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ARTICLES

THE VIDEOTAPE RENTAL CONTROVERSY: COPYRIGHT INFRINGEMENT OR MARKET NECESSITY?*

JULIE KANE-RITSCH**

INTRODUCTION

The home video recorder industry, virtually nonexistent when the Copyright Act of 1976 was passed,¹ today constitutes a substantial consumer market. Over five million households now own video recorders ("VCR's"), with projected growth to thirty-five million by 1990.² To utilize the full potential of this new market, major motion picture studios released their films on prerecorded tapes in 1977.³ Retail prices for these tapes ranged from \$45 to \$75.⁴ Because consumers were reluctant to pay such high prices to purchase a single film, video retail stores started renting the prerecorded tapes.⁵ Tape rentals were expressly prohibited by restrictive legends placed on the tape.⁶ Video stores, however, ignored the restrictions and earned \$250 million on prerecorded tape rentals in 1981.⁷

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1. The first year of significant video recorder sales occurred in 1976. At the end of 1976, 50,000 VCR's had been sold. Noltz, *Matsushita Takes the Lead in Video Recorders*, FORTUNE, July 16, 1979, at 54.

2. *The Big Bucks at Stake When Titans Clash*, U.S. NEWS & WORLD REP., March 7, 1983, at 51.

3. *Oversight of the Copyright Act of 1976: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 318 (July 29, 1981) (testimony of Stephen Roberts, President, Twentieth Century Fox Telecommunications Division) [hereinafter cited as *Testimony of Stephen Roberts*].

4. *Copyright Infringements (Audio and Video Recorders): Hearings on S. 1758 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 1070 (1982) (prepared statement of John Power, Executive Director, American Video Association) [hereinafter cited as *Testimony of John Power*].

5. *Id.*

6. See *infra* text accompanying notes 79-87.

7. *Copyright Infringements (Audio and Video Recorders): Hearings on S. 1758 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 692 (1982)

These prerecorded videotapes are included within the subject matter capable of copyright protection under the Copyright Act of 1976.⁸ The Act, however, is silent on whether the rental of prerecorded tapes constitutes infringement. In analyzing this question, two provisions of the Act offer general guidance. Section 109(a) provides that once a first sale of a legally copyrighted work occurs, the copyright owner parts with title and control over his work.⁹ Thus, any lawful purchaser can use or dispose of the copyrighted article as he or she sees fit.¹⁰ The first sale doctrine, however, has one significant limitation. Even with a first sale, the copyright owner retains the power to control a public performance of his or her work under section 106(4).¹¹ The interpretation of these two provisions will determine whether the rental of prerecorded videotapes violates the Copyright Act of 1976.

Case law interpretation of video-related issues, however, has been minimal. Because the Act lacks specific language pertaining to the use of VCRs and prerecorded tapes, the courts have been reluctant to rule on video-related issues. In fact, it took the United States Supreme Court two sessions to decide whether home taping for private use of over-the-air television broadcasts constituted infringement of the Copyright Act. In *Sony Corporation of America v. Universal Studios, Inc.* (hereinafter referred to as *Betamax*),¹² the Court eventually held that the home taping practice was a non-infringing "fair use" under the Act, although the Court called for congressional aid and clarification.¹³ No subsequent case has yet

(statement of Elmer Cooper, Chairman, and Stewart Eizenstadt, Counsel, Committee Against Regulation of Video Enterprises) [hereinafter cited as *Testimony of Elmer Cooper*].

8. The Comments to the Copyright Act of 1976 state that the definition of a motion picture includes "cinematographic works embodied in films, tapes, video disks, and other media." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 56 (1976). [hereinafter cited as HOUSE REPORT].

9. 17 U.S.C. § 109(a) (1982). See *infra* text accompanying notes 32-35.

10. See *infra* text accompanying notes 43-71.

11. 17 U.S.C. § 106(4) (1982). The definition of a public performance is explained in section 101. *Id.* at § 101. For a full discussion of the public performance doctrine, see *infra* text accompanying notes 37-40, 97-117.

12. 104 S. Ct. 774 (1984). For discussion and analysis of the lower court opinions, see generally Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (argues that fair use is an appropriate analysis in home videotaping cases because the market will fail to deliver the copyrighted works to the consumer if he or she is forced to negotiate agreements for the use of protected work); Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth*, 68 VA. L. REV. 1505 (1982) (criticizes the *Betamax* decision and argues that audio recording is neither exempt nor fair use under the Copyright Act of 1976, and thus, should be controlled through royalties assessed against manufacturers of home recording equipment).

13. *Betamax*, 104 S. Ct. at 796. The Court observed that:

One may search the Copyright Act in vain for any sign that the elected representatives . . . have made it unlawful to copy a [television] program

addressed the question of whether the rental of prerecorded videotapes constitutes a copyright infringement.¹⁴

The motion picture studios, video store retail owners, and consumers have taken the approach urged by the Supreme Court in *Betamax*. The videotape rental issue has been presented to Congress for resolution. A bill, pending in both houses, would amend the Act's first sale provision and make the rental of prerecorded copyrighted videotapes an infringement of copyright law.¹⁵ Another proposed amendment would clarify the public performance provision of the Act to include rental of prerecorded videotapes.¹⁶ Both amendments present alternatives worthy of analysis and consideration.

This article explains the first sale and public performance sections of the Act, including the legislative history and case law.¹⁷ Next, this article analyzes the enforceability of the motion picture studio's practice of placing restrictive legends on tapes under the Copyright Act.¹⁸ Then this article discusses the proposed amendments to the first sale doctrine and public performance sections of the Act.¹⁹

Even if the amendments are enacted, the motion picture studios lack an effective way to collect royalties or license fees on tape rentals. Single studio monitoring, attempted in the early 1980's, failed because of market resistance.²⁰ While a performing rights society presents an efficient and workable model for collecting royalty fees, studio practices must still comply with prior anti-trust decisions on blanket licensing.²¹ Compulsory licenses are suggested as a practical means of resolving the royalty collection problem.²² Finally, past studio marketing decisions are criticized. The studios set tape sales prices by calculating the number of times a film will be rented. Recouping rental royalty fees in the sales price has

for later viewing at home. . . . It may well be that Congress will take a fresh look at this new technology . . . [but] it is not our job to apply laws that have not yet been written.

Id.

14. *Hearings on Home Recording of Copyrighted Works before the Subcomm. on Courts, Civil Liberties and Administration of Justice of the Comm. on the Judiciary of the House of Representatives*, 97th Cong., 2d Sess. (1983) [hereinafter cited as *House Hearings*].

15. S. 33, 98th Cong., 1st Sess. (1983); H.R. 1027, 98th Cong., 1st Sess. (1983).

16. *Testimony of Stephen Roberts*, *supra* note 3, at 323. For a full discussion of the proposed public performance amendment, see *infra* text accompanying notes 123-25.

17. See *infra* text accompanying notes 43-71, 97-117.

18. See *infra* text accompanying notes 80, 85-91.

19. See *infra* text accompanying notes 118-25.

20. See *infra* text accompanying notes 81-84, 139-48.

21. See *infra* text accompanying notes 144-217.

22. See *infra* text accompanying notes 217-31.

placed tape purchases beyond the means of most consumers. This paper posits that meeting consumer demands for low cost tapes presents a feasible solution to the videotape rental controversy.²³

PERTINENT PROVISIONS OF THE ACT

The United States Constitution provides Congress with the power to enact copyright laws. The Constitution states that Congress is empowered to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."²⁴ The philosophy underlying the Copyright Act is to encourage individuals to be creative and to advance the welfare of society by offering artists and creators an economic incentive.²⁵ This economic incentive involves the right to control the use of their work for a limited time.²⁶ By placing a time limit on an artist's exclusive control over economic benefits from his work, Congress met the constitutional mandate that creative works be made available to the general public so that the free flow of ideas and information is not hindered.²⁷

The Act clearly gives videotaped works copyright protection. Section 102(a) provides seven categories of authorship protected by the Act.²⁸ Motion pictures and other audio-visual works are listed in the sixth category.²⁹ In the comments to the Act, the definition of a "motion picture" includes three elements:

(1) a series of images, (2) the capability of showing the images in certain successive order, and (3) an impression of motion when the images are thus shown [T]his definition encompasses a wide range of cinematographic works embodied in films, tapes, video disks, and other media.³⁰

Thus, copyrighted motion pictures recorded on videotape are eligible for all the rights and remedies provided by the Act.³¹

23. See *infra* text accompanying notes 232-38.

24. U.S. CONST. art. I, § 8, cl. 8.

25. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

26. The general rule under the Act is that a copyright lasts for the life of the author plus fifty years. 17 U.S.C. § 302(a) (1982). Under the 1909 Copyright Act, protection ran for 28 years from the date of publication. 17 U.S.C. § 24 (1909).

27. Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1006 (1970).

28. 17 U.S.C. § 102(a) (1982). The seven categories of works of authorship are literary works; musical works, including lyrics; dramatic works, including any music accompanying the work; pantomimed and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings. *Id.*

29. *Id.*

30. *House Report*, *supra* note 8, at 56.

31. Rights of copyright owners are defined in section 106. 17 U.S.C. § 106 (1982). These rights include the right to reproduce copies, prepare derivative works, distribute copies, perform the work publicly, or publicly display the

Specifically, the Act gives a copyright owner the power 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."³² Once the copyright owner exercises his right to sell a lawfully produced copy of his work, however, he parts with the right to restrict the purchaser's future use or sale of the work.³³ Section 109(a) provides, under the first sale doctrine, that a purchaser is entitled "without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."³⁴ Thus, a lawful purchaser can transfer the copy to someone else, or even destroy the copy. Because of the first sale doctrine, a library can lend a legally acquired copy of a book on whatever terms it chooses without infringing on the author or publisher's copyright.³⁵ The copyright owner, however, may have a state law remedy if the purchaser's use of the copyrighted article is limited by the terms of the sale contract.³⁶

Despite the copyright owner's loss of control over a copyrighted work after a first sale, the owner of such a work retains the right to control any public performance of it. Section 106(4) provides that the copyright owner always retains the exclusive right to publicly perform the copyrighted motion picture or other audio-visual work.³⁷ The comments to the Act stress that film, videotape, and video disks are included in the definition of works subject to this copyright protection.³⁸

As defined in section 101 of the Act, a "performance" of a motion picture or other audio-visual work means "to show its images in any sequence or to make the sounds accompanying it audible."³⁹

work. *Id.* Remedies are provided in sections 501 to 510. 17 U.S.C. §§ 501-10 (1982). For a discussion of remedies provided by the Act, see *infra* text accompanying notes 130-39.

32. 17 U.S.C. § 106 (1982).

33. This doctrine was set forth by the Second Circuit in 1894. The court stated that once a copy of a copyrighted work is sold, "the ordinary incidents of ownership in personal property, among which is the right of alienation, attach to it." *Harrison v. Maynard, Merrill and Co.*, 61 F. 689, 691 (2d Cir. 1894) (quoting with approval *Henry Bill Pub. Co. v. Smyth*, 27 F. 914 (C.C.S.D. Ohio 1886)). For further discussion of the first sale doctrine, see *infra* text accompanying notes 43-71.

34. 17 U.S.C. § 109(a) (1982).

35. *House Report*, *supra* note 8, at 79.

36. *Id.* For further discussion of state law breach of contract remedies, see *infra* text accompanying notes 87-89, 94-96.

37. 17 U.S.C. § 106(4) (1982). The section states that a copyright owner is authorized "in the case of literary, musical, dramatic, and choreographic works, pantomimed, and motion pictures and their audiovisual works, to perform the copyrighted work publicly." *Id.*

38. *House Report*, *supra* note 8, at 63.

39. 17 U.S.C. § 101 (1982).

The Act provides that a public performance includes the following actions:

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered, or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.⁴⁰

Therefore, if any act by a purchaser of a legally copyrighted work under the first sale doctrine constitutes a public performance, he or she is liable for infringement unless the copyright owner's permission to perform the work is obtained.

