Digital Audio Tape Machines: New Technology or Further Erosion of Copyright Protection?

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Digital Audio Tape Machines: New Technology or Further Erosion of Copyright Protection?

A long, long time ago
and I can still remember
how that music used to make me smile,
and I knew if I had my chance,
that I could make those people dance
and maybe they'd be happy for awhile...

But I knew I was out of luck
the day the music died.¹

INTRODUCTION

On May 17, 1988, the Recording Industry Association of America (RIAA)² mailed letters to several audio hardware manufacturers, warning them that it would take immediate legal action against any firm marketing digital audio tape (DAT) machines in the United States.³ The RIAA stated that it would sue the manufacturers for "contributory infringement,"⁴ which is defined as an activity by "[o]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another..."⁵ This action follows

¹ Don McLean, American Pie (United Artists Records, Inc. 1980).
² The RIAA is an organization representing the recording industry concerns. Its "member companies produce and market about 90% of the prerecorded music sold in the United States." See Copyright Issues Presented by Digital Audio Tape: Joint Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 9 (1987) [hereinafter Joint Hearing] (statement of Jason S. Berman, President, Recording Industry Association of America).
³ See Dupler, RIAA Letter Reinforces Its Threat on DAT, BILLBOARD, June 11, 1988, at 1, col. 5.
⁴ Id.
the RIAA’s apparent failure to get congressional approval on its proposed copycode scanning system, which would prevent taping of copyrighted materials with a DAT machine.

The letters are the latest action in an ongoing battle between the RIAA and audio hardware manufacturers on the issue of home taping as copyright infringement. The RIAA has the support of certain members of Congress, as evidenced by the introduction of bills in the Senate and the House of Representatives. These bills propose that copycode scanners be required in all digital audio recorders manufactured during the next thirty-six months. In addition, the Reagan administration proposed similar bills that seek to make this requirement permanent. However, to the apparent dismay of the RIAA, the National Bureau of Standards recently determined that the copycode scanner was ineffective for its proposed use.

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*See* Dupler, *supra* note 3, at 90, col. 3.


A "copy-code scanner" is an electronic circuit or comparable system of circuitry (A) which is built into the recording mechanism of an audio recording device; (B) which, if removed, bypassed, or deactivated, would render inoperative the recording capability of the audio recording device; (C) which continually detects, within the audio frequency range of three thousand five hundred to four thousand one hundred hertz, a notch in an encoded phonorecord; and (D) which, upon detecting a notch, prevents the audio recording device from recording the sounds embodied in the encoded phonorecord by causing the recording mechanism of the device to stop recording for at least twenty-five seconds.

*Id.* at 2. *See also* S. 506, at 2.

*See* H.R. 1384, at 6; *see also* S. 506, at 6.


The National Bureau of Standards (NBS) was asked by Congress to judge the copycode scanner. [The Congress'] request posed three questions: Does copycode achieve its purpose, preventing [DAT] machines from recording? Does it diminish the quality of the prerecorded material into which the notch is recorded?
determination makes passage of the congressional bills highly unlikely, thus forcing the RIAA to fall back on threats of legal action.

While threats of litigation, marketing concerns, and the objections of compact disc (CD) manufacturers have prevented formal introduction of the DAT machine into the U.S. market, some units are entering the country through a "gray market." In addition, "[should a lawsuit be initiated by the RIAA, the defendant [manufacturer] will in theory be able to draw upon a six-figure legal-defense fund established by the Electronic Industries Assn [sic]. The fund ... will match any

Can the system be bypassed, and if so, how easily? After five months of study, the NBS returned its findings, concluding that copycode was inadequate. Its 205-page report found that the system generated both "false positives" and "false negatives"—that is, non-encoded material could cause the system to incorrectly inhibit recording, and some encoded material would not cause the system to inhibit it. After testing 54 discs and 502 tracks, false positives were found for 16 tracks on 10 discs. False negatives occurred on about half the tracks studied.

Aural tests determined that for some selections, listeners could detect audible differences between encoded and unencoded material. In one test, 69 out of 84 listeners could detect the difference more than 50 percent of the time. Finally, engineers at the NBS proposed five ways to defeat copycode, all costing $100 or less to build. The NBS concluded: "The system does not achieve its stated purpose."

Pohlmann, supra note 6, at 16.

See Feighan, Digital Audio Tape: A View from the Hill, DIGITAL AUDIO & COMPACT DISC REVIEW, Sept. 1987, at 24 (article by Congressman Edward Feighan (D-Ohio), member of the House Judiciary Committee which has oversight jurisdiction of DAT).

