Chapter 3

Legal Aspects of Copyright and Home Copying

CONTENTS

Chapter 3
Legal Aspects of Copyright and Home Copying

CONSTITUTIONAL BASIS FOR COPYRIGHT LAW

Definition of Copyright

American copyright is a constitutionally sanctioned and legislatively accorded form of protection for authors against unauthorized copying of their "original works of authorship" (17 U. S. C., Sections 102, et sec. (1982)).1 These works include literary, dramatic, musical, artistic, and other intellectual works. The copyright owner is given the exclusive right to use and to authorize various uses of the copyrighted work: reproduction, derivative use, distribution, performance, and display. Violation of any of the copy-right owner's rights may result in an infringement of copyright action. However the copyright owner's rights in the work are neither absolute nor unlimited in scope, however.

Copyright Clause

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

> Clause 8. The Congress shall have Power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. (U.S. Constitution, art. I, sec. 8, cl. 8)[2]

Much of the structure and basis for American law is derived from its British legal antecedents. After the introduction of the printing press in England in the late 1400s, the Crown's first response was to control what writings were printed or copied. The earliest British copyright laws were enacted in the 1500s to promote censorship by the government in cooperation with a monopolistic group of printers known as the Stationers' guild.[3] This system collapsed when the company failed to exercise discretion as censors, but used its monopoly power to set high prices. Parliament's response in 1695 was to allow the Stationers' copyrights to expire, but this resulted in a period of anarchical publication. In 1709 Parliament responded to the situation by enacting legislation known as the Statute of Anne. This statute granted a copyright to authors, as opposed to printers, for a period of 14 years. The copyright was renewable for an additional 14 years if the author was still alive. After the expiration of the copyright, the writing became part of the public domain, available for the use of anyone. This first modern copyright law became the model for subsequent copyright laws in English-speaking countries.[4]

---

[1] See: Harry G. Henn, ***Copyright Primer (New*** York, NY: Practicing Law Institute, 1979), p. 4.

[2] It is instructive t. consider th, significance of the exact language contained in Clause 8. The use of the word "writings" signifies that there must be some permanence in the actual form of expression or some specific articulation that can be ascertainable either directly or through some mechanism. This form of expression is more concrete and definite than basic ideas. "Author" refers to the creator of the "writings" and indicates that the writing must be the author's unique and individual work, not taken from another source. The concept of "exclusive right" indicates that the rights accruing from copyright ownership repose solely with the owner of the copyright, who may not necessarily be the creator of the "writing." Congress has dealt with the aspect of "limited times" in different ways over the years. In its most recent enactment, the 1976 Copyright Act, Congress determined that "limited times" is the life of the author plus 50 years. These concepts and the scope oftheircoverage have been subject to judicial review and interpretation. (See: David Nimmer and Melvin B. Nimmer, *Nimmer on Copyright (New York, NY:* Matthew Bender, 1988), vol. 1, ***sec. 1.03 -1.08.)***

[3] See: U.S. Congress, Office of Technology Assessment, ***Intellectual Property Rights in an Age of Electronics and Information,*** OTA-CIT-302 (Melbourne, FL: Kreiger Publishing Co., April 1986), pp. 34-36.

[4] Ibid.

Congress' constitutional grant of copyright regulation is more restricted than its English antecedent concerning both the subject of copyrights and the period of time for which copyrights are granted. The subject matter of American copyright covers the "writings" of authors. Under the American copyright system, the authors' exclusive rights in their works are granted for a period of time, after which they revert to the public domain. This American approach to copy-right embodies a duality of interest: the stimulation of intellectual pursuits and the property interests of the copyright owner. These competing concepts have been a central issue in the development, implementation, and interpretation of American copyright laws.

COPYRIGHT LAW OBJECTIVES

A fundamental goal of copyright law is to promote the public interest and knowledge– the "Progress of Science and the useful Arts." A directly related copyright objective is the promotion and the dissemination of knowledge to the public. Although copyright is a property interest, its primary purpose was not conceived of as the collection of royalties or the protection of property; rather, copyright was developed primarily for the promotion of intellectual pursuits and public knowledge. As the Supreme Court has stated:

> The economic philosophy behind the clause empowering the Congress to grant patents and copyrights is the conviction that encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors and inventors in Science and the useful Arts.[5]

Therefore, the congressionally mandated grant to authors of the limited monopoly is based on a dualism that involves the public's benefits from the creativity of authors and the economic reality that a copyright monopoly is necessary to stimulate the greatest creativity of authors. A direct corollary to this concept is that the grant of a monopoly would not be justifiable if the public did not benefit from the copyright system. Melvin Nimmer observed that the Framers of the Constitution regarded the system of private property as existing per se for the public interest. Therefore, in recognizing a property status in copyright, the Framers extended a recognition of this public interest into a new realm.[6] Thus, policy arguments that equate copyright with royalty income, or theories that assert that copyright is necessary in order to secure royalty income, run counter to this theory and appear to be inconsistent with the intent of the Framers.

The Supreme Court is well aware of these competing values and expressed its recognition in the 1984 *Sony* case:

> As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interest of authors and inventors in the control and exploitation of their 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.[7]

The concept of copyright presents a seeming paradox or contradiction when considered within the context of the First Amendment freedom-of-speech guarantees: while the First

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

[6] Nimmer, op. cit., footnote 2, vol. 1, sec. 1-32.1.

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

Amendment guarantees freedom of expression, it can be argued that copyright seems to restrict the use or dissemination of information. It can be argued, however, that copyright, to the degree that it stimulates expression and encourages writing and other efforts, furthers First Amendment expression values by encouraging the quantity of "speech" that is created. In attempting to resolve these conflicting interests, the courts have adopted a test that weighs the interests of freedom of expression and the property interests of the copyright holder to arrive at an acceptable balance.[8] An extensive body of case law has been developed that weighs and counterbalances First Amendment concerns and the rights of the copyright holder.[9]

Hence, the American copyright system is based on two competing interests: intellectual promotion and property rights.[10] Combined with these factors is the First Amendment freedom-of-expression concern. Courts have balanced and assessed these seemingly conflicting elements, and Congress has considered them in enacting copyright legislation.

THE DEVELOPMENT AND CURRENT BODY OF COPYRIGHT LAW

After severing political ties with Great Britain, the former American colonies sought means to secure copyright laws. In 1783, the Continental Congress passed a resolution encouraging the various States to enact copyright legislation. All of the States except Delaware enacted some form of copyright statute, although the various State laws differed greatly .11 Because of the differences in the State copyright laws and the ensuing difficulties, the Framers of the Constitution, notably James Madison, asserted that the copyright power should be conferred to the legislative branch.[12] This concept was ultimatel$_y$ adopted, and Congress was granted the right to regulate copyright. (Art. I, sec. 8, cl. 8).

The First Congress in 1790 enacted the first Federal copyright act.[13] This legislation provided for the protection of the authors' rights. Commentators have written that the central concept of this statute is that copyright is a grant made by a government and a statutory privilege, not a right.[14] The statute was substantially revised in 1831[15] to add copyright coverage to musical compositions and to extend the term and scope of copyright. A second general revision of copy-right law in 1870[16] designated the Library of Congress as the location for copyright activities, including the deposit and registration requirements. This legislation extended copyright protection to artistic works. The third general revision of American copy-right law in 1909[17] permitted copyright registration of certain types of unpublished works. The 1909 legislation also

[8]Nimmer, op. cit., footnote 2, vol. 1, sec. 1.10.

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

[10]The Recording Industry Association of America, Inc. (RIAA) does not discern a tension between these interests. The RIAA contends that the availability of copyright protection stimulates the creative process and protects the copyright owner's property interest in the product of the creative process. The RIAA believes that the two factors are mutually reinforcing, not antagonistic. (H. Rosen, RIAA, letter to J. Winston, OTA, May 2, 1989, enclosure with comments on draft ch. 5.)