Within the videotape rental controversy, retail owners maintain they are free of any restrictive legends and may dispose of the prerecorded tapes by virtue of the first sale doctrine.⁴¹ The motion picture studios claim that the restrictive legends contractually limit the uses a retail video store may make of the prerecorded tapes. Alternatively, they argue that the rental of prerecorded videotapes constitutes an infringing public performance of the copyrighted videotape.⁴²

FIRST SALE ISSUES

The Doctrine and Case Law

The general rule that a valid first sale divests a copyright owner's power to limit the purchaser's subsequent use of the copyrighted article was established in *Harrison v. Maynard Merrill & Co.*⁴³ The corollary rule is that if no valid first sale occurred, all future dispositions of the copyrighted work are infringements which violate the Act.⁴⁴ Answering the question of whether a first sale has occurred is not an easy task. As the District Court for the Eastern District of Pennsylvania observed, transfers of copyrighted works are often accomplished through complicated arrangements.⁴⁵

40. *Id.*

41. See *infra* text accompanying notes 43-71.

42. See *infra* text accompanying notes 72-117.

43. 61 F. 689, 691 (1894). The *Harrison* case was decided under the first sale provisions of the Copyright Act of 1870.

44. *Henry Bill Publishing Co. v. Smythe*, 27 F. 914, 921 (C.C.S.D. Ohio 1886) (an agent, authorized by the copyright owner to sell books directly to subscribers, was liable for infringement when he sold books to a bookseller because the copies had been obtained through an agency arrangement rather than a first sale).

45. *United States v. Bily*, 406 F. Supp. 726, 731 (E.D. Pa. 1975) (in a criminal copyright infringement case, defendant argued that the indictment should be quashed because the films he possessed had previously been sold).

Thus, the court "must analyze the arrangement at issue to decide whether [the arrangement] should be considered a first sale" or a license.⁴⁶

The Court of Appeals for the Second Circuit directly addressed the question of whether a transfer of possession established a valid first sale in *Platt & Munk Co. v. Republic Graphics, Inc.*⁴⁷ In that case, the plaintiff contracted with the defendant to have its copyrighted toys manufactured by defendant. Defendant threatened to sell the defective toys to mitigate damages, but plaintiff warned him that any sale would constitute a copyright infringement. Plaintiff then sought to enjoin the defendant from selling the defective copyrighted toys.⁴⁸

The Second Circuit held in favor of plaintiff and granted the injunction.⁴⁹ In construing the first sale provision of the Copyright Act, the court observed that the copyright owner could not restrict the purchaser's use of lawfully obtained copyrighted articles.⁵⁰ The court stated, however, that mere lawful possession of a copyrighted work did not qualify as a first sale under the Act.⁵¹ Since the defendant only had possession of the copyrighted toys, and not title, any sales of the toys without plaintiff's consent was an infringement upon plaintiff's copyright.⁵²

The possession versus title analysis of *Platt & Munk* was redefined by the Ninth Circuit in *United States v. Wise*.⁵³ The *Wise*

46. *Id.*

47. 315 F.2d 847 (2d Cir. 1963).

48. *Id.* at 849-50.

49. *Id.* at 855.

50. *Id.* at 851. The court interpreted section 27 of the Copyright Act of 1909. Section 27 of the 1909 Act stated that "nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work, the possession of which has been lawfully obtained." 17 U.S.C. § 27 (1909). Although the language of the 1976 Act is different, see *supra* text accompanying note 33, the comments to the 1976 Act indicate that the judicial gloss of section 27 is incorporated into the first sale doctrine of the 1976 Act. *House Report, supra* note 8, at 79. Professor Melville B. Nimmer also concludes that the current section 109 simply restates the former section 27. M. NIMMER, NIMMER ON COPYRIGHT, § 8.12(B), at 8-119 (1983).

51. *Platt & Munk*, 315 F.2d at 852. The court observed that the first sale doctrine "[had] never been regarded by the courts as terminating the proprietor's control over the sale of a copyrighted object merely by virtue of his having allowed another person to obtain lawful possession of it." *Id.*

52. *Id.*

53. 550 F.2d 1180 (9th Cir. 1977). A contrary result was reached in *United States v. Wells*, 176 F. Supp. 630 (S.D. Tex. 1959). In *Wells*, the copyright owner, Tobin, granted over a hundred licensees the right to make duplicate copies of his maps. Defendant Wells, not a licensee, sold a map bearing Tobin's copyright. The court reviewed the agreement between Tobin and his licensees and found that first sale had occurred because Tobin did not expressly reserve title to the maps. *Id.* at 634.

Most courts, however, adopt the approach of the *Wise* court and look to the circumstances surrounding the transaction. In *Hampton v. Paramount Pic-*

court held that failure of the copyright owner to reserve title did not create the presumption that a first sale had occurred.⁵⁴ The defendant in *Wise* was charged with seven counts of criminal copyright infringement.⁵⁵ The jury convicted defendant on six counts, but found on one count that a valid first sale had occurred. The court of appeals affirmed four of the six convictions.⁵⁶

The defendant in *Wise* owned the "Hollywood Film Exchange," where he sold feature length motion pictures and openly advertised and solicited sales.⁵⁷ Evidence presented by the motion picture studios detailed the transactions concerning each of the six films found in defendant's possession,⁵⁸ and the government bore the burden of proving that none of the feature length films had been sold outright.⁵⁹

tures, the court looked to all the terms of the contract to determine if a first sale or a license had occurred. 279 F.2d 100 (9th Cir. 1960). Because the contract contained no time limits on use of the film, a flat sum payment for use, and no provisions for the film's return, the court found that a valid license existed. *Id.* at 103. Therefore, the licensee was restricted to the uses specified in the license. *Id.*

54. *Wise*, 550 F.2d at 1191.

55. Defendant was prosecuted under section 104 of the 1909 Act. 17 U.S.C. § 104 (1909). The provision stated that willful infringement of a copyright for profit could be punished by imprisonment of up to one year or fines between \$100 and \$1,000. *Id.* This provision is recodified in section 506 of the 1976 Act. 17 U.S.C. § 506 (1982). The penalties for willful infringement of a copyright for commercial gain were increased to \$10,000 fine or one year in prison, or both. *Id.* at § 506(a).

56. *Wise*, 550 F.2d at 1183.

57. *Id.* at 1183-84.

58. The six films in question were "The Exorcist," "Camelot," "Forty Carats," "Funny Girl," "The Sting," "American Graffiti," and "Paper Moon." *Id.* at 1183 n.1. The studios established that the only time 35 m.m. prints of the films were sold directly was to salvage companies when the prints became worn and unuseable. *Id.* at 1192. In the salvaging process, 250 foot sections of feature length films were sent to salvage companies in batches containing only parts of each feature film. The salvage companies either wash and scratch the film to produce blank leader, burn black and white film to recover silver, or grind up color film for sale to plastics companies. *Id.* at 1192-93. The evidence established that no feature film could be reconstructed from salvage pieces. *Id.* at 1193. Thus, defendant did not obtain his prints from salvage company reconstruction of the film. *Id.*

59. Under section 104 of the 1909 Act, the courts placed the burden of showing absence of a first sale on the government. *Id.* at 1190. This created a presumption that the defendant had legally acquired the copy under a valid first sale. See *United States v. Atherton*, 561 F.2d 747 (9th Cir. 1977) (government's evidence failed to establish absence of a first sale); *United States v. Drebin*, 557 F.2d 1316 (9th Cir. 1977) (conviction affirmed because defendant was authorized to rent films, and selling films was a violation of the license agreement); *United States v. Bily*, 406 F. Supp. 726 (E.D. Pa. 1975) (restates the rule that the burden of showing absence of a first sale is on the government); *American Int'l Pictures v. Foreman*, 400 F. Supp. 928 (S.D. Ala. 1975) (because the government failed to show chain of title, defendant was entitled to presumption of lawful possession), *rev'd*, 576 F.2d 661 (5th Cir. 1978).

The Copyright Act of 1976 changes the old rule and places the burden of showing lawful possession of the copyrighted work on the defendant. *House*

Evidence established that the films were loaned to stars in four VIP agreements, or were licensed to theatres. The studios claimed that no films were sold outright.⁶⁰ Three of the VIP loan agreements reviewed by the trial court expressly stated that the license included a copying prohibition, a right of limited exhibition, and a set time for return.⁶¹ The court also reviewed the licensing agreements between the studios and the exhibitors. The court found that the "mere failure to expressly reserve title . . . does not require a finding that the films were sold, where the general tenor of the entire agreement is inconsistent with such a conclusion."⁶² Thus, the court affirmed four of the six convictions on the basis that no first sale had occurred and the defendant had obtained the copies illegally.⁶³

As the cases of *Platt & Munk* and *Wise* indicate, a purchaser under a first sale acquires the right to dispose of or use the copyrighted work as one so desires. This conclusion is not altered by contract terms which restrict the purchaser's use of the copyrighted article after the first sale. In *Harrison v. Maynard Merrill & Co.*,⁶⁴ the court held that the Copyright Act could not be used to enforce contract restrictions when that contract met the tests to qualify as a

Report, supra note 8, at 80-81. This view was endorsed, albeit under the 1909 version of the Act, on the appeal of the *Foreman* case. *American Int'l Pictures v. Foreman*, 576 F.2d 661 (5th Cir. 1978). Criminal copyright infringement actions under the 1976 Act have not yet reached the trial stage. See *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982) (motion to quash search warrant denied); *United States v. Cook*, 657 F.2d 730 (5th Cir. 1981) (motion to suppress seized tapes on the basis of an invalid search warrant). Thus, the courts have not yet developed case law, under the new Act, which clearly places the burden of showing a valid first sale on the defendant.

See generally Beard, *The Sale, Rental and Reproduction of Motion Picture Videocassettes: Piracy and Privilege?*, 15 NEW ENG. L. REV. 435, 472-83 (1979) (analysis of burden of proof in criminal infringement cases and criticism of the House Report); Nevins, *The Film Collector, The FBI, and The Copyright Act*, 26 CLEV. ST. L. REV. 547 (1977) (analysis of government prosecution of criminal infringement cases under the 1909 Act).

60. Under a VIP agreement, copies of feature films are loaned to studio heads, producers, or movie stars for homeviewing. *Wise*, 550 F.2d at 1192. Licenses were granted to exhibitors for limited purposes of displaying the film. *Id.* at 1190.

61. VIP agreements were made for "The Sting," "Paper Moon," "Funny Girl," and "Camelot." The court found that the transaction providing Vanessa Redgrave with a copy of "Camelot" constituted a sale with restrictions on use of the print. *Id.* at 1192. With respect to "Camelot," the government failed to show absence of a first sale. The conviction was reversed on this count. *Id.*

62. *Id.* at 1191. The only license agreement indicating that a sale had occurred was between ABC and Screen Gems for "Funny Girl." Because the agreement permitted ABC to retain a file copy for screening, the court found a first sale had occurred. Thus, defendant's conviction for possession of "Funny Girl" was reversed. *Id.* at 1191-92.

63. *Id.* at 1193-94.