See Pohlmann, supra note 6, at 16.


di Perna, The Great DAT Caper, MUSICIAN, August 1988, at 49, 50. In the "gray market," DAT recorders are purchased by consumers in Japan and sold in the U.S. According to di Perna, "There's absolutely nothing illegal about buying—or even selling—a gray-market DAT machine. In fact the Supreme Court has recently ruled in favor of gray-market sales of overseas goods." Id. at 50. See K Mart Corp. v. Cartier, Inc., 486 U.S. _____, 108 S. Ct. 1811 (1987) (holding that the United States Customs Service regulation permitting importation of certain "gray-market" goods was valid inasmuch as it complied with 19 U.S.C.S. § 1526). In addition, Ford Motor Company is offering DAT software to customers who buy DAT-equipped Lincoln Continental models. However, their machine is a play-only device. See Pohlmann, Ford is First with DAT, DIGITAL AUDIO & COMPACT DISC REVIEW, Feb. 1988, at 8, col. 2.
manufacturer funds needed for litigation . . . .” Furthermore, at least one member of Congress shares the manufacturers’ viewpoint that a 1984 U.S. Supreme Court decision, *Sony Corp. of America v. Universal City Studios*, made home audio taping legal.

Technically, the *Sony* Court refused to take a stand on the legality of home audio taping. Due to legislative inaction, the RIAA is now faced with the task of forcing the federal courts to decide this issue. A decision in favor of the RIAA would create a cause of action against anyone engaged in home taping or providing equipment for such taping. A decision for the manufacturers would create greater problems for an industry that already claims 1.5 billion dollar losses per year due to home taping, and would further diminish the funds that are available to support new artists. This Comment analyzes the recording industry’s potential for success in a suit against audio hardware manufacturers for contributory infringement based on the *Sony* decision and related cases, and the possible ramifications of such success.

I. WHAT IS DAT AND WHY IS IT SO SPECIAL?

Depending on the point of view taken, the DAT machine is just a new tape recorder, or is the latest development in digital technology undermining the intellectual property sys-

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19 See Dupler, *supra* note 3, at 90, col. 3.
20 See, e.g., *Digital Audio Recorder Act of 1987: Hearing on S. 506 Before the Subcomm. on Communications of the Comm. on Commerce, Science and Transportation, 100th Cong., 1st Sess. 7* (1987) [hereinafter *Hearing on S. 506*] (statement of John C. Danforth, Senator from Missouri announcing his intent to withdraw his support from the bill. Danforth stated he opposed commercial piracy, but he does not believe Congress should infringe on home taping for private, non-commercial uses.).
22 Id. at 430 n.11.
24 See *Hearing on H.R. 1384, supra* note 13, at 36 (statement of Jason S. Berman).
To most DAT supporters, the DAT machine is an “important evolutionary advance in home recording technology.”

It combines video cassette recorder (VCR) recording methods with the digital electronics used in CD players. Because the audio signal is digital instead of analogue, the DAT machine records and transmits the signal more accurately. While DAT possesses some of the same weaknesses of analogue tape in that the physical tape can wear out and cannot be as easily accessed as CDs, it may be able to record even greater frequencies than the CD. A home DAT machine will enable artists to record their own works outside of a professional studio at a fraction of the cost of buying professional equipment or renting studio time. Also, since the DAT cassette is almost half the size of the standard cassette, DAT equipment is likely to be more

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25 See Joint Hearing, supra note 2, at 11 (statement of Jason S. Berman); see also Fleischmann, The Impact of Digital Technology on Copyright Law, 70 J. PAT. & TRADEMARK OFF. SOC’Y 5 (1988).

26 Joint Hearing, supra note 2, at 73 (statement of Leonard Feldman, owner of Leonard Feldman Electronics Laboratories).

27 Although the Sony Court referred to the Betamax machine as a video tape recorder, or “VTR,” the common acronym for such machines is “VCR,” derived from “video cassette recorder.” Therefore, the term “VCR” is intended as synonymous with the term “VTR” and will be used in this Comment.

28 Basically, DAT uses recording heads mounted on a rotating drum, with the tape moving past at an angle. See Joint Hearing, supra note 2, at 73-74 (statement of Leonard Feldman); see also di Perna, supra note 18, at 54.

29 Joint Hearing, supra note 2, at 21-22 (statement of Jason S. Berman).

30 See Fleischmann, supra note 25, at 6 (Whereas analogue systems reproduce sounds on a tape or phonograph analogue in size and shape to the original, digital recordings convert sounds in a binary sequence of digits 1 and 0, which are recorded and then reconverted.); see also Fantel, Magic Made Simple: How CD’s Work, N.Y. Times, April 21, 1985, § 2, at 23, col. 1 (The analogue systems are “limited by the inherent physical properties of their storage media. They depend on squiggles in a groove or magnetic fluctuations on a tape. . . .”). Both album and tape media introduce significant noise and cannot provide sufficient detail to reproduce high frequencies accurately. See Brewer & Key, Digital Audio 101, part II, DIGITAL AUDIO & COMPACT DISC REVIEW, Jan. 1988, at 90. Digital sound systems, on the other hand, store sounds as a series of numbers, which are reconverted into a more accurate representation of the actual sound without the negative factors involved in analogue recordings. See id.

31 Fleischmann, supra note 25, at 9 n.31 (stating that DATs have a wider frequency response than CDs and can reproduce sound more accurately).

