

## NOTE

# The Availability of the Fair Use Defense in Music Piracy and Internet Technology

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## I. INTRODUCTION

As technology advances, musical artists and the recording industry face new challenges for protecting the copyrights of their works. Much of the new technology is inexpensive and readily available on the Internet, often at the expense of copyright protection. Online stores like Amazon.com or bmgmusic-service.com, musical artist home pages, and unofficial Web sites maintained by fans are some of the newest means through which music aficionados may listen to and purchase music. Unfortunately, despite the large number of legitimate sites over which listeners may listen or purchase music, the majority of Internet music sites are illegitimate, featuring music publicized online without permission from the copyright holder. Moreover, the Internet often leaves the music industry without copyright infringement remedies since Webmasters cannot be located without significant costs and Web users are often too removed from the initial infringement.

Because the recording industry seeks to protect its copyrights from Internet piracy, it also has encountered adversity dealing with companies that produce devices that encourage or simplify piracy. One such device is the Rio PMP 300 (Rio), a hand-held device manufactured by Diamond Multimedia Systems, Inc., which makes portable MP3 files downloadable from the Internet. Although the Rio has no output capability—it is not able to generate copies—it stores music on removable memory cards, which creates another method enabling people to purchase, trade, or obtain pirated music.<sup>1</sup> Because of the Rio's functioning capacity and its lack of certain copyright protection devices, the Recording Industry Association of America (RIAA)<sup>2</sup> filed a lawsuit against Diamond Multimedia in 1998 seeking to enjoin Diamond from selling and distributing the Rio.

This Note examines some of the factors that influence portable MP3 technology, and the MP3 impact on copyright protection and fair use. Part II of this Note discusses the case of *Recording Industry Association of America v. Diamond Multimedia Systems, Inc. (Rio)*,<sup>3</sup> where the RIAA opposed a portable music player manufactured by Diamond Multimedia because the device lacked anticopying mechanisms, and Diamond Multimedia refused to pay royalties to the RIAA from the sale and use of

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1. See *RIAA Sues over Internet Music Recorder*, CONSUMER MULTIMEDIA REPORT, Oct. 19, 1998, at 2, available at 1998 WL 11069328.

2. The RIAA, as the largest association of recording artists, includes the five largest recording labels in America, including Sony Music Entertainment, Inc., BMG Entertainment, EMI-Recorded Music, Universal Music Group, and Warner Group. Its total sales account for almost 90% of all music sales each year.

3. 180 F.3d 1072 (1999).

copyright-protected music. Although the court decided the case under the Audio Home Recording Act of 1992 (AHRA),<sup>4</sup> the case involved copyright issues concerning unauthorized copying and payment of royalties. Therefore, for the purpose of this Note, Part II reclassifies *Rio* as a case falling directly under the Copyright Act of 1976. Part III presents the case as a fair use question and discusses the courts' treatment of the four factors of fair use under section 107 of the Copyright Act. Part IV examines the *Rio* case under a fair use analysis, focusing on whether the *Rio* user has a fair use defense in an infringement action by copyright holders. Finally, Part V discusses how the fair use argument could affect the music industry.

## II. *RECORDING INDUSTRY ASSOCIATION OF AMERICA V. DIAMOND MULTIMEDIA SYSTEMS, INC.*

Music sound files are readily available online in MPEG 1 Layer 3 (MP3) format, a technology that compresses digital sound files. MP3 has the capability of compressing an audio file by a factor of twelve to one without significantly reducing the sound quality of the music.<sup>5</sup> This is an attractive format for Internet users because it is available for anyone to use, and it permits large amounts of information to be stored on a relatively small amount of computer space. Such ease in locating, distributing, and storing should prompt the music industry to embrace the new technology and expand its sales and marketing methods, but the recording industry has instead been reluctant to market MP3 sales because of the increased potential for music piracy and bootlegging.<sup>6</sup>

Already, the music industry estimates that it loses over five million dollars each year to music piracy<sup>7</sup> because of number of illegitimate Web sites that feature copyright-protected music without the permission of the copyright owner. Oftentimes, college students or oversea Internet users

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4. 17 U.S.C. § 1001 (1994).

5. *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1074 (9th Cir. 1999).

