

SONY CORPORATION OF AMERICA, *et al.*, *Petitioners*, v. UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS, *Respondents*.

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Brief *Amici Curiae* of Minnesota Mining and Manufacturing Company, Maxell America, Inc., and Tandy Corporation, on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit IN SUPPORT OF REVERSAL

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STATEMENT OF INTEREST

The *amici curiae* filing this brief are manufacturers of videotape. In general, videotape is the medium upon which audio-visual material, such as television programs, is recorded either directly from a television camera or indirectly from broadcast signals. Under current industry practice, professional producers record on the larger videotape formats, such as 2-inch Quadruplex, 1-inch Helical Scan or 3/4-inch U-Matic, Videorecording by individuals in the home, on the other hand, is done almost entirely on videocassette recorders (VCRs) using 1/2-inch videocassette tape.

Videotape in the larger formats has been manufactured and sold for over 25 years. It was produced originally for the principal purpose of recording network programs for later rebroadcast in different time zones and for archival preservation, * and later as a substitute for film in the production of television programs and commercials. Videocassettes were developed more recently. They are used for many lawful purposes in addition to recording by VCRs, including educational and training programs, prerecorded motion pictures, and home movie production. **

* Section 112 of the Copyright Act specifically sanctions these uses. *17 U.S.C. § 112.*

** Cass, *Revolution In the Wasteland* 104-05 (1981).

Manufacturers of videotape sold approximately \$ 320 million worth of 1/2-inch videocassettes to retailers in the United States in 1981. *** This amount is expected to grow to one billion dollars in 1986. Approximately 4.6 million individuals will purchase 1/2-inch videocassettes in 1982, with 17.5 million more purchases projected in 1986. The domestic manufacturers of 1/2-inch videocassettes * employ thousands of Americans and generate many million dollars worth of sales and income taxes. ** The market for 1/2-inch videocassettes is the most significant market for videotape manufacturers, and

the most important segment of that market is the retail sales of blank 1/2-inch videocassettes for use in the home. It is estimated that in 1982, these home sales alone will be worth from \$ 260 to \$ 275 million.

*** Estimate made by the International Tape Association based upon a poll of its membership, December, 1981. All remaining estimates of sales, etc., herein were made by 3M and reflect the wholesale price of videotape. Under normal industry practice, the actual retail price of videotape and videocassettes might be as high as twice the wholesale price.

* Manufacturers of 1/2-inch videocassettes with manufacturing plants in the United States include 3M, Sony, Maxell, Tandy (parent of manufacturer of "Memorex" brand audio and videotape), TDK Electronics Corp., Ampex Corp., and BASF Canada, Inc. Sony alone employs over 1,800 people in its domestic tape plant. Petition for Writ of Certiorari (hereinafter referred to as "Pet.") at 9.

** 1982 sales taxes alone are projected to be over \$ 21 million.

The effect of the decision below is to make the manufacturers and sellers of VCRs *ipso facto* contributory infringers of the copyrights owned by the producers of television programs that are recorded in the home by individual VCR owners. If the decision of the Ninth Circuit is affirmed by this Court, the manufacture of home videocassette recorders would be restricted severely if not halted, and the projected growth in the market for 1/2-inch videocassette tape produced by the *Amici* would effectively be destroyed. This would result irrespective of what remedy might be ordered by the district court on remand. An injunction against the future sale of VCRs, the imposition of a continuing royalty upon the sale of VCRs or videocassettes (even if we were to assume the judiciary's authority to impose such a non-statutory remedy), or the required payment of statutory damages, which could amount to untold millions of dollars, *** all would have a disastrous effect on the market for 1/2-inch videocassettes and would eliminate or substantially reduce projected increases in sales and employment in the videotape industry. Jobs would be lost as manufacturers compete for a static number of potential buyers, and research and development expenditures would be cut substantially if not eliminated, significantly decreasing future technological advances and innovations not only in videotape, but in the communications industry as a whole. * This result clearly is not the intent of the Copyright Clause of the Constitution, which was included, by its very terms, "to promote the progress of Science and the Useful Arts." U.S. Const. art. I, § 8 cl. 8.

*** Section 504(c) of the Copyright Act provides for \$ 250 to \$ 10,000 of damages for *each* infringement. 17 U.S.C. § 504(c).

* The manufacture and sale of home informational products (entertainment centers, computers, security and communications devices), of which VCRs and videotape will be necessary parts, is projected to be a \$ 200 billion industry by the mid-1990s.

Blank 1/2-inch videocassette tape made by the *Amici*, even more so than the VCRs themselves, is a "staple item of commerce." *** The cassettes are used not only to record Respondents' copyrighted television programs in the home, they also are used, *inter alia*:

** A "staple item of commerce" is an item suitable for substantial noninfringing uses. *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488-89 (1964). Manufacturers of staple items of commerce generally are not subject to liability as

contributory infringers when the owner of the item used it for direct patent infringement, *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), *ovrl'd. on other grounds, Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917), and this same principle has been applied in copyright infringement cases, *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62-63 (1911).

(a) Professionally, to record, with the permission of the respective copyright owners, motion pictures, instructional programs, and other material for purchase or lease by VCR owners; ***

*** Fifty-five to sixty-five percent of VCR owners use their VCRs in part to play purchased or leased prerecorded cassettes.

(b) To record and play back "home movies" and other similar material recorded by the owner with a 1/2-inch videocassette camera; ****

**** It is estimated that by 1986, forty percent of all VCR owners will purchase a 1/2-inch videocassette camera for home use.

(c) To record and play back television broadcast programs that are not protected by copyright or whose copyright proprietors have announced or otherwise indicated they consent or do not object to such copying; *****

***** Pet. at 4-5.

(d) To prepare professional educational and training programs; * and

* Cass, *supra* note p. 2 at 104-05.

(e) Potentially for new, non-infringing purposes that the rapidly advancing technology of the industry will develop if it is permitted to continue to grow as anticipated. **

** For example, developments in videotape technology are leading to corresponding developments in digital recording of both audio and video material, which will permit both miniaturization and quality improvement.

In all, these clearly non-infringing uses will be worth hundreds of millions of dollars of 1/2-inch videocassette sales. It would be a harsh and anomalous result -- and an unwarranted extension of the doctrine of contributory infringement in copyright law -- if the virtual elimination of the present videocassette recorder market which will result from an affirmance of the Ninth Circuit's decision, also eliminated the growth of the videotape manufacturing industry represented by these *amici*.

