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ABSTRACT

American copyright law provides a means of stimulating intellectual development and protecting the ownership interests of the authors of copyrighted works. Over the years, U.S. copyright law has evolved in order to respond to societal and technological changes. Under the copyright statute certain uses of a copyrighted work are permitted under the doctrine of fair use. The criteria for the application of this doctrine are flexible and are applied on a case by case basis. New technologies such as compact disks, optical disks, computer storage devices, and digital audio technology (DAT) recording, provide challenges for U.S. copyright law. For example, DAT is capable of producing copies of copyrighted works in the privacy of the DAT owner's home. Thus, the question is whether DAT use is considered fair use or as copyright infringement. Although DAT equipment is not generally available to the public, its use and copyright law have been addressed in the 101st Congress as they relate to home recording. The most significant of the issues posed in the application of existing copyright law to DAT recording is that such recording may not fall within the fair use exception of the law, and, therefore, issues of infringement may arise with the sale and use of DAT. References are provided throughout the report. (DB)

CRS Report for Congress

Emerging Electronic Technology and American Copyright Law

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EMERGING ELECTRONIC TECHNOLOGY AND AMERICAN COPYRIGHT LAW

SUMMARY

American copyright law provides a means of stimulating intellectual development and protecting the ownership interests of the authors of copyrighted works. Over the years, American copyright law has evolved in order to respond to societal and technological changes. The most recent overall revision of copyright law was in 1976.

A copyright owner's rights in his/her work are not absolute. Under the copyright statute, certain uses of a copyrighted work are permitted under the doctrine of fair use. The criteria for the application of this doctrine are flexible and are applied on a case by case basis. In addition, this doctrine appears to be a continuously evolving concept. The leading case which examined the doctrine of fair use within the context of home recording was *Sony Corp. v. Universal City Studios, Inc.*, which examined the use of videocassette recorders within the context of home recording. The Supreme Court determined that under certain circumstances, home video recording was considered a fair use of copyrighted works. However, the effect of the *Sony* case is quite limited in that the Supreme Court addressed video recording under very specific circumstances. The holding in the *Sony* case is distinguishable from the factual and legal situations presented by digital audio technology ("DAT") recording.

New technologies such as compact discs and DAT provide challenges for American copyright law. DAT raises certain copyright issues in that it appears to be capable of producing nearly perfect copies of copyrighted works in the privacy of the DAT owner's home. Thus, the questions appear to be whether DAT use would be considered a fair use or whether it would be construed as an infringement. However, these issues are somewhat speculative, as DAT equipment is generally not available to consumers in the United States. In response to concerns regarding DAT use and copyright law, legislation has been introduced in the 101st Congress which addresses DAT use. Application of existing copyright law to DAT recording poses certain concerns. The most significant of these issues is that DAT recording may not fall within the fair use exception of copyright law, and therefore, issues of infringement may arise with the sale and use of DAT.

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EMERGING ELECTRONIC TECHNOLOGY AND AMERICAN COPYRIGHT LAW

INTRODUCTION

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

The technological innovation of digital audio recording ("DAT") poses new challenges for American copyright law. A major copyright issue which has been raised concurrently with the development and the potential marketing of DAT is DAT's ability to reproduce nearly perfect copies of copyrighted musical works. It has been argued that DAT's reproduction capability may be used to reproduce copyrighted works on a wide scale basis, and such reproduction of the copyrighted work may be construed to violate the property rights of the copyright owner.[4] It appears that potential DAT

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

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

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

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

[4] However, DAT recording equipment is not readily available for home consumers on the open market in the United States. See, Rosenbluth, *Defying RIAA Threats of Lawsuits, Nakamichi Importing DAT Players,* Variety, 208 (April 26-May 2-1989). However, DAT manufacturers have been reported as stating that they plan shipment and marketing of their DAT equipment by the

recording/copying could be carried out in the privacy of the DAT owner's home. This possibility of "home" DAT recording raises numerous copyright questions which are considered below.

This report examines the objectives of American copyright law, its development and its current day codification, and certain aspects of copyright law--such as the fair use doctrine and the concept of the "home" for copyright purposes--which appear to be relevant to the utilization of DAT technology. The report also discusses certain possible conflicts which may arise with the marketing and use of DAT within the context of the existing copyright law.