6. *See* Don Jeffrey, *Role, Growth of Online Retailing Discussed at NARM Confab*, BILLBOARD, Oct. 3, 1998, at 66. Bootlegging is the practice in which a person produces an unauthorized copy of a commercially unreleased performance. *See* Dowling v. United States, 473 U.S. 207, 209-10 n.2 (1985). This is distinguished from piracy, by which a person produces an unauthorized copy of a performance that has already been released commercially. *See id.* Although *Rio* primarily addressed music piracy, the discussion in this Note will focus on both piracy and bootlegging because the development of the recordable compact disc (CD) player, CD burner, and CD-R largely expand the ability for bootleggers to create digital copies of concert performances, television appearances, and other "out takes," which can then be digitally copied as easily as music already embodied in digital format.

7. *See* Jeffrey, *supra* note 6, at 66.

maintain such Web sites by uploading the audio files from personal CD collections and placed on a personal Web site for friends and others to enjoy. While the RIAA, fights to eliminate illegitimate music sites on the Internet, new sites pop up each day to replace the sites that have been eliminated, and the recording industry is simply unable to police and close down the many illegitimate sites. As a result, despite the fact that legitimate Internet music sales totaled over thirty-six million dollars in 1997, the RIAA still asserts that the Internet distribution of pirate copies will discourage the purchase of legitimate recordings.<sup>8</sup> The RIAA further predicts that revenues lost to Internet piracy will soon surpass money lost through all other forms of piracy combined.<sup>9</sup>

#### A. *Ninth Circuit Case Interpretation*

In October 1998, the RIAA filed a lawsuit in California seeking to enjoin Diamond Multimedia from the distribution and sale of a portable device—the Rio—capable of storing and replaying digital audio files transferred from the hard drive of a personal computer.<sup>10</sup> Specifically, the RIAA alleged that the Rio violated the AHRA,<sup>11</sup> which requires all digital audio recording devices to be equipped with certain copyright protection devices, including a system that monitors and manages the copying ability of the device and a royalties provision.

The Rio, a small hand-held device, functions like a walkman or portable CD player. Users can play music through the Rio and listen to it using headphones. Prior to the Rio, listeners of MP3 audio files listened to the music though headphones or speakers at their computers.<sup>12</sup> The Rio, however, makes listening to MP3 files portable.

A user of the Rio downloads MP3 files from the Internet or from his or her personal computer where CDs have been transferred. The MP3 files can then be transferred onto a flash memory card playable in the Rio.<sup>13</sup> These cards can hold about sixty minutes of music or sixteen hours of spoken material.<sup>14</sup> Users can add a flash memory card to store up to an additional hour of music,<sup>15</sup> or they can purchase additional flash memory

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8. *See id.* at 65.

9. *See Diamond Multimedia Systems, Inc.*, 180 F.3d at 1074. Currently, the RIAA alleges that it loses \$300 million to other traditional forms of piracy.

10. *See id.* at 1072.

11. *See* 17 U.S.C. § 1001 (1994).

12. *See Diamond Multimedia Systems, Inc.*, 180 F.3d at 1074.

13. *See id.* at 1074-75.

14. *See id.* at 1075.

15. *See id.*

cards to hold a different sixty-minute set of music to play in the user's Rio or another Rio.

Like the walkman and CD player, the Rio has no audio output capability;<sup>16</sup> the device can play back music but it cannot record music. Still, the Rio surpasses the older devices in various respects. Unlike the walkman, which allows a user only to play analog audio tapes, the Rio plays digital music. The result is a crisper, cleaner recording more true to the original recording sound than an analog copy. In addition, unlike the portable CD player, which also plays digital music, the Rio has no moving parts. This means that the listener will enjoy music free of any skips, repeats, or other interruptions caused by any shock to a normal portable CD player.

In the lawsuit against Diamond Multimedia, the RIAA alleged that the Rio did not meet the requirements for a digital audio recording device under the AHRA.<sup>17</sup> Specifically, the RIAA alleged that the Rio did not employ the required Serial Copyright Management System (SCMS),<sup>18</sup> and that Diamond Multimedia owed royalties under the Act as the manufacturer and distributor of a digital audio recording device.<sup>19</sup>

To determine whether the Rio violated the AHRA, the court had to decide whether the Rio was a digital audio recording device. The AHRA defines a "digital audio recording device" as:

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16. See *RIAA Sues over Internet Music Recorder*, *supra* note 1, at 2.

