature of a televised copyrighted audiovisual work, see 17 U.S.C. § 107(2),

(1982 ed).

and that timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact [450] that the entire work is reproduced, see [...]§ 107(3), does not have its ordinary effect of militating against a finding of fair use.[33]

This is not, however, the end of the inquiry because Congress has also directed us to consider "the effect of the use upon the potential market for or value of the copyrighted work." [...]§ 107(4). The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would [451] merely inhibit access to ideas without any countervailing benefit.[34]

Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

In this case, respondents failed to carry their burden with regard to home time-shifting. The District Court described respondents' evidence as follows:

"Plaintiffs' experts admitted at several points in the trial that the time-shifting without librarying would result in 'not a great deal of harm.' Plaintiffs' greatest concern about time-shifting is with 'a point of important philosophy that transcends even commercial judgment.' They fear that with any Betamax usage, 'invisible boundaries' are passed: 'the copyright owner has lost control over his program.'" 480 F.Supp., at 467.

[452] Later in its opinion, the District Court observed:

"Most of plaintiffs' predictions of harm hinge on speculation about audience viewing patterns and ratings, a measurement system which Sidney Sheinberg, MCA's president, calls a 'black art' because of the significant level of imprecision involved in the calculations." *Id.*, at 469.[35]

There was no need for the District Court to say much about past harm. "Plaintiffs have admitted that no actual harm to their copyrights has occurred to date." *Id.*, at 451.

On the question of potential future harm from time-shifting, the District Court offered a more detailed analysis of the evidence. It rejected respondents' "fear that persons 'watching' the original telecast of a program will not be measured in the live audience and the ratings and revenues will decrease," by observing that current measurement technology allows the Betamax audience to be reflected. *Id.*, at 466.[36] It rejected respondents' prediction "that live televi [453] sion or movie audiences will decrease as more people watch Betamax tapes as an alternative," with the observation that "[t]here is no factual basis for [the underlying] assumption." *Ibid.*[37] It rejected respondents' "fear that time-shifting will reduce audiences for telecast reruns," and concluded instead that "given current market practices, this should aid plaintiffs rather than harm them." *Ibid.*[38] And it declared that respondents' suggestion "that theater or film rental exhibition of a program will suffer because of time-shift recording of that program" "lacks merit."

Id., at 467.

[...]

The District Court's conclusions are buttressed by the fact that to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits. [...]in *Community Television of Southern California v. Gottfried*,

459 U.S. 498, 508,

[...]n. 12, [...] (1983), we acknowledged the public interest in making television broadcasting more available. Concededly, that interest is not unlimited. But it supports an interpretation of the concept of "fair use" that requires the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law.

When these factors are all weighed in the "equitable rule of reason" balance, we must conclude that this record amply [455] supports the District Court's conclusion that home time-shifting is fair use. In light of the findings of the District Court regarding the state of the empirical data, it is clear that the Court of Appeals erred in holding that the statute as presently written bars such conduct.[40]

[456] In summary, the record and findings of the District Court lead us to two conclusions. First, Sony demonstrated a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial noninfringing uses. Sony's sale of such equipment to the general public does not constitute contributory infringement of respondent's copyrights.

V

"The direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress." *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530, [...] (1972).

One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.

It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed.

It is so ordered.

[457] Justice BLACKMUN, with whom Justice MARSHALL, Justice POWELL, and Justice REHNQUIST join, dissenting.

[...]

IV

Fair Use

The doctrine of fair use has been called, with some justification, "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (CA2 1939); see *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (CA5 1980); *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (CA2 1977), cert. denied, 434 U.S. 1013, [...] (1978). Although courts have constructed lists of factors to be considered in determining whether a particular use is fair,^[27] no fixed criteria have emerged by which that [476] determination can be made. This Court thus far has provided no guidance; although fair use issues have come here twice, on each occasion the Court was equally divided and no opinion was forthcoming. *Williams & Wilkins Co. v. United States*, 203 Ct.Cl. 74, 487 F.2d 1345 (1973), aff'd, 420 U.S. 376, [...] (1975); *Benny v. Loew's, Inc.*, 239 F.2d 532 (CA9 1956), aff'd *sub nom. CBS, Inc. v. Loew's Inc.*, 356 U.S. 43, [...] (1958).

Nor did Congress provide definitive rules when it codified the fair use doctrine in the 1976 Act; it simply incorporated a list of factors "to be considered": the "purpose and character of the use," the "nature of the copyrighted work," the "amount and substantiality of the portion used," and, perhaps the most important, the "effect of the use upon the *potential* market for or value of the copyrighted work" (emphasis supplied). § 107. No particular weight, however, was assigned to any of these, and the list was not intended to be exclusive. The House and Senate Reports explain that § 107 does no more than give "statutory recognition" to the fair use doctrine; it was intended "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." 1976 House Report 66, [...] See 1975 Senate Report 62; S.Rep. No. 93-983, p. 116 (1974); H.R.Rep. No. 83, 90th Cong., 1st Sess., 32 (1967); H.R.Rep. No. 2237, 89th Cong., 2d Sess., 61 (1966).