32 Hearing on S. 506, supra note 20, at 110 (statement of Stevland Morris, a.k.a. Stevie Wonder).
compact, making personal transportation of the machines more convenient.  

The recording industry recognizes certain advantages in this new system. In fact, professional DAT machines can be purchased currently in the U.S. without any objections by the RIAA. The reason the RIAA is resisting the DAT machine for home use is because it provides audio pirates the ability to make reproductions of copyrighted material that are identical to the master copies. Because the digital signal of a digital recording is transferred onto a digital audio tape, subsequent digital recordings suffer no loss in the audio signal. A digital to digital transfer will result in a thousandth generation copy that sounds identical to the master source. Since record companies do not currently have the technological capacity to provide pre-recorded music on DAT due to a lack of commercially feasible high speed duplication equipment, the RIAA fears that the only practical use for DAT machines will be the pirating of copyrighted materials, which will cause significant losses in revenue for recording artists.

DAT supporters, such as the Home Recording Rights Coalition (HRRC), contend that home taping by private individuals is a legal, fair use of copyrighted materials. However,

33 See Hearing on H.R. 1384, supra note 13, at 44 (statement of Jason S. Berman).
34 See di Perna, supra note 18, at 54, 66.
36 Hearing on H.R. 1384, supra note 13, at 44 (statement of Jason S. Berman).
37 Id. at 44-45.
38 Id. at 46.
39 Id. at 47.
40 Id. at 49; see also Home Video Recording: Hearing Before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. 644 (Aug. 1986) (statement of Donald J. Quigg).
42 Id. at 98.
the RIAA and some legal scholars disagree, contending that the constitutional right "[t]o promote the Progress of Science and the useful Arts" has been repeatedly buffeted to the detriment of artists' copyrights. In 1983, surveys indicated that Americans were taping 3.8 billion dollars worth of music a year, thereby displacing 1.5 billion dollars worth of sales revenues. According to the Electronic Industries Association, blank tape sales increased by twenty-one percent between 1985 and 1986, while record sales declined by five percent during the same period. To the RIAA, these figures add up to lost profits for its artists due to copyright infringement. To prevent DAT from contributing to this home taping problem, the RIAA has supported proposed legislation that would require copycode scanning devices. After hearings in April and May of 1987, the House Commerce and Judiciary Committee sent models of the copycode scanner to the National Bureau of Standards (NBS) for analysis. The NBS's rejection of the scanner has placed the RIAA in a defensive posture. If the RIAA does sue a manufacturer for contributory infringement, both sides are likely to rely heavily on the Sony decision to support their respective positions. The outcome of such litigation may affect judicial opinions on fair use and contributory infringement, and will be crucial in deciding both the fate of the DAT machine and the rights of consumers to tape in their own homes.

43 U.S. CONST. art. I, § 8, cl. 8.
46 See id. at 34 (citing Statement of Alan Greenspan).
47 Hearing on H.R. 1384, supra note 13, at 34-35 (statement of Jason S. Berman).
48 Id. at 35.
49 Id. at 36; see also Pohlmann, supra note 6, at 16.
50 See supra notes 7-12 and accompanying text.
51 Pohlmann, supra note 6, at 16; see also supra note 14.
52 Pohlmann, supra note 6, at 16.
II. The Sony Decision

In *Sony Corp. of America v. Universal City Studios*, the Supreme Court held that the use of a VCR for time-shifting purposes was not a violation of copyright laws. Because the Court’s holding was limited to VCRs, both supporters and opponents of DAT turn to the case as authority for the legality of home audio taping. The situation is further complicated because the opinions of the district court (*Sony I*) and the court of appeals (*Sony II*) were published and heavily commented on before the Supreme Court handed down its opinion (*Sony III*). A review of these three decisions will aid in understanding the views of both sides.

Universal City Studios and Walt Disney Productions sued Sony Corporation, the manufacturer of the Betamax VCR, in the District Court for the Central District of California, along with the Sony Corporation of America, four retail establish-


54 See infra note 104.

55 *Sony III*, 464 U.S. at 456. For ease of reference, the opinion of the district court will be referred to as *Sony I*, the opinion of the court of appeals will be referred to as *Sony II*, and the Supreme Court’s opinion will be referred to as *Sony III*.

56 The Court based its holding on two conclusions: a significant number 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 that "respondents failed to demonstrate that time-shifting would cause any likelihood of non-minimal harm to the potential market for, or the value of, their copyrighted works." *Sony III*, 464 U.S. at 455-56. Given the narrowness of the Court's focus, and the unlikelihood that the holding could apply to any other existing copying format, it is safe to assume the Court intended its holding only to apply to VCRs.

57 Joint Hearing, supra note 2, at 40 (statement of Jason S. Berman). *Contra id.* at 122 (statement of Charles D. Ferris) ("It was the basic insight of the Supreme Court in the Betamax case that it would be dangerous, in such circumstances, to infer contributory infringement.").