OBJECTIVES OF AMERICAN COPYRIGHT LAW

A fundamental goal of American copyright is to promote the public interest and knowledge--the "Progress of Science and useful Arts."[5] Another copyright objective is closely related: the promotion and the dissemination of knowledge to the public. While copyright is a property interest, its chief purpose was not conceived of as the collection of royalties or the protection of property. Rather, copyright was developed primarily for the promotion of intellectual pursuits and public knowledge. As the Supreme Court has observed:

> The economic philosophy behind the clause empowering the Congress to grant patents and copyrights is the conviction that 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.[6]

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

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fall of 1990, or earlier. Washington Post, June 14, 1990, Washington Home section, at 6, col. 3. On June 22, 1990, an electronics retailer in the New York City area placed a full page promotional advertisement about the Sony DAT recorder. The advertisement indicated that the quantity of DAT recorders available for sale was limited. The advertised price for the Sony DTC-75ES model DAT recorder was $949. New York Times, June 22, 1990, at A5.

[5] See, note 1.

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

> As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interest of authors and inventors in the control and exploitation of their printings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly....[7]

The concept of American copyright presents an apparent paradox or contradiction when considered within the context of the First Amendment freedom-of-speech guarantees: while the First Amendment guarantees freedom of expression, it can be argued that copyright seems to restrict the use or dissemination of information. It can be argued, however, that copyright, to the degree that it stimulates expression and encourages writing and other efforts, furthers First Amendment expression values by encouraging the quality of "speech" that is created. In trying to resolve these conflicting interests, the courts have adopted a test that balances the interests of freedom of expression and the property interests of the copyright holder to arrive at an acceptable balance.[8] A large body of case law has been developed that weighs and counterbalances First Amendment freedom of expression concerns and the rights of the copyright holder.[9]

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

AMERICAN COPYRIGHT LAW

Legislative Development

Much of the legal theory underlying American copyright law was derived from its English statutory predecessors.[10] Following the American Revolution, the Continental Congress passed a resolution in 1783 encouraging the various

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

8 Nimmer, *Nimmer on Copyright* §§ 1.03-1.08 (1988).

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

10 Patterson, *Copyright in Historical Perspective*, 13 (1968).

states to enact copyright legislation. All of the states, except Delaware, enacted some type of copyright law, although these laws differed greatly.[11] However, because of the differences in state laws, the Framers of the Constitution asserted that the control of copyright should be vested in the legislative branch. This theory was ultimately adopted and Congress was granted the power to regulate copyrights.

Over the years, Congress enacted various pieces of copyright legislation.[12] These legislative enactments reflected technological and societal changes. For example, a 1971 amendment extended copyright protection to include certain sound recordings.[13] The most recent comprehensive revision of the body of copyright law occurred in 1976.[14]

During the evolution of American copyright law, the central driving force behind the revisions appears to have been the desire of Congress to keep the legislation updated in order to respond to the technological developments that affected the dissemination of knowledge.[15] The theory was summarized by the Supreme Court in the *Sony* 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 new rules that new technology made necessary.[16]

The 1976 Act explicitly sets forth the rights of the copyright owner, which include, but are not limited to: the reproduction of works in copies or phonorecords; creation of derivative works; distribution of copies of the work to the public by sale, rental, lease, or lending; public performance of

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[11] *Id.*

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

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

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

[15] Wincor & Mandell, *Copyright, Patents, and Trademarks: The Protection of Intellectual Property* 25 (1980).

[16] 464 U.S. 417, 430-431 (1984).

copyrighted work; and display of copyrighted work publicly.[17] However, the statute does specify certain exceptions to the copyright owner's exclusive rights that are not infringing uses of the copyrighted works. These exceptions include the "fair use" of the work,[18] reproduction by libraries and archives,[19] educational use,[20] and certain other uses.

The Fair Use Exception

It is of considerable importance to have a clear understanding of the fair use exception, as it appears that the concept of "home use" is a judicially created derivative of the fair use doctrine. The fair use doctrine has been applied when certain uses of copyrighted works are defensible as a "fair use" of the copyrighted work.[21] 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.[22] Courts have adopted different approaches to interpret the fair use doctrine or exception. Some commentators have viewed the flexibility of the doctrine as the "safety valve" of copyright law. Others have considered the uncertainties of the fair use doctrine the source of unresolved ambiguities. Some commentators contend that the fair use doctrine has been applied prematurely at times, such as in the case of the so-called "home use" concept, where the doctrine is used as a defense to a claim of infringement. They claim that the application is premature because without a clear delineation or mandate of rights over private uses, it is uncertain as to whether any

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[17] 17 U.S.C. § 106 (1988).

[18] 17 U.S.C. § 107 (1988).

[19] 17 U.S.C. § 108 (1988).

[20] 17 U.S.C. § 110 (1988).