[477] A

Despite this absence of clear standards, the fair use doctrine plays a crucial role in the law of copyright. The purpose of copyright protection, in the words of the Constitution, is to "promote the Progress of Science and useful Arts." Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create, and that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219, [...] (1954). The monopoly created by copyright thus rewards the individual author in order to benefit the public. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. [...] 156, [...] *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-128, [...] (1932); see H.R.Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

There are situations, nevertheless, in which strict enforcement of this monopoly would inhibit the very "Progress of Science and useful Arts" that copyright is intended to promote. An obvious example is the researcher or scholar whose own work depends on the ability to refer to and to quote the work of prior scholars. Obviously, no author could create a new work if he were first required to repeat the research of every author who had gone before him.^[28] The scholar, like the ordinary user, of course could be left to bargain with each copyright owner for permission to quote from or refer to prior works. But there is a crucial difference between the scholar and the ordinary user. When the ordinary user decides that the owner's price is too high, and forgoes use of the work, only the individual is the loser. When the scholar forgoes the use of a prior work, not only does his own [478] work suffer, but the public is deprived of his contribution to knowledge. The scholar's work, in other words, produces external benefits from which everyone profits. In such a case, the fair use doctrine acts as a form of subsidy—albeit at the first author's expense—to permit the second author to make limited use of the first author's work for the public good. See Latman Fair Use Study 31; Gordon, Fair Use as Market Failure: A Structural Analysis of the *Betamax* Case and its Predecessors, 82 Colum.L.Rev. 1600, 1630 (1982).

A similar subsidy may be appropriate in a range of areas other than pure scholarship. The situations in which fair use is most commonly recognized are listed in § 107 itself; fair use may be found when a work is used "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research." The House and Senate Reports expand on

this list somewhat,^[29] and other examples may be found in the case law.^[30] Each of these uses, however, reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work.^[31] The fair use doctrine, in other words, permits works [479] to be used for "socially laudable purposes." See Copyright Office, Briefing Papers on Current Issues, reprinted in 1975 House Hearings 2051, 2055. I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use.^[32]

I do not suggest, of course, that every productive use is a fair use. A finding of fair use still must depend on the facts of the individual case, and on whether, under the circumstances, it is reasonable to expect the user to bargain with the copyright owner for use of the work. The fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others.^[33] The inquiry is [480] necessarily a flexible one, and the endless variety of situations that may arise precludes the formulation of exact rules. But when a user reproduces an entire work and uses it for its original purpose, with no added benefit to the public, the doctrine of fair use usually does not apply. There is then no need whatsoever to provide the ordinary user with a fair use subsidy at the author's expense.

The making of a videotape recording for home viewing is an ordinary rather than a productive use of the Studios' copyrighted works. The District Court found that "Betamax owners use the copy for the same purpose as the original. They add nothing of their own." 480 F.Supp., at 453. Although applying the fair use doctrine to home VTR recording, as Sony argues, may increase public access to material broadcast free over the public airwaves, I think Sony's argument misconceives the nature of copyright. Copyright gives the author a right to limit or even to cut off access to his work. *Fox Film Corp. v. Doyal*, 286 U.S. [...]127, [...]A VTR recording creates no public benefit sufficient to justify limiting this right. Nor is this right extinguished by the copyright owner's choice to make the work available over the airwaves. Section 106 of the 1976 Act grants the copyright owner the exclusive right to control the performance and the reproduction of his work, and the fact that he has licensed a single television performance is really irrelevant to the existence of his right to control its reproduction. Although a television broadcast may be free to the viewer, this fact is equally irrelevant; a book borrowed from the public library may not be copied any more freely than a book that is purchased.

It may be tempting, as, in my view, the Court today is tempted, to stretch the doctrine of fair use so as to permit unfettered use of this new technology in order to increase ac [481] cess to television programming. But such an extension risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create.^[34] Even in the context of highly productive educational uses, Congress has avoided this temptation; in passing the 1976 Act, Congress made it clear that off-the-air videotaping was to be permitted only in very limited situations. See 1976 House Report 71; 1975 Senate Report 64. And, the Senate report adds, "[t]he committee does not intend to suggest . . . that off-the-air recording for convenience would under any circumstances, be considered 'fair use.' " *Id.*, at 66. I cannot disregard these admonitions.