[11]Lyman Ray Patterson, *Copyright in Historical* Perspective (Nashville, TN: Vanderbilt University Press, 1968), p. 183.

[12]Ibid., pp. 192-193.

[13]Ch. 15, 1, 1 Stat. 12. See: OTA-CIT-302, op. cit., footnote 3, p. 64.

[14]Patterson, op. cit., footnote 11, pp. 198-199.

[15]4 stat. 436.

[16]Act of July 8, 1870, c. 230, 16 Stat. 198.

[17]Act of Mar. 4, 1909, c. 320, 35 Stat. 1075.

changed the duration of copyright and extended copyright renewal from 14 to 28 years. A 1971 amendment extended copyright protection to certain sound recordings.[18] The fourth and most recent overhaul of American copyright law occurred in 1976, after years of study and legislative activity.[19] The 1976 legislation modified the term of copyright and, more significantly, included the fair-use concept as a limitation on the exclusive rights of the copyright holder.

Throughout the evolution of American copyright law, the central driving force was the desire to keep legislation in pace with technological developments that affected the dissemination of knowledge.[20] As the U.S. Supreme Court summarized recently in the Sony copyright decision:

> From its beginning, the law of copyright has developed in response to significant changes in technology.... Indeed, it was the invention of a new form of copying equipment – the printing press– that gave rise to the original need for copyright protection.... Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.[21]

The 1976 Act set out the rights of the copyright holder, which include: the reproduction of works in copies or phonorecords; creation of derivative works; distribution of copies of the work to the public by sale, rental, lease, or lending; public performance of copyrighted work; and display of copyrighted work publicly (17 U. S. C., sec. 106 (1982)). The statute does, however, specify certain exceptions to the copy-right owner's exclusive rights that are noninfringing uses of the copyrighted works. These exceptions include the "fair use" of the work (17 U. S. C., sec. 107 (1982)), reproduction by libraries and archives (17 U. S. C., sec. 108 (1982)), educational use (17 U. S. C., sec. 110 (1982)), and certain other uses.

A clear understanding of the fair-use exception is of extreme importance, as the concept of "home use" appears to be a judicially created derivative of the fair-use doctrine. This doctrine has been applied when certain uses of copyrighted works are defensible as a "fair use" of the copyrighted work.[22] It has been said that this doctrine allows the courts to bypass an inflexible application of copyright law, when under certain circumstances it would impede the creative activity that the copyright law was supposed to stimulate.[23] Various approaches have been adopted to interpret the fair-use doctrine. Some commentators have viewed the flexibility of the doctrine as the "safety valve" of copyright laws. Others have considered the uncertainties of the fair-use doctrine the source of unresolved ambiguities. Some commentators contend that the fair-use doctrine has been applied prematurely at times, such as in the case of "home use," where the doctrine is used as a defense to a claim of infringement. They

---

[18] Public Law 92-140, Oct. 15, 1971, 85 Stat. 391.

[19] Public Law 94-553, Oct. 19, 1976, 90 Stat. 2541, codified at 17 U.S.C. sec. 101, et seq. (1982).

[20] Richard Wincer and Irving Mandell, *Copyright, Patents, and Trademarks: The Protection of Intellectual Property* (Dobbs Ferry, *NY:* Oceana Publications, 1980), p. 25.

[21] 464 U.S. 417, 430-431 (1984).

[22] Before codification of the "fair-use" exception in the 1976 copyright act, the fair-use concept was upheld in a common law copyright action in *Hemingway v. Random House, Inc., 53* Misc.2d 462,270 N.Y.S. 2d 51 (Sup. Ct. 1967), *aff'd on othergrounds 23* NY.2d 341, 296 N.Y.S.2d 771 (1968). The common law concept of "fair use" wasdevelopedover manyyears bythecourtsofthe United States. See, for instance, *Folsom* v. *Marsh, 9* F.Cas. *342 (N. 4901)* (C.C.D. Mass. *1841)* : *Mathews Conveyor Co. v. Palmer-Bee Co., 135* F.2d 73 (6th Cir. 1943).

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

claim that the application is premature because without a clear delineation or mandate of rights over private uses, it is uncertain as to whether any infringement had ever occurred.[24] The judicial interpretations of the fair-use doctrine discussed below have a situation in which there exist concurrently the statutory concept of fair use — "the law" — and the "judicially creatd" or case-law derivatives of fair use, such as the concept of "home use."

In codifying the fair-use exception in the Copyright Act of 1976, Congress did not formulate a specific test for determining whether a particular use was to be construed as a fair use. Rather, Congress created statutory recognition of a list of factors that courts should consider in making their fair-use determinations. The four factors set out in the statute are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
4. the effect of the use on the potential market and value of the copyrighted work (17 U. S. C., Sec. 107 (1982)).

Congress realized that these factors were "in no case definitive or determinative" but rather "provided some guage [sic] for balancing equities."[25] It appears that Congress developed a flexible set of criteria for analyzing the circumstances surrounding each "fair-use" case, and that each case would be judicially analyzed on an ad hoc basis.[26] Therefore, courts seem to have considerable latitude in applying and evaluating fair-use factors.

Courts have given different weight and interpretation to the fair-use factors in different judicial determinations. The following illustrations demonstrate how some courts have interpreted certain fair-use factors. In evaluating the first factor, the purpose and character of the use, courts have not always held that use "of a commercial nature" negates a fair-use finding,[27] nor does a "nonprofit educational" purpose mandate a finding of fair use.[28] A defense of fair use on the basis of the first criterion will more often be recognized, however, when a defendant uses the work for educational, scientific, or historical purposes.[29] Consideration of the second factor, the nature of the copyrighted work, must be based on the facts and circumstances of each particular case. For instance, courts have interpreted the scope of the fair-use doctrine narrowly for unpublished works held confidential by their authors.[30] In examining the third factor, the amount and substantiality of the portion of the work used, courts have looked at both the quantitative aspect –how

[24] Electronic Industries Association (EIA), letter to D. Weimer, c/o OTA, Apr. 28, 1989. The EIA asserts that there is a "statutory exemption" for home taping under the Copyright Act and that the legality of home taping does not depend on the fair-use doctrine.

[25] H.R. Rep. No. 1476, 94th Cong., 2d sess. 65 (1976).

[26] See: EIA, op. cit., footnote 24. The EIA believes that the existing doctrine of fair use is sufficient to adapt to existing and emerging recording technologies and is adequate to address the home taping issue.

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

[28] *Marcus* v. Cowe, 695 F.2d 1171 (9th Cir. 1983).

[29] See *Italian Book Corp. v. American Broadcasting Cos.*, 458 F. Supp. 65 (S.D.N.Y. 1978).

[30] A recent case articulating the fair use doctrine involved the personal correspondence of author J.D. Salinger. The court determined that the author had a copyright interest in his correspondence. *Salinger* v. *Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 213 (1987).

much of the work is used[31] – and the qualitative factor – whether the "heart" or essence of the work is used.[32] The fair-use doctrine is usually not considered to be applicable when the copying is nearly a complete copy of the copyrighted work, or almost verbatim.[33] As will be seen below, however, the concept of "home use" is an exception to this general rule of fair use. In assessing the fourth factor, courts have examined the defendant's alleged conduct to see whether it poses a substantially adverse effect on the potential market for or value of the plaintiff's present work.[34] These fair-use considerations illustrate the great care courts take in applying the fair-use doctrine on a case-by-case basis.