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

[22] 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).

infringement had ever occurred.[23] However, over the years jurists have grappled with balancing the exclusive rights of the copyright owner with the reasonable and equitable uses of the copyrighted work.[24]

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

> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> 2. the nature of the copyrighted work;
>
> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
>
> 4. the effect of the use on the potential market and value of the copyrighted work.[25]

By enacting these fair use factors, Congress realized that they were in no case "definitive or determinative," but rather "provided some guage [*sic*] for balancing equities."[26] It seems that Congress developed a flexible set of criteria for analyzing the particular circumstances surrounding each fair use case, and that each case would be judicially analyzed on an ad hoc basis.[27] Hence, courts appear to have substantial flexibility in applying and evaluating fair use factors.

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

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

[25] 17 U.S.C. § 107 (1988).

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

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

The courts, in evaluating fair use decisions, have given varying weight and interpretation to the various fair use factors. For example, in evaluating the first factor, the purpose and character of the use, the courts have not always held that the use "of a commercial nature" negates a fair use finding,[28] nor does a "nonprofit educational" purpose mandate a finding of fair use.[29] Thus, the court usually examines all of the circumstances involved in the use of a copyrighted work before determining whether the fair use doctrine is applicable. However, the fair use doctrine is usually not considered to be a defense when the copying is nearly a complete copy of the copyrighted work.[30] It can be observed that courts take great care in the application of the fair use doctrine and this doctrine's application is on a case-by-case basis. An examination of the fair use copyright decisions demonstrates the intense judicial scrutiny which courts exert in their application of the fair use doctrine.[31]

Although there are statutory criteria and substantial caselaw interpretation in existence concerning the implementation of the fair use exception, substantial confusion still occurs over the precise parameters and the actual application of the doctrine.[32] This uncertainty in the appropriate application of the fair use doctrine has been recently demonstrated in the area of unpublished writings. In a series of recent cases, courts have examined the use of unpublished materials within the context of the fair use doctrine[33] and have in effect restricted the quotation of unpublished materials such as

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[28] *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).

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

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

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

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

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

diaries, letters, and other unpublished materials.[34] In response to the potentially far-reaching effects of these cases, legislation has been introduced in the 101st Congress to amend the fair use doctrine to specifically include unpublished works within the purview of fair use to the same extent that published works are so included in the doctrine.[35] Although this legislation and the judicial background do not specifically relate to home DAT recording, they do illustrate the continually evolving concept of fair use and how Congress has attempted to revise copyright law to reflect current judicial decisions, as well as developments in literary trends and uses.[36]

Copyright Infringement and Remedies

Anyone who violates the exclusive rights of the copyright owner in the copyrighted work is considered to be an infringer of copyright.[37] The provisions of the 1976 Act provide that the copyright owner may institute an action for infringement against the alleged infringer.[38] In response to this action, a court may issue an injunction against the copyright infringer to prevent further infringement of the copyright.[39] An infringer of a copyright may be subject to the payment of the actual damages and profits to the copyright owner.[40] In some instances, the copyright owner may elect to receive specified statutory damages in lieu of the actual damages and profits.[41]

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

[35] H.R. 4263, 101st Cong., 2d Sess. (1990). The bill was introduced by Rep. Kastenmeier on March 14, 1990 and was referred to the House Committee on the Judiciary. On March 19, 1990 it was referred to the House Subcommittee on Courts, Intellectual Property and the Administration of Justice. *Bill Would Apply Fair Use Equally to Unpublished Works and Published Works*, 39 Patent, Trademark & Copyright J. (BNA) 405 (1990).

[36] *Copyright Conference Examines Fair Use, DAT, Berne, and International Uses*, 39 Patent, Trademark & Copyright J. (BNA) 492 (1990).

[37] 17 U.S.C. § 501(a)(1988). For a complete discussion of the remedies for copyright infringement, see, Henn, *Copyright Primer* 245-267 (1979)(cited hereafter as "Henn").

[38] 17 U.S.C. § 502(b) (1988).

[39] 17 U.S.C. § 502 (1988).

[40] 17 U.S.C. § 504(b) (1988).

[41] 17 U.S.C. § 504(c) (1988).