In light of the substantial injury to the manufacturers of videotape that would follow from an affirmance of the Ninth Circuit's decision, the *amici* filing this brief clearly have an interest in this proceeding. Furthermore, the *amici* believe that the arguments made herein might not otherwise be presented to the Court. It is for these reasons that this brief *amici curiae* is submitted.

Brief *Amici Curiae* of Minnesota Mining and Manufacturing Company, Maxell

America, Inc., and Tandy Corporation, on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTRODUCTION

Minnesota Mining and Manufacturing Company (3M), Maxell America, Inc., and Tandy Corporation, respectfully file this brief *Amici Curiae* in support of Petitioner, the Sony Corporation of America. Petitioners and Respondents have granted their consent to the filing of this brief pursuant to their "Written Consent of All Parties to Filing of *Amici Curiae* Briefs," on file with the Court.

SUMMARY OF ARGUMENT

Time-shifting, the taping and viewing of a program once or twice only a few days after taping, is the principal use of VCRs and serves a "paramount" First Amendment goal by providing access to information broadcast into private homes by Respondents. Consequently, time-shifting can be limited or abridged only to secure a compelling interest, and only in a manner which is least restrictive of the protected activity.

The Copyright Act's goal of encouraging creativity does not amount to a compelling interest in this case because the Respondents are not economically harmed by the principal use of VCRs, time-shifting, and thus will not be discouraged from creating new works if time-shifting is allowed. Respondents are compensated for time-shifting in the same manner they are compensated for all television viewing of their material: through the rating services.

If the creation of tape libraries of Respondents' works is to be prohibited, the general banning of all videorecording is not the proper means to use to reach this end. The Ninth Circuit's opinion, therefore, which decided that all home videorecording of Respondents' material violated the Copyright Act, was overbroad and did not utilize the least restrictive means of securing whatever copyright interest might justify a limitation on the creation of tape libraries.

Consequently, this Court either should reinstate the district court's conclusion that home videorecording, which is principally done for time-shifting purposes, is a "fair use" of Respondents' copyrighted material, or should find that home videorecording cannot constitutionally be prohibited or limited generally by the Copyright Act.

ARGUMENT

The Copyright Clause and the First Amendment of the Constitution are apparently inconsistent. On the one hand, the First Amendment broadly proclaims that "Congress shall make *no* law... abridging the freedom of speech or of the press..." U.S. Const. amend I (emphasis supplied). On the other hand, the Copyright Clause states in equally broad terms that the Congress has the power "To promote the progress of Science and the Useful Arts, by securing for limited times to Authors... the *exclusive* Right to their respective Writings..." *Id.* at art. I, § 8 cl. 8 (emphasis supplied).

Consequently, to avoid the anomalous result of finding one of these constitutional provisions to be unconstitutional, commentators have struggled for years to interpret these provisions consistently, * and courts have engaged in *ad hoc* balancing of the respective demands of the Copyright Act and the First Amendment. This balancing either is addressed through the court's determining whether the challenged use of copyrighted material was a "fair use" ** within the Copyright Act, *** or through the court's consideration of whether the First Amendment imposes some non-statutory limitations on the Copyright Act. **** Depending upon the weight ascribed to the

competing demands of the Copyright Act and the First Amendment, the court decides whether the use should be permitted.

* See, e.g., Patterson, *Private Copyright & Public Communication: Free Speech Endangered*, 28 *Vand. L. Rev.* 1161 (1925) (use of a copyrighted work which does not compete economically with the copyright holder's use is protected by the First Amendment); Denicola, *Copyright and Free Speech -- Constitutional Limitation on the Protection of Expression*, 67 *Cal. L. Rev.* 283 (1979) (whenever conflicting, the statutory property interests of copyright must yield to the constitutional protection of the First Amendment); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 *U.C.L.A.L. Rev.* 1180 (1970) (the First Amendment protects access to the *idea* expressed by an author, while copyright protects the specific *expression* of that idea).

** "Fair use," some of the relevant considerations of which are set forth in section 107 of the Copyright Act, 17 *U.S.C. § 107*, is a judicial doctrine allowing "others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner." *Rosemont Enterprises v. Random House*, 366 *F.2d* 303, 306 (2d Cir. 1966) (quoting Ball, *Copyright and Literary Property* 260 (1966)).

*** 17 *U.S.C. § 107*. See, e.g., *Triangle Publications v. Knight-Ridder Newspapers*, 626 *F.2d* 1171 (5th Cir. 1980); *Wainwright Securities v. Wall Street Transcript Corp.*, 558 *F.2d* 91 (2d Cir. 1977), *cert. denied*, 434 *U.S.* 1014 (1978); *Rosemont Enterprises v. Random House*, 366 *F.2d* 303 (2d Cir. 1966), *cert. denied*, 385 *U.S.* 1009 (1967); *New York Times v. Roxbury Data Interface*, 434 *F. Supp.* 217 (D.N.J. 1977); *Time, Inc. v. Bernard Geis Associates*, 293 *F. Supp.* 130 (S.D.N.Y. 1968).

**** E.g., *Triangle Publications v. Knight-Ridder Newspapers*, 445 *F. Supp.* 875 (S.D. Fla. 1978), *aff'd*, 626 *F.2d* 1171 (5th Cir. 1980); and see Denicola, *Copyright and Free Speech -- Constitutional Limitations on the Protection of Expression*, 67 *Cal. L. Rev.* 283 (1979); and *First Amendment Exception To Copyright: A Proposed Test*, 1972 *Wisc. L. Rev.* 1158 (1977).