B

I recognize, nevertheless, that there are situations where permitting even an unproductive use would have no effect on the author's incentive to create, that is, where the use would not affect the value of, or the market for, the author's work. Photocopying an old newspaper clipping to send to a friend [482] may be an example; pinning a quotation on one's bulletin board may be another. In each of these cases, the effect on the author is truly *de minimis*. Thus, even though these uses provide no benefit to the public at large, no purpose is served by preserving the author's monopoly, and the use may be regarded as fair.

Courts should move with caution, however, in depriving authors of protection from unproductive "ordinary" uses. As has been noted above, even in the case of a productive use, § 107(4) requires consideration of "the effect of the use upon the *potential* market for or value of the copyrighted work" (emphasis added). "[A] particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come." Register's Supplementary Report 14. Although such a use may seem harmless when viewed in isolation, "[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." 1975 Senate Report 65.

I therefore conclude that, at least when the proposed use is an unproductive one, a copyright owner need prove only a *potential* for harm to the market for or the value of the copyrighted work. See 3 M. Nimmer, Copyright § 13.05[E][4][c], p. 13-84

(1983)

[...]Proof of actual harm, or even probable harm, may be impossible in an area where the effect of a new technology is speculative, and requiring such proof would present the "real danger . . . of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances." Register's Supplementary Report 14. Infringement thus would be found if the copyright owner demonstrates a reasonable possibility that harm will result from the proposed use. When the use is one that creates no benefit to the public at large, copyright protection should not be denied on the basis that a new technology that may result in harm has not yet done so.

[483] The Studios have identified a number of ways in which VTR recording could damage their copyrights. VTR recording could reduce their ability to market their works in movie theaters and through the rental or sale of pre-recorded videotapes or videodiscs; it also could reduce their rerun audience, and consequently the license fees available to them for repeated showings. Moreover, advertisers may be willing to pay for only "live" viewing audiences, if they believe VTR viewers will delete commercials or if rating services are unable to measure VTR use; if this is the case, VTR recording could reduce the license fees the Studios are able to charge even for first-run showings. Library-building may raise the potential for each of the types of harm identified by the Studios, and time-shifting may raise the potential for substantial harm as well.^[35]

Although the District Court found no likelihood of harm from VTR use, 480 F.Supp., at 468, I conclude that it applied an incorrect substantive standard and misallocated the [484] burden of proof. The District Court reasoned that the Studios had failed to prove that library-building would occur "to any significant extent," *id.*, at 467; that the Studios' prerecorded videodiscs could compete with VTR recordings and were "arguably . . . more desirable," *ibid.*; that it was "not clear that movie audiences will decrease," *id.*, at 468; and that the practice of deleting commercials "may be too tedious" for many viewers, *ibid.* To the extent any decrease in advertising revenues would occur, the court concluded that the Studios had "marketing alternatives at hand to recoup some of that predicted loss." *Id.*, at 452. Because the Studios' prediction of harm was "based on so many assumptions and on a system of marketing which is rapidly changing," the court was "hesitant to identify 'probable effects' of home-use copying." *Ibid.*

The District Court's reluctance to engage in prediction in this area is understandable, but, in my view, the court was mistaken in concluding that the Studios should bear the risk created by this uncertainty. The Studios have demonstrated a potential for harm, which has not been, and could not be, refuted at this early stage of technological development.

The District Court's analysis of harm, moreover, failed to consider the effect of VTR recording on "the *potential* market for or the value of the copyrighted work," as required by § 107(4).^[36] The requirement that a putatively infringing use [485] of a copyrighted work, to be "fair," must not impair a "potential" market for the work has two implications. First, an infringer cannot prevail merely by demonstrating that the copyright holder suffered no net harm

from the infringer's action. Indeed, even a showing that the infringement has resulted in a net benefit to the copyright holder will not suffice. Rather, the infringer must demonstrate that he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work. Second, the fact that a given market for a copyrighted work would not be available to the copyright holder were it not for the infringer's activities does not permit the infringer to exploit that market without compensating the copyright holder. See *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57 (CA2 1980).

In this case, the Studios and their *amici* demonstrate that the advent of the VTR technology created a potential market for their copyrighted programs. That market consists of those persons who find it impossible or inconvenient to watch the programs at the time they are broadcast, and who wish to watch them at other times. These persons are willing to pay for the privilege of watching copyrighted work at their convenience, as is evidenced by the fact that they are willing to pay for VTRs and tapes; undoubtedly, most also would be willing to pay some kind of royalty to copyright holders. The Studios correctly argue that they have been deprived of the ability to exploit this sizable market.

It is thus apparent from the record and from the findings of the District Court that time-shifting does have a substantial [486] adverse effect upon the "potential market for" the Studios' copyrighted works. Accordingly, even under the formulation of the fair use doctrine advanced by Sony, time-shifting cannot be deemed a fair use.

