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The Audio Home Recording Act of 1992

Christine C. Carlisle

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RECENT DEVELOPMENTS

THE AUDIO HOME RECORDING ACT OF 1992

I. INTRODUCTION

The enactment of the Audio Home Recording Act\(^1\) (AHRA) to regulate the new area of Digital Audio Technology\(^2\) (DAT) raises several questions in light of the Constitution and the Copyright Act of 1976. This Comment addresses two areas in which problems may exist with the AHRA. First, the AHRA is inconsistent with the Copyright Clause of the Constitution.\(^3\) The legislation presents two constitutional concerns: it allows copyright holders to control access to works and it subjects public domain works to copyright protection. Second, the AHRA makes no allowance for the fair use of a copyrighted work under section 107 of the Copyright Act.\(^4\)

The deficiencies in the AHRA most likely reflect the negotiation process behind the legislation;\(^5\) the Act grew out of negotiations and lobbying efforts by special interest groups in the music and electronics industries. Congress’s reliance on these special interest groups has resulted in a statutory subsidy for the music industry that conflicts with and restricts the public’s rights under the

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2 Digital Audio Technology uses computer technology to create the same high sound quality as laser compact discs. The difference is that DAT employs cassette tapes rather than compact discs. These tapes can be copied on DAT recorders. Further, copies of DAT tapes do not lose sound quality or clarity because the computer technology converts music into binary codes rather than simply copying the sounds. This conversion eliminates the loss in sound quality experienced with traditional recording devices. Eric Fleischmann, The Impact of Digital Technology on Copyright Law, 8 COMPUTER/L.J. 1, 3-5 (1987).
3 "To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . ." U.S. CONST. art. I, § 8, cl. 8.
5 See Jessica Litman, Copyright Legislation and Technological Change, 68 OR. L. REV. 275, 277-79 (1989) (arguing that copyright law problems stem from Congress’s reliance on special interest group negotiations for copyright legislation).
II. DESCRIPTION OF THE LEGISLATION

The AHRA seeks to regulate DAT equipment because the equipment's technology facilitates the creation of near-perfect copies of copyrighted sound recordings.\(^6\) According to proponents of the legislation, such high-quality copies threaten the music industry and the value of sound recording copyrights.\(^7\) In light of this threat, Congress attempted to balance music industry concerns with society's right of access to the new technology.\(^8\) This balancing resulted in an agreement in which the music industry promises not to sue consumers or DAT manufacturers in return for royalty payments.\(^9\)

The AHRA royalty plan\(^10\) requires payments equaling two percent of the transfer price of a DAT recorder and three percent of a blank DAT tape.\(^11\) The royalty applies to all consumer models of DAT recorders\(^12\) and blank DAT tapes\(^13\) sold in the United

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\(^7\) House Panel Approves Bill on Digital Audio Recording and Home Audio Taping, 44 Pat. Trademark & Copyright J. (BNA) 324 (August 6, 1992).


\(^10\) §§ 1003-1007.

\(^11\) §§ 1004(a)-(b). The plan determines the transfer price as either the value amount entered with United States Customs upon importation of the DAT equipment or the manufacturer's freight on board (FOB) price for domestic products. If the manufacturing entities are related, then the transfer price is the reasonable arm's-length price under all applicable IRS codes. § 1001(12).

\(^12\) § 1001(3) ("A 'digital audio recording device' is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use . . . ".") (emphasis added).

\(^13\) § 1001(4)(A) ("A 'digital audio recording medium' is any material object in a form commonly distributed for use by individuals, that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device . . . ".") (emphasis added).
States. The Act excludes spoken word recordings, computer program recordings, professional model DAT recorders, and nonmusical sound recording devices.

Royalty payments may not exceed eight dollars on single component DAT recorders or twelve dollars on a multi-unit stereo system. Although the individual royalty per unit is small, the royalty system will raise a large amount of money. Government figures predict that royalties will equal an estimated 188 million dollars in the first two years. The Copyright Office will supervise the distribution of AHRA funds, the bulk of which are directed to the music industry.

The AHRA distribution plan results in recording companies taking approximately forty percent of overall AHRA proceeds, which will amount to seventy-six million dollars in the first two years.