59 Universal City Studios v. Sony Corp. of America, 659 F.2d 963.

ments, and one VCR owner. The plaintiffs complained that home video taping of their copyrighted works constituted copyright infringement and that the corporate defendants were liable as direct, contributory and/or vicarious infringers. The district court held that home taping for personal use was not copyright infringement. More significantly for the purposes of this Comment, the court concluded that the statute's legislative history established an implied exemption from copyright infringement liability for home audio taping. The Court of Appeals for the Ninth Circuit reversed the district court's decision of the video taping issue because it could find "no clear legislative language indicating that home video recording is not within the exclusive rights created by § 106 [of the Copyright Act]." At the same time, the court distinguished video tapes from audio tapes stating that "[t]he copyright statute treats sound recordings and audiovisual works as separate categories of protected materials."

The Supreme Court, in overruling the court of appeals, held that the sale of home VCRs to the general public did not constitute contributory infringement of copyrights because the plaintiffs failed to show that time-shifting of programs would cause any significant harm to the value of the copyrights. In addition, the Court stated that many copyright holders who license their works for broadcast on free television would not object to having their programs time-shifted by private viewers. The Court noted Sony's argument that the legislative history of the Sound Recording Act of 1971 created a home audio and video recording exemption. However, the Court stated that "in view of our disposition of the contributory

\[\text{Sony I, 480 F. Supp. at 433.}\]
\[\text{Id. at 432.}\]
\[\text{Id. at 469.}\]
\[\text{Id. at 444-46.}\]
\[\text{Sony II, 659 F.2d at 977.}\]
\[\text{Id. at 968.}\]
\[\text{Id. at 967 (footnote omitted).}\]
\[\text{Sony III, 464 U.S. at 456.}\]
\[\text{Id.}\]
\[\text{Id.}\]
infringement issue, we express no opinion on that question.”

Thus, by reserving its opinion on this issue, the Court refused to either accept or reject the lower courts’ interpretation of the 1971 Home Recording Act, leaving the subject open to debate.

With this background in mind, the RIAA’s current position, that home audio taping with a DAT machine is illegal and that DAT manufacturers would be committing contributory infringement, will now be discussed.

III. HOME TAPING: FAIR USE OR CONTRIBUTORY INFRINGEMENT?

Copyright law derives its legal authority from the Constitution, which provides that “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.” Federal law totally preempts state and common law in this area. “The term ‘writings’ has historically been interpreted broadly,” and currently is defined as that which is “fixed in any tangible medium of expression, now known or later developed, from which [the original work or authorship] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

In the past, Congress has responded to changes in technology by extending copyright protection to developments such as photography, audio recordings, and computer programs. In 1976, the U.S. copyright laws were substantially revised, and extended protection to “original works of authorship fixed in any tangible medium of expression, now known or later devel-

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72 Sony III, 464 U.S. at 430 n.11.
73 U.S. Const. art. 1, § 8, cl. 8.
74 17 U.S.C. § 301 (1977) (expressly pre-empting state or common law copyright laws).
77 See Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540.
op ed.” Before the 1976 revision, Congress imposed no statutory limitations on an author’s exclusive rights of reproduction. Instead, a judicially created doctrine of fair use was applied to assure that the limited monopoly granted to copyright holders did not conflict with “the competing interest of society in the untrammeled dissemination of ideas.” The courts have applied this doctrine when the use of the copyrighted material acts to foster, rather than to deter, creative activity and dissemination. The 1976 revision, in effect, codified the judicial doctrine of fair use.

The exclusive rights of a copyright holder are described in 17 U.S.C. § 106. These rights are the exclusive rights of

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81 See Nimmer, supra note 44, at 1507.
82 “Fair use” is privilege in other than owner of copyright to use copyrighted material in reasonable manner without consent, notwithstanding monopoly granted to the owner.” BLACK'S LAW DICTIONARY 538 (5th ed. 1979).
83 See, e.g., Simms v. Stanton, 75 F. 6, 10 (C.C. N.D. Cal. 1896); Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C. D. Mass. 1841) (examples of pre-1909 fair use cases); see also Iowa State University Research Found., Inc. v. American Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980); Williams & Wilkins Company v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973), aff’d by an equally divided Court, 420 U.S. 376 (1975) (per curiam) (examples of more recent cases).
84 “Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammeled dissemination of ideas.” B. KAPLIN, AN UNHURRIED VIEW OF COPYRIGHT, viii (1967).
85 See, e.g., supra note 83 and sources cited therein; see also L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT (1978) (providing a history of the development of the judicial doctrine of fair use and criticism of the current statutory scheme).
86 See id. at § 107.
87 § 106. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS
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;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Id. at § 106.
reproduction, adaptation, publication, performance, and display. In order to determine whether DAT manufacturers will be liable for contributory infringement, the rights under 17 U.S.C. § 106 must be balanced with the fair use exceptions set out in 17 U.S.C. § 107, also taking into account the interpretations of contributory infringement in Sony III and subsequent cases.