64. 61 F. 689 (2d Cir. 1894).

first sale.⁶⁵ The case involved a copyright owner who sent sheets of a manuscript to a binder for storage until additional copies of the book were needed. The contract prohibited the binder from selling any damaged books. A fire in the bindery damaged the manuscript pages. The binder sold the ruined pages to a waste dealer under a contract containing the restrictive legend. The defendant, a second-hand book-dealer, obtained copies containing the damaged pages. Defendant had no knowledge of plaintiff's restriction against selling the damaged books, and sold the defective copies.⁶⁶ The Court found that a first sale occurred and that the defendant could dispose of the books.⁶⁷

The Supreme Court held that a first sale made contract restrictions unenforceable as a matter of copyright law in *Bobbs-Merrill Co. v. Straus*.⁶⁸ Plaintiff owned the copyright to a novel entitled "The Castaways." The copyright legend stated that the retail price must be \$1.00, that no dealer was licensed to sell for less, and that sale for under \$1.00 constituted infringement.⁶⁹ The Court found that the first sale occurred when the plaintiff sold the novel to the distributor. Ruling that no privity of contract existed between the plaintiff and defendant retailer, the Court held that the Copyright Act could not be used to enforce the contractual restriction.⁷⁰ A state breach of contract remedy, however, would still be available to the copyright owner under state law.⁷¹

Studio Use of Restrictive Legends and Rental Only Schemes

The motion picture studios first released feature films on pre-recorded videotapes (tapes) in 1977.⁷² Copyright owners received fifteen to thirty percent of the wholesale price of the tape as a roy-

65. *Id.* at 691. As a general rule courts disfavor contractual restraints on alienation. See generally Lewson, *The Videotape Rental Controversy*, 30 J. COPYRIGHT SOC'Y. 1, 17-24 (1982).

66. *Harrison*, 61 F. at 689.

67. *Id.* at 691. See also *Independent News Co. v. Williams*, 293 F.2d 510 (3rd Cir. 1961) (comic book publisher could not enforce restrictive legend requiring wholesale dealers to destroy unsold comic books when wholesaler never informed the scrap dealer of the restrictive legend).

68. 210 U.S. 339 (1908).

69. *Id.* at 341.

70. *Id.* at 350. The Court stated:

In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of one dollar per copy.

Id.

71. See *infra* text accompanying notes 86-88.

72. Sales of videotapes and videodiscs now provide a substantial amount of revenue to the motion picture industry. Sales of tapes accounted for 13 percent of all gross movie revenues, an increase of 5 percent from 1982 figures. Bowden,

alty.⁷³ A typical sixty dollar tape, therefore, usually returned an eight dollar royalty fee to the copyright owner.⁷⁴ Under this plan, the studio made its profit, the copyright owner of the film received his royalty, and the consumer received a chance to view a film in his home.⁷⁵ The studios released tapes of their films with the belief that their royalty revenues were protected under the public performance section of the Act.⁷⁶

Video retail store owners had a different view of the law. Looking to the first sale doctrine, they believed that a purchase of a tape freed it from the copyright owner's control.⁷⁷ Thus, the retailers met the growing consumer demand for reasonably priced tapes by renting tapes to VCR owners. By 1981, over 25,000 video retail-

Movies on Tape Reel in the Profits, St. Petersburg Times, May 13, 1984, § E (Arts/Travel), at 1E.

73. *Testimony of Stephen Roberts*, *supra* note 3, at 318.

74. *Id.* at 319. In support of his statements, Mr. Roberts submitted the following chart:

| | RENTAL PLUS SALE | | |
|---------------------------|------------------|---------|---------|
| | SALES ONLY | CASE #1 | CASE #2 |
| Retail Sale Price | \$60 | \$ 40 | \$ 29 |
| Rental Price | — | \$ 5 | \$ 6 |
| Number of Rentals | 0 | 12 | 20 |
| Retail Rental Revenue | — | \$ 60 | \$120 |
| Gross Revenue to Retailer | \$60 | \$100 | \$149 |
| Wholesale Cost of Video | | | |
| Cassette/Gross Revenue to | | | |
| Manufacturer-Distributor | \$40 | \$ 40 | \$ 40 |
| Gross Royalty Revenue to | | | |
| Copyright Owner | \$ 8 | \$ 8 | \$ 8 |
| Guild/Union Membership | | | |
| Participation | \$ 1 | \$ 1 | \$ 1 |

Id. at 319.

75. Frank Barnako testified that in 1982, movie studios made 150 percent on sales of tapes to distributors. Distributors made 15 percent on their sales to retailers. Thus, typical prices were a movie studio cost of \$20, sales of \$42 to \$48 to distributors, and \$50 to \$60 to retailers. *Hearings on Home Recording of Copyrighted Works before the Subcomm. on Courts, Civil Liberties, and Administration of Justice of the Comm. on the Judiciary of the House of Representatives*, 97th Cong., 2d Sess. 746 (1983) (testimony of Frank Barnako, President, Video Software Dealer's Association) [hereinafter cited as *House Hearings: Frank Barnako*].

Today many tapes are selling at retail for \$39.98. The retailer is charged \$29.95 for the tape. Commtron Corp. Video Tape Price List, Effective 2/01/84, at 38. If the above proportions still hold true, distributors are charged \$25.00 and studios produce the tapes for about \$8.00. Thus royalties would be approximately \$2.40 per tape. Tape sales, however, increase with reduced retail sales prices. See *infra* text accompanying note 234.

76. *Hearings on Home Recording of Copyrighted Works before the Subcomm. on Courts, Civil Liberties, and Administration of Justice of the Comm. on the Judiciary of the House of Representatives*, 97th Cong., 2d Sess. 5 (1983) (testimony of Jack Valenti, President, Motion Picture Association of America) [hereinafter cited as *House Hearings: Jack Valenti*].

77. *House Hearings: Frank Barnako*, *supra* note 75, at 743.

ers were engaged in the business of renting tapes. Seventy-five percent of the video retailer's revenue came from tape rentals.⁷⁸ Rentals generate income of up to one hundred dollars per tape, for which the copyright owner receives no royalty.⁷⁹

To recoup lost royalty revenues, the motion picture studios devised two separate plans. First, the studios placed restrictive legends on the cardboard boxes containing the prerecorded movies. Although the exact language of the legends varies, all legends restrict the use of the tape to private home use. No tape may be copied or used for purposes other than in the home.⁸⁰

Second, the studios devised a "rental only" program. Walt Disney Studio was the first studio to adopt such a program.⁸¹ Under their "rent only" program, Disney had a dual distribution system. Tapes marked "for sale only" were sold to the retailer to sell directly to consumers. Disney then required retailers to contract for the "rental only" tapes. Separate books were kept for each type of tape, and royalty fees were collected based upon tape rentals.⁸² Twentieth Century Fox, Metro-Goldwyn-Mayer, and Warner Brothers followed suit with "rental only" programs for their new

78. *Hearings on S. 1758 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 1068 (1982) (testimony of Richard Soukup, Owner, Video Station Stores, Madison, Wisconsin) [hereinafter cited as *Testimony of Richard Soukup*].

79. See *supra* note 75. Frank Barnako creates a different picture of the video retailer's world. Using the \$89 retail sales price of "Star Wars" as an example, Barnako observed that the tape must rent 18 times at \$5 per night before the initial investment is recovered. Barnako rents tapes for a 3-day period, so the time to recover his investment would be 54 days. Because there is usually a day and a half lag before a film rents again, the time to recover the initial investment is 81 days.

Barnako stressed that popularity of a film lags after the first five weeks, and the rental demand for the film decreases. As an example, old classics, such as "Citizen Kane" may be purchased at a cost of \$45. But because the film is older, it may rent only once a month. Thus, it would take a full year before the initial investment was recovered. Barnako stressed that his break even point depends upon the purchase price of the tape. *House Hearings: Frank Barnako*, *supra* note 75, at 732.

80. For example, Warner Brothers uses the following legend on its videotapes: "The motion picture contained in this videocassette is protected under the copyright laws of the United States and other countries and the cassette is sold for home use only. Duplication, public exhibition, rental or any other commercial use, in whole or in part, is strictly prohibited." The Paramount Pictures legend states: "Licensed only for noncommercial private exhibition in homes. Any public performance, or other use, or copying, is strictly prohibited. . . ."

81. Disney instituted their "rental only" plan in October of 1981. *Hearings on Home Recording of Copyrighted Works before the Subcomm. on Courts, Civil Liberties and Administration of Justice of the Comm. on the Judiciary of the House of Representatives*, 97th Cong., 2d Sess. 906 (1983) (testimony of James P. Jimirro, President, Walt Disney Telecommunications Non-Theatrical Co.) [hereinafter cited as *House Hearings: James Jimirro*].

82. Comment, *Cheaper by the Dozen: Unauthorized Rental of Motion Picture Videocassettes and Videodiscs*, 34 FED. COMM. L.J. 259, 268 (1982) [hereinafter cited as *Cheaper by the Dozen*].

releases.⁸³ These programs theoretically enabled the studios to monitor rentals and obtain adequate royalty fees.⁸⁴

Legal Consequences

Both programs, however, proved legally unworkable. First, the restrictive legends on the tape boxes present a situation analogous to the *Bobbs-Merrill* case.⁸⁵ Limitations on a purchaser's use of a legally copyrighted work are comparable to the resale price provisions imposed on retailers in *Bobbs-Merrill*. There the Supreme Court held that the Copyright Act gave the copyright owner no power to enforce contract provisions against future purchasers who lacked privity of contract. Additionally, the comments accompanying the Act clearly state that an outright sale frees a copyrighted work from a copyright owner's control over the resale price or "other conditions of its future disposition."⁸⁶ The legends' restriction against rentals also infringes upon the purchaser's future disposition. Thus, the legends were held unenforceable as a matter of copyright law.

State law remedies, however, are available to the copyright owner if the purchaser violates a valid contractual provision.⁸⁷ To have a valid contract, there must be a meeting of the minds on all essential terms.⁸⁸ Thus, the movie studios must prove that the re-

83. *Testimony of John Power*, *supra* note 4, at 1071. Rent only limitations of four and six months, respectively, were imposed on new films released by Metro-Goldwyn-Mayer and Twentieth Century Fox. Warner Brothers imposed permanent rent only provisions on its new releases. *Testimony of Elmer Cooper*, *supra* note 7, at 695. As of April 12, 1982, the films involved in the rent only programs were as follows:

TWENTIETH CENTURY FOX: History of the World Part I, The Great Muppet Caper, Dr. No, Eyewitness, Blackie, For Your Eyes Only, Rocky, Final Conflict, Tatoo, Thunderbolt and Lightfoot, La Cage Aux Folles II, Eye of the Needle, From Russia With Love, Death Hunt, Zorro: The Gay Blade, What's New Pussycat?

MGM/CBS: Tarzan the Apeman, S.O.B., Rich and Famous, All the Marbles.

WARNER BROTHER: Outland, Superman II, Body Heat, Arthur, Excalibur, Prince of the City, Blow Out, Wolfen, Private Benjamin, Altered States, The Shining.

Id. at 699.

84. All the studios except Disney had abandoned their rental only plans by 1984. Bookkeeping requirements and excessive costs of policing the program made it impractical. Takiff, *Next Battle Zone in the VCR War May Be Neighborhood Rental Outlet*, Chicago Tribune, February 9, 1984, at 12, col. 1 [hereinafter cited as *Takiff*].

85. See *supra* text accompanying notes 67-70.

86. *House Report*, *supra* note 8, at 79.

87. The comments to the Act state that the first sale doctrine "does not mean that conditions on future dispositions, . . . imposed by contract between the buyer and seller would be unenforceable between the parties as a breach of contract." *Id.*

88. 17 AM. JUR. 2d, *Contracts* § 18, at 354 (1964).

tailer had knowledge of the restrictive legend and that the retailer agreed to be bound by its terms.⁸⁹

Enforcement of the restrictive legend would be both impractical and costly. First, the studios would have to prove the retailer had knowledge of the terms. Even if this were possible, because the legend is printed clearly on the box, the studios would have to prove the retailer assented to the provision.⁹⁰ A retailer, however, would unlikely agree to a restricted use. Like the bookdealer in *Bobbs-Merrill*, the retailer merely purchases the tapes in the normal course of business.⁹¹ The terms of the legend are not negotiated. Thus, to bring breach of contract actions against each video retailer for violating the terms of the legend would be extremely time consuming, costly, and practically impossible to prove.