Anyone who violates the exclusive rights of the copyright owner may be considered to be an infringer of copyright.[35] The copyright statutes provide that the copyright owner may institute an action for infringement against the alleged infringer (17 U. S. C., sec. 501(b)(1982)). A court may issue an injunction against the copyright infringer to prevent further infringement of the copyright (17 U. S. C., sec. 502 (1982)). An infringer of a copyright may be subject to the payment of actual damages and profits to the copyright owner (17 U. S. C., sec. 504 (b)(1982)); or in certain circumstances the copyright owner may elect to receive specified statutory damages in lieu of actual damages and profits (17 U. S. C., sec. 504(C)(1982)). In addition, the court may permit the recovery of legal fees and related expenses involved in bringing the action (17 U. S. C., sec. 505 (1982)). Criminal sanctions may also be imposed for copyright infringements in certain cases (17 U. S. C., sec. 506 (1982)).

ANALYSIS OF HOME RECORDING

The Sony Case

American courts have been called on to examine home recordings within the context of videocassette recorders (VCRs). The home use of VCRs under certain circumstances was carefully analyzed, and after a series of conflicting lower court judgments, was approved by the U.S. Supreme Court.[36] In the Supreme Court action, Universal City Studios (the plaintiffs/respondents) did not seek relief against the actual users of the VCRs; instead, Universal sued the VCR manufacturers and suppliers, primarily, Sony, on the basis of contributory infringement.[37] This theory was based on the argument that the distribution and sale of VCRs encouraged and contributed to the infringement of the plaintiffs' copyrighted works.[38] Universal sought monetary damages and also an injunction that would prohibit Sony from manufacturing VCRs in

[31] *Consumers* Union *of U.S., Inc.* v. *General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983).

[32] *Maxtone- Graham* v. *Burtchaell*, 803 F.2d 1263 (2d Cir. 1986).

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

[34] This factor was of considerable importance in the *Sony* cases discussed below. See, also, *Consumers Union of U. S., Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983).

[35] 17 U.S.C. 501(a)(1982). For a complete discussion of the remedies for copyright infringement, see: Henn, op. cit., fOOtnOte 1, pp. 245-267.

[36] *Universal City Studios, Inc.* v. *Sony Corp. of America*, 480 F.Supp. 429 (D.C. Cal. 1979), rev'd, 659 F,2d 963 (9th Cir. 1981), rev'd, 464 Us. 417 (1984).

[37] *Sony Corp.* v. *Universal City Studios, Inc.* 464 U.S. 417 (1984). In the district court action, Universal had also sought relief against an actual VCR user.

[38] Ibid., pp. J20-A21, 434. "It is, however, the taping of respondents' own copyrighted programs that provides them with the standing to charge Sony with contributory infringement. To prevail, they have the burden of proving that users of the Betamax have infringed their copyrights and that Sony should be held responsible for that infringement."

the future. This action was of great significance, as the Supreme Court had not previously interpreted the issue of fair use within the context of home taping/recording. The Court determined that the key issue to be resolved was whether the sale of Sony's equipment to the public violated any of the rights given to Universal by the Copyright Act.[39]

First, the Court considered the exact nature of the relationship between Sony and its purchasers. The Court determined that if vicarious liability was to be imposed on Sony, such liability had to be basal on the constructive knowledge that Sony's customers might use the equipment to make unauthorized copies of copyrighted material. The Court observed that there exists no precedent in copyright law for the attribution of liability on the basis of such a theory.@ Therefore, it was argued that the sale of such copying equipment is not deemed to be contributory infringement if the product is capable of other uses that are noninfringing. To respond to this issue, the Court deliberated whether the VCR was able to be used for commercially significant noninfringing uses. The Court concluded that the VCR was capable of such noninfringing uses through private noncommercial time-shifting activities in the home. In reaching this determination, the Court relied heavily on the findings of the district court and rejected the conclusions of the court of appeals. The Court's conclusions were based on the idea that Universal cannot prevent other copyright holders from authorizing the taping of their programs and on the finding of fact by the district court that the unauthorized home time-shifting of the respondents' programs was a legitimate fair use.[41] When bringing an action for contributory infringement against the seller of copying equipment, the copyright holder cannot succeed unless the relief affects only the holder's programs, or unless the copyright holder speaks for virtually all copyright holders with an interest in the outcome.[42] The Court determined that the copyright holders would not prevail, since the requested relief would affect other copyright holders who did not object to home time-shifting recording.[43]

After examining the unauthorized time-shifting use of VCRs, the Court determined that such use was not necessarily infringing.[44] On the basis of the district court's conclusions, the Court determined that the potential harm from time-shifting was speculative and uncertain. The Supreme Court arrived at two conclusions. Sony demonstrated that various copyright holders who license their works for broadcast on commercial television would not object to having their programs time-shifted by private viewers. Also, Universal did not prove that time-shifting would cause the likelihood of nonminimal harm to the potential market for or the value of their copyrighted works.[45] Therefore, home use of VCRs could involve substantial noninfringing activities, and the sale of VCR equipment to the public did not represent a contributory infringement of Universal's copyrights. The scope of the Court's holding was expressly limited to video recording in the home, to over-the-air noncommercial broadcasting, and to recording

[39]Ibid., p. 423.

[40]Ibid., p. 439.

[41]Ibid., p. 442.

[42]Ibid., p. 466.

[43]Ibid.

"Ibid., p. 446.

[45]Ibid., p. 456.

for timeshifting purposes. The holding did not address the taping of cable or pay television or the issue of "library building" of recorded programs. In reaching its determinations, the Court rejected the central finding of the court of appeals that required that a fair use had to be "productive."[46] Rather, the Court determined that under certain circumstances, the taping of a video work in its entirety for time-shifting purposes would be allowable under the fair-use doctrine.[47] It should be considered that these findings are "case-law" or "judicially made law" and not statutory law.

Relying substantially on the findings of the court of appeals, the dissenting opinion asserted that there was potential harm to Universal through the use of home video recording.[48] Hence, the dissent concluded that there was no exception for home video recording under the fair use doctrine of current copyright law scheme.[49]

Despite their differing views, both the majority and the dissent inferred that Congress may wish to examine the home video recording issue.[50] As the majority opinion stated:

> 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.[51]

Home Use of Recording Equipment

Although the Supreme Court and other courts have provided some guidance for interpreting copy-right law in home recording/taping situations, many questions and issues remain unresolved. It should be considered that the previously discussed *Sony* case was a narrow holding, strictly limited to a very specific situation — home video recording of noncommercial or "nonpay" television for time-shifting. The practical application of current copyright law and related judicial interpretations are here considered within the context of certain typical home recording and viewing situations.

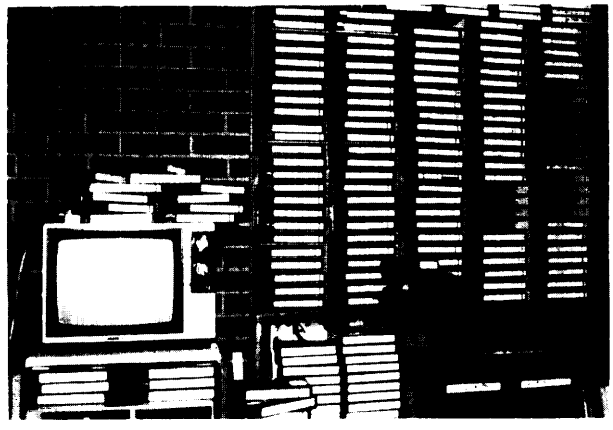

Photo Credit: Office of Technology Assessment

Some consumers have used VCRs to create large home video libraries.

[46]Ibid., pp. 454-455.

[47]Ibid., pp. 449-450.

[48]Ibid., pp. 482-486.

[49]Ibid., p. 475. The decision is the case was a 5-4 vote (majority: Stevens, Burger, Brennan, White, and O'Connor; dissent: Blackmun, Marshall, Powell, and Rehnquist).