When addressing this balance, the monopoly rights granted by the Copyright Act are generally considered by the courts to be only *very limited* exceptions to the generally applicable right of the public to have full and free access to all communications and information released to the public, *Twentieth Century Music v. Aiken*, 422 *U.S.* 151 (1975), and are tolerated *only* for the purpose of encouraging creativity and the development of the arts and sciences. The copyright owner's monetary award is not the only or even the primary purpose of the Copyright Act. *U.S. v. Paramount Pictures*, 334 *U.S.* 131, 155 (1948). Rather, the author's monopoly-based return simply reflects Congress' determination that monetary incentives will best encourage creativity. *Twentieth Century Music v. Aiken*, *supra*, 422 *U.S.* at 156 (1975); *Mazer v. Stein*, 347 *U.S.* 201, 219 (1954), *Berlin v. E.C. Publications*, 329 *F.2d* 541, 543-44 (2d Cir.), *cert. denied*, 379 *U.S.* 822 (1964). The monetary reward is not appropriate when it does not serve this underlying purpose of the Copyright Act. *Paramount Pictures*, *supra*, 344 *U.S.* at 159; *Fox Film Corp. v. Doyal*, 286 *U.S.* 123, 127 (1932). If a direct conflict arises between the Copyright Act and the First Amendment, the Act must be strictly construed, *Wheaton v. Peters*, 33 *U.S.* 591, 661-63 (1834), and interpreted in light of its purpose to encourage creativity. As with all other acts, the Copyright Act must be construed as narrowly as possible to achieve its goal to encourage creativity while maintaining consistency with the overriding constitutional demands. *Triangle Publications v. Knight-Ridder Newspapers*, 445 *F. Supp.* 875, 882 (S.D. Fla. 1978), *aff'd*, 626 *F.2d* 1171 (5th Cir. 1980) (citing *Crowell v. Benson*, 285 *U.S.* 22 (1932)).

The policies served by the First Amendment and the Copyright Clause specifically and perhaps uniquely conflict in this case. The testimony and surveys in the record, and the district court's specific factual findings, establish that the principal use of VCRs is to "time-shift," or delay the viewing of material transmitted into the VCR owner's home over the broadcast media. * Pet. App. at 43-48. The recording of copyrighted television programs for repeated viewings, or the "librarying" of recorded programs, is only a secondary and relatively unusual use of VCRs.

* The "Crossley" survey introduced by Petitioners, for example, indicates that approximately 96% of all VCR owners record and replay programs that they otherwise would be unable to see. Pet. App. at 48. The "Field" survey introduced by Respondents similarly concluded that approximately 75% of VCRs are used at least half of the time to record programs that otherwise would have been missed. *Id.* at 47-48. Given the fact that over three million people presently own VCRs, these surveys indicate that between 2.5 and 2.8 million people use VCRs most often to obtain otherwise unavailable access to information transmitted over the broadcast media.

The specific testimony of individual Betamax owners in this case also establishes that time-shifting was their principal use of VCRs and that this use allowed new access to the media for later viewing of programs which otherwise would have been missed. It was their practice generally to view a tape once or twice soon after recording, and then to erase the tape to allow the recording of other programs in a similar fashion. Appendix to Petition for Certiorari (hereinafter referred to as "Pet. App.") at 43-47.

VCRs accomplish time-shifting by recording programs for later viewing by the owner. The normal procedure is that while the owner is away from his television receiver, or while he is watching a program on another channel, the VCR will be set to record a program automatically and keep it available for viewing by the owner at a later time. The recorded program normally is viewed within a few days of the recording, is viewed only once or twice, and then is erased by the recording of a new program on the same tape. * In addition to entertainment programming, VCRs are often used to record political information, ** educational programming, religious programming, and the like. ***

* *Id.*

** Politically-based speech is "at the heart of the First Amendment's protections." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (citation omitted).

*** The surveys in the record, see note at p.p. 8-9 *supra*, indicate that 63% of VCR owners record educational programming, 49% of VCR owners record sports programming, and 10% of VCR owners record religious programming.

Time-shifting overcomes the arbitrary scheduling limitations necessarily resulting from the scarcity of the broadcast frequencies and from the marketing strategies of the few networks and media owners who broadcast popular programs at the same time on different channels ("counter-programming"). Consequently, VCRs provide their owners with previously unavailable access to television programming and information that is intentionally broadcast for the use of the general public. * In effect, VCRs make the opportunity to view television programs, if not the programs themselves, no longer scarce.

* In this case, the electronic signals VCRs record have already been "released to the

public," *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394, 410 (1974), or, as specifically found by the district court: "The purpose of [VCR] use is to increase access to the material plaintiffs chose to broadcast." Pet. App. at 82.

"Broadcasting" itself is defined in the Communications Act as "the dissemination of radio communications intended to be received by the public...." 47 U.S.C. § 153(o). ("Radio communications," of course, includes television broadcasting. *Allen B. DuMont Laboratories v. Carroll*, 184 F.2d 153 (3d Cir. 1950), cert. denied, 340 U.S. 929 (1951).) Consequently, any transmission which can be received only upon payment of a fee would not appear to be "broadcasting" within the Communications Act. See *National Subscription Television v. S&H T.V.*, 644 F.2d 820 (9th Cir. 1981); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 467 (6th Cir. 1980); *Home Box Office v. Pay T.V. of Greater New York*, 467 F. Supp 525 (E.D.N.Y. 1979); *KMLA Broadcast Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35 (C.D. Cal. 1967). Senator Clarence Dill, the Senate sponsor of the 1924 Radio Act, stated in this regard, when discussing the Act's intent and effect:

First, and most important of all, radio in the United States is free. It is so free to the listener that anybody anywhere may listen in to any broadcast whatsoever...

This freedom of radio reception by the American people is the feature of radio that distinguishes and differentiates radio conditions in the United States from radio conditions in every other country in the world. In practically every other country, the government levies a tax on receiving sets... 59 Cong. Rec. at 12335 (1920).

By providing new access to ideas and information, time-shifting through VCRs serves a "paramount" goal of the First Amendment. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). There is little question today but that the First Amendment guarantees the public's right to have access to information. Indeed, the Court only recently stated:

Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)... In keeping with this principle, we have held that in a variety of contexts "the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); see *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972) (citing cases). This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them: "The right of freedom of speech and press... embraces the right to distribute literature... and necessarily protects the right to receive it." *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (citation omitted). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom. Madison admonished us that

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed.

1910).

Board of Education, Island Trees Union Free School District v. Pico, 50 U.S.L.W. 4831, 4835 (June 22, 1982) (footnotes omitted). *

* In a variety of cases, this Court has held that the First Amendment guarantees the right to listen as well as to speak, the right to read as well as to print, and the right to receive as well as to transmit. "It is now well established that the Constitution protects the right to receive information and ideas." *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (citations omitted); see, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555, 566-67 (1980); *Bellotti*, *supra* note p. 9, 435 U.S. at 783; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); A. Meiklejohn, *Political Freedom* 25-28 (1960).