14 § 1001(5)(B)(i) (including spoken sound recordings with incidental musical accompaniment).
15 § 1001(5)(B)(ii).
16 § 1001(3)(A). Professional models of DAT products would be used in places like recording studios.
17 § 1001(3)(B) (including devices such as answering machines and dictation machines).
18 § 1004(a)(3). Single component systems generally cost approximately $1000 each.
20 § 1007. See also David Goldman, DAT Royalty Payment Regulations Released, J. PROPRIETARY RTS., May 1993, at 24 (showing that manufacturers are required to submit "statements of account" and pay royalty payments before May 15, 1993); David Goldman, Group Formed To Distribute DAT Royalties, J. PROPRIETARY RTS., Mar. 1993, at 41 (noting that nonprofit corporation was formed to distribute royalties and settle disputes arising under AHRA).
21 For instance, two-thirds of the proceeds are allocated to the Sound Recording Fund and one-third is allocated to the Musical Works Fund. § 1006. Approximately sixty percent of the Sound Recording Fund goes to record companies while approximately forty percent is received by featured performers. Id. The Musical Works Fund divides its proceeds evenly between music publishers and music or song writers. Id.
22 These figures are only approximations to give the reader an idea of the overall division of AHRA funds. For the background of this distribution plan, see Audio Home Recording Act of 1992, Pub. L. No. 102-563, 1992 U.S.C.C.A.N. (106 Stat.) 3578, 3591-94.

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years, according to government estimates.23 Featured musicians and performers (not in their capacity as song writers) will take approximately twenty-six percent of overall proceeds, equaling approximately fifty million dollars over two years. Finally, music publishers and music writers will each take only sixteen and one-half percent of the overall proceeds, or approximately thirty million dollars in a two year period.

In addition to establishing a royalty system, the AHRA requires that all DAT recorders24 be equipped with a Serial Copy Management System (SCMS).25 Without the SCMS, tenth-generation DAT copies would sound as clear as an original master copy because DAT technology can eliminate the scratches and hisses of analog equipment.26 The music industry feared that these clear DAT copies would greatly diminish sales of prerecorded works because consumers could copy a borrowed prerecorded copy. Although some commentators have argued that the SCMS is a more viable copyright protection device than royalties,27 this Comment limits its discussion to the legality and policy considerations of the AHRA's royalty system.

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23 See supra note 19 and accompanying text (estimating that royalty system will take in over 188 million dollars in first two years).
25 § 1002. The SCMS is a device that can distinguish between a prerecorded tape and one that is a copy of a prerecorded tape. The device prevents a DAT recorder from making a copy of the latter. Michael Plumleigh, Digital Audio Tape: New Fuel Stokes the Smoldering Home Taping Fire, 37 UCLA L. REV. 733, 761 (1990).
26 For further descriptions of DAT functioning and the technological advances facilitated by DAT, see Fleischmann, supra note 2, at 3-5; Todd Page, Digital Audio Tape Machines: New Technology or Further Erosion of Copyright Protection?, 77 KY. L.J. 441, 445 (1989); Douglas R. Weimer, Digital Audio Recording Technology: Challenges to American Copyright Law, 22 ST. MARY'S L.J. 455 (1990).
27 See, e.g., Plumleigh, supra note 25, at 762 (arguing that SCMS, which is limited to small set number of copies, would better balance copyright protection and private use than only prohibiting copies of copies).
III. CONSTITUTIONAL ANALYSIS OF THE AHRA

The founding fathers believed that learning and education are essential to a more productive democracy and a better society. This belief is reflected in the Copyright Clause, which gives Congress the authority to grant authors limited monopolies in their works to ensure society's access to ideas. Ensuring access to ideas is the primary goal of the Clause because learning hinges on open access. Specifically, the Clause serves this goal by authorizing Congress to legislate copyright law to promote learning through the dissemination of ideas. This policy ensures society's right of access to copyrighted works by creating a limited copyright monopoly for authors. In addition, the Clause promotes learning through access by protecting the public domain and the works it encompasses. Works in the public domain are available to everyone for free use.