17. See *Diamond Multimedia Systems, Inc.*, 180 F.3d at 1075.

18. Section 1002(a) of the AHRA requires that all digital audio recording devices be equipped with the SCMS or a functionally equivalent system. The SCMS generates certain copyright information which it sends, receives, and acts upon to prevent unauthorized copying. See 17 U.S.C. § 1002(a) (1994). Its central purpose is to minimize copying of copies, permitting a first-generation copy to be made from the original, while preventing copies produced from that first-generation copy. See Malcolm Maclachlan, *Digital Music Needs Copyright Protection*, TECHWEB NEWS, Oct. 22, 1998, at 1-2, available in LEXIS, News Group File. Although the SCMS does prevent second-generation copying and beyond, it is not without flaws, because it will not prevent infinite first-generation copies from being produced from the original phonorecord.

19. Section 1003 requires any person who imports and distributes, or manufactures and distributes, any digital audio recording device to give notice to the Register of Copyrights with respect to the device, and to make royalty payments for the device. See 17 U.S.C. § 1003 (1994). The AHRA also states the royalty payment due is two percent of the transfer price and limits the requirement of payment only to the first person to manufacture and distribute the device. See 17 U.S.C. § 1004(a)(1) (1994). This provision was essentially a compromise by the music industry for sales lost to the home taping of analog music, but if applicable to devices like the Rio, would also compensate musicians for lost sales due to Internet music piracy. See *RIAA Wins Restraining Order on Rio Portable*, CONSUMER ELECTRONICS NEWSLETTER, Oct. 19, 1998, at 2, available at 1998 WL 10716444; Tracey Snell, *MP3 Player Comes to UK as US Legal Fight Begins*, MUSIC WK., Oct. 24, 1998, at 6, available at 1998 WL 11882859.

[A]ny machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use.<sup>20</sup>

A “digital audio copied recording” is defined by the AHRA as “a reproduction in a digital recording format of a digital music recording, whether that reproduction is made directly from another digital music recording or indirectly from a transmission.”<sup>21</sup> A “digital musical recording” is defined as:

[A] material object—

(i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and

(ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.<sup>22</sup>

The Ninth Circuit Court of Appeals held that the Rio was not a digital audio recording device because it recorded from a computer hard drive, which Congress exempted from the AHRA since the hard drives contain more than “only sounds, and material, statements, or instructions incidental to those fixed sounds.”<sup>23</sup> Moreover, the Act excluded from the term “digital musical recording” a material object “in which one or more computer programs are fixed.”<sup>24</sup> Although this holding appeared to create a loophole by simply passing the music through a computer and allowing the file to reside momentarily on the hard drive, the court determined that the AHRA made this evasion permissible by design.<sup>25</sup> Finally, the Rio was not a digital audio recording device because it could not reproduce a digital music recording from a transmission.

### *B. The Rio Case as a Fair Use Issue*

Having determined that the Rio was not a digital audio recording device, the court did not subject the Rio to the AHRA’s requirements and had no need for further examination. The court stated, however, that the Rio “merely makes copies in order to render portable, or space-shift those

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20. 17 U.S.C. § 1001(3) (1994).

21. *Id.* § 1001(1).

22. *Id.* § 1001(5)(A)(i)-(ii).

23. Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1076 (9th Cir. 1999) (quoting 17 U.S.C. § 1001(5)(A)).

24. *Id.*

25. *See id.* at 1078.

files that already reside on a user's hard drive,"<sup>26</sup> thereby analogizing the use of the Rio for space-shifting purposes to *Sony Corp. of America v. Universal City Studios, Inc. (Betamax)*,<sup>27</sup> where the court held that video taping television shows for the purpose of time-shifting was a permissible use under the Copyright Act. The *Betamax* court stated that "such copying is paradigmatic noncommercial personal use entirely consistent with the purpose of the Act."<sup>28</sup>

Because the court had no occasion to look at the *Rio* case from a fair use perspective, this Note examines the case as one of fair use to reach the same conclusion as the Ninth Circuit. Downloading files from the Internet—even pirated files—for the purposes of placing such files on the Rio to listen to MP3 files away from a personal computer is a fair use under the Copyright Act. Because the court has had only few occasions to examine copyright issues on the Internet and none pertain directly to the issue of fair use, Part IV of this Note analogizes this case to other fair use cases involving newly developed technology. Thus, the next section discusses the historical development of the fair use doctrine as it relates to new technologies.