[50]Ibid., p. 456 (majority), p. 500 (dissenting). The RIAA takes the position that the Court "expressly suggested" that Congress examine the home video recording issue. (H. Rosen, op. cit., footnote 10.)

[51]I bid., p. 456.

A primary consideration in copyright law as it applies to the judicially created concept of "home use" of recording equipment is determining what constitutes a "home." Although current copyright law and regulations do not specifically define what constitutes a "home," certain inferences can be drawn from the statutory definition provided for the public performance of a work:

> To perform or display a work "publicly" means —
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside a normal circle of a family or its social acquaintances is gathered.[52]

An inference can be drawn from the language that the opposite of a "public" display of a work might be a "home," or a private display of the work. In considering this proposition, it could be inferred that a home would signify a place not open to the public and/or a place where only a family and/or its social acquaintances are gathered.

A review of the legislative history pursuant to the passage of copyright legislation gives some insight into the congressional intent concerning the concept of a home. The accompanying legislative history of the Sound Recording Amendment of 1971 appears to indicate that Congress meant the term "home" to include only the traditional, generally conceived concept of an individual's own home. A statement in the 1971 House Report on audio recording provides some insight into the meaning of home recording "where home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it."[53] The legislative history of the 1976 copyright revision discussed the concept of "public performance" and provides some guidance for the concept of home use.

> One of the principal purposes of the definition ["public performance"] was to make clear that,... performances in "semipublic" places such as clubs, lodges, factories, summer camps, and schools are "public performances" subject to copyright control. The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of businesses and governmental personnel would be excluded because they do not represent the gathering of a "substantial number of persons."-

It therefore appears from the legislative history of both the 1971 and 1976 copyright laws that the concept of a "home" is limited to the traditional meaning of the term and that certain other "semi-public" situations are to be considered as "public" places for the purposes of copyright law.[55]

The district court in the *Sony* case examined the concept of home use and its limits:

> "Home-use" recording as used in this opinion is the operation of the Betamax in a private home to record a program for subsequent home viewing. The programs involved in this lawsuit are broadcast free to the public over public airwaves... the court's declaration of non-infringement is limited to this home-use situation.
>
> It is important to note the limits of this holding. Neither pay or cable television stations are plaintiffs in this suit and no defendant recorded the signals from either. The court is not ruling on tape duplication within

[52] 17 U.S.C. 101 (1982).

[53] U.S. Congress, House Committee on th, Judiciary, *Sound Recordings, Report Accompanying S.646*, Serial No. 92-487, September 1971.

[54] U.S. Congress, House Committee on th, Judiciary, *Report* t. *Accompany S.22*, Serial No. 94.-1476, September 1976. (This was the congressional report accompanying the last major copyright revision.)

[55] Melville Nimmer, "Copyright Liability for Audio Home Recording: Dispelling the 'Betamax' Myth, " *Virginia Law Review*, vol. 68, 1982, pp. 1505, 1518-1520.

> the home or outside, by individuals, groups, or corporations. Nor is the court ruling on the off-the-air recording for use outside the home, e.g., by teachers for classrooms, corporations for employees, etc. No defendant engaged in any of these activities and the facts necessary to determine their legality are not before this court.[56]

The court of appeals and the Supreme Court did not contradict the district court's concept of a home or the factual circumstances involved with the home taping in the *Sony* case. It seems certain that the Sony decisions envisioned a home as a private home. Not all recordings made in a home would necessarily fit with the home-use exemption, however.[57]

Since the *Sony* decision, courts have examined various concepts of home recording. A series of cases has examined public performance and home use within the context of VCR viewing. This line of cases has held that the viewing of copyrighted videocassettes in private rooms at video stores constitutes public performance,[58] even when members of a single family viewed a cassette in a private room at the store.[59] These cases illustrate that American courts are very careful in categorizing various situations as a "home" for the purposes of copyright law. Ruling that these viewings were public performances, the courts held that they were subject to the provisions of copyright law.[60]

Two recent cases brought new judicial scrutiny to the home use concept. In one case, a condominium association held weekly dances in its clubhouse, which was owned by all of the condominium owners. The association charged a small admission to cover the cost of the musicians. Representatives of the owners of the copyrighted music that was played at the dances brought an infringement action against the association and won.[61] The importance of this case is that the district court recognized and discussed a "family exception')[62] from copyright liability that the court derived from the "public performance" definition of section 101 of the 1976 Copyright Act. The court determined that the condominium's situation did not fall within this so-called "family exception," and gave judicial recognition to a "family exception" under section 101. In a 1986 decision, a district court held that a private club did not fit within the concept of a home and hence copyrighted materials performed or viewed there were subject to the copyright laws.[63] While these cases did not involve home audio or video recording or viewing, they do illustrate the limited concept of a "home" as interpreted by the courts and the recently articulated "family exception" doctrine of copyright law. The courts have been sparing in the application of "home use" to situations other than the traditional home setting.

Applying copyright law and the relevant judicial guidance can lead to various conclusions about home recording in particular circumstances. The *Sony* case affirmed the use of VCRs to record and replay commercially televised programs for personal use. The concept

---

[56] 480 F.Supp. 429, 442 (D.C. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981).

57A VCR could be used in a home to make copies of a copyrighted tape, hence infringing on the copyright owner's rights.

[58] *Columbia Pictures Indus. v. Redd Home Inc., 568* F. Supp. 494 (W.D. Pa. 1983), *aff'd.*, 794 F.2d 154 (3rd Cir. 1984).

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

[60] Although these cases were factually different from the *Sony* cases, they illustrate the reluctance of courts to use the concept Of "home use" in situations that do not fall within the traditional concept of the home.

[61] *Hinton* v. *Mainlands of Tamarac*, 611 F. Supp. 494 (S.D. Fla. 1985).

[62] Ibid., pp. 495-496.

[63] *Ackee Music, Inc. v. Williams, 650* F.Supp 653 (D.Kan. 1986).

of VCR recording for time-shifting purposes appears to be judicially acceptable. The *Sony* case did not, however, address audiotaping, or home taping of cable or "pay" television.

THE INTELLECTUAL PROPERTY SYSTEM AND HOME COPYING

Concept of Intellectual Property

Intellectual property is a unique conception of an inherent and intangible property right in an artistic, scientific, or intellectual work. Sometimes characterized as a "bundle of rights, " intellectual property rights inhere in a particular creation.[64] The intellectual property concept is a unique representation or embodiment of expression which is invested in an artistic, scientific, or intellectual work. This contrasts with the concept of personal property, which governs the ownership of the actual works themselves. Applying these property concepts to particular examples is instructive to distinguish between them. An example of personal property would be a specific phonorecord with a particular musical composition recorded on it. Thus, the phonorecord is personal property–the medium in which the intellectual property is imbedded-while the musical composition/ arrangement/instrumentality that is embodied in all phonorecords with this particular musical composition recorded on it represents the intellectual property. Therefore, the individual phonorecord represents the personal property right, but the artistry, the arrangement, and the musical composition that inhere in this recording represent the intellectual property right. Thus, the concept of an intellectual property right involves the right to create works in particular characterizations.[65]

Statutory Concept of Intellectual Property

The 1976 Copyright Act embraces the concept of the existence of intellectual rights that are separate from the physical ownership rights in the copyrighted works:

> Sec. 202. Ownership of copyright as distinct from ownership of material object
>
> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the *copy or phonorecord in which the work is first freed,* **does** not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of any agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object. (emphasis added)[66]

The House Report accompanying its enactment analyzes this concept:

> The principle restated in section 202 is a fundamental and important one: that copyright ownership and ownership of a material in which the copyrighted work is embodied are entirely separate things. Thus transfer of a material object does not of itself carry any rights under the copyright, and this includes transfer of the copy or phonorecord– the

[64] U.S. Congress, Serial No. 94-1476, op. cit., fOOtnOte 54, p. 124.