The "rental only" schemes attempted to circumvent the evidentiary problems of proving the retailer's assent to the restrictive legends. Disney contracted with its purchasers for the use of its films. Due to the nature of the distribution system, these programs also failed.⁹² Retailers rarely purchase directly from the motion picture studio's distribution company. Wholesale companies serve as middlemen between the studio distributor and the retailer.⁹³ The wholesaler would agree to be bound by the "rental only" system, only to then make a sale of the tape to the retailer. As a result, the retailer purchased the tape without consenting to the contractual restrictions.

Copyright cases suggest that privity of contract is essential to a successful suit for breach of contract.⁹⁴ In the situation described above, privity is lacking between the retailer and the motion picture

89. M. NIMMER, *supra* note 50, at § 8.12[B(1)], at 8-122.

90. *Id.*

91. *See supra* note 68 at 341.

92. Disney acknowledged itself that the chain of title in videotape distribution made the rent only plan difficult to enforce. *House Hearings: James Jimirro, supra* note 81, at 921.

93. *Testimony of John Power, supra* note 4, at 1070. An example of such wholesalers or distributors is Communitronics in Chicago, Illinois. Founded in 1976, the company earned over \$120 million in 1982. Sales of over \$160 million are predicted in 1983. It should be noted that the company offers a full line of consumer electronics in addition to its sales of prerecorded videotapes. *VS Interview with Jack Silverman, VIDEO STORE, January 1984, at 62-63 [hereinafter cited as Silverman Interview]*.

94. *Bobbs-Merrill Co. v. Strauss*, 210 U.S. 339, 350-51 (1908) (wholesale dealers did not agree to restrictive legend and were not required to demand consent from third parties before selling books because there was no privity of contract); *Independent News Co. v. Williams*, 293 F.2d 510, 517-18 (3d Cir. 1961) (a valid contract between two persons does not bar a subsequent purchaser from using the work free of the restriction); *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, 233 F. Supp. 881, 884 (E.D. Pa. 1964) (defendant, although aware of contractual restrictions between plaintiff and his supplier, was not bound by the contract to which he was not a party).

distributor. Only the wholesaler is bound by the restriction.⁹⁵ Studios could sue wholesalers for violations of the contract terms, but this would not be productive. The purpose of the restrictions is to obtain royalty fees on rentals, not breach of contract damages from wholesalers. Additionally, lawsuits to enforce the right would be costly.

Even if the retailer were contractually bound to the "rental only" system, the system was unsuccessful. Retailers balked at the bookkeeping requirements, and records were poorly kept, thereby reflecting inaccurate information. Furthermore, retailers sold the "sale only" tapes to customers who eventually rented the tapes.⁹⁶ These remote purchasers lacked privity with the movie studios. Unable to enforce their copyrights because of the first sale doctrine, the studios turned to the newly drafted "public performance" section of the Copyright Act of 1976.

PUBLIC PERFORMANCE: THEORY AND CASE LAW

The landmark case construing the public performance exception under the Copyright Act of 1909 was *Metro-Goldwyn-Mayer v. Wyatt*.⁹⁷ In *Wyatt*, a private yacht club gave an unlicensed exhibition of a copyrighted film to its members. The court held that the performance was not "public" because only club members, not the general public, were admitted.⁹⁸ *Wyatt*, however, was expressly overruled by the first section of the public performance definition of the Copyright Act of 1976.⁹⁹ This section states that a public place includes any place where a substantial number of persons outside of the normal circle of family and their social acquaintances

95. See generally Beard, *supra* note 59, at 465-72 (discussion of the cases requiring privity of contract to enforce restrictions); *Cheaper by the Dozen*, *supra* note 82, at 276-78 (discussion of privity analysis in video rental distribution chain).

96. *Hearings and Home Recording of Copyrighted Works before the Subcomm. on Courts, Civil Liberties, and Administration of Justice of the Comm. on the Judiciary of the House of Representatives*, 97th Cong., 2d Sess. 905 (1983) (testimony of Ron Berger, President, National Video, Inc.) [hereinafter cited as *House Hearings: Ron Berger*].

97. 21 C.O. BULL. 203 (D. Md. 1932).

98. *Id.*

99. *House Report*, *supra* note 8, at 64. The previous definition of a "public performance" stated that a copyright owner shall have the exclusive right to: perform or present the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced, and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever. . . . 17 U.S.C. § 1(d) (1976).

are gathered.¹⁰⁰ The drafters of the comments observe that this definition of "public" specifically includes semi-public gatherings. Places such as lodges, clubs, factories and schools are "public" as defined by the Act.¹⁰¹

Unfortunately, congressional intent with regard to the second section of the public performance definition is not as clear. The second clause states that a communication is public if the public receives the transmission "in the same place or in separate places and at the same time or at different times."¹⁰² No additional commentary adds insight into these phrases. Professor Melville B. Nimmer suggests that the language refers to repeated performances of the same copy to different members of the public at different times.¹⁰³ Two examples are offered by Nimmer. First, he presents the situation of a penny arcade "peep-show" where only one member of the public can view the motion picture at any given time. Yet, the performance is public because it is repeatedly offered to the public on a daily basis.¹⁰⁴ Second, Nimmer creates a scenario of theatres with individual screening rooms for greater privacy and viewing schedule flexibility for patrons. He suggests that these private screenings would also constitute a public performance under the new Act.¹⁰⁵

A district court in *Columbia Pictures Industries v. Redd Horne*¹⁰⁶ agreed with Nimmer's conclusion regarding the screening room scenario. Redd Horne owned two retail video stores offering 83 private screening rooms to the public. The rooms were rented by two to four people who were either relatives or close social acquaintances. Patrons selected prerecorded videotaped films to rent, and went to their private screening rooms to watch.¹⁰⁷ Seven motion picture studios challenged the practice as an unlicensed public performance in violation of section 106(4).¹⁰⁸ The issue, however, of whether the practice of renting the copyrighted videotapes constituted an infringement was not raised.¹⁰⁹ The court held that the defendant had caused a public performance by showing the tapes to

100. See *supra* text accompanying note 40-41.

101. *House Report*, *supra* note 8, at 64.

102. 17 U.S.C. § 101(2) (1976).

103. M. NIMMER, *supra* note 50, at § 8.14[C][3], 8-142-43.

104. *Id.*, at 8-142.1.

105. *Id.*

106. 568 F. Supp. 494 (W.D. Pa. 1983).

107. *Id.* at 496, 500.

108. The other motion picture studios involved in the suit were Embassy Pictures, Paramount Pictures, Corp., Twentieth Century Fox Film Corp., Universal City Studios, Inc., Walt Disney Productions & Warner Brothers, Inc. *Id.* at 494.

109. *Id.* at 496 n.3. The court addressed the sole issue of whether Red Horne had caused a public performance of the videotapes as defined in section 106(4). *Id.*

patrons in the private screening rooms.¹¹⁰ Rejecting the defendant's argument that it met the terms of the Act because screening rooms were rented only to family members or close social acquaintances, the court found that the defendant's operation was indistinguishable from the practices of regular movie theatres. Both facilities were available to paying customers, had limited seating capacities, and were open to the public. Although no more than four persons could see a tape at any one time, the court found that substantial numbers of the public could view the tapes over time. The court thus found defendant had infringed on plaintiff's copyrights by causing an unlicensed public performance.¹¹¹

The crucial question not raised in *Redd Horne* is whether rental of the copyrighted tapes for home viewing constitutes a public performance within the meaning of section 106(4). Professor Nimmer suggests that each rental of a tape constitutes a public performance of the copyrighted movie.¹¹² Unlike a direct purchaser of a prerecorded tape or record album who employs the article solely for home use, the video store owner rents the *same copy* to the public at *different times*.¹¹³ Professor Nimmer would, thus, find the video store retailer liable for infringement.¹¹⁴ The movie studios also read the Act as including within the definition of a public performance successive rentals of a single tape.¹¹⁵

This is not an unfair reading of the new Act. However, one problem with this reading is that the public performance section was drafted in 1976 to reflect concerns with the cable industry.¹¹⁶ Congress expressed no intent that the public performance section preclude rental of pre-recorded videotapes because the video industry and rental practice did not exist in 1976. Legislative reform, rather than judicial interpretation,¹¹⁷ should arguably delineate the scope of the public performance definition as it relates to videotape rentals.

110. *Id.* at 500.

111. *Id.*

112. M. NIMMER, *supra* note 50, at § 8.14[C][3], 8-143-44.

113. Professor Nimmer carefully distinguishes the sale of a mass produced copyrighted good for home use by a single purchaser and the case where a single copy is purchased to rent to other consumers. According to Professor Nimmer, the language of section 101 does not limit a single consumer's ability to purchase a work for performance in his own home. Purchase of record albums for home playing was the example given of a type of activity the new definition is not meant to include. *Id.* at 8-141.

114. *Id.* at 8-143-44.

115. *House Hearings: Jack Valenti, supra* note 76.

116. *House Report, supra* note 8, at 64-65.

117. The Legislature has the resources to analyze the video tape rental market and make broad based policy decisions regarding the industry's growth and regulation. *Betamax*, 104 S. Ct. at 783.

PROPOSED AMENDMENT TO THE COPYRIGHT ACT

Both sides of the video rental controversy have shifted the major battlefront from the courtroom to the halls of Congress. A proposed amendment to the first sale doctrine is now pending before Congress.¹¹⁸ The bill, which would add language to section 109(2), prohibits the rental, lease, or lending of a copy of a copyrighted work for commercial gain without the copyright owner's consent.¹¹⁹ Sponsored by Senator Charles C. Mathias, the amendment has received the backing of the Reagan administration¹²⁰ and the Registrar of Copyrights.¹²¹ Video store owners contend that the amendment will result in higher rental fees for consumers, higher studio profits, and the death of many retail operations.¹²²

118. The issue of amending the Copyright Act to impose royalty fees on the sales of videorecorders and blank videotapes is not addressed in this paper. See S. 31, 98th Cong., 1st Sess. (1983); H.R. 1030, 98th Cong., 1st Sess. (1983).

119. The bill states in pertinent part:

That, unless authorized by the copyright owner, the owner of a particular copy of a motion picture or other audiovisual work may not, for the purposes of direct or indirect commercial advantage, dispose of the possession of that copy by rental, lease, or lending, or by any other activity or practice in the nature of rental, lease, or lending.

S. 33, 98th Cong., 1st Sess. (1983); H.R. 1029, 98th Cong., 1st Sess. (1983). Identical bills were introduced in the 97th Congress. See S. 1333, 97th Cong., 1st Sess. (1982); H.R. 5705, 97th Cong., 1st Sess. (1982).

120. *White House Backs Repeal*, VIDEO STORE, January 1984, at 8. While the White House may support repeal of the first sale doctrine, the move is opposed by consumers. Senator Mathias scheduled hearings on the first sale bill on February 22, 1984. Due to intensive consumer lobbying, including a phone-in and write-in campaign, enough Senators were persuaded that voting for the measure would be unwise in an election year. Senators failed to attend the meeting, and without a quorum, no vote could be held. Dunlavey and Gombert, *The Betamax Decision—Will Congress Erase It?*, 2 THE ENTERTAINMENT AND SPORTS LAWYER 1, 22 (1984) (publication of the ABA Forum Committee on the Entertainment and Sports Industries).

Hearings were held in the House on October 6, 1983, October 27, 1983, December 13, 1983, and February 23, 1984. More hearings are expected in the near future. *Id.*

121. *Hearings on Oversight of the Copyright Office and Copyright Royalty Tribunal before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. of the Judiciary of the United States Senate*, 98th Cong., 1st Sess. 65 (1983) (testimony of David Ladd, Registrar of Copyrights).

122. Frank Barnako testified that repeal of the first sale doctrine could increase rental prices by 50 percent and drive 90 percent of the video retailers out of business. *House Hearings: Frank Barnako*, *supra* note 75, at 733. Another industry official predicts that 50 percent of the video retailers would be driven out of business. See *Silverman Interview*, *supra* note 93, at 71.