### III. THE HISTORICAL DEVELOPMENT OF FAIR USE

*Folsom v. Marsh*<sup>29</sup> was the first case to introduce the doctrine of fair use, an affirmative defense to a copyright infringement suit, to American jurisprudence. In *Folsom*, the court permitted the copying of numerous works included in the plaintiff's copyrighted biography of George Washington. In finding that the copying was a permissible use—despite the prima facie showing of copyright infringement—the court looked to the following factors: (1) the nature and objectives of the selections made; (2) the quantity and value (quality) of materials used; and (3) the degree to which the use may prejudice the sale by the plaintiff or diminish the plaintiff's profits.<sup>30</sup> Congress later codified these factors in section 107 of the Copyright Act of 1976, which reads as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether

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26. *Id.* at 1079.

27. 464 U.S. 417 (1984).

28. *Id.* at 447.

29. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

30. *See id.* at 344.

the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>31</sup>

It is important to note that by codifying the doctrine of fair use, the legislature only intended to recognize the privilege statutorily, to “restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”<sup>32</sup> In the litany of cases decided after codification of section 107, the court continued to examine the applicability of the fair use defense on a case-by-case basis. This, coupled with the common law tradition of fair use adjudication, best demonstrate the Congress’s intention. The next parts focus on fair use cases involving newly developed technologies, specifically the video cassette recorder (VCR) and the photocopier.

#### A. *Video Recording Technology and Fair Use*

In *Betamax*,<sup>33</sup> the Court examined the fair use defense as it related to the manufacturer of a videotape recorder capable of copyright infringement.<sup>34</sup> Sony manufactured the Betamax, a home VCR capable of, among other things, playing back already-taped video cassettes or recording television programs.<sup>35</sup> Universal Studios brought a copyright infringement lawsuit against Sony, alleging that the sale of the VCR that permitted users to record television programs broadcast on public airwaves (of which Universal owned some copyrights) constituted copyright infringement by Sony.<sup>36</sup>

To reach the conclusion that recording television programs was a fair use under the Copyright Act, the Court first noted several characteristics of the Betamax technology. Among other things, the Betamax allowed users to record one program while viewing another program. Also, video tapes used in recording could be reused or erased before or after viewing the recorded program. Finally, the VCR could function on a timer system so

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31. 17 U.S.C. § 107 (1994).

32. H.R. REP. NO. 94-1476, at 66 (1976).

33. 464 U.S. 417 (1984).

34. *See id.*

35. *See id.* at 422.

36. *See id.* at 420.



users could record programs when away from home.<sup>37</sup> Thus, the Court found that the central purpose for a consumer to tape a publicly broadcast television program was to time-shift, or “to record a program he cannot view as it is being televised and then to watch it once at a later time.”<sup>38</sup> Despite this finding, however, the Court also took note of several surveys that showed that a substantial number of Betamax users did not simply view the recorded program once and erase or record over it, but rather accumulated tapes to create personal video libraries.<sup>39</sup> Nevertheless, the Court found this to be a permissible use under the fair use doctrine, engaging in the four-factor analysis established in section 107 of the Copyright Act.

First, under the purpose and character of the use, the Court found that recording programs to view them later time in the privacy of the user’s home was a noncommercial use acting in favor of fair use.<sup>40</sup> Moreover, this use “increas[ed] access to television programming,” furthering the First Amendment’s goal of disseminating information to the fullest extent.<sup>41</sup>

Second, although courts generally disfavor entertainment uses under the fair use doctrine,<sup>42</sup> many copyright holders would not object to the Betamax users taping programs for home viewing at a later time. It provided television viewers the opportunity to watch the holders’ programs, supported a finding of fair use.<sup>43</sup>

Under the third factor for determining fair use—the amount and substantiality of the portion used—the defense loses its effectiveness when the user copies the entire work, rather than only portions of a work, because the excessive copying can displace the original.<sup>44</sup> The Court found that although Betamax users would record television programs in their entirety, the court lessened the importance of this factor because in order to make taping meaningful, the program would have to be recorded in its entirety.<sup>45</sup>

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37. *See id.* at 422-23.

38. *Id.* at 421.

39. *See id.* at 423-24.

40. *See id.* at 425.

41. *Id.*

42. *See id.*; *see also* *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 971-72 (9th Cir. 1981). Fair use is disfavored when the copying is not a “productive use.” “[W]hen the copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved . . . precludes the application of fair use.” *Id.*

43. *See Sony Corp. of Am.*, 464 U.S. at 424. Many of the copyright holders that did not object to copying televised programs offered programming dedicated to sports events, religious teaching, and education.

44. *See Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986).

45. *See Sony Corp. of Am.*, 464 U.S. at 425-26.