55 See L. Ray Patterson, Copyright and "the exclusive Right" of Authors, 1 J. INTELL. PROP. L. 1, 26 (1993) (discussing founding fathers' approach to copyright in 1790).
56 "To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings and Discoveries . . ." U.S. CONST. art. I, § 8, cl. 8.
57 See, e.g., Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("[T]he primary object in conferring the monopoly lie[a]l in the general benefits derived by the public from the labors of authors."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[T]he limited grant of the monopoly privilege of copyright is a means by which an important public purpose may be achieved.").
58 See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").
59 See Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering the Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); Patterson, supra note 28, at 26 ("The most important natural-law right of the Copyright Clause is not the right of the author to gain a profit, but the right of the people to learn: the future of society is determined by the learning of its citizens."); Weimer, supra note 26, at 458-61 (describing balance between rights of authors and rights of society in copyright law).
60 The public domain includes works that no longer belong to an author because the term of copyright protection has expired or the work was not copyrighted originally. These works are available for everyone to use without a concern of infringement. See MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 1.05[A][2] (1992) (discussing how works may not be recaptured after they have entered public domain).
A. ACCESSIBILITY AND THE AUTHOR'S RIGHTS

The Copyright Clause ensures that society has access to copyrighted works by rewarding authors with a limited copyright monopoly. As codified in the Copyright Act of 1976, an author's monopoly is limited both in scope and duration. Such limitations exist to protect the public's right of access while also encouraging the author to create and publish his work. Accordingly, if the Constitution is to have meaning, any copyright legislation, including the AHRA, must respect this balance. Thus, Congress should grant only that monopoly necessary to encourage the public circulation of works.

Arguably, however, the AHRA increases authors' monopolistic control without first determining what incentives are necessary to

34 See, e.g., Sony, 464 U.S. at 429 ("[The limited grant] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."). (emphasis added).

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Id. (emphasis added).

36 See United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.") (quoting Fox Film v. Doyal, 286 U.S. 123, 127 (1932))).

37 See Sony, 464 U.S. at 429 ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").
encourage song writers to create and publish. For example, if song writers would continue to publish in spite of DAT copies, then any increased monopoly is unnecessary and an inappropriate limit on society's right of access to works. Such a determination should be made before Congress enacts legislation that expands the copyright monopoly.

The AHRA increases the copyright monopoly by guaranteeing profits to the music industry and allowing the industry to control access to DAT equipment. Guaranteeing profits is not part of the limited statutory monopoly, which only protects an author's opportunity to benefit from his work. Even if the actual royalty amount per unit is small, the guaranteed royalties still exceed the limited monopoly and encroach on the public's right of access free from excessive copyright holder control.

The AHRA is also problematic because its royalty plan guarantees profits primarily to record companies rather than to song writers. Recording companies will take over seventy-six million dollars while song writers will take only approximately thirty million dollars. This is contrary to the Copyright Clause, which requires Congress to reward authors for publishing their creative works. That is, the Constitution does not empower Congress to promote the interests of recording company entrepreneurs who are not the creative sources of the copyrighted works.

In addition, the AHRA increases the copyright monopoly by allowing the music industry to charge royalty fees for access to DAT recorders and blank tapes, which members of the electronics industry designed and produced. Thus, the AHRA allows one set of copyright holders to charge consumers for access to another's works. This is an inappropriate use of copyright law, which grants a limited monopoly only to authors for their works.

The fact that the electronics industry agreed to such a system may seem strange. One explanation is that some electronics

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38 The guarantee of royalties to AHRA beneficiaries is at the cost of consumers. See Levine, supra note 18, at 88. ("It's a toss-up," said Michelle Mendelson, a spokesman for Consumers Union. "It's unfortunate that [the AHRA] will entail higher prices, but at least it is getting the technology out to the consumer.").

39 See supra note 22 and accompanying text (noting distribution of AHRA proceeds).

40 House Panel Approves Bill on Digital Audio Recording and Home Audio Taping, 44 Pat. Trademark & Copyright J. (BNA) 324 (Aug. 6, 1992).
corporations also own recording companies. Moreover, the electronics industry as a whole arguably profits under the AHRA because it passes the royalty fees to consumers and then indirectly receives royalties back through their subsidiary recording companies and the AHRA. In this way, the AHRA is a winning proposition for everyone, except perhaps the American consumer.

Therefore, the AHRA arguably conflicts with the Copyright Clause because it allows copyright holders to enlarge the copyright monopoly and to encroach on society's right of access to copyrighted works. Both results conflict with the policies inherent in the constitutional grant of a limited monopoly.

B. THE PUBLIC DOMAIN

A second potential constitutional problem with the AHRA is that it may give copyright protection to works in the public domain. The public domain consists of works for which the term of copyright protection has expired or that were never copyrighted. Examples of public domain works include the writings of Shakespeare or the music of Mozart. Further, government works automatically enter the public domain. Such works are available for use by everyone without being subjected to a copyright royalty, thereby promoting learning in society.