17 U.S.C. § 501 provides that "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . is an infringer of the copyright." As previously noted, a contributory infringer is defined as one "who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another . . . ." To hold the DAT manufacturers liable as contributory infringers, opponents must first establish primary liability for home taping. More so than in the Sony case,

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89 Section 107 states:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include

(1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) The nature of the copyrighted work;

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) The effect of the use upon the potential market for or value of the copyrighted work.


92 See generally Nimmer, supra note 44, at 1527 (this liability is based on an assumption that the equipment was manufactured principally for making unauthorized copies).
opponents of DAT appear to have a strong case for establishing infringement.93

DAT supporters argue that the House report on the 1971 amendment94 supports their contention that Congress intended to exclude home use audio recording from the scope of the 1909 act.95 However, as Melville B. Nimmer96 points out, the relied-upon passage,97 when read in context, shows that the committee did not intend to create a special exemption for home audio recording.98 The Sony II court agreed with Nim-

93 See infra notes 101-48 and accompanying text.
96 The late Mr. Nimmer was a renowned authority on copyright law, and his opinions were cited in all three Sony cases. See, e.g., Sony I, 480 F. Supp. at 451; Sony II, 659 F.2d at 967; and Sony III, 464 U.S. at 482 (Blackmun, J., dissenting).
97 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.

98 Nimmer, supra note 44, at 1508-11.

The most telling argument against the [Sony III] court’s interpretation of the House report is the language of the report itself. The Committee’s statement that “it is not the intention . . . to restrain . . . home recording,” if read in context, reveals that the Committee never intended to create a special exemption for audio home recording. The passage in which the home recording remark appears 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. . . . [T]he 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 language emphasizes the point that the 1971 Amendment extends to the owners of sound recording copyrights the same statutory protection already granted to the owners of musical composition copyrights. No one
mer's position and noted that this language was not repeated in the legislative history accompanying the 1976 act. Finally, as Nimmer notes:

[a]ny lingering doubt as to whether the copyright act of 1976 includes a special exemption for home recording is laid to rest by the following passage from the House report on the 1976 Act: "[I]t is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use." So, for home tapers to avoid the charge of copyright infringement, they must qualify under the fair use provisions of section 107 of the Copyright Act of 1976.

IV. HOME TAPING WITH DAT CONSTITUTES INFRINGEMENT

Following the Supreme Court's ruling that individual VCR owners could copy free television broadcasts for the purposes of time-shifting, at least one commentator feared that the Court's philosophy would "drastically affect the ability of authors to control the use of their works." However, this fear seems exaggerated for a number of reasons. First, the Court was responding to a well-established technology, already in the homes of millions of consumers. More importantly, the decision was very narrowly defined. The Court held only that private home taping of a public broadcast, provided free to the

has claimed that the pre-1971 copyright statutes contained any provision other than the doctrine of fair use for exempting home recording from copyright infringement of the musical works thereby produced. Since the House report states that the purpose of the Amendment is to extend the same protection to sound recordings, it is clear that the Amendment did not create a new exemption for home recording. The most one can fairly attribute to the House report, then, is an opinion that home recording constitutes fair use.

Jd. at 1510-11.

99 Sony II, 659 F.2d at 967 n.5.


101 See Sony III, 464 U.S. at 422.
public, for the purpose of time-shifting, was a fair use. By applying the fair use criteria for VCRs used in Sony III to DAT, the RIAA appears to have a strong argument for infringement.

Although section 107 of the Copyright Act of 1976 does not limit consideration to the four outlined criteria in determining fair use, the courts give primary consideration to the factors listed in the statute. For this reason, each factor is discussed in detail below.

A. The Purpose and Character of the Use

In Sony III, the Court’s opinion applied only to time-shifting of free programs for home use. The Court found that “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.” In addition, the evidence presented at trial showed that some

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104 Time-shifting was defined as the ability 1) to tape a show for later viewing when the individual is engaged in watching a show simultaneously being broadcast on another channel, or 2) to have the machine record a desired program for later viewing, through the use of the automatic timer device on the VCR, when the individual is not at home. Id. at 423; Berman argues that time-shifting does not apply to audio recording. He states:

The Home Recording Rights Coalition argues that home taping is really just the innocent practice of shifting the playing of a musical recording from one playback device to another. But this neologism makes no sense. . . . [I]f you do not want to carry a bulky hard-cover book to the beach, but prefer to bring a paperback, you cannot go into a bookstore and demand a paperback for free just because you have already purchased the hard-cover edition. So it is with music: If you have already bought a record or a CD, and you decide that you want a tape cassette version, you should pay for it. The concept of play-shifting is nonsensical and unfair.

Joint Hearing, supra note 2, at 50.


See infra notes 110-34 and accompanying text.


See, e.g., Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 n.10 (5th Cir. 1980) (noting that “[n]ormally these four factors would govern the analysis”).