Finally, the Court found that the effect, if any, on the market for or the value of the copyrighted works would not be significant. The Court based this determination on consumer surveys reporting no significant decrease in regular television viewing, despite the introduction of the VCR, and on Universal's inability to demonstrate the likelihood of harm.<sup>46</sup> Additionally, the Court noted that time-shifting enlarges the television viewing audience.<sup>47</sup>

The Court emphasized that Universal broadcast the televised material free of charge, users record the material for noncommercial purposes, and users conduct the infringing activity (recording the programs and viewing them later) solely within the privacy of their homes.<sup>48</sup> Moreover, the user could employ the Betamax for a number of noninfringing purposes, including the authorized use of a copyrighted work or creation of new works. Finally, the Court analogized the copyright issue of contributory infringement presented to patent law, finding that articles or commodities suitable for substantial noninfringing use do not contributorily infringe.<sup>49</sup> Thus, the Court found that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes."<sup>50</sup>

From this case arose the "Sony presumption," a presumption against fair use when copies are made for commercial or profit-making purposes.<sup>51</sup> Where use of the copyrighted work is a noncommercial use, on the other hand, the plaintiff must prove either that the particular use was harmful or that it could adversely affect the potential market for the copyrighted work.<sup>52</sup>

The Court in the *Betamax* case confined its holding to the issue of private home use of the VCR for recording programs broadcast on public airwaves at no charge to the viewer.<sup>53</sup> As a result, the Court did not address other issues concerning use of the VCR for infringing purposes, including "the transfer of tapes to other persons, the use of home-recorded tapes for public performances, or the copying of programs transmitted on pay or cable television systems."<sup>54</sup> Although the *Betamax* court did not address this last concern, scholars have observed that the central holding of the case still

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46. *See id.* at 454.

47. *See id.* at 421.

48. *See id.* at 425.

49. *See id.* at 439-42.

50. *Id.* at 442.

51. *See id.* at 449.

52. *See id.* at 451.

53. *See id.* at 425.

54. *Id.*

applies when a user records a program televised on pay or cable television for private home use for time-shifting purposes.<sup>55</sup>

Contrary to *Betamax*, the district court in *Encyclopaedia Britannica Education Corp. v. Crooks*<sup>56</sup> held that a school board engaging in large-scale videotape copying of copyrighted works taken from publicly televised airways did not constitute fair use. In that case, the school board maintained a video library of educational videotapes containing protected works and copied the videos upon request by teachers.<sup>57</sup> The school board made copies available either free of charge or for a nominal fee, allowing teachers to engage in time-shifting of the educational programs.<sup>58</sup>

Examining this type of copying, the court held that the fair use defense was not available. Even though courts apply the fair use privilege more liberally in noncommercial and nonprofit educational situations,<sup>59</sup> ““a highly organized and systematic program for reproducing videotapes on a massive scale”” is not a permissible use under section 107.<sup>60</sup>

Utilizing the four fair use factors, the court acknowledged that the use of the work supported a finding of fair use based on the educational value derived from the infringement.<sup>61</sup> Turning to the Senate Report on the Copyright Act of 1976, however, the court found that:

[T]he fair use doctrine would apply to a teacher who acts individually in making one or more copies for temporary use in classroom teaching but that

[a] different result is indicated where the copying was done by an educational institution . . . or larger unit. . . .<sup>62</sup>

Moreover, the court found that the amount of copying exceeded any reasonable amount permissible under the fair use defense.<sup>63</sup> Finally, because the copyrighted works could be easily be acquired lawfully by other methods, the school board’s actions weighed against fair use.<sup>64</sup>

Although the court recognized that—under the second factor—the educational value of the works may justify copying, the court emphasized the need to limit the amount of copying to preserve the works’ original

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55. See, e.g., Joni Lupovitz, *Beyond Betamax and Broadcast: Home Recording from Pay Television and the Fair Use Doctrine*, 2 FORDHAM INTELL. PROP. & MEDIA ENT. L.J. 69, 88 (1992).

56. 542 F. Supp. 1156 (W.D.N.Y. 1982).

57. See *id.* at 1163.

58. See *id.*

59. See *id.* at 1168.

60. *Id.* at 1169 (citation omitted).

61. See *id.* at 1174.

62. *Id.* at 1175 (quoting S. REP. NO. 94-473, at 63 (1975)).