In addition to this recourse, the court may permit the recovery of legal fees and related expenses involved in bringing the action.[42] In some cases, criminal sanctions may be imposed for copyright infringement.[43]

Analysis of Home Recording--the "Sony" Case

In 1984 the Supreme Court had to resolve copyright issues involving the use of videocassette recorders (VCRs). *Sony Corp. v. Universal City Studios, Inc.*[44] concerned the home use of VCRs and resulted in the resolution of some of the questions concerning home recording and copyright law. However, the decision has left numerous questions unanswered, as are discussed below. The *Sony* case seems to be the most analogous decision which can be related to the home use of DATs, although there are numerous significant factual and legal differences between the *Sony* decision and DAT recording which are discussed below.[45]

Following the conflicting lower court decisions,[46] the Supreme Court examined the home use of VCRs. In the Court action, Universal City Studios (the plaintiffs/respondents) did not seek relief against the actual users of the VCRs; instead Universal sued the VCR manufacturers and suppliers, primarily, Sony, on the basis of contributory infringement.[47] This action was based on the theory or argument that the distribution and sale of VCRs encouraged and contributed to the infringement of the plaintiffs' copyrighted works.[48] The plaintiff sought monetary damages and also an injunction that would prohibit Sony from manufacturing VCRs in the future. This legal proceeding was of considerable importance, as the Supreme Court had not

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[42] 17 U.S.C. § 506 (1988).

[43] *Id.*

[44] 464 U.S. 417 (1984).

[45] See, CRS Rept. 89-30, *supra* note 31, at 6-8; OTA Report at 70-72.

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

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

[48] 464 U.S. 417, 420-421. "It is, however, the taping of respondents' own copyrighted programs that provides them with the standing to charge Sony with contributory infringement. To prevail, they have the burden of proving that users of the Betamax have infringed their copyrights and that Sony should be held responsible for that infringement."

previously interpreted the issue of fair use within the context of home taping/recording. The Court determined that the primary issue to be resolved was whether the sale of Sony's equipment to the public violated any of the rights given to Universal by the Copyright Act.[49]

First, the Court considered the particular nature of the relationship between Sony and its purchasers. The Court ascertained that if vicarious liability was to be imposed upon Sony, such liability had to be based upon the constructive knowledge that Sony's customers might use the equipment to make unauthorized copies of copyrighted material. The Court observed that there exists no precedent under copyright law for attribution of liability on the basis of such a theory.[50] It was argued that the sale of such duplicating equipment is not considered to be contributory infringement if the product is capable of other uses that are noninfringing. To respond to this issue, the Court deliberated whether the VCR was capable of commercially significant noninfringing uses. The Court held that the VCR was able to be used for noninfringing uses through private noncommercial time-shifting activities in the home. In reaching this conclusion, the Court relied heavily on the determination of the district court and rejected the conclusions of the court of appeals.[51] In addition, the Court found that in bringing an action for contributory infringement against the seller of copying equipment, the copyright holder cannot succeed unless the relief affects only the holder's programs, or unless the copyright holder speaks for nearly all copyright holders with an interest in the outcome.[52] The Court determined that the copyright holders would not prevail, since the requested relief would affect other copyright holders who did not object to time-shifting recording.[53]

Following its examination of the unauthorized time-shifting use of VCRs, the Court determined that time-shifting use was not necessarily infringing.[54] Relying extensively on the district court's conclusions, the Court determined that the potential harm from this time-shifting practice was speculative and uncertain. The Supreme Court reached two conclusions. First, Sony

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[49] *Id.*, at 423.

[50] *Id.* at 439.

[51] The Court's conclusions were based in part on the idea that Universal could not prevent other copyright holders from authorizing the taping of their programs and on the finding of fact by the district court that the unauthorized home time-shifting of the respondents' programs was a legitimate fair use. *Id.*, at 442.

[52] *Id.*, at 466.

[53] *Id.*

[54] *Id.*, at 446.

demonstrated to the Court that certain copyright holders who license their work for broadcast on commercial television would not object to having their programs time-shifted by private viewers. Second, Universal did not prove that time-shifting would cause the likelihood of nonminimal harm to the potential market or the value of the copyrighted works.[55] Thus, home use of VCRs could involve substantial noninfringing activities and the sale of VCR equipment to the public did not represent a contributory infringement of Universal's copyrights. The scope of the Court's holding was expressly limited to video recording in the home, to over-the-air non-cable broadcasting,[56] and to recording for time-shifting purposes. The *Sony* decision did not address audio taping, the taping of cable or pay television, or the issue of "library building" of recorded programs. In arriving at its conclusions, the Court rejected the central finding of the court of appeals that required that a fair use had to be "productive."[57] Rather, the Court determined that under certain circumstances, the taping of a video work in its entirety for time-shifting purposes would be permissible under the fair use doctrine.[58]

While the views of the majority and the dissent differed substantially, both opinions inferred that Congress may wish to examine the home video taping issue.[59] As the majority opinion held:

> It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written.[60]

Copyright Law and Home Recording

Although lower courts and the Supreme Court have provided some legal guidance for the interpretation of copyright law in home recording/taping situations, numerous questions and issues remain unresolved. The *Sony* case was a narrow holding, strictly limited to a very specific situation--home video

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55 *Id.*, at 456.