The right to receive information has served as a basis for many of this Court's decisions establishing the right to "speak." For example, the public's First Amendment right to be informed was the basis of this Court's recognition of the right of the press to attend and publish the results of trials, *Richmond Newspapers*, *supra*; the right of businesses to advertise, *Central Hudson Gas & Elec. Corp v. Public Service Comm'n of New York*; 447 U.S. 557 (1980); *Bellotti*, *supra*; *Virginia State Board of Pharmacy*, *supra*; *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); the right to send uncensored mail, *Procurier v. Martinez*, 416 U.S. 396 (1974); the right to obtain a temporary non-immigration visa for a speaking engagement, *Kleindienst v. Mandel*, *supra*; the right to speak in favor of labor unions, *Thomas v. Collins*, 323 U.S. 516 (1945); the right to distribute religious handouts, *Marsh v. Alabama*, 326 U.S. 501 (1946); *Martin v. Struthers*, 319 U.S. 141 (1943); and the right to place "for sale" signs in front of homes, *Linmark Assn's v. Willingboro*, 431 U.S. 85 (1977).

The right to receive ideas is recognized regardless of their social worth. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). "There is no doubt that entertainment, as well as news, enjoys First Amendment protection." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977). "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment... fall within the First Amendment guarantee." *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1980); *accord Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

The public's right to have access to information has been particularly protected by this Court when that information is transmitted over the broadcast media, as in this case. The Court has recognized that each medium of expression presents unique First Amendment problems that must be analyzed separately. *Metromedia v. City of San Diego*, 453 U.S. 490, 500 (1981); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973). Due to the scarcity of the broadcast frequencies and the pervasiveness of the medium, the Court has held that the right to receive broadcast information enjoys the broadest First Amendment protection, *Red Lion Broadcasting Co.*, *supra*, 395 U.S. at 390, *Columbia Broadcasting System*, *supra*, 412 U.S. at 102, while the right to transmit information over the medium is entitled to the most limited protection, *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978). Perhaps the most often cited statement of the dominant right of television viewers to have access to broadcast information is Justice White's, when writing for the Court in *Red Lion*, *supra*, he stated:

... [D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them... Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees... But the people as a whole retain their interests in free speech by radio and their collective right to have the media function consistently with the ends and purposes of the First Amendment. It is the right of the

viewers and listeners, and not the right of the broadcasters, which is paramount... *It is the right of the people to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.*

395 U.S. at 386, 390 (citations omitted) (emphasis supplied); and see *Kleindienst v. Mandel*, *supra*, 408 U.S. at 753. * This Court stated similarly in *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394, 408 (1974): "The privilege of receiving the broadcast electronic signals and of converting them into sights and sounds of the programs inheres in all members of the public who have the means of doing so."

* "The Supreme Court has ruled that the public's right to access must prevail over all other claims...." *Mt. Mansfield Television v. FCC*, 442 F.2d 470, 477 (2d Cir. 1977). See also *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973); and Judge Learned Hand's decision in 1942 to uphold the FCC's "chain broadcasting" rules, *National Broadcasting Co. v. United States*, 47 F. Supp. 940, 946 (S.D.N.Y. 1942), *aff'd*, 319 U.S. 190 (1943), where he stated: "[T]he interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e., the interest, first, of the 'listeners....'"

The rights within the First Amendment also are particularly protected by this Court when those rights are exercised, again as in this case, within the privacy of the individual's home. As the Court stated in *Stanley v. Georgia*, *supra*, 394 U.S. at 564:

This right to receive information and ideas, regardless of their social worth, see *Winters v. New York*, 333 U.S. 507, 510 (1948), is fundamental to our free society. Moreover, in the context of this case -- a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home -- that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. The conduct challenged in this case -- the recording of television programs which Respondents are responsible for broadcasting to the general public -- occurs solely within the home. There was no sale of the recording as in *U.S. v. Bodin*, 375 F. Supp. 1265 (W.D. Okla. 1974), or *Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972), *aff'd in part, rev'd in part*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979), no commercial gain to the VCR users, see *Triangle Publications*, *supra*, 445 F. Supp. at 880, * and no publication to the general public, commercial or otherwise, as in *Zacchini*, *supra*, 433 U.S. 562.

* Even if the VCR owners used their copies for commercial gain, this would not preempt a finding that VCR recording was a "fair use" of Respondents' material. See text at 24, *infra*.

In short, time-shifting, the principal use of VCRs to obtain new access to broadcast programming and information, is an activity protected by the First Amendment. The First Amendment protections are especially weighty in this case because the Respondents used the public's scarce broadcast frequencies to transmit their copyrighted programs to the public, and because the allegedly infringing activity occurs within the privacy of the home. These First Amendment considerations conflict with, and thus must be weighed against, the interest of the Copyright Act to encourage creativity. As recently held by the court in *Encyclopedia Britannica Dictionary Corp. v. Crooks*, Civ. No. 77-560 at 48 (W.D.N.Y., June 21, 1982):

[T]he public interest in the dissemination of information, *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932), must be balanced against the author's motivation to create new works. *Mazer v. Stein*, 347 U.S. 201, 219 (1954), *Twentieth Century Music Corp. v.*

Aiken 422 U.S. at 156.

Because time-shifting to obtain access to broadcast information is a freedom guaranteed by the First Amendment, it can be abridged or limited by operation of the Copyright Act *only* if that restriction is a "precisely drawn means" of serving a "compelling" copyright interest. *Consolidated Edison v. Public Service Comm. of New York*, 447 U.S. 530, 540 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Nixon v. Administrator of General Services*, 433 U.S. 425, 467 (1977). In addition to assessing the substantiality of the copyright interests, the Court must also determine whether those interests could be served by means that would be less intrusive on time-shifting than the remedies authorized by the Court of Appeals. *Schad v. Borough of Mount Ephraim*, *supra*, 452 U.S. at 70-71; *Bellotti*, *supra*, 447 U.S. at 786. Even if the Copyright Act presents a compelling interest conflicting with First Amendment protections, that interest

cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). Restrictions of First Amendment freedoms must be "closely drawn" to avoid unnecessary abridgments, *Bellotti*, *supra*, 435 U.S. at 786; *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633 (1980), and "[p]recision of regulation must be the touchstone...." *NAACP v. Button*, 371 U.S. 415, 438 (1960) (citation omitted). *