Under the AHRA, a royalty is levied on all DAT equipment at the time of sale. Because the AHRA does not distinguish between the recording of works in the public domain and those protected by copyright, it inevitably charges consumers for use of public domain works. Specific instances in which the AHRA royalty might apply inappropriately to works in the public domain include a historic release of Thomas Edison's original recordings or a government...
work such as a recording of the United States Navy Band.

Thus, the policies behind the Copyright Clause raise several questions about the validity of the AHRA. First, the Act's royalty system will increase the copyright monopoly at the cost of access to works available through DAT technology. Second, the royalty system fails to distinguish between the use of copyrighted works and the use of public domain works, and wrongfully charges royalties on the latter.

IV. FAIR USE OF DAT

A. FAIR USE ANALYSIS

Congress codified the fair use doctrine in the Copyright Act of 1976 to address fact-specific usage questions. Fair use allows use of a copyrighted work without infringing that work if the use satisfies a balancing test of four factors. Being a judicially

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Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.; see also Litman, supra note 5, at 340-42 (describing legislative history of section 107 during its enactment into Copyright Act of 1976).

46 17 U.S.C. § 107 (1988). For further analysis of the fair use factors, see William W. Fisher III, Reconstructing the Fair Use Doctrine, 101 HARV. L. REV. 1661 (1988) (analyzing fair use from economic or efficiency viewpoint and then from utopian viewpoint); Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors, 82 COLUM. L. REV. 1600 (1982) (arguing for economic and market analysis of fair use based on three factors: (1) whether market failure necessitates allowing fair use, (2) whether allowing fair use is socially desirable, and (3) whether use will cause substantial injury to incentive for artists and authors to create).
created doctrine later codified by Congress, the fair use doctrine has been the subject of considerable case law and academic analysis.\textsuperscript{47}

Fair use analysis may be applicable to making a copy with DAT equipment in certain situations,\textsuperscript{48} and if the private use of DAT copies of copyrighted works does qualify as fair use, AHRA royalties are inappropriate. For instance, consider the home recording of an entire album that is broadcast over the radio, for subsequent personal use. Radio stations sometimes play copyrighted albums in their entirety as part of the station’s programming. This example is analogous to the factual situation in \textit{Sony Corp. of America v. Universal City Studios}.\textsuperscript{49} \textit{Sony} involved the recording of broadcast television shows by consumers for later viewing—an activity known as time-shifting.\textsuperscript{50} A suit was instituted against VCR manufacturers for contributing to consumers’ infringing activities.\textsuperscript{51}

1. \textbf{The Purpose and Character of the Use.} The first factor of the fair use analysis addresses the purpose and character of the infringing use and focuses on whether the use was commercial or nonprofit educational in nature.\textsuperscript{52} A basis for this factor is the Copyright Clause because it requires that copyrighted works promote learning.\textsuperscript{53} Further, the Copyright Act distinguishes

\begin{itemize}
\item \textsuperscript{47} See, e.g., Fleischmann, \textit{supra} note 2, at 9 (criticizing doctrine of fair use as imprecise); Weimer, \textit{supra} note 26, at 461-65 (noting that some courts view fair use as good safety valve for rigid copyright application and other courts view it as source of unresolved ambiguities and as often applied prematurely). \textit{But see}, Patterson, \textit{supra} note 46, at 36-37 (arguing that fair use should be read broadly in order to properly interpret free speech limitations within Copyright Clause).
\item \textsuperscript{48} See also, L. Ray Patterson, \textit{Free Speech, Copyright, and Fair Use}, 40 \textit{VAND. L. REV.} 1 (1987) (arguing that first fair use factor of nature of use protects consumer private use completely, and only competitor-users should be subject to rest of fair use analysis).
\item \textsuperscript{49} 464 U.S. 417 (1984) (finding fair use applicable to time-shifting copies of television broadcasts made by private consumers on their home videotape recorder).
\item \textsuperscript{50} \textit{Id.} at 423 (1984) (noting that time-shifting is “the practice of recording a program to view it once at a later time, and thereafter erasing it”).
\item \textsuperscript{51} For analysis of the contributory infringement issue, see \textit{id.} at 442-47; see also Nintendo of Am. v. Lewis Galoob Toys, 780 F. Supp. 1283, 1298 (N.D. Cal. 1991) (“Absent direct infringement, there is no contributory infringement.”), \textit{aff’d}, 964 F.2d 965 (9th Cir. 1992), \textit{cert. denied}, 113 S. Ct. 1582 (1993).
\item \textsuperscript{52} 17 U.S.C. § 107(1) (1988).
\item \textsuperscript{53} U.S. CONSTAT., art. I, § 8, cl. 8.
\end{itemize}
between the copyrighted work and a copy of that work. The owner of a particular copy has a right to use that work as long as it does not interfere with an author's rights under section 106.