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

57 *Id.*, at 454-455.

58 *Id.*, at 449-450.

59 *Id.*, at 456 (majority); at 500 (dissenting).

60 *Id.*, at 456.

recording of noncable or "nonpay"[61] television for the purposes of time-shifting. The practical application of current copyright law and the related judicial interpretations are considered within the context of typical home recording situations.

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

> To perform or display a work "publicly" means--
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside a normal circle of a family or its social acquaintances is gathered.[62]

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

An examination of the legislative history surrounding the enactment of the copyright legislation provides some insight into the congressional intention involving the concept of a "home." The legislative history accompanying the enactment of the Sound Recording Amendment of 1971 seems to indicate that Congress meant the term "home" to include only the traditional, generally perceived concept of an individual's own home. A statement in the 1971 House Report on audio recording gives some insight into the meaning of home recording "where home recording is for private use with no purpose of reproducing or otherwise capitalizing commercially on it."[63] The legislative history of the 1976 copyright revision discussed the concept of "public performance" and also provides some illumination on the concept of home use.

> One of the principal purposes of the definition ["public performance"] was to make clear that, . . . ,performances in "semipublic" places such as clubs, lodges, factories, summer camps and schools are "public performances" subject to copyright control.

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[61] See, note 56.

[62] 17 U.S.C. § 101 (1988).

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

> The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of businesses and governmental personnel would be excluded because they do not represent the gathering of a "substantial number of people."[64]

Therefore, it would seem from the legislative history of both the 1971 and the 1976 copyright laws that the concept of a "home" is limited to the traditional understanding of the term and that certain other "semi-public" situations are to be considered as "public" places for the purposes of copyright law.[65]

In the district court decision in the *Sony* case, the court delineated some of the limits of "home use." The court noted in this "home use" instance that the television programs involved were broadcast free to the public over the public airwaves.[66] The court further observed that it was "not ruling on tape duplication within the home or outside, by individuals, groups, or corporations."[67] Neither the court of appeals or the Supreme Court contradicted the district court's concept of home taping.

Following the *Sony* decision, different courts have scrutinized various situations involving VCR home recording within the context of copyright law. For example, a series of cases has examined public performance and home use within the context of VCR viewing. This line of cases has held that the viewing of copyrighted videocassettes in private rooms at video stores constitutes public performance,[68] even when members of a single family viewed a cassette in a private room at the store.[69]

Application of copyright law and the pertinent judicial guidance can lead to various conclusions about home recording in certain circumstances. The *Sony* case affirmed the use of VCRs to record and replay commercially televised programs for personal use. The concept of VCR recording for time-

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

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

[66] 480 F.Supp. 429, 442 (C.D. Cal. 1979).

[67] *Id.*

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

[69] *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).

shifting purposes appears to be judicially acceptable. The *Sony* case did not, however, address audio taping, or home taping of cable or "pay" television.

As Congress may wish to enact legislation dealing with the subject of home recording, in light of recent technological advances, it may be instructive to examine the criticism of the *Sony* decision raised by the late Professor Melville Nimmer, considered by many to be the dean of American copyright law. Nimmer interpreted the legislative history and congressional intent very differently than the Supreme Court and the district court did.[70] Professor Nimmer, in analyzing the legislative history underlying the 1971 Sound Recording Amendment, did not believe that it created an audio home recording exemption.[71] His interpretation of the legislative history was that no special home audio exemption was created, and in addition, that Congress never intended to create such an exemption. Nimmer also disagreed with the Court's construction of the hearings on the 1971 Amendment.[72] Professor Nimmer's interpretations can be summarized as follows. The language of the reports and statements of the 1971 Amendment and the statements of interested individuals appear to indicate that the legislators did not intend to create a special exemption from copyright liability for home audio recording, and at the most, it can be inferred that home recording should be defensible under the existing judicial doctrine of fair use. Nimmer, argued further that even if the 1971 Amendment had created a home-use exemption, there was no basis for the assumption that this exemption survived the general revision of the copyright laws in 1976.[73] Nimmer arrived at this conclusion from the reasoning that the Copyright Act provides specific and quite narrowly drawn exemptions for certain kinds of recording and he found it unlikely that the legislators also intended the Act to contain an *implied* home recording exemption of indeterminate scope.[74] He also noted that the legislative history of the 1976 Copyright Act gave no indication that it intended to exempt home audio recording from copyright liability. Professor Nimmer concluded his argument by quoting from the House Report on the 1976 Act: [I]t is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use."[75] In conclusion, Nimmer asserted that if home audio recording