Tape rental prices now range from \$1 to \$2 per day to a high figure of \$4 to \$5 per day. *Testimony of John Power*, *supra* note 4, at 1071. Mr. Roberts testified that if any amendments to the Act were passed, the rental rates for pre-recorded videotapes should still average about \$5 per day. *Testimony of Stephen Roberts*, *supra* note 3, at 315. Video retailers, however, dispute Roberts' predictions. Both Jack Wayman, of the Electronic Industry Association, and Joan Chase, of the Video Software Dealer's Association, predict increases in

On the other hand, the amendment proposed by the studios calls for clarification of the public performance definition in section 101.¹²³ The amendment provides that a public performance can occur in a private home if: (a) the cumulative total of persons capable of viewing the particular copy is greater than the circle of family and close friends and (b) the particular copy was furnished to obtain a direct or indirect commercial gain.¹²⁴ Because congressional debates have not been held on this bill, the practical and legal ramifications have yet to be fully explored.¹²⁵

rental prices to \$8 to \$10 per night. Jacobs, *Are Movie Rentals Going Up in Smoke?*, VIDEO REV., May 1984, at 20, 21.

Furthermore, opponents of the first sale repeal suggest that the less popular titles will not be available. Studios could take less popular, less profitable titles off the market to encourage sales of the newer, more popular titles. This means a reduced movie selection for the consumer. *Id.* at 21-22.

Finally, it is unclear whether the first sale repeal would be retroactive. The White House supports a non-retroactive application of the measure. *Id.* at 22. Peter Nolan, Senior Counsel for Disney Home Video, believes that the current version of the bill would apply retroactively to all tapes currently on the market. *Id.* at 114.

123. *Testimony of Stephen Roberts*, *supra* note 3, at 323. The full text of the amendment states:

The reference to 'at different times' in the preceding sentence refers to those circumstances in which one particular copy or phonorecord of a work is employed to communicate two or more performances or displays of such work (whether such performances or displays occur in private homes or otherwise), provided: (1) the total number of persons cumulatively capable of receiving all such performances or displays collectively constitute a substantial number of persons outside the normal circle of one family and its social acquaintances, and (2) such particular copy or phonorecord was furnished or otherwise made available to communicate such performance or displays in order to derive a direct or indirect commercial advantage.

Id.

124. Stephen Roberts submitted the following rationale for the bill:

When the same copy of a given work gives rise to numerous performances by different members of the public, each such performance (although it is not received by the public generally) must be regarded as a public performance because the public at large receives performances 'at different times' all emanating from the same copy.

Id. at 322.

125. While Congress has not debated the bill, scholars have commented on the proposed public performance amendment. One commentator views the bill as a practical way to insure that copyright owners are fully compensated for performances of their works. *Cheaper by the Dozen*, *supra* note 82, at 286. Another commentator observes that the amendment raises privacy issues if homeviewing is the act that triggers the public performance, and hence, infringement liability. Lewson, *supra* note 65, at 30. Stephen Roberts suggests that the video retailer is liable for infringement because he furnished the means for executing the public performance, and that the individual home viewer would not be prosecuted for infringement. *Testimony of Stephen Roberts*, *supra* note 3, at 323.

ANALYSIS AND COMMENTARY

While Congress is considering amendments to the Act, an analysis of the alternatives and their impact is appropriate. First, judicial resolution of the issue is not likely to occur, and a resolution of the issue on a case-by-case basis is impractical. Video presents an emerging technology that is not specifically addressed by the Copyright Act of 1976. Explicit statutory language regarding video, and clear statements of congressional intent cannot be found.¹²⁶ Although courts have power to make case-by-case determinations of video related issues, they lack the resources to fully assess the new market and develop a cogent policy for future practice. Thus, nonjudicial solutions should be devised. Statutory clarification and market forces offer two viable solutions to the videotape rental question.

Analysis of the Proposed Amendments

The proposed amendments to sections 109(a) and 106(4) both present viable alternatives for clarification of the Act and resolution of the unanswered questions surrounding the propriety of renting prerecorded tapes. Under the proposed amendment to section 109(a), copyright owners would obtain a limited exception to the first sale doctrine.¹²⁷ The need to prove absence of a first sale because of a license or a contract would not be necessary. Once a copyright owner proves unauthorized renting for commercial gain, the Act would establish liability. The copyright owner could then seek damages for infringement or license fees to secure economic compensation for his copyright.¹²⁸

126. *Betamax*, 104 S. Ct. at 783.

127. While the present first sale amendment does not address the question of renting records for profit, audio rental is addressed in two other bills pending before Congress. See S. 32, 98th Cong., 1st Sess. (1983); H.R. 1027, 98th Cong., 1st Sess. (1983). The audio rental bill passed the Senate unanimously in June, 1983. Dunlavey and Gomberg, *supra* note 120, at 22. Further House hearings are scheduled on H.R. 1027. *Id.*

The rent-a-record problem is a growing one. Rent-a-record retail outlets, unknown in 1982, numbered over 214 in 1983. Phillips and Graham, *New Developments in Recording Contract Negotiations: Reflections of a Changing Economic Profile*, 2 ENTERTAINMENT AND SPORTS LAWYER 1, 5 (1984) (publication of the ABA Forum Committee on the Entertainment and Sports Industries). In Japan over 1,600 rent-a-record outlets exist. Japanese studies show that 94 percent of persons who rent records do so to make copies. Record sales have decreased by 30 percent in areas where a rental and retail record store exist. *Id.* CBS estimates that it loses \$700 to \$800 million each year because of illegal record copying. Frank, *Payment Due*, 129 FORBES 124, 126 (1982). As stated by Eric Hultman, General Counsel to the Senate Judiciary Committee, illegal copying is so extensive "that pot [marijuana] would be the only other thing to rival it." *Id.* See generally *Hearings on S. 1768 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 997 (1982).

128. For a discussion of remedies, see *infra* text accompanying notes 129-38.

The proposed amendment to the public performance section would eliminate any questions regarding congressional intent. Once the copyright owner proves that the retailer made the copy available to the public to derive a commercial advantage, liability is established. The copyright owner then can sue for infringement or obtain royalties for each public performance of his work.¹²⁹

Statutory Remedies

Statutory remedies for infringement are included in the Act. If a motion picture studio established that a video retailer's rental of tapes constituted infringement under either of the proposed amendments, the studio could seek an injunction,¹³⁰ actual damages and lost profits,¹³¹ statutory damages,¹³² and costs and attorney's fees.¹³³ Every successful suit could result in a studio collecting actual damages incurred as a result of the video retailer's infringement as well as profits not included in the damage calculations that the video retailer earned through the infringement.¹³⁴ Moreover, a successful suit could result in an injunction restraining the retailer from future rental of copyrighted prerecorded videotapes.¹³⁵ Studios would, thus, have a legal remedy available to enforce the protections guaranteed to them by the proposed amendments to the Act.

Liability would be easier to prove under either of the amendments. Litigation, however, would still be an unattractive solution. The video retail business is growing at phenomenal rates.¹³⁶ The rental problem is already out of control and is multiplying daily.¹³⁷ To enforce their copyrights, studios would be required to file numerous lawsuits, and the prosecution of these suits would prove time consuming and costly. Even if all attorney's fees were ordered

129. See *infra* text accompanying notes 129-38.

130. 17 U.S.C. § 502 (1982).

131. *Id.* at § 504(b).

132. *Id.* at § 504(c).

133. *Id.* at § 505.

134. The act provides that, "the copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing actual damages." *Id.* at § 504(b).

135. A permanent injunction generally will be issued once infringement has been proven and the threat of continuing violation exists. *Encyclopedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y.) (a permanent injunction was proper where continued threat of using pirated copies of plaintiff's copyrighted films existed); *Lauratex Textile Corp. v. Allton Knitting Mills, Inc.*, 519 F. Supp. 730 (S.D.N.Y. 1981) (injunction proper where defendant was prepared to produce more textiles bearing plaintiff's copyrighted design).

136. See *supra* text accompanying note 2.

137. See *supra* text accompanying note 5.

paid by the defendants,¹³⁸ a cash outlay would be tied up in litigation for long periods of time. Studios would have to vigilantly guard their rights until the threat of lawsuits became so great that compliance with licensing or performing rights fees became voluntary on the part of video store owners. Given the massive growth in this retail industry, piecemeal litigation does not present a workable solution.¹³⁹

Direct Studio/Retailer Licensing

Both the public performance and first sale amendments give the studio a clear right to collect royalties on the performance or licensing of their tapes.¹⁴⁰ Negotiated performance or licensing fees avoid the costs of litigation to obtain royalties due from video store owners.¹⁴¹ A prototype for this exists in the current arrangements between the feature film distributor and theatre owners. Theatre owners license the film based on a flat fee or a percentage of the net receipts on the film. When a run of the film is over, the film is returned to the distributor for holding or redistribution.¹⁴² A similar system theoretically could be developed between videotape distributors and the retail owner. Two practical problems, however, make this solution not feasible.

First, a middleman exists in the videotape distribution chain.¹⁴³

138. Although the Court's power to award costs and attorney's fees is discretionary, the power is frequently exercised. M. NIMMER, *supra* note 50, at §§ 14.09, 14.10.

139. Two commentators who addressed the video rental issue did not even discuss litigation under the Copyright Act as a means of enforcing royalty rights. *Cheaper by the Dozen*, *supra* note 81; Lewson, *supra* note 64.

140. Public performance rights and licensing rights are separate rights. The amendment to section 101 would provide that each rental of a tape is a public performance which must be authorized by the copyright owner. See 17 U.S.C. § 106(4) (1982). The amendment to the first sale doctrine would, in essence, give the copyright owner a right to royalties on works he has sold and that are used to derive commercial gain. See *id.* at § 109(a). While the rights are separate, the practical problems of collecting public performance royalties and first sale royalties are identical. Thus, fee collection problems are treated as identical throughout the remainder of this comment.

141. Alan Hirschfield, Chairman of Twentieth Century Fox Film Corporation, has revealed what the company will do if the bill is passed. Hirschfield stated that a dual inventory system would be instituted. Wholesale prices would be reduced by 50 percent, to an average of \$29.95 per copy. Rental only plans would be based upon either a surcharge plan, or a consignment plan for every tape entered. Takiff, *supra* note 84.

142. *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485 (5th Cir. 1982). Fees are set through a competitive bidding process in which exhibitors submit sealed bids to distributors for review. Even if a bid is rejected an exhibitor still may be able to obtain the film through negotiations. *Id.* at 488-89. See generally Note, *Motion Picture Split Agreements: An Antitrust Analysis*, 52 FORDHAM L. REV. 159 (1983) (analyzes split bidding agreements and argues that such arrangements are *per se* violations of the antitrust laws).

143. See *supra* text accompanying note 93.

The studios would have to trace the tape copy from the distributor, to the wholesaler, and to the ultimate purchaser who rented the tape for profit. Unlike the feature film distribution system, licenses would be negotiated after the tapes were purchased by the retailer.¹⁴⁴ Retailers would purchase tapes not knowing the license fees until negotiations with the studios had concluded. Such a system would reduce all bargaining power of the retail purchaser. As long as a middleman exists in the distribution chain, direct negotiations are unworkable.¹⁴⁵

Second, studios would be negotiating with thousands of retail owners. Each of these owners inventories hundreds or thousands of titles.¹⁴⁶ Unlike the transactions between a finite number of theatre owners for a limited number of feature films,¹⁴⁷ policing rental tape licenses would involve hundreds of thousands of transactions monthly. The sheer volume of transactions makes studio/retailer licensing agreements impractical.¹⁴⁸

Performing or Licensing Rights Societies

An alternative to direct licensing and distribution by the studio could be the formation of a performing rights society to handle the licensing arrangements on prerecorded videotapes. Prototypes of these nonprofit organizations already exist.¹⁴⁹ The three major societies are the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and the Society of European Stage Authors and Composers (SESAC). Composers, au-

144. See *supra* text accompanying note 140.

145. The middleman problem could be eliminated if the studios entered the wholesale industry and appointed local agents to negotiate royalty fees when retailers purchased tapes. Some wholesale companies are already owned by the motion picture studios. *Cheaper by the Dozen*, *supra* note 82, at 227 n.104.