* *Accord Citizens Against Rent Control/Coalition For Housing v. City of Berkley*, 50 U.S.L.W. 4071, 4072 (1981); *Central Hudson Gas and Elec. Co.*, *supra* note p. 12; *United States v. O'Brien*, 391 U.S. 367 (1968); *Talley v. California*, 362 U.S. 60 (1960); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

Similarly, a prior restraint on the exercise of a First Amendment freedom "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 238 U.S. 697 (1931). ** The fact that a freedom might be abused is not a sufficient reason to prohibit the exercise of an activity altogether, and subsequent punishment for the abuse itself is the appropriate remedy consistent with the constitutional privilege. *Id.* at 720; *Village of Schaumburg*, *supra*. Broad prophylactic rules in the area of the First Amendment are suspect, *NAACP v. Button*, *supra*, 371 U.S. at 438. As stated long ago by James Madison when he was interpreting the First Amendment guarantees:

** *Accord Lovell v. Griffin*, 303 U.S. 441, 444 (1938); *Schneider v. State*, 308 U.S. 147, 164 (1939); *Niemotko v. Maine*, 340 U.S. 268, 273 (1951); *Kunz v. New York*, 340 U.S. 290, 293 (1951); and *Staub v. Baxley*, 355 U.S. 313, 321 (1958).

Some degree of abuse is inseparable from the proper use of everything... It has accordingly been decided... that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.

Madison, Reports on the Virginian Resolution, *Madison's Works*, vol. 4 at 544 (1865).

In this case, the Ninth Circuit violated these principles when it based its decision on the conclusion that Respondents' copyrights were infringed by all home videorecording of Respondents' programs, and failed to differentiate between, for example, time-shifting and the creation of tape libraries, or between the recording of Respondents' copyrighted

programs and the recording of the majority of television programming which is not copyrighted or might be copied without objection of the copyright owner, or even between the recording of educational or political information and cartoons. No investigation was made by the court into whether the Copyright Act presents a compelling reason to overcome the First Amendment's protection of time-shifting in this case, *Consolidated Edison, supra*, 447 U.S. at 530, no safeguard of protected areas was provided by the lower court, *Bantam Books, supra*, 372 U.S. at 70, and no showing was made that a more limited restriction would not have been effective, *Central Hudson Gas and Electric Corp. v. Public Service Comm.*, 447 U.S. 557, 571 (1980). The Ninth Circuit should have recognized that the principal use of VCRs, time-shifting to obtain access to information, was protected by the First Amendment. Had it done so, it could not reasonably have decided to authorize the banning of the manufacture of VCRs, even though they might occasionally be used for reasons other than pure time-shifting. The Ninth Circuit at least should have "closely drawn" its decision to avoid unnecessary abridgment of the constitutionally protected activity. *Bellotti, supra*, 435 U.S. at 786; *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

The Ninth Circuit failed even to recognize the First Amendment implications of its decision. When presented with the argument that the primary use of VCRs, time-shifting to obtain access to information, is protected by the First Amendment and thus should be considered a "fair use" of Respondents' programming, the court replied simply: "the statute does not list... 'increased access' as [one of the] purposes within the general scope of fair use..." Pet. App. at 14; "in this case, there is no corresponding countervailing societal benefit to 'weigh against' the copyright interest of the author..." *id.* at 16; and "we fail to see how the method by which appellants have chosen to distribute their work is relevant..." *id.* at 20-21. The previous discussion establishes that these conclusions were simply incorrect. The fact that Respondents chose to broadcast their material over the scarce public airwaves is *highly* relevant, and the First Amendment goals served by increased access to the information which is broadcast into private homes is an *important* societal benefit which at least arguably might outweigh the copyright owners' interest. As in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980), the lower court failed even to recognize any right under the Constitution for the public to have access to information transmitted over the broadcast media. Consequently, the Ninth Circuit's decision must be reversed.

Remand for further consideration of the First Amendment protections is not required in this case, however, because the record fails to establish any legitimate copyright interest sufficient to overcome the constitutional protections applying to time-shifting. There is little question, of course, that the goals of the Copyright Act are "legitimate" interests, which in many circumstances are sufficiently "compelling" to overcome the public's right to have access to copyrighted information. However, when the facts in this case are reviewed, the goals of the Copyright Act are revealed not to be sufficiently compelling.

In the cases of *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974), and *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968), which held that the re-transmission of broadcast signals by cable systems was not a "performance" of a copyrighted work so as to subject the systems to copyright liability, this Court recognized that copyright claims made with regard to television broadcast programs invoke different considerations than those arising in the context of the print media. In *Teleprompter, supra*, for example, the Court specifically addressed an argument similar to one made in this case, that the re-transmission of copyrighted motion pictures deleteriously affected the economics and market structure of the motion picture industry, and that to allow such a re-transmission would discourage creativity in that industry. In rejecting that argument, the Court stated:

In the television industry... the commercial relations between the copyright holders

and the licensee on the one hand and the viewing public on the other are such that dilution or dislocation of markets does not have the direct economic or copyright significance that this argument ascribes to it. Unlike propagators of other copyrighted materials, such as those who sell books, perform live dramatic productions, or project motion pictures to live audiences, holders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material -- that is, the television viewers -- but by advertisers who use the drawing power of the copyrighted material to promote their goods and services. Such advertisers typically pay the broadcaster a fee for each transmission of an advertisement based on an estimate of the expected number and characteristics of the viewers who would watch the program. While, as members of the general public, the viewers indirectly paid for the privilege of viewing copyrighted material through increased prices for the goods and services of the advertisers, they are not involved in a direct economic relationship with the copyright holders or their licensees.

By extending the range of viewability of a broadcast program, CATV systems do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder,... he gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation. Instead of basing advertising fees on the number of viewers within the range of direct transmission... broadcasters whose reception ranges have been extended by... CATV re-channeling will merely have a different and larger viewing market.
Teleprompter, supra, 415 U.S. at 411-12 (footnotes omitted).