V

Contributory Infringement

From the Studios' perspective, the consequences of home VTR recording are the same as if a business had taped the Studios' works off the air, duplicated the tapes, and sold or rented them to members of the public for home viewing. The distinction is that home VTR users do not record for commercial advantage; the commercial benefit accrues to the manufacturer and distributors of the Betamax. I thus must proceed to discuss whether the manufacturer and distributors can be held contributorily liable if the product they sell is used to infringe.

It is well established that liability for copyright infringement can be imposed on persons other than those who actually carry out the infringing activity. *Kalem Co. v. Harper Brothers*, 222 U.S. 55, 62-63, 32 S.Ct. 20, 21-22, 56 L.Ed. 92 (1911); 3 M. Nimmer, Copyright § 12.04[A]

(1983)

[...]see *Twentieth Century Music Corp. v. Aiken*, 422 U.S.

at

[...]160, n. 11, [...] *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198, [...] (1931). Although the liability provision of the 1976 Act provides simply that "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright," 17 U.S.C. § 501(a),

(1982 ed.)

the House and Senate Reports demonstrate that Congress intended to retain judicial doctrines of contributory infringement. 1975 Senate Report 57; 1976 House Report 61.[37]

[487] The doctrine of contributory copyright infringement, however, is not well-defined. One of the few attempts at definition appears in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (CA2 1971). In that case the Second Circuit stated that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Id.*, at 1162 (footnote omitted). While I have no quarrel with this general statement, it does not easily resolve the present case; the District Court and the Court of Appeals, both purporting to apply it, reached diametrically opposite results.

A.

In absolving Sony from liability, the District Court reasoned that Sony had no direct involvement with individual Betamax users, did not participate in any off-the-air copying, and did not know that such copying was an infringement of the Studios' copyright. 480 F.Supp., at 460. I agree with the *Gershwin* court that contributory liability may be imposed even when the defendant has no formal control over the infringer. The defendant in *Gershwin* was a concert promoter operating through local concert associations that it sponsored; it had no formal control over the infringing performers themselves. 443 F.2d, [488] at 1162-1163. See also *Twentieth Century Music Corp. v. Aiken*, 422 U.S., at 160, n. 11, 95 S.Ct., at 2046, n. 11. Moreover, a finding of contributory infringement has never depended on actual knowledge of particular instances of infringement; it is sufficient that the defendant have reason to know that infringement is taking place. 443 F.2d, at 1162; see *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F.Supp. 399 (SDNY 1966).[38] In the so-called "dance hall" cases, in which questions of contributory infringement arise with some frequency, proprietors of entertainment establishments routinely are held liable for unauthorized performances on their premises, even when they have no knowledge that copyrighted works are being performed. In effect, the proprietors in those cases are charged with constructive knowledge of the performances.[39]

[489] Nor is it necessary that the defendant be aware that the infringing activity violates the copyright laws. Section 504(c)(2) of the 1976 Act provides for a reduction in statutory damages when an infringer proves he "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," but the statute establishes no general exemption for those who believe their infringing activities are legal. Moreover, such an exemption would be meaningless in a case such as this, in which prospective relief is sought; once a court has established that the copying at issue is infringement, the defendants are necessarily aware of that fact for the future. It is undisputed in this case that Sony had reason to know the Betamax would be used by some owners to tape copyrighted works off the air. See 480 F.Supp., at 459-460.

The District Court also concluded that Sony had not caused, induced, or contributed materially to any infringing activities of Betamax owners.

Id.

[...]at 460. In a case of this kind, however, causation can be shown indirectly; it does not depend on evidence that particular Betamax owners relied on particular advertisements. In an analogous case decided just two Terms ago, this Court approved a lower court's conclusion that liability for contributory trademark infringement could be imposed on a manufacturer who "suggested, even by implication" that a retailer use the manufacturer's goods to infringe the trademark of another. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 851, [...] (1982); see *id.*, at 860,

(Opinion Concurring in result)

[...]I think this standard is equally appropriate in the copyright context.

The District Court found that Sony has advertised the Betamax as suitable for off-the-air recording of "favorite shows," "novels for television," and "classic movies," 480 F.Supp., at 436, with no visible warning that such recording [490] could constitute copyright infringement. It is only with the aid of the Betamax or some other VTR, that it is possible today for home television viewers to infringe copyright by recording off-the-air. Off-the-air recording is not only a foreseeable use for the Betamax, but indeed is its intended use. Under the circumstances, I agree with the Court of Appeals that if off-the-air recording is an infringement of copyright, Sony has induced and materially contributed to the infringing conduct of Betamax owners.[40]

B

Sony argues that the manufacturer or seller of a product used to infringe is absolved from liability whenever the product can be put to any substantial noninfringing use. Brief for Petitioners 41-42. The District Court so held,

borrowing the "staple article of commerce" doctrine governing liability for contributory infringement of patents. See 35 U.S.C. § 271.^[41] This Court today is much less positive. See *ante*, [491] at 440-442. I do not agree that this technical judge-made doctrine of patent law, based in part on considerations irrelevant to the field of copyright, see generally *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187-199, [...] (1980), should be imported wholesale into copyright law. Despite their common constitutional source, see U.S. Const., Art. I, § 8, cl. 8, patent and copyright protections have not developed in a parallel fashion, and this Court in copyright cases in the past has borrowed patent concepts only sparingly. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 345-346, [...] (1908).