146. It is estimated that an average store catalogues over 500 titles. *House Hearings: Frank Barnako*, *supra* note 75, at 732. Many retailers, however, pride themselves on carrying a large number of the approximately 15,000 titles available on prerecorded videotapes. See Commtron Corporation Videotape Price List, Effective Date 2/01/84. As an example, Video Adventure, located in Evanston, Illinois, carries over 2,000 Beta and VHS titles. Video Adventure Title List, March 1984, Evanston, Illinois.

147. Films are released in three stages, known as first run, intermediate run, and wide break. On a first run, the distributor usually licenses the film to a small number of theatres for an exclusive time period. *Southway Theatres*, 672 F.2d at 488. This reduces the amount of monthly transactions that are needed on each film.

148. A direct licensing scheme is quite similar to the rental only plans that were attempted by the studios, and abandoned by all but Disney. Takiff, *supra* note 84. See *supra* text accompanying notes 91-92.

149. Although performing rights societies collect royalties due under the public performance section of the Act, 17 U.S.C. § 106(4) (1982), the pooling arrangement could also be used to collect royalty fees due for renting the copy of a work for profit without the copyright owner's consent under the proposed amendment to section 109(a).

thors, and publishers assign their performing rights to these societies. In turn, the societies collect and distribute the royalties due on the small performance rights of their members.¹⁵⁰ Licenses generally are granted on a blanket basis,¹⁵¹ and royalties are distributed to members based upon the average number of times the work was performed. The societies have proved highly successful, and in 1980, they handled the licensing rights of over four million compositions.¹⁵²

Antitrust and the Performing Rights Society

The practice of blanket licensing, however, raises antitrust questions. First, section 1 of the Sherman Act prohibits all contracts, combinations, or conspiracies which restrain trade.¹⁵³ When a group has set prices for its goods, the Supreme Court has found that this conduct is *per se*¹⁵⁴ violative of the Sherman Act.¹⁵⁵ Second, section 3 of the Clayton Act prohibits selling goods, on the con-

150. For a discussion of small performance rights, see Perrone, *Small and Grand Performing Rights? (Who Cared Before "Jesus Christ Superstar")*, 20 J. COPYRIGHT SOC'Y 19 (1972) (analysis of what constitutes a small, or nondramatic, performance of a musical work under the provisions of the Copyright Act of 1909).

151. Blanket licenses are licenses which give the licensee the right to use any and all of the music in a society's repertory. The licenses have a set date of expiration, and fees are usually set either on a percentage of the licensee's total revenue for the year, or a flat amount. The cost does not reflect the type or amount of music used by the licensee. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 15 (1979).

152. *Id.* at 46. Unlike BMI and ASCAP, SESAC is privately owned. SESAC handles the performing rights of only 300 publisher and writer affiliates. Note, *Controlling the Market Power of Performing Rights Societies: An Administrative Substitute for Antitrust Regulation*, 72 CALIF. L. REV. 103, 106 (1983) [hereinafter cited as *Market Power*].

153. The Sherman Act states in pertinent part that, "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982).

154. Courts analyze antitrust cases under either the *per se* analysis or rule of reason analysis. Under *per se* analysis, the courts decide that some acts are so detrimental to competition that they can be declared illegal without inquiring into business motives or justifications. *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958). Conversely, courts look to business motives and justifications under a rule of reason analysis. Because some restraints on trade may be necessary for healthy competition, courts consider the market structure, the effect of the restraint on competition, and the defendant's intent. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

For a discussion of the *per se* analysis and rule of reason analysis, see Phelan, *The Continuing Battle with the Performing Rights Societies: The Per Se Rule, The Rule of Reason Standard, and Copyright Misuse*, 15 TEX. TECH. L. REV. 349, 360-74 (1984). See also Comment, *Convergence of the Copyright Law and Sherman Act*, 51 MISS. L.J. 79 (1980) (discussion of the Sherman Act as it pertains to copyright cases).

155. *Kiefer-Stewart v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

dition that the purchaser will not deal in the goods of the seller's competitor, if the effect is to substantially lessen competition or create a monopoly.¹⁵⁶ These arrangements, called tying arrangements, also have been stricken by the Supreme Court.¹⁵⁷

The Justice Department realized the potential antitrust problems and now governs the conduct of the societies through consent decrees.¹⁵⁸ Antitrust suits are not limited to government plaintiffs, and numerous private parties have sought refuge in the antitrust laws.¹⁵⁹ Motion picture theatre owners initiated a class action suit in *Alden-Rochelle v. ASCAP*.¹⁶⁰ Plaintiffs objected to ASCAP's practice of issuing blanket licenses to cover the music per-

156. Section 3 of the Clayton Act provides in pertinent part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or other commodities . . . or fix a price charged therefor . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14 (1982).

157. *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958). The Court discussed tying arrangements in the context of the motion picture industry in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). Paramount had engaged in the practice of blockbooking. It required exhibitors to purchase a package of films containing marketable new features as well as less desired films. Because the copyright owner of the less desired feature had his copyright monopoly strengthened through the sale of his works with the popular films, the Court found the practice constituted an illegal tie-in. *Id.* at 158.

The illegality of tie-ins was reaffirmed in *United States v. Loew's, Inc.*, 371 U.S. 38 (1962). Motion picture distributors sold feature films to television stations in blocks. Even though a station might only want 10 or 15 films, it had to purchase the entire block. Block prices varied for \$15,000 for a 100 film block to \$314,725 for an entire library of 723 films. *Id.* at 39-41. The Court held that the practice was anticompetitive and violative of the antitrust laws. *Id.* at 49-51.

158. BMI entered into consent decrees with the Justice Department in 1941 and 1966. *United States v. Broadcast Music, Inc.*, 1940-43 Trade Cases para. 56,096 (E.D. Wisc. 1941); *United States v. Broadcast Music, Inc.*, 1966 Trade Cases para. 71,941 (S.D.N.Y. 1966). ASCAP entered into Justice Department consent decrees in 1941, 1950, and 1960. *United States v. ASCAP*, 1940-43 Trade Cases para. 56,104 (S.D.N.Y. 1941); 1950-51 Trade Cases para. 62,505 (1950); 1960 Trade Cases para. 69,612 (1960). As a result of these consent decrees, ASCAP and BMI must permit their members to license performing rights independent of the society. Any licensee who objects to the blanket license fee set by the society may appeal the reasonableness of the fee to the District Court for the Southern District of New York. *BMI*, 441 U.S. at 10-12.

159. 15 U.S.C. § 15 (1982). The Clayton Act provides in pertinent part that "any person who shall be injured in his business or his property by reason of anything forbidden by the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ." *Id.*

160. 80 F. Supp. 888 (S.D.N.Y. 1948). The class consisted of 164 motion picture exhibitors, who owned over 200 theatres. *Id.* at 890.

formance rights of films they exhibited.¹⁶¹ While "per piece" licenses were available,¹⁶² the structure of the market precluded plaintiffs from using this option. Negotiations for films occurred long before the exhibitor received the list of music in the film.¹⁶³ Exhibitors thus lacked bargaining power to negotiate a reasonable fee on a per use basis.

The court in *Alden-Rochelle* found that ASCAP was a monopoly as defined by the Sherman Act.¹⁶⁴ Because ASCAP restrained competition among composers, the court held that the licensing practice was an illegal combination in restraint of trade.¹⁶⁵ The court determined that competition between composers would be increased if the motion picture studios obtained public performance rights from ASCAP members at the same time that synchronization rights were negotiated.¹⁶⁶ As a result, exhibitors received the cost of the public performance right, competitively negotiated by the film producer, in the cost of licensing their film from the studio.¹⁶⁷

Despite the holding of *Alden-Rochelle*, in *K-91 v. Gershwint Publishing Co.*,¹⁶⁸ the court found that blanket licensing to local radio stations did not violate section 1 of the Sherman Act.¹⁶⁹ Gershwint sued K-91 for copyright infringement, and K-91 counter-claimed that the plaintiff participated in ASCAP for the purpose of restraining trade.¹⁷⁰ The court found that any antitrust violations by ASCAP had been "disinfected" by the Justice Department con-

161. The court observed that the motion picture studios owned several publishing companies that were members of ASCAP. Publishers were allotted 50 percent of ASCAP net proceeds, of which the motion picture studio owned publishers received 37 percent. *Id.* at 892.

162. The court found that an average film contained 20 pieces of music, of which ASCAP owned 80 percent. An exhibitor would thus have to negotiate at least 64 licenses per week. *Id.* at 893.

163. *Id.*

164. *See supra* note 153.

165. *Alden-Rochelle*, 80 F. Supp. at 895.

166. Synchronization rights are the right to put the music with the film itself, not the right to play the music in a public performance of the film. *Id.* at 893. When motion picture producers negotiated music rights with non-ASCAP members, they purchased both the synchronization rights and the public performance licensing rights. The court found that the producer also could purchase both rights from ASCAP members during negotiations for synchronization rights. *Id.* Because studio synchronization right negotiations were for individual compositions, at prices of \$100 to \$25,000, the court found that this arrangement increased competition among composers. *Id.*

167. *Id.* at 896.

168. 372 F.2d 1 (9th Cir. 1967).

169. *Id.* at 4.

170. *Id.* at 2. Some courts have expressed disfavor with using antitrust defenses to copyright infringement claims and have denied defendants the use of the antitrust defense. *See United Artists Assoc., Inc. v. NWL Corp.*, 198 F. Supp. 953, 957 (S.D.N.Y. 1961); *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, 187

sent decrees. Moreover, the court emphasized that K-91 could purchase licenses directly from the copyright holder. Finally, the court observed that any party dissatisfied with the licensing fees set by ASCAP could appeal to the District Court for the Southern District of New York for a determination of the reasonableness of the fee.¹⁷¹ The court affirmed the trial court's order of one thousand dollars of damages for the plaintiff and an injunction barring K-91 from future infringing conduct.¹⁷²

The Supreme Court finally addressed the issue of blanket licensing in *Broadcast Music, Inc. v. Columbia Broadcast System, Inc. (BMI)*.¹⁷³ CBS challenged the blanket license as a *per se* violation of the Sherman Act. After reviewing the structure and purpose of the performing rights societies, the Court held that a rule-of-reason analysis should apply.¹⁷⁴ The *BMI* decision relied on four factors. First, potential licensees could negotiate directly with copyright owners, or obtain a per program license for musical pieces from BMI. If licensees were dissatisfied with the blanket license fees, they could ask the district court to review the fee schedules.¹⁷⁵ Second, the Court observed that the Copyright Act of 1976 itself provides for compulsory blanket licensing of cable television,

F. Supp. 334, 336 (S.D.N.Y. 1960) (dictum). Cf. *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947).

A copyright misuse defense presents a similar problem. The defense doctrine of copyright misuse was established in *Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948). The court found that pooling public performance rights gave members of the society rights beyond the limited monopoly granted by the Copyright Act. *Id.* at 846-47. The court stated:

However free plaintiffs and their associates in ASCAP may have been from any design or intent to extend their copyright monopoly, or however beneficial it may be for them to carry on their business in this manner, or however inconvenient it may be for them to function otherwise, such facts and circumstances will not permit them to enlarge their lawful monopoly.

Id. at 848. Copyright misuse claims are independent of antitrust claims. Fine, *Misuse and Antitrust Defenses to Copyright Infringement Actions*, 17 HASTINGS L.J. 315 (1965) (misuse doctrine covers all types of conduct which extend copyright monopoly grant); Gibbs, *Copyright Misuse: Thirty Years Waiting for the Other Shoe*, 23 CORP. L. SYMP. (ASCAP) 31 (1977) (courts should not confuse the antitrust laws with the defense doctrine of copyright misuse).