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[70] Nimmer, *Nimmer on Copyright* § 8.05[C] (1989)(cited hereafter as "Nimmer"). *See, also,* "Betamax" Myth, *supra* note 65.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

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

transcends copyright laws, it must be done exclusively through the fair use provisions of section 107 of the Act.[76]

HOME TAPING AND TECHNOLOGICAL INNOVATIONS

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

CD

The CD was introduced in 1982 in Japan and in 1983 in the United States and Europe. This technology provides considerable improvement over the longplaying vinyl discs (LP records).[77] Although LP records may provide high tonal quality, they are subject to damage, background interference, and other problems. CD technology involves digital information recorded on the surface of a CD. This information is a sampling of an audio signal which the CD player reads with a laser-optical scanning system involving no physical contact. Also, the player's digital signal processing system is not dependent on the rotational speed of the disc. This technology results in a nearly perfect reproduction of sound that does not deteriorate after repeated use.[78] At this time, CD technology does not provide for a home copying or recording capacity.[79]

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

[77] OTA Report, *supra* note 45 at 45.

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

[79] However, music played on a CD player could be recorded using another recording device such as a conventional tape recorder, although the quality of the recording would not equal the quality of a DAT recording.

DAT

DAT is a mechanism for computer-data storage.[80] DAT also has entertainment capabilities which involve very high quality digital recording and playback of CD recordings.[81] DAT has the capability of producing nearly perfect copies of CD recordings and the ability of making almost unlimited nearly perfect copies of other copies.[82] Some prerecorded DAT tapes and CDs have digital "copy-protect" signals or flags which are not part of the music or recording which are "read" by the consumer-model digital recorders. These flags are to prevent the copying of the tape or disc. However, the DAT hardware must be able to read the copy inhibiting instruction on the CD or DAT recordings.[83]

The implications of these technological innovations raise numerous policy and legal questions. These technologies have revolutionized the recording and the home taping industries and they have been developed since the last substantial revision of the copyright laws in 1976. This technology has the ability of creating nearly perfect copies of copyrighted works. Copies can be made of copies without loss of sound quality.[84]

The recording industry in the United States has been concerned with the development and the potential marketing of DATs in this country. The Recording Industry Association of America ("RIAA") has argued that the technological change represented by DAT recording will greatly increase home copying, so as to seriously threaten the recording industry's economic future.[85]

Because of the legal ambiguity involving copyright implications of DAT use, market uncertainty has developed in the DAT industry. For example, in

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

[81] *Id.* DAT is capable of making excellent copies of CDs.

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

[83] *Id.* Factual questions may arise regarding the ability of the DAT hardware and software to utilize such digital codes or "flags" to inhibit recording. *See*, Hack, *supra* note 80, at p. 16.

[84] In addition, copies could be made using conventional recording technology, although not the DAT recording quality. See note 79.

[85] OTA Report, at 38.

1987, the RIAA threatened copyright infringement actions against the first manufacturer to sell consumer-model DAT recorders in the United States.[86] Many observers believe that this threat was responsible for consumer model DATs from being withheld from the American market until 1989 when one manufacturer began a very small importation and sale of DAT recorders.[87]

As a consequence of a legal and market understanding, a Memo of Understanding (MOU) was entered into between the international recording industry and numerous consumer-electronics manufacturers with the apparent intent being the mass introduction of DATs with copy-limiting features. Such copy-limiting features would apparently limit the ability of DATs to make multiple copies of copyrighted work.[88] The MOU recommended that Congress enact legislation that would require copy-restricting circuitry in all DAT machines sold in the United States. Under the proposed "serial copy management system," ("SCMS"), the DAT machines would permit consumers to make copies of original materials such as prerecorded DAT tapes, CDs and digital broadcasts. However, they would be prevented, through the digital coding, from making subsequent copies from the first copy. This agreement was signed by twelve Japanese and three European manufacturers and two recording industry trade groups.[89] The MOU did not deal with the issue of royalties from recording artists.

CONGRESSIONAL RESPONSE

Legislation was introduced on February 22. 1990 to require that DAT recorders marketed in the United States have an SCMS to limit DAT copying capacity.[90] On March 28, 1990, an identical bill was introduced in the Senate and was referred to the Senate Committee on Commerce.[91] The proposed Digital Audio Tape Recorder Act of 1990 would require SCMS circuitry to

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[86] OTA Report, at 41.

[87] See, note 4.

[88] However, it is unclear whether or not such copy-limiting features could actually be circumvented or bypassed on DAT equipment.

[89] *Wall Street Journal*, July 28, 1989, at B2, col. 5.