[65] For the purposes of this report, the discussion of intellectual property rights will be limited to only those rights that specifically involve American copyright law. Intellectual property rights may also involve patents, for example.

[66] 17 U.S.C. 202 (1982).

> original manuscript, the photographic negative, the unique painting or statue, the master tape recording, etc.—in which the work was first fixed. Conversely, transfer of a copyright does not necessarily require the conveyance of any material object.[67]

American courts have examined and upheld this concept of intellectual property recognition.[68]

The development of a process enabling the electronic transfer of various creative works has raised the question as to whether an actual physical embodiment of the work must exist to apply the concept of intellectual property. A careful reading of the entire copyright statute and an examination of the legislative history indicate that there need not be an actual physical copy or embodiment of the copyrighted work for the concept of intellectual property to inhere in the work. The copyright statute uses the concepts of both "phonorecord"[69] and of a work being "fixed."[70] In addition to these concepts, it appears from the statutory directives that works that may be electronically or otherwise transmitted would be covered by the statutory provisions governing intellectual property. The legislative history of the 1976 Copyright Law Revision reinforces this belief. As the House Report language stated:

> Under the bill, it makes no difference what the form, manner or medium of fixation may be–whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is *capable of perception directly or by means of any machine or device now known or later deueloped.* [emphasis added][71]

Therefore, the concept of intellectual property covers electronic transfer or transmission of a work, so long as the work is "fixed," even if the work is not in a "physical" form.

Recent Technological Developments

Recently, great interest has been given to the intellectual property rights in audio and visual works. One reason for this increased interest has been the technological revolution that has occurred since the last major revision of American copyright law in 1976. Since this revision went into effect in 1978, there have been major technological advances that allow easy and effective copying of many copyrighted works. While the 1984 *Sony* case ex-

---

[67] U.S. Congress, Serial No. 1476, op. cit., footnote 54, p. 124.

[68] See, for instance, *Nika* COW. v. *City of Kansas City, Mo.*, 582 F. Supp. 343 (D.C. Mo. 1983). In this action, the court examined whether a company, in transferring certain documents to a municipal corporation, had also transferred its actual intellectual property copyright in these items. The court determined that in following the copyright statute, the copyright of the objects was indeed distinct from the actual ownership or possession of the object.

[69] The copyright statute defines phonorecord as follows:

"Phonorecords" are material objects in which sounds, other than those accompanying motion picture or other audiovisual work, are fried by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid ofa machine or device. The term "phonorecords" includes the material object in which the sounds are first freed. (17 U. S. C., sec. 101 (1982)).

[70] The copyright statute defines a work as being fixed under the following circumstances:

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission. (17 U. S. C., sec. 101 (1982)).

[71] U.S. Congress, Serial No. 94-1476, op. cit., footnote 54, p. 52.

amined a limited aspect of home video recording use for time-shifting purposes, major technological and market changes have occurred since this last judicial determination.

Among these are the advent of compact disc players and digital audiotape (DAT).[72] Other changes include growth in the home video cassette industry[73] and product improvement and declining prices for audio and video recording equipment. While these developments may be truly considered advances for mankind and intellectual development, they raise a myriad of copyright questions that were not directly addressed in either the 1976 revision of the copyright law or in the 1984 *Sony* case.[74]

Although clearly there is a statutory recognition of fair use of copyrighted works, and the courts have created a limited concept of "home use" for certain home videocassette recorder use, the impact of effective and relatively inexpensive sophisticated visual and audio recording equipment has not been legislatively or judicially analyzed in depth. As has been illustrated in the nearly 200 years of American copyright law, however, Congress has attempted to respond legislatively to technological advances that have altered the balance of the traditionally competing factors in copyright: the property rights of the copyright holder and the stimulation of the public's knowledge. This congressional responsiveness was discussed at length in the legislative history surrounding the enactment of the 1976 copyright revision:

> The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into two general categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expression forms-electronic music, filmstrips, and computer programs, for example-could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.[75]

The House Committee on the Judiciary emphasized that the 1976 revision was not inflexible and would itself probably be revised, and that the Committee did not intend to "freeze the scope of copyrightable technology."[76] The Committee also alluded to "other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to."[77]

This tradition and practice of Congress' responding to technological changes has been recognized by the Supreme Court in its decision in the *Sony* case:

---

[72]See: Ronald K. Jurgen, "consumer Electronics, " in "Technology 'SS," ***IEEE Spectrum,*** January 19S8, p. 56.

[73]Ibid., pp. 112-114.

[74]Some of these legal and policy questions include: What are the precise legal boundaries of the judicial theory of " home use"? When does recording done in the "home" not constitute "home use"? What, if any, enforcement mechanism scould be used to protect copyright holders' rights? Another rather fundamental question is whether the development of digital recording– which produces very high qualit, copies — represents a "quantum leap" in recording technology and therefore indicates the desirability of a major revision in the American system of copyright law. Does the digital representation ofa musical or image/pictorial composition represent a fundamental technological change to which the American copyright system must respond in a substantive manner?

[75]U.S. Congress, Serial No. 94-1476, op. cit., footnote 54, p. 51.

[76]Ibid.

[77]Ibid., p. 52.

> From its beginning, the law of copyright has developed in response **to significant changes** in technology . . . Indeed, it was the invention of a new form of copying equipment – the printing press — that gave rise to the original need for copyright protection. . . . Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.[78]

Therefore, it may well be, as the Supreme Court implied in the Sony decision,[79] that Congress may wish to examine and act in response to the numerous technological advances that have occurred in the information recording and dissemination areas. If Congress does choose to act in this area, it may wish to examine the approaches taken in other countries.

COMPARISON OF THE AMERICAN INTELLECTUAL PROPERTY SYSTEM WITH OTHER INTERNATIONAL COPYRIGHT SYSTEMS

This section describes and analyzes certain aspects of the intellectual property protection/copyright systems in the United States, Great Britain, Canada, and France that relate to home copying. Although the United States, Great Britain, and Canada share historical roots in the development of national copyright laws, significant differences in their intellectual property systems exist. France, with a tradition of national support and protection of the arts, takes yet another approach to the protection of intellectual property.[80]

The United States

As has been previously discussed, the American copyright law has its origins in English common and statutory law. Despite these colonial British roots, American copyright law has developed to suit the specific needs and outlooks of the United States. A fundamental tension in the development of American copyright law relates to the competing concerns for the ownership/property rights of the author/creator/owner and the goal of free dissemination of information for the public good. Traditionally, the United States has espoused a free enterprise system that did not pursue a national policy to promote the arts, and American copyright law reflected these doctrines. For instance, there has never been statutory recognition of artists' or moral rights, and the statutory embodiment of intellectual property rights is a relatively recent occurrence. It does, however, appear that there is a growing trend in American law and philosophy to recognize creative rights.

While the basic legal framework of American copyright law has been previously discussed in this chapter, considering specific aspects of American copyright law will provide insight into the concepts of home copying. In particular, it would be instructive to examine the "first-sale" doctrine and recent amendments that have been enacted concerning record rentals. The principle of the "first-sale" doctrine, in practice, upholds the copy-right of the copyright owner during the first sale or

[78] 464 U.S. 417, 430-431 (1984).

[79] Ibid., p. 456.

[80] One consequence Of this distinction is that the French Government imposes a levy on both audio- and videotapes since December 1986. In addition, other countries have introduced levy schemes. For additional discussion of international systems dealing with performance rights in sound recordings, see ch. 5.

commercial transaction of the work, but extinguishes the copyright owner's rights in subsequent sales or transactions.[81] The House Report accompanying the original (1976) legislation provided an example of the application of the "first-sale" doctrine.

> Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose.[82]

The "first-sale" doctrine has been upheld in recent court decisions. Thus, when a copyrighted work is subject to a valid first sale, the distribution rights of the copyright holder are extinguished, and the title passes to the buyer.[83]

Congress enacted a significant statutory modification to the "first-sale" doctrine was enacted in the "record rental amendments" to American copyright law in 1984.[84] This legislation was designed to help deal with the situation where record rental stores purchased record albums – the first sale – and then leased the albums for a fee that represented a small portion of the purchase price. The lessee frequently taped the rented record. It was argued that the use of the rental record may have displaced a potential sale of the actual record.[85] Congress thus amended the "first-sale" doctrine:

> (b)(l) Notwithstanding the provisions of subsection (a), *unless authorized by the owners of* ***copyright in the sound recording and in the musical works embodied therein,*** the owner of a particular phonorecord may not, for purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution. (emphasis added)[86]

The practical effect of this amendment is to prohibit the rental of such sound recordings without the copyright owners' permission. In actual practice the copyright owners – usually the recording companies–have not authorized record rental, and as a result record rental is not an industry in the United States.

Another aspect of home audio recording occurs when an individual tapes music broadcast on the radio, or records from tapes or records for personal use in the home or for "time-shifting" purposes. Congressional intent underlying the Sound Recording Amendment of 1971 was very clearly to continue to permit certain home taping:

> 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

---

[81] 17 U.S.C. 109 (1982 & Supp. V, 1987).

[82] See U.S. Congress, Serial No. 94-1476, op. cit., footnote 54, p. 79.

[83] See, *T.B. Harms Co. v. JEM Records, Inc., 655* F. Supp. 1575 (D. C.N.J. 1987); *Walt Disney Productions v. Basmajian*, 600 F. Supp. 439 (D. C.N.Y. 1984). See also: Nimmer, op. cit., footnote 2, vol. 1, sec. 8.12 **[B].**

[84] Public Law 94-450, SEC. 2, Oct. 4, 1984, 98 Stat. 1727.

[85] See 129 *Congressional Record*, S 9374 (1983) (Statement of senator Thurmond).

[86] 17 U, S, C., sec. 109(b)(1) (1982 & Supp. V, 1987).

> **and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.[87]**

While it appears that Congress intended to allow certain home audiotaping practices in 1971, the congressional reports accompanying the 1976 copyright revision were silent on this issue. However, no report or statutory language negated the principles stated in 1971.[88] Currently, it appears that the 1971 legislative history may provide evidence of congressional intent to permit home taping of music from broadcasts or prerecorded sources. This issue is not positively determined by statute or case-law, however.

The Electronic Industries Association (EIA) advances the position that language of the 1971 amendments clearly denied to copyright owners the right to prevent home taping.[89] Furthermore, the EIA believes that nothing in the 1976 amendments to the copyright law negated the principle that home taping from broadcasts or prerecorded materials was not an infringement.[90] EIA takes the position that in view of the "clear Congressional intent to exempt home taping from among the exclusive rights granted to copyright holders, we submit that it is inappropriate to consider the right of home taping strictly as a judicial derivative of the fair-use doctrine."[91] The EIA summarized their opinion:

> The fair use doctrine comes into play only where the activity arguably falls within the exclusive rights accorded to the copyright holder. Because home audio taping is statutorily exempt from those exclusive rights, the fair use issue, while theoretically pertinent, should not ordinarily be implicated in the context of home audio taping.[92]

In a sharply contrasting opinion, the Recording Industry Association of America, Inc., (RIAA) disregards the legislative history of the 1971 amendments. RIAA asserts that the legislative history was "made irrelevant *by* the subsequent overhaul of the copyright law in 1976."[93] RIAA takes the approach that the 1971 legislation was intended to preserve the status quo, pending a full revision of the law, and that the enactment of the new copyright law made the former legislative history irrelevant.

The home taping of records or other recordings that are borrowed from a public library raises additional copyright considerations. While the American copyright statute is very explicit on the reproduction abilities of libraries and archives,[94] there does not appear to be specific statutory language dealing with the home copying of audio works borrowed from public libraries.

Another aspect of American copyright law that deals with the copying of copyrighted materials allows the copying of computer programs for certain purposes and under specific

---

[87] U.S. Congress, Serial No. 92-487, op. cit., footnote 53, p. 7. The district court in the ***Sony*** decision relied on this rationale in upholding the taping of broadcast material for home use. See, 4S0 F. Supp. 429, 444 (D.C. Cal. 1979).

[88] This issue was addressed by the district, court in the ***Sony*** case. See, 480 F. Supp. 429, 444-445 (1979). However, the Supreme Court in the Sony decision did not analyze this issue.

[89] EIA, op. cit., footnote 24, p. 3. The EIA asserts that section 1(f) of the 1971 Act provided copyright holders the exclusive right to reproduce and distribute sound recordings "to the public." "By limiting the right of copyright holders to reproduce and distribute only as to the public, Congress thereby also denied copyright holders the right to preclude home taping for private use." Ibid.

[90] Ibid. "It would be folly to presume that Congress would have made such sweeping change to the existing state of the law, turning millions of private citizens into lawbreakers, without explicit statutory language or legislative history."

"I bid., pp. 3-4.

[92] Ibid., p. 4.

[93] H. Rosen, op. cit., footnote 10, p. 2.

9417 U.S.C. 10s (1982).

circumstances.[95] Thus, the owner of a computer program may make another copy or adaptation of that program if the copy is needed for a specific step in using the computer program or if the copy is for archival purposes.

Great Britain

Great Britain enacted a revised, comprehensive copyright act, the Copyright, Designs and Patents Act 1988, on November 8, 1988.[96] Most of the provisions of the Act became effective in the spring of 1989, and the Act repeals and entirely replaces existing copyright legislation.

Several provisions of the new British Act are of interest in the analysis of home taping. The Act provides a sweeping definition of "sound recording" that exceeds the American concept of "sound recording":

> "sound recording" means —
> (a) a recording of sounds, from which the sounds may be reproduced, or
>
> (b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part maybe produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced; ...[97]

Just as American law permits the copying of certain computer programs, so does the British law, but the British law has a far broader application than the American law. The American law is limited to computer software, while the British counterpart covers a variety of **works** which are in "electronic form":

> Works in electronic form
> 56.– (1) This section applies where a copy of a work in electronic form has been purchased on terms which, expressly or impliedly or by virtue of any rule of law, allow the purchaser to copy the work, or to adapt it or make copies of an adaptation, in connection with his use of it.
>
> (2) If there are no express terms–
> (a) prohibiting the transfer of the copy by the purchaser, imposing obligations which continue after a transfer, prohibiting the assignment of any licence or terminating any license on a transfer, or
>
> (b) providing for the terms on which a transferee may do the things which the purchaser was permitted to do, anything which the purchaser was allowed to do may also be done without infringement of copyright by a transferee; but any copy, adaptation or copy of an adaptation made by the purchaser which is not also transferred shall be treated as an infringing copy for all purposes after the transfer.
>
> (3) The same applies where the original purchased copy is no longer usable and what is transferred is a further copy use in its place.
>
> (4) The above provisions also apply on a subsequent transfer, with the substitution for references in subsection (2) to the purchaser of references to the subsequent transferor.[98]

---

[95] 17 U.S.C. 117 (1982).

[96] See: Intellectual Property Dept., Linklaters & Paines, "Copyright, Designs and Patents Act 1988 1-2" (London: Linklaters & Paines, 1988). This work is an analysis of the new British copyright law prepared by a British law firm for its international offices and clients.

In addition to dealing with copyrights, the Act also includes provisions for the protection of design rights, and patents and trademarks.