171. *Gershwin*, 372 F.2d at 3-4.

172. *Id.* at 2.

173. 441 U.S. 1 (1979).

174. The majority never addressed the question of whether blanket licensing constituted an illegal tying arrangement and CBS chose not to appeal that finding because the district court found that BMI was not liable under that count. *Id.* at 6-7. Justice Stevens' dissent, however, applied the tying arrangement analysis to the blanket licensing practice, which he characterized as "blockbooking." *Id.* at 28 n.12 (Stevens, J., dissenting). Although an individual license was available to users, Justice Stevens found that blanket licensing caused price discrimination and significant barriers to entry into the performing rights society market. *Id.* at 37. Thus, he found the blanket license constituted an illegal tying arrangement. *Id.* at 38. See *supra* note 157.

175. *BMI*, 441 U.S. at 11-12.

broadcasters, juke box owners, and record distributors.¹⁷⁶ Third, the Court addressed the realities of the market. Not only would thousands of copyright owners have trouble policing the public performances of their works, but the transactional costs of negotiating separate licenses would be extremely high.¹⁷⁷ Finally, the Court observed that competition among composers was not reduced because the blanket license was, in essence, a different good than that offered by a single composer. The Court observed that consumers preferred the blanket license over the individually negotiated license.¹⁷⁸ The Court remanded the case to the district court with orders to consider the above factors in rendering an opinion under the rule-of-reason analysis.

BMI, however, did not stop the flow of private suits. A small bar owner challenged the blanket licensing arrangement in *Broadcast Music, Inc. v. Moor-Law, Inc.*¹⁷⁹ BMI sued Moor-Law for infringement, and Moor-Law counterclaimed that the blanket license constituted an illegal tying arrangement and price fixing under the Sherman Act.¹⁸⁰ Using the rule-of-reason analysis prescribed by the Supreme Court in *BMI*, the district court found that the practice did not violate the antitrust laws.¹⁸¹

The court in *Moor-Law* adopted a rationale quite similar to that in *BMI*. Observing that numerous copyright owners and entertainment establishments existed in the market, the court found that licensing directly from the copyright owner would be costly. The performing rights societies reduced transactional costs and facilitated quick and efficient licensing. The court distinguished *BMI* by observing that, unlike other large industries which had some market power as buyers, the small entertainment establishments lacked bargaining power in the marketplace.¹⁸²

The court determined, however, that blanket licensing consti-

176. *Id.* at 15-16. For a discussion of compulsory licensing see *infra* text accompanying notes 217-31.

177. The Court observed that "[i]ndividual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers." *BMI*, 441 U.S. at 20. See *Market Power*, *supra* note 152, at 107-11 (discussing the transactional costs of identification, information, time and enforcement).

178. The Court noted that CBS had never attempted to obtain anything but a blanket license. *BMI*, 441 U.S. at 5-6. On remand, the Second Circuit applied the rule of reason analysis and found that blanket licenses were not anticompetitive, and because they were a result of consumer preference, they did not violate the Sherman Act. *Columbia Broadcasting Sys. v. American Soc'y of Composers*, 620 F.2d 930, 934 (2d Cir. 1980).

179. 527 F. Supp. 758 (D. Del. 1981).

180. *Id.* at 759.

181. *Id.* at 765, 775.

182. *Id.* at 762-64.

tuted an illegal tying arrangement.¹⁸³ The court then applied a rule-of-reason analysis to determine whether alternative pricing structures would reduce some of the anti-competitive effects of the tying arrangement.¹⁸⁴ Moor-Law proposed a mini-license by music category, which the court rejected because of classification problems.¹⁸⁵ A per use system based upon random sampling was rejected because of increased transaction costs.¹⁸⁶ Finally, the court declined to use its authority to oversee the fees charged by BMI because the constant oversight would require them to function as a regulatory agency.¹⁸⁷ As a result, the court found blanket licensing of entertainment establishments did not violate the antitrust laws.¹⁸⁸

The rule-of-reason analysis yielded a different result in *Buffalo Broadcasting Co. v. ASCAP*.¹⁸⁹ Local television stations initiated a class action suit challenging the blanket license issued by ASCAP.¹⁹⁰ The court analyzed the market and found that syndicated television programming¹⁹¹ comprised sixty-five to seventy-five percent of all local television programming. Locally-produced programs comprised the remaining programming.¹⁹² Local stations purchased blanket licenses primarily to cover music rights for the syndicated programs.¹⁹³

183. *Id.* at 765-66. The court analogized BMI's blanket licensing practices to the blockbooking arrangements previously condemned by the Supreme Court. See *supra* note 158.

184. The court listed the anticompetitive effects as increasing the copyright monopoly power of the artist holding the copyright to the inferior good, higher prices to the purchaser, and barriers to entry for potential BMI competitors. *Moor-Law*, 527 F. Supp. at 766.

185. *Id.* at 767. Moor-Law proposed licensing by categories such as country western, bluegrass, folk, and other musical genre. *Id.* at 767. An expert testified that while categorization based upon song score and lyrics would be difficult, there was no way to control the style in which the performer chose to sing the work. *Id.* at 768.

186. *Id.* at 769. The court also found that the random sampling system would not materially affect the market constraints existing under the blanket licensing system. BMI would still have the power to set a per use random sampling price base. *Id.* at 770.

187. *Id.* at 772. The court quoted from an opinion by Judge Kaufman and noted that "[j]udicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. We would be wise to decline that function unless Congress clearly bestows it upon us." *Id.* at 772 (quoted in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979)).

188. *BMI*, 527 F. Supp. at 775.

189. 546 F. Supp. 274 (S.D.N.Y. 1982).

190. *Id.* at 276.

191. Syndicated television programs are motion pictures and prerecorded and live television programs that local stations may purchase or license for non-network broadcast. *Id.* at 279.

192. *Id.*

193. The court observed that music in television programs was either feature music, where the focus was on the song itself, theme music which opened pro-

The court followed an analysis similar to that used by the court in *Alden-Rochelle*.¹⁹⁴ Once again, composers gave television producers only synchronization rights to the music, and then demanded public performance royalties from stations when the programs were aired.¹⁹⁵ The court observed that negotiations between the producer and composer for synchronization rights were price competitive, while local stations were forced to accept blanket licenses for music performance rights.¹⁹⁶

The court in *Buffalo Broadcasting* found that source licensing of music performance rights for syndicated programming presented a workable solution.¹⁹⁷ Direct licensing for locally-produced programs was found to be more competitive and cost effective than blanket licensing.¹⁹⁸ The court enjoined BMI from issuing blanket licenses to local television stations.¹⁹⁹

*Formation of a Performing Rights or Licensing Right's Society
for Owners of Copyrighted Videotapes*

Theoretically, owners of copyrighted films embodied on videotape could band together to form a performing rights society or licensing rights society.²⁰⁰ Copyrights to a film are typically owned

grams, or background music within the program itself. *Id.* at 281. Local stations could control the amount and type of music they used in their own productions, but they had to accept the music within the syndicated programs if they wanted to broadcast the syndicated shows. *Id.*

194. See *supra* text accompanying notes 160-67.

195. *Buffalo Broadcasting*, 546 F. Supp. at 281-84.

196. *Id.* at 284. The court found that local stations had no bargaining power and could not negotiate favorable licensing fees with BMI because the bidding for the syndicated programming itself was highly competitive. *Id.* at 280. Eight companies controlled licensing of the syndicated programming desired by 750 local stations. *Id.* at 279-80. Thus, the local stations were forced to accept the responsibility of obtaining music performance rights if they wanted the syndicated programs. *Id.* at 289.

197. Because the producers had the power to set prices at the time synchronization rights were obtained. *Id.* at 284. The court found that source licensing of syndicated television program music performance rights would increase competition among composers. *Id.* at 292.

198. Local stations could choose pieces of music they wished to place in their own productions. *Id.* at 291. They were free to deal with owners of preexisting pieces of copyrighted music or hire a local composer to create music that they needed. *Id.* These transactional costs would be significantly less than negotiating for vast numbers of licenses in the syndicated programs. *Id.* at 294.

199. *Id.* at 296.

200. This next section assumes that all copyright owners of motion pictures assign their performances or licensing rights to a society for enforcement. The analysis would be the same, however, if each motion picture studio decided to license their films on a blanket basis. While price-fixing would not be an issue because there would be no "combination," blanket licenses from one studio would still theoretically constitute a tying arrangement.

by the producer of the film or the motion picture studio.²⁰¹ Such a group is more concentrated and powerful than the myriad of small composers, authors, and publishers which comprise the bulk of BMI and ASCAP membership.²⁰² While the members may be more powerful, the policing problems still exist. Video retail operations are proliferating, and monitoring each film rental presents a herculean task.²⁰³ Individual negotiations would have exceedingly high transactional costs.²⁰⁴ These market conditions are what initially prompted the formation of BMI and ASCAP.²⁰⁵

The question becomes whether blanket licensing of pre-recorded videotapes to retailers would violate the antitrust laws. The rationales in *Alden-Rochelle* and *Buffalo Broadcasting* do not apply to film performance and licensing rights. Film performance and licensing rights are not obtained by the producer in the course of production.²⁰⁶ Performance and licensing rights to a film are held by the studio itself, and not by a third party.²⁰⁷ Thus, the concept of encouraging "source licensing" is inapplicable to the videotape rental controversy. The source itself owns the copyright.²⁰⁸

In contrast, the rationale of *BMI* and *Moor-Law* readily adapts to an analysis of the videotape rental controversy. As in *BMI*, the video store retailer could directly negotiate fees for licensing or performance rights with the copyright owner. The cost of negotiations on each film would be prohibitive, just as the cost of individual

201. *Columbia Pictures Indus. v. Redd Horne, Inc.*, 568 F. Supp. at 494-95 (W.D. Pa. 1983).

202. ASCAP has approximately 21,000 writer and 8,000 publisher members. BMI has 38,000 writer and 22,000 publisher members. *Buffalo Broadcasting Co., Inc. v. American Soc'y of Composers, Authors & Publishers*, 546 F. Supp. 274, 277 (S.D.N.Y. 1982). In contrast, the primary videotape distributors are Metro-Goldwyn-Mayer, Columbia Pictures, Twentieth Century Fox, Paramount Pictures, Walt Disney Studios, Embassy Studios, Warner Brothers, and Universal City Studios. Commtron Corporation Video Tape Price List, effective 2/01/84.

203. Takiff, *supra* note 85.

204. *See supra* notes 15 and 16.

205. *BMI*, 441 U.S. at 4-5. Even a private synchronization rights broker, The Harry Fox Agency, functions similarly to BMI and ASCAP. The agency serves as the agent for approximately 3,500 publishers. Persons wishing to use a published piece of music contact the Harry Fox Agency, which sets a price for use of the piece. While negotiations and prices are set on a per piece basis, pooling of all the copyrights with a single agent reduces the costs of locating the copyright owner before negotiations begin. *See Buffalo Broadcasting*, 546 F. Supp. at 284; *Alden-Rochelle*, 80 F. Supp. at 893. *See generally Market Power, supra* note 152, at 122 (argues that Harry Fox negotiations are not competitive and closely resemble blanket licenses).

206. *See supra* text accompanying notes 158-67, 190-99.

207. In fact, the *Alden-Rochelle* holding that synchronization rights and performance rights can not be split obviates the need for the video retailer to obtain music performance rights when renting his tapes. *See supra* text accompanying notes 157-66.