In Sony, the Court equated private use with nonprofit use and held that making a time-shifting copy of a broadcast television show for private home enjoyment constituted fair use. The Court noted that the work was transmitted free of charge over the broadcast airwaves, and the copy was a time-shifting one. No evidence in the case indicated that a consumer had published or otherwise attempted to profit from a time-shifting copy. Based on this argument, some courts have held that a private and noncommercial use is presumed to be a fair use.

A court reasonably could extend the nonprofit and private fair use in Sony to the hypothetical DAT usage described above. The hypothetical DAT consumer is recording a work off the radio airwaves for noncommercial private enjoyment. The two situations are similar, as highlighted by the DAT user's motives and intentions. He is taping a work that he received free over the radio and is merely enjoying it later. The consumer has not attempted to benefit commercially from the work or from the author's publishing rights. Therefore, focusing on the private nature of a consumer's actions, the Sony rationale embraces this example.


57 Id. at 449.

58 Id.


60 See Plumleigh, supra note 25, at 742 (making copy of work for your car would exemplify form of place-shifting analogous to time-shifting in Sony).

61 Although not part of the Sony case or the hypothetical, one could imagine a consumer borrowing a prerecorded copyrighted work and making a copy without purchasing the work. One could argue that every allegedly private nonprofit copy displaces a commercial sale, and thus, all are profit-motivated attempts to avoid paying for a copyrighted work. Weimer, supra note 26, at 484. As a further argument against the private DAT user, the permanent librarying of copies would mitigate against a finding of fair use because the Sony Court limited its holding to time-shifting or ephemeral copies. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 448-51 (1984).

However, three points argue in favor of the borrowing consumer. First, a copyright holder does not control a particular copy once it has been sold. 17 U.S.C. § 109(a) (1988) (enacting
An additional issue, the educational aspect, has a bearing on analysis of the first fair use factor. This aspect gives preference to educational uses of copyrighted works. The Ninth Circuit weighed this aspect heavily when it decided the Sony case. The Supreme Court, however, reversed the Ninth Circuit and noted that distinguishing what is beneficial to society from what is beneficial to an individual wrongfully reduces fair use to a two-dimensional question. Thus, the fact that the hypothetical DAT user is engaged in a non-educational use does not undermine a finding of fair use. In light of Sony, the first factor supports a finding of fair use for the hypothetical DAT user.

2. The Nature of the Copyrighted Work. The nature of the copyrighted work, the second fair use factor, addresses whether society would be benefitted by additional access to a work. If further access would benefit society, the fair use doctrine should apply. The hypothetical DAT usage would fulfill this factor because it would improve access to copyrighted works. Arguably, DAT technology is beneficial for consumers, society, and authors. A consumer benefits from DAT's higher sound quality and the convenience of hearing that quality in different locations. Society benefits because better access will encourage new ideas and works. An author benefits because increased exposure may pique the first sale doctrine as limit on copyright monopoly). Consumers are thus free to use a work as they wish so long as they do not appropriate the copyright holder's right to copy and vend for profit. Id. Second, section 106 does not guarantee an author the highest return on his work and thus, certain losses are beyond its scope. Finally, a borrower's actions will not violate the enumerated rights of section 106 because society's right to copy as a fair use is superior to a copyright holder's right to control a work. L. Ray Patterson, Understanding Fair Use, 55 Law & Contemp. Probs. 249, 260-61 (1992).


63 Sony, 464 U.S. at 455 n.40 (1984) ("[T]he Court of Appeals chose not to engage in any 'equitable rule of reason' analysis in this case. Instead, it assumed that the category of 'fair use' is rigidly circumscribed by a requirement that every such use must be 'productive'. . . . That understanding of 'fair use' was erroneous . . . ."").