[90] H.R. 4096, 101st Cong., 2d Sess. (1990). The bill was referred to the House Committee on Energy and Commerce and on March 5, 1990 was referred to the House Subcommittee on Commerce, Consumer Protection and Competitiveness.

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

prevent unrestricted copying.[92] Also, the bills specifically state that the legislation "does not address or affect the legality of private home copying under the copyright laws."[93] The bills also do not address the issue of royalties for the copyright owners of the music or other works which may be recorded.[94] Civil remedies would be available for violations of the legislation. Remedies would involve injunctions against the sales of non-SCMS-equipped DATs and monetary fines.

In response to the absence of royalty provisions in the legislation, the Copyright Coalition, a group representing the copyright owners of musical compositions,[95] has threatened legal action against DAT importers.[96] In addition, the National Music Publishers Association has threatened legal action to bar DAT importation and sales in the United States "if recorders enter the American market before adequate steps are taken to protect music copyright owners."[97]

COPYRIGHT LAW CONSIDERATIONS AND DAT

At the outset, it should be noted that any consideration concerning DAT use and copyright law is somewhat conjectural, as DAT technology is not widely available or used in this country. In addition, there are somewhat limited current uses for DAT.[98] However, DAT capabilities and uses are rapidly being developed.

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

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

[94] *Id.*, § 2(14).

[95] The Copyright Coalition includes the American Society of Composers and Publishers, (ASCAP), the Songwriters Guild of America, (SGA), and the National Music Publishers Association, (NMPA).

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

[97] *Id.*, at 11.

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

Home Audio Taping

As this report has previously considered, there is a running controversy as to whether there exists a home audio taping exception under current copyright law. Proponents of such a home taping exception cite to the legislative history of the Audio Recording Amendments of 1971 which discussed the preservation of home taping rights. Commentators have stated that there was a universal feeling that home audio taping was not an infringement and that there have been no court challenges for home taping as an infringement.[99] Opponents of such a theory, notably the late Professor Melville Nimmer, content that there is no exception for home audio taping and that the only exception that home audio taping would fall under would be the fair use criteria of Section 107 of copyright law.[100] Therefore, it is unclear whether courts would be persuaded by a defense of a home audio taping exception to charges of DAT copyright infringement.

Fair Use Exception[101]

The doctrine of fair use, as set forth in the copyright statute provides certain specific criteria which are to be balanced in a determination of whether the use of copyrighted work is a "fair" use, i.e., noninfringing use, or whether such use constitutes an infringement. Application of these four criteria to the DAT recording situation is instructive in determining whether DAT recording could be construed as a fair use.[102] In evaluating DAT recording, a court would examine the factual circumstances surrounding the use, apply the statutory criteria, and then evaluate the situation as to whether the use was infringing or noninfringing.[103] The courts appear to be given great flexibility in the application and in the evaluation of each factor in their fair use analysis. Each fair use determination is made on a case by case basis and there is frequent disagreement among the courts as to what may constitute fair use.[104]

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[99] Nimmer, *supra* note 62, § 13.05[F]. *See also*, Comment, *Disc, Dat and Fair Use*, 25 Cal. W.L. Rev. 103 (1988).

[100] *Id.*

[101] See, discussion, at pp. 5-8.

[102] See, Fleischmann, *The Impact of Digital Technology on Copyright Law*, 8 Computer L.J., 9-10 (1987); reprinted at 70 J.Pat & Trademark Off. Soc'y. 5 (1988) and 23 New Eng. L. Rev. 45, 52-5 (1988).

[103] See, Abramson, *Copyright Law*, 61 Temple L. Rev. 133-96 (1988).

[104] For instance, in the "fair use" *Sony* case, the court of appeals reversed the decision of the district court. However, in reversing the decision

The first statutory factor for fair use involves the purpose and the character of the use. In the *Sony* case, the Court discussed the time-shifting theory at length and found that some broadcasters did not object to such taping. DAT use, by comparison, would probably involve the home recording of purchased or borrowed copyrighted CD recordings. As has been already observed, copyright owners and their representatives object to home DAT recording of their copyrighted works. It could be argued that the purpose and character of this use are to create copies of copyrighted works without having to purchase an original copy of the work. Nor does DAT taping of copyrighted works seems to fall within any of the statutorily enumerated exceptions to infringement such as educational uses. Hence, DAT taping may not qualify as a fair use under the "purpose and character of the use" factor.

The second factor involves the nature of the copyrighted work. Often, this criteria is not given strong weight by the courts and is considered to be vague.[105] At times distinctions are made between whether the copyrighted work is an informational or a creative work, the creative work being given more protection. It could be argued that CDs of musical works would involve a creative work and would be given a higher degree of protection.[106] Hence, it could be argued that because creative works are involved, strong protection should be given to the copyrighted work to protect it (i.e., CDs) from potential infringement from DAT copying.