I recognize, however, that many of the concerns underlying the "staple article of commerce" doctrine are present in copyright law as well. As the District Court noted, if liability for contributory infringement were imposed on the manufacturer or seller of every product used to infringe—a typewriter, a camera, a photocopying machine—the "wheels of commerce" would be blocked. 480 F.Supp., at 461; see also *Kalem Co. v. Harper Brothers*, 222 U.S., at 62, [...]

I therefore conclude that if a *significant* portion of the product's use is *noninfringing*, the manufacturers and sellers cannot be held contributorily liable for the product's infringing uses. See *ante*, at 440-441. If virtually all of the product's use, however, is to infringe, contributory liability may be imposed; if no one would buy the product for noninfringing purposes alone, it is clear that the manufacturer is purposely profiting from the infringement, and that liability is appropriately imposed. In such a case, the copyright owner's monopoly would not be extended beyond its proper bounds; the manufacturer of such a product contributes to the infringing activities of others and profits directly thereby, while [492] providing no benefit to the public sufficient to justify the infringement.

The Court of Appeals concluded that Sony should be held liable for contributory infringement, reasoning that "[v]ideotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming," and "[v]irtually all television programming is copyrighted material." 659 F.2d, at 975. While I agree with the first of these propositions,^[42] the second, for me, is problematic. The key question is not the amount of television programming that is copyrighted, but rather the amount of VTR usage that is infringing.^[43] Moreover, the parties and their *amici* have argued vigorously about both the amount of television programming that is covered by copyright and the amount for which permission to copy has been given. The proportion of VTR recording that is infringing is ultimately a question of fact,^[44] and the District Court specifically declined to make [493] findings on the "percentage of legal versus illegal home-use recording." 480 F.Supp., at 468. In light of my view of the law, resolution of this factual question is essential. I therefore would remand the case for further consideration of this by the District Court.

VI

The Court has adopted an approach very different from the one I have outlined. It is my view that the Court's approach alters dramatically the doctrines of fair use and contributory infringement as they have been developed by Congress and the courts. Should Congress choose to respond to the Court's decision, the old doctrines can be resurrected. As it stands, however, the decision today erodes much of the coherence that these doctrines have struggled to achieve.

The Court's disposition of the case turns on its conclusion that time-shifting is a fair use. Because both parties agree that time-shifting is the primary use of VTRs, that conclusion, if correct, would settle the issue of Sony's liability under almost any definition of contributory infringement. The Court concludes that time-shifting is fair use for two reasons. Each is seriously flawed.

The Court's first reason for concluding that time-shifting is fair use is its claim that many copyright holders have no objection to time-shifting, and that "respondents have no right to prevent other copyright holders from authorizing it

for their programs." *Ante*, at 442. The Court explains that a finding of contributory infringement would "inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting." [494] *Ante*, at 446. Such reasoning, however, simply confuses the question of liability with the difficulty of fashioning an appropriate remedy. It may be that an injunction prohibiting the sale of VTRs would harm the interests of copyright holders who have no objection to others making copies of their programs. But such concerns should and would be taken into account in fashioning an appropriate remedy once liability has been found. Remedies may well be available that would not interfere with authorized time-shifting at all. The Court of Appeals mentioned the possibility of a royalty payment that would allow VTR sales and time-shifting to continue unabated, and the parties may be able to devise other narrowly tailored remedies. Sony may be able, for example, to build a VTR that enables broadcasters to scramble the signal of individual programs and "jam" the unauthorized recording of them. Even were an appropriate remedy not available at this time, the Court should not misconstrue copyright holders' rights in a manner that prevents enforcement of them when, through development of better techniques, an appropriate remedy becomes available.[45]

[495] The Court's second stated reason for finding that Sony is not liable for contributory infringement is its conclusion that even unauthorized time-shifting is fair use. *Ante*, at 447.

et seq.

This conclusion is even more troubling. The Court begins by suggesting that the fair use doctrine operates as a general "equitable rule of reason." That interpretation mischaracterizes the doctrine, and simply ignores the language of the statute. Section 107 establishes the fair use doctrine "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research." These are all productive uses. It is true that the legislative history states repeatedly that the doctrine must be applied flexibly on a case-by-case basis, but those references were only in the context of productive uses. Such a limitation on fair use comports with its purpose, which is to facilitate the creation of new works. There is no indication that the fair use doctrine has any application for purely personal consumption on the scale involved in this case,[46] and the Court's application of it here deprives fair use of the major cohesive force that has guided evolution of the doctrine in the past.