64 17 U.S.C. § 107(2) (1988). See supra note 45 (providing text of statute); Sony, 659 F.2d at 972 ("The courts inquire whether the nature of the material is such that additional access 'would serve the public interest in the free dissemination of information.' " ).
interest of other consumers and improve sales.65

In response, some have argued that DAT tapes would not satisfy this second factor because musical works are creative, and thus, less likely to be grounds for fair use than informational works.66 Although this distinction appears in some lower court opinions,67 the Supreme Court in Sony left this question open by not analyzing the second factor in depth.68 Nevertheless, one can argue that the hypothetical DAT usage satisfies this second factor because DAT will improve access to copyrighted works and benefit society.

3. The Amount of the Use. Analysis under the third factor, the amount of the use, generally holds that the copying of an entire work is presumptively unfair.69 In spite of this presumption, however, the Sony Court extended fair use to time-shifting copies of entire television broadcasts.70 The Court noted that a consumer originally was invited to watch the entire broadcast, which weighed in favor of finding fair use.71 Similar to the facts in Sony, the hypothetical DAT consumer received the entire copyrighted work over the radio; thus, this factor should not weigh heavily against him.

65 Plumleigh, supra note 25, at 747 (noting that consumers may not risk purchasing music of an unknown group, but upon hearing group's music in friend's car, they may become new fans).
66 Sony, 659 F.2d at 972 (noting that creative works should not be subject of fair use as much as informational works). See also Nimmer, supra note 62, at 1522 (arguing that fair use is less appropriate when using creative works).
67 See, e.g., Sony, 659 F.2d at 972 (noting that fair use claim generally will not extend to entertainment work); New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 221 (D.N.J. 1977) (recognizing distinction between works of diligence and of originality and granting defendant greater fair use with work of diligence).
69 17 U.S.C. § 107(3) (1988). See supra note 45 (providing text of statute); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757 (9th Cir. 1978) (finding fair use inapplicable only where virtually complete copy had been made by infringing user), cert. denied, 439 U.S. 1132 (1979); Nimmer, supra note 62, at 1522-23 (arguing that home audio recording always involves copying of entire work, and therefore, is presumptively unfair).
70 Sony, 464 U.S. at 449-50.
71 Id. ("Moreover, when one considers the nature of a televised copyrighted audiovisual work, and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced does not have its ordinary effect of militating against a finding of fair use.") (citations omitted).
4. Potential Harm to the Copyright. The final factor of the fair use analysis addresses the potential harm to the market for and value of the copyright.\textsuperscript{72} This factor generally is considered the most important factor.\textsuperscript{73} While a commercial use may be evidence of harm, no presumption will arise.\textsuperscript{74} The rationale behind this factor is that protecting a copyrighted work maintains the incentive for the author to create and publish additional works.\textsuperscript{75} Copyright protection should discourage a use that threatens this incentive, but not those that do not.\textsuperscript{76} Limiting a non-harmful use would exceed the scope of copyright protection and create an unnecessarily broad monopoly.\textsuperscript{77}

In the DAT hypothetical, using DAT to record an album received over the airwaves should be prohibited if it would discourage writers or musicians from writing and publishing new songs. If, however, people continue to write and publish songs in spite of DAT use, the AHRA would be an unnecessary prohibition on society's right of access.

Considering that people continue to write and publish songs in spite of analog taping equipment,\textsuperscript{78} DAT recording probably will not adversely impact the music industry. Further, analog recording actually poses a greater threat to the music industry because it is a cheaper copying alternative than DAT.\textsuperscript{79} Since the industry has


\textsuperscript{73} See, e.g., Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 566 (1985) (noting that fourth factor is most important); NIMMER, supra note 33, at § 13.05[A], 13-81 (noting that fourth factor is most central and important).


\textsuperscript{75} See supra note 37 and accompanying text (discussing concept of benefit to authors).

\textsuperscript{76} Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 450-51 (1984) ("But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create.").

\textsuperscript{77} Id. ("The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.").

\textsuperscript{78} Plumleigh, supra note 25, at 754-55.

\textsuperscript{79} Plumleigh, supra note 25, at 752. Plumleigh further argues that many consumers will recognize that little is saved by making DAT copies. New prerecorded CDs are only a few dollars more than blank DAT tapes, and used prerecorded CDs and new prerecorded analog tapes are both cheaper than blank DAT tapes. Since DAT is more expensive, it is not the dangerously cheap copying scheme alleged by the music industry. Plumleigh, supra note 25, at 752.
prospered in spite of blank cassette sales, the industry would likely continue to prosper without the AHRA’s restrictions on access.