The district court specifically found that an exactly analogous situation exists in the instant case. Pet. App. at 51-54. Here, the viewers of broadcast programming do not pay the copyright holders directly for access to the programming, or on a pay-per-view basis. Rather, the copyright holders are compensated by the viewers only indirectly: they obtain their compensation from the broadcasters, who obtain their compensation from the advertisers, who obtain their compensation from the viewers in the form of purchased goods. By allowing access to the programming by an entirely new set of viewers, and thus "extending the range of viewability of a broadcast program, [a VCR] thus does not interfere in any traditional sense with the copyright holder's means of exacting recompense for [Respondents'] creativity or labor." *Teleprompter, supra, 415 U.S. at 412*.
* Consequently, the access provided by VCRs, just as the access provided by the cable systems in *Fortnightly* and *Teleprompter*, does not affect in any meaningful way the compensation of copyright holders such that creativity might suffer if that access is allowed. The analysis which protected the *place* -shifting of viewers in *Fortnightly* and *Teleprompter* should also protect the *time* -shifting of viewers in the instant case. **

* Indeed, if anything, the additional viewers *increase* the return to the copyright holders. *Teleprompter, supra* note p. 10, *415 U.S. at 413*.

** In this regard, it is interesting to note that although Respondents seek to obtain payment for the viewing of programs which they allege are now viewed for free, they do not offer to repay the millions of individuals who "pay" for programming through the purchase of advertised products, but who do not own a television set or who do not view the programs in which the products are advertised.

Moreover, Respondents are compensated for whatever impact time-shifting does have on the size of the audience of their works. The copyright license fees broadcasters pay to Respondents for the use of their material, and the charge they consequently impose on their advertisers, is, as stated in *Teleprompter*, derived *inter alia* from the estimated size of the audience of the specific program. Pet. App. at 52. These estimates are provided to

the broadcasters by Nielsen and Arbitron, *id.* at 53, both of which include as a "viewer" of a specific program any VCR recording a program for later viewing. * * * Thus, the copyright holders are compensated by the broadcaster for the principal use of VCRs, the time-shifting of program viewing. * The policy served by the Copyright Act thus is fulfilled in this case, and consequently, there is no copyright interest presented which is adequate to overcome the First Amendment protection applicable to time-shifting. Remand for the balancing of the competing claims of the Copyright Act and the First Amendment, therefore, is unnecessary.

*** *E.g.*, 1980-81 Reference Supplement, Nielsen Station Index, at 10 (Home recordings of programs are included [into the ratings] at time of recording"); Arbitron Description of Methodology for Television Market Reports, at 18 (October 1980).

* With regard to what, if any, economic harm is imposed upon Respondents from the alleged "librarying" of tapes, (1) the district court found that Respondents had failed to establish any harm, *see text infra* at 27, and (2) even if true, the creation of libraries of tapes containing Respondents' material is a fractional use of VCRs and certainly is not sufficient to prohibit VCR recording altogether.

Two avenues are available to this Court to address the competing considerations of the Copyright Act and the First Amendment. First, the Court could inquire into whether the First Amendment protection is sufficient to cause time-shifting to be deemed a "fair use" of the Respondents' programming within the Copyright Act's provisions. *17 U.S.C. § 107*. Alternatively, the Court could decide that if for some reason time-shifting is not a "fair use," that it nevertheless cannot be prohibited because it is a constitutionally protected activity. A holding based upon fair use analysis would seem preferable given the more limited applicability of a statutory interpretation.

The fair use doctrine "offers a means of balancing the exclusive rights of a copyright holder with the public's interest in the dissemination of information..." *Wainwright Securities v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), and "frequently serves to eliminate potential conflicts between copyright and free speech," *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1174 (5th Cir. 1980); *Wainwright Securities, supra*, 558 F.2d at 95. The fair use doctrine has been referred to as a

'rule of reason' fashioned by Judges to balance the author's right to compensation for his works, on the one hand, against the public's interest in the widest possible dissemination of ideas and information, on the other.

Triangle Publications, supra, 626 F.2d at 1174 (citation omitted).

Many cases have used fair use analysis to balance the competing considerations of the Copyright Act and the First Amendment. In *New York Times v. Roxbury Data Interface*, 434 F.Supp. 217, 221 (D.N.J. 1977), for example, the defendant's publication of an index of plaintiff's copyrighted work was held to be a protected "fair use" in part because "the defendant's index will serve the public interest in the dissemination of information." In *Rosemont Enterprises v. Random House*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), the court refused on fair use grounds to enjoin the publication of a biography of Howard Hughes even though the biography contained, without authorization, articles copyrighted by the plaintiff. The court noted that whether the fair use privilege may be properly applied to a particular situation was initially dependent upon "whether their distribution would serve the public interest in the free dissemination of information..." *Id.* at 307; *accord Meeropol v. Nizer*, 361 F. Supp. 1063, 1067-68 (S.D.N.Y. 1973). In *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968), the court allowed the unauthorized publication of copyrighted pictures of

President Kennedy's assassination. The court found that "there is a public interest in having the fullest information available on the murder of President Kennedy." *Id. at 146*. In *Meeropol v. Nizer*, 560 F.2d (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), the court found the fair use doctrine applicable to the use of copyrighted letters of Julius and Ethel Rosenberg in part because of the "public's interest in dissemination of information..." *Id. at 1068*. The court found that "the mere fact that [the defendant's] book might be termed a popularized account of the Rosenberg trial lacking substantial scholarship and published for commercial gain does not, standing alone, deprive [the defendant] or his publisher from the fair use doctrine." *Id. at 1069*. *

* *See also Berlin v. E. C. Publications*, 329 F.2d 541, 545, (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (Mad Magazine parody of plaintiff's copyrighted song was a "fair use" even though "the societal interest in encouraging the broad-gauged burlesque of Mad Magazine is admittedly not readily apparent."); *Meeropol v. Nizer*, 417 F. Supp 1201, 1207 (S.D.N.Y. 1976), *aff'd in part, rev'd in part*, 560 F.2d 1061 (2d Cir. 1977), *cert denied*, 434 U.S. 1013 (1978); *Triangle Publications*, *supra* note p. 7, 626 F.2d 1171.

The doctrine of fair use was incorporated in the Copyright Act with the specific anticipation that it would allow the Act to be adaptable to new technological improvements, such as VCRs. As stated in *Triangle Publications*, *supra*, 445 F. Supp. 880:

The fluidity built into the statute was designed to diminish the difficulty which arises when an innovation in technology makes possible new techniques of display that could not have been contemplated by the legislators in the year the statute was framed. The fair use doctrine, thus, is the statutory mechanism to use in cases such as this one, where "technological change has rendered the Copyright Act's terms ambiguous," and thus where the Act "must be construed in light of its basic purpose" to encourage creativity. *Twentieth Century Music Corp. v. Aiken*, *supra*, 422 U.S. at 156.