Id. at 444.
copyright owners had no objection to home taping for noncommercial use.\footnote{Id. at 445-46.}

In contrast, the majority of home audio tapings are made from purchased or borrowed commercial recordings.\footnote{See Note, Home Taping, supra note 60, at 652 n.28 (citing W. Hamilton, A Survey of Households with Tape Playback Equipment 8 (1979)). This survey, commissioned by the Copyright Royalty Tribunal, "found that most record taping involves albums, and that rock music was by far the most common type of music taped." Id. at 655 n.56 (quoting Hamilton, supra, at 6).} A number of artists and copyright holders have objected to home taping.\footnote{See, e.g., Hearing on H.R. 1384, supra note 13, at 25 (statement of Emmylou Harris); Hearing on S. 506, supra note 20, at 71-73 (statement of Mary Travers, representing the band Peter, Paul, and Mary). But see id. at 110 (statement of Stevland Morris in favor of home recording); cf. Taylor, To Notch or Not to Notch, Digital Audio, Oct. 1987, at 7 (taking note of opposition and support for the DAT copycode scanner).} The recordings are not provided to the public free of charge, as were the videotaped programs in Sony. Because prerecorded DAT cassettes are not available on the market, the machines, at least presently, can only be used to record from other sources.\footnote{See Hearing on H.R. 1384, supra note 13, at 30 (statement of Berman).} Such use seems more of a commercial than a non-profit educational use.\footnote{"The statute does not, however, draw a simple commercial/noncommercial distinction. The statute contrasts commercial and non-profit educational purposes, and there is no question that the copying of entertainment works for convenience does not fall within the latter category." Universal City Studios v. Sony Corp. of America, 659 F.2d 963, 972 (9th Cir. 1981), rev'd, 464 U.S. 417 (1984).}

The statutory purposes cited as appropriate to a finding of fair use\footnote{The purposes are "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research . . . ." 17 U.S.C. § 107 (1982).} are limited to "the context of a further commentary . . . by the person using the copyrighted work."\footnote{Nimmer, supra note 44, at 1521. Nimmer states that fair use has always involved a second author's use of the original author's work. "In such circumstances, the public benefit from the dissemination of the new work may be said to outweigh the earlier author's copyright interest." Id.} In these circumstances, the courts believe "the public benefit from the dissemination of a new work . . . outweigh[s] the earlier author's copyright interest."\footnote{Id.; see, e.g., Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978) (holding that the fair use doctrine allows courts to .}
tertainment purposes is not considered a productive use, it cannot be said that the purpose and character of taping with a DAT machine qualify under the first requirement of fair use.

B. The Nature of the Copyrighted Work

The nature of the copyrighted work has rarely been relied upon by the courts. In Sony III, the Supreme Court did not directly discuss this criterion. However, the court of appeals stated 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." In Loew's Inc. v. Columbia Broadcasting System, the district court stated that "[a]s we draw further away from the fields of science or pure or fine arts, and enter the fields where business competition exists, we find the scope of fair use is narrowed but still exists." Most copied sound recordings are "products of originality" and intended "to entertain, not to instruct." As such, they should not be classified as fair use under this criterion.

C. The Amount and Substantiality of the Portion Used

As with the second criterion, Sony III does not concentrate on the amount and substantiality of the portion used. In Walt Disney Productions v. Air Pirates, the court stated that

\[\text{balance "the exclusive rights of a copyright holder with the public interest in dissemination of information affecting areas of universal concern".}\]

\[\text{See Note, Universal City Studios, Inc. v. Sony Corp.: "Fair Use" Looks Different on Videotape, 66 Va. L. Rev. 1005, 1012-14 (1980) (discussing the principle of productive use).}\]


\[\text{Sony II, 659 F.2d at 972.}\]

\[\text{131 F. Supp. 165 (S.D. Cal. 1955), aff'd sub nom., Benny v. Loews Inc., 239 F.2d 532 (9th Cir. 1956), aff'd by an equally divided court, 356 U.S. 43 (1958) (per curiam).}\]

\[\text{Id. at 175 (emphasis in original).}\]

\[\text{Nimmer, supra note 44, at 1522.}\]

\[\text{581 F.2d 751 (9th Cir. 1978), cert. denied sub nom., O'Neill v. Walt Disney Productions, 439 U.S. 1132 (1979).}\]
"[w]hile other factors in the fair use calculus may not be sufficient by themselves to preclude a fair use defense, this and other courts have adopted the traditional American rule that excessive copying precludes fair use."\textsuperscript{126} Home audio taping almost "always involves the reproduction of an entire work."\textsuperscript{127} As Nimmer notes, "It is the whole song, not merely a particular passage, that the home recorder wishes to capture."\textsuperscript{128} Therefore, home taping with the DAT is not fair use under this criterion.\textsuperscript{129}

D. The Effect of Copying on the Market for the Copyrighted Work

\textit{Sony III} put much emphasis on the effect of copying on the market for the copyrighted work. The Court stated that the plaintiff's failure to prove that time-shifting "has impaired the commercial value of [the] copyrights or has created any likelihood of future harm" left the Court with no basis on which to find the defendants liable.\textsuperscript{130} The plaintiffs "offered no evidence of decreased television viewing by Betamax owners,"\textsuperscript{131} and failed to show that time-shifting would cause anything but minimal "harm to the potential market for, or the value of, their copyrighted works."\textsuperscript{132}