The amount and the substantiality of the portion of the copyrighted work used constitutes the third fair use factor. In home audio taping, it seems likely that the home taper would copy the entire musical composition rather than just a portion of the work. Hence, if the composition is copied in its entirety, a claim of fair use on the part of the home taper would not seem compelling, since a substantial, if not the entire amount of the copyrighted work has been copied.

The last factor in the fair use criteria--the effect of copying on the market for the copyrighted work--appears to be an element of considerable importance. It appears that home taping substantially reduces revenue.[107] It is conceivable that a home taper could make many copies of copyrighted works and have good quality copies of the works without purchasing even one copy of the copyrighted work. Therefore, because the market value of the

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of the court of appeals, the Supreme Court did not accept *all* of the legal and factual conclusions of the district court.

[105] Henn, *supra* note 37, at pp. 156-7. See also, Note, *Digital Audio Tape Machines*, 77 Ky.L.J. 441, at 457 (1989).

[106] *Id.*

[107] *Id.* See also, OTA Report.

copyrighted work may be diminished through DAT recording, a court could make a finding of infringement after considering this factor.

After evaluating the four factors which would be used in the determination of whether a use is to be considered a "fair" use, and hence not subject to claims of copyright infringement, a court could arguably determine that DAT recording was not a fair use and that DAT recording may be an infringement of the copyright owner's rights.[108] However, a court would examine the actual circumstances of each case in determining whether such use was an infringement or whether such use was a "fair" use.

DAT Recording as Distinguished from the 'Sony' Case

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

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[108] However, see, Comment, *Digital Audio Tape: New Fuel Stokes the Smoldering Home Taping Fire*, 37 UCLA L. Rev. 733, 744-761 (1990). In this comment, the author applied the four fair use factors to DAT recording and concluded that DAT recording would probably constitute a fair use. The author concluded that the purpose of the DAT recording was for a personal use; that the nature of the work was to provide for the dissemination of information to the public; that recording in its entirety did not preclude fair use; and that DAT would not cause substantial harm to the copyright holder.

uses than VCRs.[109] The number of noninfringing uses for which the DAT may be utilized may be relevant in a court's evaluation of the issue of contributory infringement. Thus, if there is only one use for the DAT--which would be considered infringing--it seems that contributory infringement might be attributable to the entire chain of DAT manufacture/distribution/use. However, on the basis of the *Sony* decision, if there are numerous noninfringing uses for DAT, these noninfringing uses may diminish the strength of a contributory infringement claim.

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

CONCLUSION

American copyright law provides a means of stimulating intellectual development and protecting the ownership interests of the authors of copyrighted works. Over the years, American copyright law has evolved in order to respond to societal and technological changes. The most recent overall revision of copyright law was in 1976.

A copyright owner's rights in his/her work are not absolute. Under the copyright statute, certain uses of a copyrighted work are permitted under the doctrine of fair use. The criteria for the application of this doctrine are flexible and are applied on a case by case basis. In addition, this doctrine appears to be a continuously evolving concept. The leading case which examined the doctrine of fair use within the context of home recording was *Sony Corp. v. Universal City Studios, Inc.*, which examined the use of videocassette recorders (VCRs) within the context of home recording. The Supreme Court determined that under certain circumstances, home video recording was considered a fair use of copyrighted works. However, the effect of the *Sony* case is quite limited in that the Supreme Court addressed video recording under very specific circumstances. The holding in the *Sony* case is distinguishable from the factual and legal situations presented by DAT recording.

New technologies such as compact discs and DAT provide challenges for American copyright law. DAT raises several copyright issues in that it appears to be capable of producing nearly perfect copies of copyrighted works in the privacy of the DAT owner's home. Thus, the questions appear to be

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[109] At the current time, the primary purpose for DAT appears to be recording which may be an infringing use. However, in the future DAT could be used for the playing of copyrighted pre-recorded DAT tapes. Such a use would probably be considered a noninfringing use. It appears that the uses of DAT are constantly expanding. See, note 1.

whether DAT use would be considered a fair use or whether it would be construed as infringement. However, these issues are somewhat speculative, as DAT equipment is generally not available in the United States. In response to concerns regarding DAT use and copyright law, legislation has been introduced in the 101st Congress which addresses DAT use. Application of existing copyright law to DAT recording poses certain concerns. The most significant of these issues is that DAT recording may not fall within the fair use exception of copyright law, and therefore, issues of infringement may arise with the sale and use of DAT.

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