When applied to this case, the criteria listed in Section 107 of the Copyright Act clearly indicate that time-shifting is a fair use of Respondents' copyrighted broadcast programming. * First, the "purpose" of time-shifting is simply to obtain access to programs that Respondents themselves make available for free viewing. * There is no commercial exploitation of Respondents' works, ** there is not even a secondary release to the public. The legislative history of Section 107 specifically notes in this regard that "the commercial and non-profit character of an activity, while not conclusive to fair use, can and should be weighed along with the other factors in fair use decisions." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66.

* Although four factors used in determining whether use is "fair" are set forth in section 107, a finding of fair use is not dependent upon the meeting of these criteria, but is to be determined upon the specific facts of each case. *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). The statute does not pretend to present an exhaustive list of potentially fair uses. It states only that the factors to be taken into account when determining whether a use is fair "shall include" the considerations listed therein. 17 U.S.C. § 107. As the House Report on the Copyright Act stated in this regard:

[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change... [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66; *see also* S.Rep. No. 94-473, 94th Cong., 1st Sess. 62. Similarly, the Senate Report states:

[N]ew conditions arising in the future may alter the balance of equities. It is also important to emphasize the singling out of some instances to discuss in the context of fair use is not intended to indicate that other activities will or will not be beyond fair use. S. Rep. No. 94-473, 94th Cong., 1st Sess. 63.

* Contrary to the Ninth Circuit's impression, the fair use doctrine is applicable to other than scholarly uses of copyrighted material. See, e.g., *Wainwright Securities*, *supra* note p. 7, 558 F.2d 91 (fair use doctrine applicable to commercial index of plaintiff's works); *Berlin v. E. C. Publications*, *supra* note p. 22, 329 F.2d 541 (doctrine applicable to Mad Magazine parody).

** Even if the time-shifted recordings were sold commercially, this would not preempt a finding of their recording being a "fair use." As stated by the court in *New York Times*, *supra* note p. 7:

While whether the alleged infringer seeks financial gain from its use is a factor to be considered, the fact that defendants seek to profit financially will not preclude their use from being a fair use.

434 F. Supp. at 221 (citations omitted). Similarly, in *Rosemont*, *supra*, note p. 7, the court stated:

Whether an author or publisher reaps economic benefits from the sale of [a work], or whether its publication is motivated in part by a desire for commercial gain... has no bearing on whether a public benefit may be derived from such a work. 366 F.2d at 307. See also *Triangle Publications*, *supra* note p. 7, 626 F.2d at 1175 ("Clearly, § 107 makes commercial motive relevant to fair use analysis. But it is certainly not decisive."); and *Meeropol v. Nizer*, 361 F. Supp. 1063, 1068 (S.D.N.Y. 1973) ("The [copies] commercial success, however, is no reason to conclude that it should be denied the benefits of the fair use doctrine.").

The second consideration of fair use listed in section 107, the "nature of the copyrighted work," was primarily relied upon in the above-described cases but is not directly relevant in its classic sense in this case. Traditionally, consideration of the "nature" of the programming looked to the substance or "newsworthiness" of the program. However, VCRs are used to record *all* types of programming. In addition to the "Chip and Dale/Mixed Nuts" cartoon noted by the Ninth Circuit, VCRs record political, educational, religious, sports, and many other types of programming and information. See text, *supra* at 2, 9. This criterion, therefore, is not helpful in this case when reviewed in its classic sense, although it assuredly does not undercut a finding that VCR recording is fair use of programming in general.

When analyzed in a more modern sense, however, the "nature" of the programming recorded by VCRs in this case indicates that time-shifting is, in fact, a fair use. The "nature" of the programming in this case is that it is voluntarily broadcast into the home for the specific purpose of having it viewed by the greatest number of individuals. The fact that viewers use new technology to accomplish the viewing intended by Respondents, only at a later time, should not subject them to copyright infringement liability, especially when Respondents have no control over when the program is broadcast initially. As the Court stated in *Teleprompter*, *supra*, 415 U.S. at 408:

The privilege of receiving broadcast electronic signals and converting them into the sights and sounds of the program inheres in all members of the public that have the means of doing so.

VCRs do no more than simple television sets in this regard; they simply allow reception and viewing by the public of broadcast information. Respondents cannot be allowed to increase their returns simply by limiting the public's access to VCRs, anymore than they could deny access to their programs by any person who did not own a television

receiver at the time the program was produced. The fact that viewers now have a new means of gaining access to the programs does not lead to their being guilty of copyright infringement, especially when, as discussed earlier, the copyright holders are compensated for the additional viewers.

The third criterion of fair use, the "substantiality" of the challenged recording, graphically illustrates the inapplicability of the print-media precedents relied upon by the Ninth Circuit. The court noted in this regard simply, although accurately, that VCR owners usually record the entirety of programs, and concluded that this factor therefore undercut a finding that time-shifting was "fair use." Pet. App. at 21-22. However, as the only other case concerning fair use ever to be addressed by this Court established, the fact that the entirety of a copyrighted work is used does not necessarily indicate that the copying is not a fair use. *Williams & Wilkins v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided court*, 420 U.S. 376 (1975) (copying by the National Institutes of Health of the entirety of copyrighted medical articles was a "fair use"). The court in *New York Times*, *supra*, 434 F.Supp. at 222, stated in this regard:

Although the quantum of material taken from the copyrighted work must be considered, a bald quantitative approach is not determinative. While the taking of as little as three sentences has been held to constitute an infringement..., the copying of an entire work has been held to be a fair use... The inadequacy of a pure quantitative approach obviously results from the fact that the quantum of appropriated material must be interrelated with a number of other factors, such as the quality and substantiality of the appropriated material, the need to use the appropriated material in the manufacture of defendants' product, and the other factors discussed herein [citations omitted]. *

* To paraphrase this Court in *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 397 (1968): "[M]ere quantitative [analysis] cannot be the proper test to determine copyright liability in the context of television broadcasting... Rather, resolution of the issue before us depends upon a determination of the function that [a VCR] plays in the total process of television broadcasting and reception."