63. See *id.*

64. See *id.* at 1176.

value.<sup>65</sup> Because the school board copied programs in their entirety and often retained the copies for several years, the court, considering the third factor, found that the substantiality of copying weighed against fair use since it essentially created a substitution for the purchase of a license for the copyrighted work.<sup>66</sup>

The court found that the fourth factor was the most significant. Interference with the marketability of the plaintiff's work, or "the cumulative effect of mass reproduction . . . [which] tends to diminish the potential market for the copyright holders' works"<sup>67</sup> weighed against finding fair use. With the technological development of the VCR, the school board could engage in a mass reproduction scheme that essentially replaced the need for the original work without contributing a new work or a new element to the existing work. Thus, the court found that the school board's use of videotaping for time-shifting purposes was not permissible in this case.

### B. *Photocopying and Fair Use*

Another method for determining the applicability of the fair use defense arises under a doctrine known as productive use or transformative use. The court applied the transformative use doctrine in *American Geophysical Union v. Texaco, Inc.*<sup>68</sup> In that case, the American Geophysical Union (AGU) was the copyright holder of various scientific and technical journals. Texaco was a profit-seeking corporation employing research scientists.<sup>69</sup> Although Texaco subscribed to numerous journals—many of which AGU published—many of the corporation's scientists photocopied some of the journal articles to keep in their personal files, rather than simply reading the articles in the library.<sup>70</sup> The employees used the photocopies for their personal knowledge, future use, or laboratory research work.<sup>71</sup> This practice has several advantages. It kept the original journal free for others to access and allowed scientists to easily reference pertinent articles. It also helped avoid unnecessary, repeated, and time-consuming trips to the library and eliminated the risk of transcription error (if the article would be studied and notes taken instead of photocopying). Finally, it gave the scientist portability by allowing him to take only a small

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65. *See id.* at 1177-79.

66. *See id.* at 1179.

67. *Id.* at 1169.

68. 802 F. Supp. 1 (S.D.N.Y. 1992).

69. *See id.* at 4.

70. *See id.*

71. *See id.*

articles into a laboratory instead of large volumes and preserved the original while allowing the scientist to make notations in the margins of “his copy.”<sup>72</sup>

Despite all these advantages and useful reasons for photocopying, the court found that this practice was not a fair use of the AGU’s copyrighted journals.<sup>73</sup> The court reasoned that photocopying deprived AGU of the ability to sell additional subscriptions, conflicting with copyright protection’s purpose.

If authors are guaranteed the opportunity to profit from their writings, they will have an incentive to create, and the public will ultimately reap the resulting expansion of human knowledge. In contrast, if no copyright protection were granted and others were permitted to copy freely works of authorship, authors would find it difficult to earn a living from their writings; their energies would be diverted to other pursuits . . . consequently, the public’s right to appropriate the works of authors would make the public poorer through the loss of the benefit of authors’ endeavors.<sup>74</sup>

The court then moved to the four-factor analysis under the fair use defense in section 107 of the Copyright Act.

While evaluating the first factor, the court noted a preference for secondary uses that did not merely copy and offer themselves as substitutes for the original copyrighted text, but that used the matter taken from the copyrighted work for some new objective or purpose.<sup>75</sup> The court also emphasized that although Texaco’s employees copied the articles in their entirety, the focus of the first-factor analysis lies on the “object of the selections made . . . and the degree [of use]” by the infringing party, rather than a mere quantitative analysis.<sup>76</sup> The court then acknowledged the *Betamax* holding, which indicated that a nonproductive but noncommercial

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72. *Id.*

73. *See id.* at 28.

74. *Id.* at 9.

75. *See id.* at 11. This theory, the transformative use doctrine, is based largely on the preamble language of section 107. It argues for protection for productive uses of copyrighted works, even if infringing uses, because they confer some benefit on the public by adding a new socially valuable creative element. *See* LEON E. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 24 (1978). Nonproductive or reproductive uses occur where the user copies the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used. *See* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 320 (2d ed. 1995). Such uses do not contribute anything new or beneficial to the public. Thus, the fair use privilege should be limited to situations where a productive use has been made of the copyrighted work. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 478 (1984) (Blackmun, J., dissenting); *see also* LEAFFER, *supra* 75, at 321.