[97] [Great Britain] *Copyright, Designs and Patents Act* (1988), ch. *48, 5(* 1).

[98] Ibid., sec. 56.

A particular section of the Act provides for the rental of sound recordings, films, and computer programs to the public.[99] Under these statutory provisions, a rental arrangement with the public is outlined. This section also provides that the copyright in a computer program is not infringed by the rental of copies to the public after the end of a period of 50 years from the end of the calendar year in which the copies of it were initially issued to the public in electronic form.[100]

The subject of time-shifting is dealt with directly in the Act.

> The making for private and domestic use of a recording of a broadcast or cable programme solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or cable programme or in any work included in it.[101]

Thus, the British law specifically exempts time-shifting recording from the realm of infringement. In the United States, this practice is embodied only in case-law, not statutory law. The principle is further extended by the provision that the free public showing or playing of a broadcast or cable programme is not to be considered an infringement of copyright. Certain condition and circumstances must, however, be met for the viewing to be considered a free public showing.[102]

The issue of moral rights is directly and comprehensively addressed in the British copyright law.[103] The scope of British statutory moral rights includes the right to be identified as the author or director of the work,[104] the right to object to the derogatory treatment of the work,[105] protection against false attribution of works,[106] and other factors.

Therefore, it appears that the new British copyright law intends to respond comprehensively to recent technological advances and problems that are created through the use of such inventions.[107]

Canada

The Canadian copyright law has recently undergone significant amendments,[108] and several provisions of the new law provide an interesting contrast to American copyright law. Canadian copyright law is of interest to the United States, as both nations share a heritage of the British common law tradition and are North American neighbors, with an overflow of broadcasting, popular culture, and other common interests.

It appears that Canada does not have a "home-use" exception embodied in its copyright statute. The Canadian statute describes sound recordings as follows: "...copyright

---

[99] Ibid., sec. 66.

[100] Ibid., sec. 66.(5).

[101] Ibid., sec. 70.

[102] Ibid., sec. 72.

[103] Ibid., ch. IV.

[104] Ibid., sec. 77.

[105] Ibid., sec. 80.

[106] Ibid., sec. S4.

[107] Although the British Government considered a royalty payment on blank tapes, it was not enacted as part of the copyright revision.

[108] See: Canada Gazette, *Statutes of Canada, 1988* (Ottowa, Canada: Minister of Supply Services, Sept. 1, 1988), chs. 13 to 19.

shall subsist for the term hereinafter mentioned in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical, literary or dramatic works. ''log The length of copyright protection for these works is '(fifty years from the making of the original plate from which the contrivance was directly or indirectly derived.... "[110]

Several aspects of the 1988 Canadian copyright amendments are of interest. A computer program is statutorily defined as "a set of instructions or statements, expressed, freed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result."111 The law also permits the owner of a computer program to make a single reproduction of that program for his own use.[112] The Canadian amendments also recognize the moral rights of the creators of artistic works and provide protection for the injury to such rights.113

France

France has a very comprehensive copyright law that differs markedly from the other laws examined in this section. The statutory scope of intellectual works covers a wide variety of artistic works:

> Article 3. The following shall in particular be considered intellectual works within the meaning of this law: books, pamphlets, and other literary, artistic and scientific writings; lectures, addresses, sermons, pleadings in court, and other works of the same nature; dramatic or dramatico-musical works; choreographic works; circus acts and feats and pantomimes, the acting form of which is fixed in writing or otherwise; musical compositions with or without words; cinematographic works and other works consisting of moving sequences of images, with or without sound, together referred to as audiovisual works; works of drawing, painting, architecture, sculpture, engraving, lithography; graphical and typographical works; photographic works and other works produced by techniques analogous to photography; works of applied art; illustrations; geographical maps; plans, sketches, and plastic works, relative to geography, topography, architecture, or the sciences; software,.... [114]

This inclusive scope of intellectual property in the French law appears to be one of the most all-encompassing in the world.

Similarly, France has a very far-reaching concept concerning the performance rights of the author/copyright owner:

> Article 27. Performance shall consist in the communication of the work to the public by any process whatsoever, particularly:
>
> –public recitation, lyrical performance, dramatic performance, public presentation, public projection and transmission in a public place of a telediffused work;
>
> –by telediffusion
>
> Teledifussion shall mean distribution by an telecommunication process whatsoever of sounds, images, documents, data and messages of any kind.

---

[109] Canadian Copyright Statute, Sec. 4(3), from UNESCO and WIPO, *Copyright Laws and Treaties of the World* (Washington, DC: Bureau of National Affairs, 1987).

[110] Ibid., sec. 10.

[111] Canada Gazette, op. cit., footnote 110, sec. 1(3).

[112] Ibid., sec. 5.

[113] Ibid., sees. 1, 12

[114] Law No 57-298 [France] on *Literary and Artistic Property*, Art. 3, from: UNESCO, *Copyright Laws and Treaties of the World* (1987).

> Transmission of the work towards a satellite shall be assimilated to performance.
>
> Transmission of a broadcast work by means of a loudspeaker or, as the case may be, by means of a television screen placed in a public place.115

This statute presents the novel concept of "teledifussion," which would apparently cover the distribution of sounds through any telecommunication process.

Like the American statute, the French copyright law distinguishes between the transfer of personal and intellectual property: "The incorporeal property ...shall be independent of property rights in the material object. The person who acquires this object shall not be invested, by its acquisition, with any of the rights provided by this law... "[116]

One of the most unique features of the French copyright law is the great emphasis placed on the rights of the creator and/or copyright owner: the integrity of the creator's works and the protection of such creative efforts are of major importance.

Summary

While this section is not a comprehensive analysis of international copyright law, several salient features of the various national copyright systems have been examined. In the United States the "first-sale" doctrine and the rental record amendments illustrate how American copyright law has developed and responded to particular circumstances and needs. In Great Britain the new copyright law also responded to changes in society and technology. Although the Canadian copyright law is less comprehensive than the other statutes **examined, it** too has been amended to reflect changing technology. The French copyright law appears to be one of the most inclusive in the world. Its scope of coverage is very broad and it is deferential to the rights of creative artists.

CHANGES TO TRADITIONAL AMERICAN COPYRIGHT CONCEPTS

International Protection of American Intellectual Property

Concurrent with the rapid technological developments in the audio recording and reproduction industry, there has been a growing concern regarding the international protection of American intellectual property. Two forces have given rise to this concerns: the ability to produce high-quality copies of copyrighted works easily and inexpensively, and the resulting possibility of "piracy" of copyrighted works – the reproduction, manufacture, and sale of copy-righted works without the permission of the copyright owner.

At the present time there exists no uniform international or universal copy-right concept that would ensure the protection of an author's works on a global basis. An author's protection for the unapproved use of his works in a foreign country usually is based on that country's laws. Many foreign nations provide copyright protection for works created by foreigners through terms set by various international copyright agreements. Protection for American authors may exist through bilateral or multinational treaties. The United States is a member of the two principal multinational

[115] Ibid., title II, art. 27.

[116] Ibid., art. 29.

copyright conventions: the Universal Copyright Convention ("UCC")[117] and the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").[118]

Before Congress enacted legislation that enabled the United States to adhere to the Berne Convention in 1988, the UCC provided the broadest international protection available to American copyright holders.[119] Many countries belong to both the UCC and the Berne Convention. The UCC standards, however, are not considered to be so stringent as the Berne Convention's, and commentators believe that the UCC is less effective in preventing copyright violations.[120] Under the UCC, works by an author who is a national or a domiciliary of a UCC member country are eligible for UCC protection. Any author, irrespective of nationality or domiciliary, whose work was first published in a country covered by the UCC, may claim protection under the UCC. Thus, under the UCC, works by Americans and works first published in the United States would at least be given the same copyright protection as that accorded to the works of the foreign country's nationals for works first published in that foreign country. This copyright treatment is usually called "national treatment."[121] UCC protection is available to American authors, provided that certain notice formalities and other requirements are met.