[496] Having bypassed the initial hurdle for establishing that a use is fair, the Court then purports to apply to time-shifting the four factors explicitly stated in the statute. The first is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." § 107(1). The Court confidently describes time-shifting as a noncommercial, nonprofit activity. It is clear, however, that personal use of programs that have been copied without permission is not what § 107(1) protects. The intent of the section is to encourage users to engage in activities the primary benefit of which accrues to others. Time-shifting involves no such humanitarian impulse. It is likewise something of a mischaracterization of time-shifting to describe it as noncommercial in the sense that that term is used in the statute. As one commentator has observed, time-shifting is noncommercial in the same sense that stealing jewelry and wearing it—instead of reselling it—is noncommercial.[47] Purely consumptive uses are certainly not what the fair use doctrine was designed to protect, and the awkwardness of applying the statutory language to time-shifting only makes clearer that fair use was designed to protect only uses that are productive.

The next two statutory factors are all but ignored by the Court—though certainly not because they have no applicability. The second factor—"the nature of the copyrighted work"—strongly supports the view that time-shifting is an infringing use. The rationale guiding application of this factor is that certain types of works, typically those involving "more of diligence than of originality or inventiveness," *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F.Supp. 217, 221 (NJ 1977), require less copyright protection than other original works. Thus, for example, informational [497] works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment. Sony's own surveys indicate that entertainment shows account for more than 80 percent of the programs recorded by Betamax owners.[48]

The third statutory factor—"the amount and substantiality of the portion used"—is even more devastating to the Court's interpretation. It is undisputed that virtually all VTR owners record entire works, see 480 F.Supp., at 454, thereby creating an exact substitute for the copyrighted original. Fair use is intended to allow individuals engaged in productive uses to copy small portions of original works that will facilitate their own productive endeavors. Time-shifting bears no resemblance to such activity, and the complete duplication that it involves might alone be sufficient to preclude a finding of fair use. It is little wonder that the Court has chosen to ignore this statutory factor.^[49]

The fourth factor requires an evaluation of "the effect of the use upon the potential market for or value of the copyrighted work." This is the factor upon which the Court focuses, but once again, the Court has misread the statute. As mentioned above, the statute requires a court to consider the effect of the use on the *potential* market for the copyrighted work. The Court has struggled mightily to show that VTR use has not *reduced* the value of the Studios' copyrighted works in their *present* markets. Even if true, that showing only begins the proper inquiry. The development ^[498] of the VTR has created a new market for the works produced by the Studios. That market consists of those persons who desire to view television programs at times other than when they are broadcast, and who therefore purchase VTR recorders to enable them to time-shift.^[50] Because time-shifting of the Studios' copyrighted works involves the copying of them, however, the Studios are entitled to share in the benefits of that new market. Those benefits currently go to Sony through Betamax sales. Respondents therefore can show harm from VTR use simply by showing that the value of their copyrights would *increase* if they were compensated for the copies that are used in the new market. The existence of this effect is self-evident.

Because of the Court's conclusion concerning the legality of time-shifting, it never addresses the amount of noninfringing use that a manufacturer must show to absolve itself from liability as a contributory infringer. Thus, it is difficult to discuss how the Court's test for contributory infringement would operate in practice under a proper analysis of time-shifting. One aspect of the test as it is formulated by the Court, however, particularly deserves comment. The Court explains that a manufacturer of a product is not liable for contributory infringement as long as the product is "*capable* of substantial noninfringing uses." *Ante*, at 442 (emphasis supplied). Such a definition essentially eviscerates the concept of contributory infringement. Only the most unimaginative manufacturer would be unable to demonstrate that a image-duplicating product is "capable" of substantial noninfringing uses. Surely Congress desired to prevent the sale of products that are used almost exclusively to infringe copyrights; ^[499] the fact that noninfringing uses exist presumably would have little bearing on that desire.

More importantly, the rationale for the Court's narrow standard of contributory infringement reveals that, once again, the Court has confused the issue of liability with that of remedy. The Court finds that a narrow definition of contributory infringement is necessary in order to protect "the rights of others freely to engage in substantially unrelated areas of commerce." *Ante*, at 442. But application of the contributory infringement doctrine implicates such rights only if the remedy attendant upon a finding of liability were an injunction against the manufacture of the product in question. The issue of an appropriate remedy is not before the Court at this time, but it seems likely that a broad injunction is not the remedy that would be ordered. It is unfortunate that the Court has allowed its concern over a remedy to infect its analysis of liability.