76. *Texaco, Inc.*, 802 F. Supp. at 11.

use might be a fair use, but that a nonproductive use for commercial or profit-making purposes would be presumptively unfair.<sup>77</sup>

While finding that Texaco's copying was commercial because its purposes were "to create new products and processes for Texaco that will improve its competitiveness and profitability,"<sup>78</sup> the court ultimately rejected the Sony presumption and focused on the four-factor analysis. It found that Texaco's use was not transformative because its purpose was to "supersede the original and permit duplication."<sup>79</sup> Moreover, this type of copying added nothing new or different to the original work.<sup>80</sup>

Under the second factor, the court found in favor of fair use. First, the court noted that scientific articles have a strong claim to protection from copying but do not have a strong claim as to their secretive quality.<sup>81</sup> In other words, scientific knowledge without dissemination would conflict with the purpose of copyright protection to promote the progress of science. The court also found, however, that factual works, such as scientific works, had a large scope for fair use.<sup>82</sup> Thus, the court concluded that the second factor favored Texaco.

On the other hand, the court quickly noted that the third factor clearly weighed against Texaco since the employees copied the entire article.<sup>83</sup> Although the amount of copying was small in a comparison to the length of the articles and the length of the journal, the court emphasized that each article had individual copyright protection.<sup>84</sup>

Given Texaco's numerous alternatives to provide its scientists with copies of articles for their files, such as purchasing additional subscriptions or negotiating licensing agreements to photocopy, the court found against Texaco on the fourth factor.<sup>85</sup>

Finally, the court weighed equitable considerations and found in favor of the AGU. Distinguishing the *Betamax* holding, the court did not find nonproductive copying a fair use because the use by Texaco's scientists was neither private nor noncommercial.<sup>86</sup> Here, unlike in the *Betamax* case, the use was not personal use since its purpose benefited the employer.<sup>87</sup>

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77. *See id.* at 12.

78. *Id.* at 16.

79. *Id.* at 13.

80. *See id.*

81. *See id.* at 16.

82. *See id.* at 16-17.

83. *See id.* at 17.

84. *See id.*

85. *See id.* at 18.

86. *See id.* at 22.

87. *See id.* at 6.

Additionally, the *Texaco* court found that photocopying by a large number of scientists at a large corporation deprived AGU of substantial revenues that could have been earned through the sale of additional subscriptions or licensing arrangements.<sup>88</sup> This, too, differed from the *Betamax* case, where the Supreme Court found that time-shifting caused no economic loss to the copyright owners.

The holding in *Texaco* is often compared with *Williams & Wilkins Co. v. United States*,<sup>89</sup> a preceding case in which the court held that photocopying entire articles from medical journals by medical researchers was a fair use. In that case, the Department of Health, Education, and Welfare, through the National Institutes of Health (NIH) and the National Library of Medicine (NLM), made unauthorized copies of articles from Williams & Wilkins's copyrighted medical journals.<sup>90</sup>

The library received two copies of each of the journals involved. When the subscriptions did not satisfy the demand for the journals, the library ran a photocopy service for its research staff.<sup>91</sup> The library instituted several policies to prevent abusive photocopying, such as limiting copying requests to approximately fifty pages of a single article, rejecting requests for copies of articles deemed "widely available," and limiting the number of requests each individual staff researcher can make.<sup>92</sup> If the library met the researchers' requests, the researchers retained the photocopied articles in their personal files for future reference.<sup>93</sup>

Despite the seeming similarities between *Williams & Wilkins* and *Texaco*, the court found that this type of photocopying was permissible under the fair use doctrine because Williams & Wilkins could show no harm as a result of the copying<sup>94</sup> and because prohibiting copying would hinder medical research.<sup>95</sup> In reaching this determination, the court focused on several factors: (1) NIL and NLM were nonprofit organizations and were not seeking profit or commercial gain from the photocopying; (2) the researchers obtaining the copies had no purpose to duplicate the copies for

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88. *See id.* at 22.

89. 487 F.2d 1345 (Ct. Cl. 1973).

90. *See id.* at 1346-47.

91. *See id.* at 1347-48.

92. *See id.* at 1348-49.

93. *See id.* at 1348.

94. The court based its conclusion that photocopying would not result in economic harm to the plaintiffs in part on the fact that journal subscribership had increased over the years, and also on the fact that the library had engaged in this type of photocopying with "apparent general acceptance" since before the Copyright Act of 1909 came into existence. *Id.* at 1355-56.