Based on the Sony analysis of fair use, private DAT home recording should qualify as a fair use. Such a finding would undercut the AHRA royalty scheme because it charges consumers when they have a right to the free fair use of copyrighted works. Further, the AHRA bases its royalty system on copyright holders promising not to sue infringing consumers or DAT manufacturers. If DAT recording is a fair use, that promise is hollow.

B. EFFECT OF THE AHRA’S FAILURE TO CONSIDER FAIR USE

Although the AHRA is an effort to protect the prosperity of the music industry, its denial of fair use and other copyright policies actually thwarts this goal. As VCRs demonstrate, new technologies can benefit established industries and thus should be promoted rather than restricted by copyright protection. The Sony Court recognized the potential economic success of VCRs and that this success would benefit copyright holders in the long run. Based on this recognition and the noncommercial nature of the use, the Court rejected the plaintiffs’ claims of harm.

Like the plaintiffs in Sony, the music industry has argued that DAT threatens harm to their copyrights. They contend that

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80 Plumleigh, supra note 25, at 755 (noting that traditional analog cassette tapes outsell both albums and compact discs).
82 See, e.g., Eben Shapiro, DAT’s Entertainment—or That’s What the Audio Industry Hopes, CHI. TRIB., Dec. 9, 1990, at 13A (noting that over 69% of American homes have VCRs).
83 Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 454 (1984) (noting that it was not implausible that benefits of VCRs would accrue to plaintiffs, broadcasters, and advertisers because of increased audiences due to time-shifting).
84 Id. at 452-53 (rejecting plaintiffs’ further argument that VCRs would decrease theater and television rerun audiences, which would reduce value of their copyrights and discourage advertisers from advertising during broadcasts of their works).
85 See, e.g., Nimmer, supra note 62, at 1523-25 (arguing that home recording has had devastating impact for music industry, which allegedly suffers between 700 and 800 million dollars in losses annually). But see Plumleigh, supra note 25, at 753-58 (noting that actual music industry loss is almost impossible to determine because each blank tape sold does not equal one lost prerecorded tape sale, and that industry overlooks benefits of increased exposure based on hearing copies of works).
each blank tape sold displaces a prerecorded copy sale.\textsuperscript{86} This contention lacks support. A congressional study refused to report definitively that each blank cassette tape sale displaced the sale of a prerecorded work.\textsuperscript{87} Moreover, in contrast to the music industry's arguments, one study found that consumers who made copies on blank tapes bought more prerecorded works than those who did not make copies.\textsuperscript{88}

Further, DAT may actually benefit the industry through its technological advances.\textsuperscript{89} DAT provides better access to higher sound quality, more computer data storage capacity, and a less expensive alternative to studio recording.\textsuperscript{90} DAT also offers an alternative to compact disc (CD) car stereos because DAT will not skip on bumpy roads.\textsuperscript{91} These examples demonstrate how DAT equipment will make higher quality sound more available to consumers, which may increase sales of both DAT and prerecorded works on DAT tapes. In these ways, DAT is analogous to the VCR and exemplifies how new technology can profit a given industry.

V. NEGOTIATIONS BEHIND THE LEGISLATION

According to Congress, the purpose of the AHRA is to facilitate the importation of DAT equipment for consumers' benefit without injuring the music industry.\textsuperscript{92} It is important, however, to consider the negotiations behind the AHRA.\textsuperscript{93} The dominant parties in the negotiations were members of the music and electronics