VII

The Court of Appeals, having found Sony liable, remanded for the District Court to consider the propriety of injunctive or other relief. Because of my conclusion as to the issue of liability, I, too, would not decide here what remedy would be appropriate if liability were found. I concur, however, in the Court of Appeals' suggestion that an award of damages, or continuing royalties, or even some form of limited injunction, may well be an appropriate means of balancing the equities in this case.^[51] Although I express no view on the merits ^[500] of any particular proposal, I am certain that, if Sony were found liable in this case, the District Court would be able to fashion appropriate relief.

The District Court might conclude, of course, that a continuing royalty or other equitable relief is not feasible. The Studios then would be relegated to statutory damages for proved instances of infringement. But the difficulty of fashioning relief, and the possibility that complete relief may be unavailable, should not affect our interpretation of the statute.

Like so many other problems created by the interaction of copyright law with a new technology, "[t]here can be no really satisfactory solution to the problem presented here, until Congress acts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S., at 167, 95 S.Ct., at 2049 (dissenting opinion). But in the absence of a congressional solution, courts cannot avoid difficult problems by refusing to apply the law. We must "take the Copyright Act . . . as we find it," *Fortnightly Corp. v. United Artists*, 392 U.S.

at

[...]401-402, [...]and "do as little damage as possible to traditional copyright principles . . . until the Congress legislates." *Id.*, at 404, [...] (dissenting opinion).

[...]

[18] The so-called "dance hall cases," *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass'n*, 554 F.2d 1213 (CA1 1977) (racetrack retained infringer to supply music to paying customers); *KECA MUSIC, Inc. v. Dinges McGee's Co.*, 432 F.Supp. 72 (W.D.Mo.1977) (cocktail lounge hired musicians to supply music to paying customers); *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (CA7 1929) (dance hall hired orchestra to supply music to paying customers) are often contrasted with the so-called landlord-tenant cases, in which landlords who leased premises to a direct infringer for a fixed rental and did not participate directly in any infringing activity were found not to be liable for contributory infringement. *E.g.*, *Deutsch v. Arnold*, 98 F.2d 686 (CA2 1938).

In *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (CA2 1963) the owner of twenty-three chain stores retained the direct infringer to run its record departments. The relationship was structured as a licensing arrangement, so that the defendant bore none of the business risk of running the department. Instead, it received 10% or 12% of the direct infringer's gross receipts. The Court of Appeals concluded:

"[The dance-hall cases] and this one lie closer on the spectrum to the employer-employee model, than to the landlord-tenant model. On the particular facts before us, . . . Green's relationship to its infringing licensee, as well as its strong concern for the financial success of the phonograph record concession, renders it liable for the unauthorized sales of the 'bootleg' records.

"[T]he imposition of *vicarious* liability in the case before us cannot be deemed unduly harsh or unfair. Green has the power to police carefully the conduct of its concessionaire; our judgment will simply encourage it to do so, thus placing responsibility where it can and should be effectively exercised." *Id.*, at 308 (emphasis in original).

In *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (CA2 1971), the direct infringers retained the contributory infringer to manage their performances. The contributory infringer would contact each direct infringer, obtain the titles of the musical compositions to be performed, print the programs, and then sell the programs to its own local organizations for distribution at the time of the direct infringement. *Id.*, at 1161. The Court of Appeals emphasized that the contributory infringer had actual knowledge that the artists it was managing were performing copyrighted works, was in a position to police the infringing conduct of the artists, and derived substantial benefit from the actions of the primary infringers. *Id.*, at 1163.

In *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F.Supp. 399 (SDNY 1966), the direct infringer manufactured and sold bootleg records. In denying a motion for summary judgment, the District Court held that the

infringer's advertising agency, the radio stations that advertised the infringer's works, and the service agency that boxed and mailed the infringing goods could all be held liable, if at trial it could be demonstrated that they knew or should have known that they were dealing in illegal goods.

[19] *E.g.*, *United States v. Paramount Pictures*, 334 U.S. 131, 158, [...] *Fox Film Corp. v. Doyal*, 286 U.S. 123, 131, [...] *Wheaton and Donaldson v. Peters and Grigg*, 33 U.S. (8 Pet.) 591, 657-658, [...] (1834). The two areas of the law, naturally, are not identical twins, and we exercise the caution which we have expressed in the past in applying doctrine formulated in one area to the other. See generally, *Mazer v. Stein*, 347 U.S. 201, 217-218, [...] (1954); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 345, [...]