In this case, the principal factor taken into account under this criterion should have been the temporary nature of the typical use made of Respondents' works by VCR owners. As stated above, when time-shifting, VCR owners watch a recorded program only once or twice within a few days after recording, and then effectively destroy the copy by recording new material on the same tape. Although the entire work is normally copied, the short term of the copy's lifespan in this case indicates that this use of VCRs is not "substantial" within the meaning of section 107, because the recording will not generally be available for reviewing at the time the program is rebroadcast by the Respondents, * which might not occur until *years* later. Pet. App. at 36-39.

* The legislative history of the Copyright Act notes that whether a written work is out of print is relevant in determining whether the copying of that work would be a "fair use." S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975). In the instant case, the fleeting character of broadcast transmissions is analogous to a printed work being out of print. If the viewer is not fortunate enough to be at home in front of his television receiver when the program is broadcast, he has no opportunity to view that program. The indication that Congress did not intend this restraint to apply to readers of printed material supports the conclusion that Congress would not have intended to impose the same restraint on viewers of broadcast programs.

The final consideration mentioned in section 107, the economic harm imposed on the Respondents by VCR copying, generally has been considered to be the principal

consideration of fair use. Denicola, *copyright and Free Speech -- Constitutional Limitation on the Protection of Expression*, 67 Cal. L. Rev. 283 (1979). ** In this case, the final consideration clearly indicates that time-shifting is a fair use of Respondents' works.

** Regardless of the economic impact of the copying on the copyright holder, however, Denicola concludes: "Where the objectives of free speech require access to the expressions of another, the property interest created by copyright law must yield." Denicola, *supra* note p. 7 at 303.

Initially, the district court specifically found, and the court of appeals failed to reject as "clearly erroneous," Fed. R. Civ. Pro. 52 (a), that Respondents "have conceded that neither the sale nor use of Betamax or Betamax tapes had by the time of trial caused [Respondents] any measurable monetary damage, economic loss or revenue loss," Pet. App. at 50, nor were Respondents able "to predict at what point in either time or in Betamax sales such harm would occur," *id.* As this Court recently has restated, an appellate court cannot substitute its view of the facts for the district court's unless it is left with a "definite and firm conviction that an error has been committed." *Inwood Laboratories v. Ives Laboratories*, 50 U.S.L.W. 4592, 4595 (June 1, 1982); *see also United States v. Real Estate Boards*, 339 U.S. 485, 495 (1950); *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948). Because the district court found in this case that no economic harm to Respondents has resulted from VCR copying, and that Respondents have failed to establish that economic harm to them would result, the district court's finding on this criterion is conclusive.

Additionally, as stated above, Respondents are compensated for the additional viewers who obtain access to Respondent's programs via VCR time-shifting. The increased audience proportionately increases the licensing fees they obtain from the broadcasters. *Teleprompter, supra*, 415 U.S. at 412. Therefore, no economic harm to Respondents results from VCR recording of their work for time-shifting purposes. * Consequently, such time-shifting should be considered a fair use of Respondent's copyrighted work.

* In fact, as noted in *Teleprompter, supra* note p. 10 at 412, and *Meeropol, supra* note p. 24, 361 F. Supp. at 1068, the increased audiences for Respondents' programs resulting from VCR taping, which is taken into account in "rating" those programs by Nielsen and Arbitron, should result in *increased* revenues to Respondents.

The Ninth Circuit erroneously assumed that Respondents were economically harmed in this case simply because viewers were willing to pay for VCRs. The fact that the viewing of programs has value, however, does not establish that Respondents were economically injured when that value is passed along to the Respondents in the form of their receiving greater licensing fees from the broadcasters. The CATV system subscribers in *Teleprompter, supra*, and *Fortnightly, supra*, also paid for the services they received, but that did not inhibit the Court from finding that the re-transmission of broadcast signals by CATV systems did not infringe the copyrights at issue in that case.

In short, the use of VCRs to time-shift is directly analogous to the use of cable systems which were found not to violate the Copyright Act in *Fortnightly, supra*, and *Teleprompter, supra*. A VCR "no more than enhances the viewer's capacity to receive the broadcaster's signal... The basic function [VCRs] serve is little different from that served by the equipment generally furnished by a television viewer." *Fortnightly, supra*, 392 U.S. at 399 (footnote omitted). Consequently, time-shifting by VCRs should not be considered a violation of Respondents' copyrights. To hold otherwise would deny the

public's access to the same programming which the Copyright Act seeks to promote.

If, for any reason, the Court decides that time-shifting is not a "fair use" within the terms of section 107, time-shifting nevertheless should be allowed because it is an activity protected by the First Amendment and no compelling interest has been established in this case which cannot be (and is not being) met by reasonably available alternatives. * As the court stated in *Triangle Publications, supra*, 445 F. Supp. at 882:

* Professor Nimmer noted that if a publication was to be allowed despite the infringement of another's copyright, the publication should be allowed directly pursuant to the First Amendment and not under the doctrine of fair use because the exception would be applicable even when the marketability of the copyright holders' work would be affected. *Nimmer, supra* note p. 7 at 1200-01.

When the Copyright Act and the First Amendment both seek the same objective, their future co-existence is easily assured. However, when they operate at cross-purposes, the primacy of the First Amendment mandates that the Copyright Act be deprived of effectuation.

The Respondents are compensated for the viewers given access by time-shifting, and thus there is no copyright interest to weigh against the viewers' First Amendment right to have access to broadcast information. Moreover, as time-shifting is the principal use of VCRs, any copyright interest applying to the repeated viewing resulting from the creation of tape libraries must be remedied through a more limited means than the general prohibition of all VCR recording, the imposition of a generally applicable "compulsory license," or the imposition of statutory damages which will be passed down to the viewers. Legal prohibitions specifically aimed at librarying, ** or the development of videotape cassettes which would not maintain the quality of recordings over repeated viewings or past a relatively short period of time, both are reasonably available and more limited means of securing the Copyright Act's policies with regard to librarying. To the limited extent librarying will occur despite these restrictions, it is one of the "noxious branches" that must be tolerated to avoid "pruning away the vigors" of the First Amendment. Madison, Reports on the Virginia Resolutions, *Madison's Works*, Vol. 4 at 544.

** Wrongful conduct "can be prohibited and the penal laws used to punish such conduct directly." *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620, 637 (1980).

CONCLUSION

For each and all of the foregoing reasons, the judgment and opinion of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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