208. *Buffalo Broadcasting*, 546 F. Supp. at 284.

transactions made per program licensing impractical in *BMI*.²⁰⁹ Moreover, the pricing alternative rejected by the *Moor-Law* court should also be rejected in the present case.²¹⁰ The category blanket license is impractical because a single film can be categorized in several genre.²¹¹ Keeping books to assess a per-use price based on random sampling would simply add additional costs to rental transactions, which would probably be passed on to the consumer.²¹² Finally, seeking court intervention to review fees is a long, costly process, which judges and plaintiffs have been reluctant to use as a remedy.²¹³

A performing rights society to monitor videotape rentals and grant licenses to retailers would thus withstand antitrust challenges under the precedent of *BMI* and *Moor-Law*.²¹⁴ Although price competition would be reduced because retail owners would not be bidding on individual films, the transaction costs of a per use system would be prohibitive.²¹⁵ The society would have power to fix prices, and probably would come under Justice Department scrutiny, and eventually, would be limited by a consent decree to prevent potential abuses of monopoly power.²¹⁶ Given the parallels between the video market and those in *BMI* and *Moor-Law*, and the lack of feasible alternatives to a blanket licensing scheme, the society could present a practical, cost effective way to compensate copyright owners for licensing and public performance rights for their works embodied on videotape.

Compulsory Licensing

Compulsory licensing could also secure a copyright owner's right to royalties due on videotape rentals.²¹⁷ While specific language would have to be added to either the first sale or public per-

209. See *supra* text accompanying note 178.

210. See *supra* text accompanying notes 184-88.

211. Typical categories of films include comedy, drama, horror, action/adventure, foreign, musicals and children's films. "All That Jazz" featured song and dance, but had a serious dramatic theme. "My Dinner With Andre" contained serious food for thought interspersed with some hilarious moments. While many consider "The Paper Chase" a drama, most law students or lawyers can find a good deal of humor in the film.

212. See *supra* text accompanying note 187.

213. See *Market Power*, *supra* note 152, at 121-24 (analysis of litigation costs and the limits of the District Court for the Southern District of New York's power to review licensing fees).

214. See *supra* text accompanying notes 152-99.

215. *Id.*

216. See *supra* note 158.

217. Compulsory licensing, with collection of royalties by the Copyright Royalty Tribunal, was established by the Copyright Act of 1976. See generally Brylawski, *The Copyright Royalty Tribunal*, 24 UCLA L. REV. 1265 (1977) (discussion of the organization and operations of the Copyright Tribunal and its compulsory licensing functions).

formance amendments to include tape rentals in this scheme, the remedy is feasible. As with cable transmissions, record sales, jukebox performances, and broadcasts, the Register of Copyrights would establish royalty fees for public performance or licensing rights of videotapes.²¹⁸ Video retailers would have to file an application of intent to use the copyrighted work with the Copyright Office.²¹⁹ A fee, probably monthly, would be assessed against rental vendors.²²⁰ Fees could be based on playing time of the tape multiplied by the number of rentals, a flat fee for each rental, a monthly flat fee for use of all prerecorded tapes, or by some other measuring device.²²¹ A vendor's failure to comply with the compulsory licensing would render him liable for an infringement suit under section 501.²²²

An alternative compulsory licensing scheme regulates the royalties due from broadcasters to copyright owners of nondramatic musical works, and published pictorial, graphic and sculptural works.²²³ Section 118(b) provides that "[n]otwithstanding any provision of the antitrust laws," broadcasters may negotiate separately for nondramatic music rights and pictorial, graphic, and sculptural display rights.²²⁴ A common agent may be appointed to collect and distribute royalty fees.²²⁵ These voluntary agreements will supersede any rates set by the Copyright Royalty Tribunal if the rates are filed with the Tribunal within thirty days of execution.²²⁶ Thus, section 118 presupposes the formation of a licensing rights society to handle the negotiations on behalf of the copyright owners.²²⁷ Given the apparent antitrust immunity, these organizations would not face the antitrust problems encountered by BMI, ASCAP, or an independently formed organization to secure licenses for royalties

218. 17 U.S.C. §§ 111, 115, 116 (1982). The Copyright Royalty Tribunal also has the ability to set rates for the broadcast industry if the individuals do not choose to negotiate a separate agreement. *Id.* § 118(b).

219. For example, section 115 governs licenses for making and distributing phonorecords. A record distributor must apply for the license prior to the distribution of any records. The filing of an application provides notice to the copyright owners and precludes infringement suits. *Id.* § 115(b).

220. Monthly fees are assessed against record distributors. *Id.* § 115(C)(3). Jukebox royalties are paid annually. *Id.* § 116(B)(1)(a). Cable royalties are collected and accountings rendered semiannually, *id.* § 111(d)(2), with annual distribution of funds. *Id.* § 111(d)(5).

221. Record distribution royalties are now collected on each record sold. The fee is based upon the larger of two and three-fourths cents, or one-half of one cent per minute of playing time. *Id.* § 115(C)(2).

222. *See id.* § 115(4) (failure to comply with licensing requirements renders record distributor liable for infringement).

223. *Id.* § 118(b).

224. *Id.*

225. *Id.*

226. *Id.* § 118(b)(2).

227. Brylawski, *supra* note 217, at 1275. No similar society for pictorial, graphic, and sculptural artists has yet been formed. *Id.* at n.60.

due on tape rentals.²²⁸

Such a system, however, again places the bargaining power in the hands of the performing rights societies.²²⁹ Thus, compulsory licensing with fees set by the Copyright Royalty Tribunal is the most desirable course. First, a federal agency will be setting fees, rather than a private performing rights society. Second, the Registrar of Copyrights can hold hearings to determine the needs of the market and revise fees from time to time after a full study of market economics and consumer needs.²³⁰ Third, the government has the resources to analyze the market, and to set fees which would adequately compensate copyright owners without limiting consumer access to the copyrighted works because of artificially high retail prices resulting from excessive royalty fees.²³¹

Market Controls

Until Congress decides upon a statutory solution to the videotape rental dispute, copyright owners must contend with the existing rental market which deprives copyright owners of royalties each time a tape is rented. In 1981, Paramount Pictures/Paramount Home Video acknowledged that 100 percent of retailers purchasing its prerecorded video tapes were in the rental business.²³² A program of mark-ups on sales prices was instituted based upon the rental potential of the movie. Mark-ups of 200 percent were witnessed by the retail video store owners.²³³ Paramount surrendered to the tape rental phenomenon and simply devised a system to compensate artists by projecting the estimated lost royalties on rentals into the retail sales price of the prerecorded videotape. This tactic, however, appears faulty upon closer analysis. Raising retail prices of prerecorded tapes to such excessive prices would discourage consumers from purchasing films for their own home use.²³⁴ The prac-

228. See *supra* text accompanying notes 152-216.

229. *Id.*

230. Rates for cable television are reviewed every five years. Record royalty rates are reviewed every ten years, as are jukebox royalty fees. A five year review period, commencing with 1982, was set for broadcasters. *House Report, supra* note 8, at 112.

231. The Copyright Royalty Tribunal receives assistance from the Library of Congress and experts in the field of copyright. *Id.*

232. *Cheaper by the Dozen, supra* note 82, at 268. As the Vice President of Paramount Home Video, Richard Childs, stated: "We simply legitimized what was going on. . . . We sell the product with a price that includes rental royalties and the dealer does what he wishes. We've found, however, that 100 percent of our retailers are now in the rental business." *Id.* at 268 n. 46, citing, Walter, *Predict 322% Leap in Paramount Sales*, BILLBOARD, Jan. 1981, at 73.

233. *Testimony of Elmer Cooper, supra* note 7, at 695.

234. Tapes priced at \$59 to \$109 typically sell 14,000 copies. Conversely, prices of \$29.95 to \$39.95 result in sales upwards of 150,000 copies. *House Hearings: Ron Berger, supra* note 96, at 904.

tice simply guarantees an even greater consumer need for rental tapes, and gives the video retail rental stores a solid hold on the prerecorded tape rental market.

In late 1983, Paramount switched tactics. Instead of pricing the prerecorded tapes based upon the anticipated lost royalties due to rentals, the company decided to court the consumer. Tim Clott, of Paramount Home Video, stated that the goal was a reasonably priced tape to spur consumer sales. Royalties on the prerecorded tapes would thus be collected on each tape based upon one sale, rather than figuring the cost of lost royalties on rentals into the retail price.²³⁵

Thus, new releases from Paramount were priced at \$29.95 and \$39.95. While a normal \$80 prerecorded tape sells 30,000 copies, sales of the new lower priced tapes have skyrocketed.²³⁶ A Field Research Corporation study revealed that 23 percent of all consumers were building tape libraries, either legally or illegally.²³⁷ Paramount's move to give consumers reasonably priced prerecorded tapes was an astute response to public demand.²³⁸

CONCLUSION

The videotape rental controversy is one area in which case-by-case decisions will only confuse the questions and provide incomplete or unworkable answers. Although a work embodied on videotape can be copyrighted under the new Act, no statutory language or congressional comment addresses the issues raised in the evolving home video industry. Existing statutory provisions, moreover, offer little guidance. The case law and doctrines underlying the first sale provisions of section 109(a) indicate that a purchaser who takes title of a prerecorded videotape can dispose of or use the work as he pleases. Conversely, if sequential renting of the same tape falls within the definition of a public performance, copyright own-

235. Takiff, *supra* note 84.

236. February 1984 figures show that "Star Trek: The Wrath of Kahn" sold 150,000 copies, while "Flashdance" sold 250,000 copies. The popular "Raiders of the Lost Ark" sold a remarkable 500,000 copies. *Id.* Because of the new reduced tape prices, sales now constitute 10 percent of the video retailer's business, as compared to 5 percent for the previous year. CONSUMER ELECTRONICS, May 1984.

237. *Saved by the Numbers*, TIME, December 4, 1981, at 58.

238. Apparently, other motion picture studios are following Paramount's lead. Warner Brothers released "Risky Business" with a \$39.95 price tag. Commtron Corporation Video Tape Price List, effective 2/01/84. Vestron released "Making of Michael Jackson's Thriller" at \$29.95. Both have been highly successful. *Top Tapes*, VIDEO REV., May 1984, at 64.

Consumers have responded favorably to the lower price tags. In 1983, 24 percent of all videotape consumers had purchased a prerecorded tape. This was a six percent increase over consumer tape purchase in 1982. Bowden, *supra* note 72.

ers have the right to control the use of their works through licensing.

Studios and retailers alike have urged Congress to clarify the issue. Amending the first sale doctrine, as currently proposed, or the public performance definition both offer workable solutions. The problem lies in developing an adequate remedy to enforce the licensing right. Studios can embark on a spree of litigation to obtain damages from video retailers. Other alternatives include undertaking the monstrous task of developing licensing arrangements for each store or assigning their rights to a performing rights or licensing society for monitoring and distributing royalties.

In the past, performing rights societies' blanket licensing agreements have been challenged as violative of the antitrust laws. The Supreme Court softened the *per se* rule against price fixing in the *BMI* case, holding that the unique market structures of the industry require a society to enforce the copyright purposes of compensating the copyright owner. A lower court subsequently rejected a series of alternative pricing arrangements in favor of the blanket license. Given this line of analysis, it appears unlikely that the new performing rights society will be dismantled on the basis of antitrust violations.

Because the other alternatives present unanswered antitrust questions, bookkeeping problems, and potential litigation costs, compulsory licensing may be the least troublesome course. The Copyright Royalty Tribunal can simply add another area of compulsory licensing to the four areas it already oversees. An impartial governmental body would set and review fees to reflect market prices and consumer needs.

The best solution, however, may simply be for studios to exercise sound business acumen. The home video industry is booming and consumers are anxious to build home videotape libraries. Instead of placing affordable price tags on prerecorded videotapes to meet consumer demands, however, studios set the high prices on prerecorded tapes which contributed to the creation of the rental market, which usurps royalties and studio profit. Paramount's lower-priced line of videotapes resulted in successful sales records. Perhaps other studios will feel some competitive pressure and adjust their retail prices. The rental market will probably never be eliminated because consumers simply do not want to own a copy of every film they may want to view. Competitive pricing, though, offers an attractive, workable solution at least until Congress resolves the statutory questions.