We have consistently rejected the proposition that a similar kinship exists between copyright law and trademark law, and in the process of doing so have recognized the basic similarities between copyrights and patents. *The Trade-Mark Cases*, 100 U.S. 82, 91-92, 25 L.Ed. 550 (1879); see also, *United Drug Co. v. Rectanus Co.*, 248 U.S. 90, 97, 39 S.Ct. 48, 50, 63 L.Ed. 141 (1918) (trademark right "has little or no analogy" to copyright or patent); *McLean v. Fleming*, 96 U.S. 245, 254 (1877); *Canal Co. v. Clark*, 13 Wall. 311, 322, 20 L.Ed. 581 (1871). Given the fundamental differences between copyright law and trademark law, in this copyright case we do not look to the standard for contributory infringement set forth in *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 854-855, 102 S.Ct. 2182, 2188, 72 L.Ed.2d 606 (1982), which was crafted for application in trademark cases. There we observed that a manufacturer or distributor could be held liable to the owner of a trademark if it intentionally induced a merchant down the chain of distribution to pass off its product as that of the trademark owner's or if it continued to supply a product which could readily be passed off to a particular merchant whom it knew was mislabeling the product with the trademark owner's mark. If *Inwood's* narrow standard for contributory trademark infringement governed here, respondents' claim of contributory infringement would merit little discussion. Sony certainly does not "intentionally induce[]" its customers to make infringing uses of respondents' copyrights, nor does it supply its products to identified individuals known by it to be engaging in continuing infringement of respondents' copyrights, see *id.*, at 855, [...]

[29] The Copyright Act of 1909, 35 Stat. 1075, did not have a "fair use" provision. Although that Act's compendium of exclusive rights "to print, reprint, publish, copy, and vend the copyrighted work" was broad enough to encompass virtually all potential interactions with a copyrighted work, the statute was never so construed. The courts simply refused to read the statute literally in every situation. When Congress amended the statute in 1976, it indicated that it "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." House Report No. 94-1476, 94th Cong., 2d Sess., p. 66, U.S.Code Code & Admin.News 1976, pp. 5659, 5679.

[...]

[27] The precise phrase "fair use" apparently did not enter the case law until 1869, see *Lawrence v. Dana*, 15 F.Cas. 26, 60 (No. 8,136) (CC Mass.), but the doctrine itself found early expression in *Folsom v. Marsh*, 9 F.Cas. 342 (No. 4,901) (CC Mass.1841). Justice Story was faced there with the "intricate and embarrassing questio[n]" whether a biography containing copyrighted letters was "a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs." *Id.*, at 344, 348. In determining whether the use was permitted, it was necessary, said Justice Story, to consider "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. . . . Much must, in such cases, depend upon the nature of the new work, the value and extent of the copies, and the degree in which the original authors may be injured thereby." *Id.*, at 348-349.

Similar lists were compiled by later courts. See, *e.g.*, *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279, 283 (CA5), cert. denied, 398 U.S. 928, 90 S.Ct. 1819, 26 L.Ed.2d 91 (1970); *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (CA6 1943); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348 (SD

Cal.1955); *Shapiro, Bernstein & Co. v. P.F. Collier & Son Co.*, 26 U.S.P.Q. 40, 43 (SDNY 1934); *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (SDNY 1914).

[...]

[32] *Williams & Wilkins Co. v. United States*, 203 Ct.Cl. 74, 487 F.2d 1345 (1973), aff'd by an equally divided Court, 420 U.S. 376, 95 S.Ct. 1344, 43 L.Ed.2d 264 (1975), involved the photocopying of scientific journal articles; the Court of Claims stressed that the libraries performing the copying were "devoted solely to the advancement and dissemination of medical knowledge," 203 Ct.Cl., at 91, 487 F.2d, at 1354, and that "medical science would be seriously hurt if such library photocopying were stopped." *Id.*, at 95, 487 F.2d, at 1356.

The issue of library copying is now covered by § 108 of the 1976 Act. That section, which Congress regarded as "authoriz[ing] certain photocopying practices which may not qualify as a fair use," 1975 Senate Report 67; 1976 House Report 74, U.S.Code Cong. & Admin.News 1976, p. 5688, permits the making of copies only for "private study, scholarship, or research." §§ 108(d)(1) and (e)(1).

[...]

[35] A VTR owner who has taped a favorite movie for repeated viewing will be less likely to rent or buy a tape containing the same movie, watch a televised rerun, or pay to see the movie at a theater. Although time-shifting may not replace theater or rerun viewing or the purchase of prerecorded tapes or discs, it may well replace rental usage; a VTR user who has recorded a first-run movie for later viewing will have no need to rent a copy when he wants to see it. Both library-builders and time-shifters may avoid commercials; the library builder may use the pause control to record without them, and all users may fast-forward through commercials on playback.

The Studios introduced expert testimony that both time-shifting and librarying would tend to decrease their revenue from copyrighted works. See 480 F.Supp., at 440. The District Court's findings also show substantial library-building and avoidance of commercials. Both sides submitted surveys showing that the average Betamax user owns between 25 and 32 tapes. The Studios' survey showed that at least 40% of users had more than 10 tapes in a "library"; Sony's survey showed that more than 40% of users planned to view their tapes more than once; and both sides' surveys showed that commercials were avoided at least 25% of the time. *Id.*, at 438-439.

[...]