The recording industry has conducted various studies that indicate substantial losses in sales due to home taping.\textsuperscript{133} As Nimmer notes,

If this fourth factor is ever to militate against application of the fair use defense, it must do so in the case of audio home

\textsuperscript{126} \textit{Id.} at 758; \textit{see also} Whitol v. Crow, 309 F.2d 777, 780 (8th Cir. 1963) (stating that it is inconceivable that the copying of all, or substantially all, of a copyrighted song can constitute fair use).
\textsuperscript{127} Nimmer, \textit{supra} note 44, at 1522.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{But see} Williams and Wilkins Co. v. United States, 487 F.2d 1345, 1347, 1362 (Ct. Cl. 1973), \textit{aff'd} by \textit{an equally divided court}, 420 U.S. 376 (1973) (per curiam), wherein the copying of entire scientific articles was held to be a fair use. The circuit court, in \textit{Sony II}, distinguishes home taping from the copying of scientific articles. \textit{See Sony II}, 659 F.2d at 971.
\textsuperscript{130} \textit{Sony III}, 464 U.S. at 421.
\textsuperscript{131} \textit{Id.} at 424.
\textsuperscript{132} \textit{Id.} at 456.
\textsuperscript{133} \textit{See generally} Note, \textit{Home Taping}, \textit{supra} note 60 and sources cited therein.
recording. Those who argue that home taping should be regarded as fair use because it is noncommercial in nature have overlooked its substantial commercial effect. . . . For fair use purposes, [the taper's] motivation is nevertheless commercial. By engaging in audio home recording, he avoids the cost of purchasing records or prerecorded tapes.\textsuperscript{134}

Unlike \textit{Sony III}, the evidence here supports a finding that home copying has a detrimental effect on the market for the copyrighted work. Therefore, the DAT fails to qualify as fair use under this criterion, as well. Thus, under the criteria of section 107 of the Copyright Act of 1976, home taping with the DAT does not appear to be a fair use of the copyright.

V. OTHER CONSIDERATIONS

Even if a court determines that home taping with DAT does not constitute fair use, other factors may prevent the RIAA from proving contributory infringement on the part of the manufacturers. For example, \textit{Sony III} indicated the Court's reluctance to expand copy protections without explicit legislative guidance.\textsuperscript{135} Unlike the VCR, Congress has already had several conferences regarding DAT and the proposed copycode scanner,\textsuperscript{136} and the courts may hesitate to address an issue pending before Congress.

Should a court view this issue as justiciable, it would probably follow the lead of \textit{Sony III} in holding that "the sale of copying equipment . . . does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes,"\textsuperscript{137} or is only "capable of substantial

\textsuperscript{134} Nimmer, \textit{supra} note 44, at 1524. Cf. Wickard v. Filburn, 317 U.S. 111, 127-29 (1942) (finding that wheat grown and consumed at home can cause a decrease of the amount of wheat sold in interstate commerce, thus allowing Congress to regulate).\textsuperscript{135} "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." \textit{Sony Corp of America v. Universal City Studios}, 464 U.S. 417, 431 (1984).

\textsuperscript{136} See Joint Hearing, \textit{supra} note 2; \textit{Hearing on H.R. 1384, supra} note 13; \textit{Hearing on S. 506, supra} note 19.

\textsuperscript{137} \textit{Sony III}, 464 U.S. at 442.
noninfringing uses." In the DAT dispute, however, prerecorded cassettes are not yet available, so the machines are most likely to be used to record from other sources. As previously noted, professional DAT machines are already available for recording by musicians. Therefore, the RIAA is resisting DAT machines that will have only substantially infringing uses.

The *Gershwin Publishing Corp. v. Columbia Artists Management* test for contributory infringement contains two elements: knowledge of infringement and contribution to that known infringement. By resisting the copycode scanner so stringently, DAT manufacturers reveal that they are aware of a possible infringement problem. Indeed, they admit that consumers tape at home but contend that, after the ruling in *Sony III*, such activities are legal. Regarding the second element, a manufacturer has not yet attempted to release a DAT machine. However, an analogy to regular cassette tape recorders suggests that a court could find that the DAT machine contributes to copyright infringement. Two cases, *Electra Records Co. v. Gem Electronic Distributors* and *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, found suppliers of blank tape liable for copyright infringement. In *Electra*, the defendant supplier provided a "make-a-tape" service to defendant stores that sold blank tapes and allowed customers to copy original copyrighted materials. The defendants were held liable because they provided the mechanism for a foreseee-