In addition to the UCC, the United States has entered into other bilateral copyright treaties or accords with countries that belong to neither the Berne Convention nor the UCC. In recent years the United States signed treaties with certain nations where alleged copyright "piracy" had occurred. Among these bilateral copyright treaty countries are Thailand, Taiwan, Singapore, and South Korea.

The most recent development for the international protection of American intellectual property has been United States adherence to the Berne Convention. On March 1, 1989, the United States, formally became a party to the Berne Convention, which has been in existence since 1886. The decision was made only after extensive congressional consideration of the implications of membership.[122] On March 1, 1989, certain copyright amendments went into force that brought American copyright law into compliance with Berne Convention obligations.[123] From March 1, 1989, onward, copyrights in the works of American authors will receive copyright protection by all of the

---

[117] The Universal Copyright Convention consists of two acts, one signed in Geneva in 1952 and another signed in Paris in 1971. The United States ratified both agreements. See: Nimmer, op. cit., footnote 2, vol. 1, sec. 17.04 [B].

[118] Berne Convention Implementation Act of 1988, Public Law 100-568, Oct. 31, 1988, 102 Stat. 2853.

[119] The UCC is administered by the United Nations Educational, Scientific, and Cultural Organization (UNESCO). This accord was established for the purpose of providing an international copyright protection network suitable for the participation of the United States.

[120] See: Harrison Donnelly, "Artists' Rights and Copyrights," *Congressional Quarterly's Editorial Research Reports,* May 13, 1988, pp. 246, 248.

[121] See, Nimmer, op. cit., footnote 2, vol. 1, sec. 17.04[B].

[122] In the 100th Congress, five bills were introduced and considered concerning the adherence of the United States to the Berne Convention: H.R. 1623, H.R. 2962, H.R. 4262, S. 1301, and S. 1971. The Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee held hearings on H.R. 1623. The House Judiciary Committee prepared a report on H.R. 4262 (H.R. Rep. No. 100-609). H.R. 4262 was the bill that was enacted into law. The Senate Subcommittee on Patents, Copyrights, and Trademarks of the Senate Judiciary Committee held hearings on S. 1301 and on S. 1971 and prepared a report on S. 1301 (S. Rep. No. 100352).

[123] See Public Law 100-568, Oct. 31, 1988, 102 Stat. 2853. Among the changes brought about by the United States' adherence to the Berne Convention were: changes in the formalities of copyright registration, inclusion of architectural plans within the scope of copyright coverage; matters dealing with jukebox licenses, and other areas. A specific provision of the law expressly excludes recognition of the concept of artists' or moral rights. See discussion below.

Berne Convention's member nations. In adhering to the Berne Convention, member nations must agree to treat nationals of other member nations as their own nationals for the purposes of copyright protection. Thus, under certain instances, American authors may receive higher levels of protection than the guaranteed minimum. Also, works of foreign authors who are nationals of a Berne Convention country and whose works are first published in a Berne Convention country will receive automatic copyright protection in the United States.

The primary purpose of these international accords is to provide copyright protection for American nationals in foreign countries. While the exact terms of the accords vary, the basic intent and fundamental treaty provisions are similar. Until fairly recently, the United States was ambivalent about adhering to the Berne Convention. A primary reason for negotiating the UCC was to provide "Berne-like" protection for American nationals, and many of the negotiators of the UCC saw it as a "bridge" to adhering to the Berne Convention.[124] The provisions of the UCC and the Berne Convention are similar; however differences exist. Notably, the Berne Convention has no formal notice requirements for copyright registration and the Berne Convention recognizes the moral rights of artists. Some commentators believe that the primary difference between the two accords was the notice of registration requirement.[125]

Several strong arguments *were* advanced for the United States adhering to the Berne Convention.[126] A primary reason was that Berne Convention membership would restore the United States' international copyright leadership role, which has been limited since the American withdrawal from UNESCO– the administering body of the UCC –in 1984. Another important reason advanced for Berne Convention adherence was that 24 nations who are not members of the UCC were members of the Berne Convention, and greater protection to American copyright holders would be extended through Berne membership. Arguably, American adherence to the Berne Convention would result in the Berne Convention itself gaining strength and becoming a more dynamic international force in the realm of copyright protection.[127]

Artists' Rights

Although the concept of artists' rights is beyond the scope of this OTA study, it is a current issue of concern in the field of American copyright law and will be briefly summarized. The Anglo-American common law copyright tradition did not recognize certain "(moral" or artists' creative rights in their artistic creations. Thus, protection for artists' works was achieved primarily through bargaining and negotiation with publishers, purchasers, and other buyers of works. Hence, under common law, when ownership of the objector the copyright passed from the creator to the buyer, creative or artistic rights usually passed on to the purchaser.[128] In the United States, where there was no strong tradition of public support for the arts, there has not been strong

[124] W. Allen Wallis, "International Protection of U.S. Copyrights, " ***Department of State Bulletin,*** October 1987, p. 26.

[125] William S. Strong, ***The Copyright Book: A Practical Guide*** (Cambridge, MA: MIT Press, 1981), p. 166.

[126] See: Wallis, op. cit., footnote 124, p. 28.

[127] Ibid. See also: U.S. Congress, The ***Berne Contention,*** Hearings before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 100th Cong., 2d sess. (1988), pp. 5961.

[128] In contrast see the discussion of the "first-sale" doctrine above.

recognition of the creative rights of the artist.[129] In continental European countries, where the role of the artist and his work was considered more important, different legal concepts developed. Thus, in some European countries a major goal of copyright laws is to protect the connection between the artist and his work. This right of "paternity" recognizes the author's creation of the work. Certain European nations also recognize laws prohibiting the change, 'mutilation," or alteration of artists' works. These artists' rights were first recognized by the Berne Convention in 1928.

Consideration of artists' rights or moral rights has become an issue in the United States. In the 100th Congress, bills were introduced[130] and were seriously analyzed and debated.[131] A closely related issue to the traditional concept of artists' or moral rights is the recent technological development of motion picture "colonization." Through various electronic means, color is added to copies of motion pictures that were originally produced in black and white. Currently, moral rights of artists are not formally recognized in the United States, as they are in some European nations.

In adhering to the Berne Convention, the United States specifically did not agree to the Berne Convention's provisions for moral/artists' rights. As the Berne Convention Implementation Act provided:

> (b) CERTAIN RIGHTS NOT AFFECTED. – The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law–
>
> (1) to claim authorship of the work; or
>
> (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.[132]

Thus, although the issue of artists'/moral rights has been of considerable legislative, political, and societal concern in the United States, no major legislation addressing it has been enacted.

---

[129] Nadine Cohodas, "Berne-Convention Bill Approved," Congressional *Quarterly,* Apr. 16, 1988, pp. 1028, 1028-1029.

[130] Two pieces of companion legislation were introduced in the 100th Congress concerning artists' rights: H.R. 3221 and S 1619. The House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee held hearings on H. R. 3221 The Subcommittee on Patents, Copyrights and Trademarks of the Senate Judiciary Committee held hearings on S. 1619. Although neither bill was enacted, negotiations and deliberations were in progress at the close of the 100th Congress, and this legislation had proceeded farther in the legislative process than prior legislation concerning artists' rights. At the time of this writing, legislation has not yet been introduced in the 101st Congress concerning artists' rights.

[131] See, for instance U.S. Congress, *Visual Artists Rights Act of 1987,* Hearings before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 100th Cong., 1st sess. (1987).

[132] Public Law 100-568, 102 Stat. 2853, Oct. 31, 1988, sec. 3(b).