\textsuperscript{86} Plumleigh, \textit{supra} note 25, at 754.
\textsuperscript{87} Plumleigh, \textit{supra} note 25, at 757.
\textsuperscript{88} Plumleigh, \textit{supra} note 25, at 757.
\textsuperscript{89} \textit{But see infra} note 98 and accompanying text (discussing questions about projected success of DAT equipment as home consumer product).
\textsuperscript{90} Plumleigh, \textit{supra} note 25, at 759 (noting that DAT equipment allows new artists and groups to create inexpensive, high-quality demo tapes, and thus, reach new audiences).
\textsuperscript{91} Shapiro, \textit{supra} note 82, at 13A.
\textsuperscript{92} \textit{See Audio Home Recording Bill Enactment Near}, \textit{Consumer Electronics}, Sept. 28, 1992, at 10 ("It's also 'landmark intellectual property legislation, placing the U.S. squarely in line with the growing international consensus on how to resolve the difficult issues of new technological uses of copyrighted works,' said Rep. Moorhead (R. Cal.), member of two panels that handled [the] bill.").
industries, which are in some instances the same companies.\textsuperscript{94} The AHRA is similar to many copyright bills, which originate out of negotiations between special interest groups due to the complexity of the issues and Congress's limited schedule.\textsuperscript{95} Although helpful in some respects, such negotiations invariably leave unrepresented parties without protection and often are too biased to reach any long-term solutions.\textsuperscript{96} The unrepresented party in the DAT context is the American consumer, who will invariably have to pay these royalties.\textsuperscript{97}

In light of such biased negotiations, one could argue that the AHRA is not copyright legislation at all; rather, it is a government subsidy that guarantees profits to the music industry from the sale of products manufactured by the electronics industry. Neither industry minds the royalty because it will be passed on to consumers as a cost of doing business.

In relying on special interest groups, Congress also may have mistaken the commercial reality of DAT. Although the Copyright Office predicts high royalties, there is some question if consumers really want DAT.\textsuperscript{98} DAT's success may be hampered because DAT equipment may be too expensive to induce consumers to switch from their cassette or compact disc systems.\textsuperscript{99} Moreover, the delay in DAT availability may have damaged sales because consumers already have lost interest in DAT.\textsuperscript{100} This potential outcome

\textsuperscript{94} Shapiro, supra note 82, at 13A (noting that Sony purchased CBS record company and that other manufacturers have followed Sony's lead); see also Michael Schrage, Congress Should Scratch Record Industry's Parasitic Taping "Royalties", WASH. POST, August 30, 1991, at G3 (noting that like Sony, other manufacturers are buying record labels to help DAT succeed with prerecorded material).

\textsuperscript{95} See Litman, supra note 5, at 277 (arguing that copyright law deficiencies stem from Congress's reliance on special interest group negotiations for copyright legislation).

\textsuperscript{96} Litman, supra note 5, at 277-82. Moreover, "[i]t is the seemingly inevitability of bias against absent interests, and of narrow compromises with no durability that makes such a process [passing legislation based on negotiations] so costly. Each time we rely on current stakeholders to agree on a statutory scheme, they produce a scheme designed to protect themselves against the rest of us." Litman, supra note 5, at 359.

\textsuperscript{97} Levine, supra note 18, at B8.

\textsuperscript{98} Ken C. Pohlmann, Where did DAT go Wrong?, STEREO REVIEW, Apr. 1992, at 17 (questioning potential success of DAT because of high cost, product introduction delays, and limited selection availability).

\textsuperscript{99} Id.

\textsuperscript{100} See Shapiro, supra note 82, at 13A (noting also that this delay has made it possible to work problems out of DAT equipment and improve product quality).
further argues against accepting the music industry’s contention that DAT is a major threat and undermines the AHRA’s function as affording protection from this threat.

The potential failure of DAT highlights that music industry concerns may have biased the negotiation and enactment process of the AHRA. Arguably, the music industry realized that it had lost money to blank analog tapes and cassette players, and in its effort to prevent similar losses to DAT products, the industry sought to guarantee profits for itself. In this way, the AHRA may represent Congress’s codification of the music industry’s position—at the cost of consumers.

VI. CONCLUSION

The AHRA is inconsistent with constitutional policies in the Copyright Clause and with the Copyright Act of 1976. First, the AHRA conflicts with constitutional policy because it grants a copyright holder monopoly rights beyond those necessary to encourage creativity and publication, at the cost of society’s right of access. Second, the AHRA attempts to give copyright protection to works in the public domain by levying royalties at the time of sale on all DAT equipment. Finally, the AHRA fails to address the fair use doctrine, which should protect private DAT home recording in a noncommercial context.

The deficiencies present in the AHRA may stem from the enactment and negotiation process. The music industry and the electronics corporations that own recording companies may have biased the negotiation process. By deferring to these special interest groups, Congress codified their scheme for guaranteeing profits in conflict with society’s rights under copyright law. For these reasons, the AHRA runs counter to constitutional policies, statutory enactments, and common sense.

CHRISTINE C. CARLISLE