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138 Id.
139 *Hearing on H.R. 1384, supra* note 13, at 30 (statement of Jason S. Berman).
140 See di Perna, *supra* note 18, at 54.
141 443 F.2d 1159 (2d Cir. 1971) (The court's definition of contributory infringement was adopted by the district court and court of appeals in *Universal City Studios v. Sony Corp. of America*, 480 F. Supp. 429, 459 (C.D. Cal.), rev'd, 659 F.2d 963, at 975 (9th Cir. 1981), rev'd, 464 U.S. 417 (1984)).
142 Id. at 1162.
143 There is no reason whatsoever for "the Congress to assume that DAT recorders are somehow illegitimate. As you are aware, under both the 1971 legislative history accompanying the Sound Recording Act and case law, private consumer home taping is legal. No lawsuit has ever been brought claiming that audio home taping, by consumers, is illegal. *Joint Hearing, supra* note 2, at 102 (statement of Charles D. Ferris).
145 845 F.2d 773 (8th Cir. 1988).
146 *Electra*, 360 F. Supp. at 822-23.
able infringement.\textsuperscript{147} In \textit{RCA/Ariola}, the manufacturers were held vicariously liable for issuing directives on the use of the machines and profiting by their use.\textsuperscript{148}

The DAT manufacturers appear to meet both criteria for contributory infringement. DAT manufacturers have reason to fear liability for contributory infringement, and this may be why they have delayed release of DAT machines to date.

**CONCLUSION**

If the RIAA successfully prevents DAT manufacturers from releasing the machines in the U.S., it will have only prevented a new technology while leaving the original problem of home taping intact. Other threats, such as recordable CDs,\textsuperscript{149} loom on the horizon. A judicial victory for the RIAA will not solve its major problem regarding copyright infringement. Commentators have suggested several solutions to the ultimate prob-

\textsuperscript{147} Id. at 824-25.

\textsuperscript{148} \textit{RCA/Ariola}, 845 F.2d at 781-82. In \textit{RCA/Ariola}, the defendant Metacom manufactured and placed its Rezound machines in defendant retailer's stores. The machines were equipped only to accept specially notched blank tapes, which Metacom sold to retailers, who in turn sold them to customers. \textit{Id.} at 777. While copyright warnings were attached to the machines, the court found that Metacom's authority to control the machines, along with its "financial interest in the copying as the source for the notched blank tapes needed to use the machine, sufficed to render Metacom vicariously liable." \textit{Id.} at 778. In \textit{Sony III}, the Court noted,

As the District Court correctly observed, ... "the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn..." (citation omitted) The lack of clarity in this area may, in part, be attributable to the fact that an infringer is not merely one who uses a work without authorization by the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from the copyright owner.

... We also observe, however, that reasoned analysis of respondents' unprecedented contributory infringement claim necessarily entails consideration of arguments and case law which may also be forwarded under the other labels, and indeed the parties to a large extent rely upon such arguments and authority in support of their respective positions on the issue of contributory infringement.


\textsuperscript{149} "On April 22 [1988], Texas' Tandy Corporation (of Radio Shack fame) announced that it had developed recordable/erasable compact disc technology." Pohlmann, \textit{DAT Hears Footsteps}, supra note 6, at 16.
lem, and Congress needs to act soon on one of these proposals to prevent the further erosion of copyright protection of sound recordings. A failure to respond to changes in technology may result in dwindling fees for recording artists and funds to develop new talent, inevitably leading to "the day the music died."

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For example, the Register of Copyrights would prefer a royalty solution (see Joint Hearing, supra note 2, at 145), as would Nimmer (see Nimmer, supra note 44, at 1529-34). Fleishmann calls for the repeal of the fair use doctrine, to allow copyright law its full effect. See Fleishmann, supra note 25, at 25. A normative solution has been suggested, wherein activities are broken down into economic and derivative dimensions, commercial and noncommercial, interactive and iterative. See Note, Toward a Unified Theory, supra note 60, at 460-68.

[One] reason that the DAT recorder is such a threat to musicians is that it will severely limit their opportunities to make recordings. Reduced sales of records will means less money for record companies to invest in new recordings.

And it is not only musicians who will suffer at the hands of DAT machines. There will also be artists, performers, producers, and thousands of workers and craft-persons of every kind who provide the necessary support to create the work of art that is a sound recording. Hearing on H.R. 1384, supra note 12, at 79 (statement of Victor W. Fuentealba, President of the American Federation of Musicians); The costs of creating and recording has (sic) risen enormously in the last 25 years, . . . If the recording companies' ability to recoup its costs are damaged by the copying of its product by others, the recording industry as a whole will be less able to invest in new artists.

But in the end, it is the individual artist that [sic] is hurt most of all. The legitimate income from his or her copyrighted work will be greatly diminished, and the economic base that should have sustained the artist in order to be able to continue to create new work is destroyed.

Hearing on S. 506, supra note 20, at 72 (statement of Mary Travers, of Peter, Paul, and Mary).

I went down to the sacred store,
where I'd heard the music years before
but the man there said the music wouldn't play. . .
. . . the day the music died.

American Pie

Don McLean, supra note 1.

* This Comment has been entered in the Nathan Burkan Memorial Competition.