95. *See id.* at 1354.

sale or other distribution; (3) the copies were useful to the researchers' work; and (4) rather than attempting to misappropriate work, the copying was merely an effort to gain easier access to research materials.<sup>96</sup>

So why the different results in *Williams & Wilkins* and *Texaco*? Noting that, since the decision in *Williams & Wilkins*, the practice of photocopying has increased vastly, the court in *Texaco* stated that “[t]he monumental change since the decision of *Williams & Wilkins* in 1973 has been the cooperation of users and publishers to create workable solutions to the problem.”<sup>97</sup> Unlike the *Texaco* case, where licensing arrangements and the Copyright Clearance Center (CCC) made negotiating for photocopying faster and easier, the *Texaco* court noted that at the time of the *Williams & Wilkins* decision, such services and practices did not exist and negotiating each time a researcher needed a photocopy of an article would have been inconvenient, expensive, and time consuming.<sup>98</sup>

Moreover, the *Texaco* court emphasized several benefits found in *Williams & Wilkins* not present in the present case. First, the AGU did not suffer economic harm by the photocopying practices. Second, medical research would be seriously hurt if the court prohibited photocopying. Third, the court could not devise a remedy for the infringement without exceeding its judicial authority. Fourth, the libraries in *Williams & Wilkins* were nonprofit institutions and were not attempting to gain financially from the photocopying. Fifth, the researchers needed the copies for scientific work and did not intend to sell or distribute the copies. Finally, the enterprise of duplication served scientific progress.<sup>99</sup>

Although many of these factors do not seem distinguishable between the two cases, it appears that—with the possible exception of *Texaco*<sup>100</sup>—advances in technology that make it easier to copy and disseminate material generally extend the fair use privilege to otherwise infringing uses. Thus, new technologies will often limit the rights of copyright owners.

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96. *See id.*

97. *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 24 (S.D.N.Y. 1992).

98. *See id.*

99. *See id.* at 23.

100. One possible reason *Texaco* came out against fair use, unlike *Betamax* and *Williams & Wilkins*, is that by 1992, the photocopier, although faster, cheaper, and easier to use, was no longer a “new” technology. Coupled with the court’s observation that other relatively attainable methods for negotiating for authorization to make the copies were available, the holding in *Texaco* differed from cases finding fair use more based on societal development, and perhaps less on the four fair use factors.



#### IV. ANALYSIS OF FAIR USE UNDER THE *RIO* CASE

In light of the courts' holdings in some fair use cases concerning new technology, if the court examined the *Rio* case as a fair use issue, it is likely the copyright infringers would benefit from the fair use defense. The most likely theory under which a fair use defense would be pursued would be one of "space-shifting." Similar to time-shifting, space-shifting simply permits a user to record a program (here, a music file) and listen to it at a more convenient time in a more convenient place. Of course, obvious problems exist in analogizing the *Rio* case to past fair use cases because the level of technology the court confronts in *Rio* far surpassed what courts faced in other cases. Still, the court is determining fair use in light of new technology, rather than the degree of advancement of technology, making the analogous argument possible.

Although the *Betamax* case did not address the copyright violation liability of the person actually videotaping the programs, and the *Williams & Wilkins* and *Texaco* cases did not address the liability of the infringing employees, it seems apparent that initiating an infringement action against such users would be difficult and futile since the copyright holder will rarely be able to identify these persons. However, no court has ever specifically exempted such persons from an infringement action on the ground that it would be difficult to pursue them. Likewise, the *Rio* user will be difficult to track, since he or she is not the person engaging in direct infringement by placing pirated music on the Web. The recording industry will be unable to determine which users download pirated MP3 files onto their *Rios* since this function is done entirely offline between the computer's hard drive and the *Rio* itself. Unless some type of information is collected from the user before he downloads an MP3 file, the industry will not even know who downloads the files. Although the use of *Rio* has undisputed copyright infringement abilities, *Rio* users should be permitted to assert a fair use defense in an infringement action in light of the four-factor analysis set forth in the *Betamax* case.

##### A. Purpose and Character of the Use

Like the *Betamax* case, here the user conducts the infringing activity entirely within the user's home. An Internet user downloads an MP3 file onto his or her computer and transfers it to the *Rio* to enjoy at a later time in a different location. The private nature of this activity weighs in favor of fair use.

Second, analogous to the copying in *Williams & Wilkins*, the purpose of the *Rio* is to listen to music in a portable manner not to reproduce

multiple copies of the music for sale or other distribution.<sup>101</sup> Because each user customizes flash memory cards, a reproduced flash memory cards carries little value, since each listener will likely want to produce his or her own individualized cards. Moreover, since the Rio has no output capability and reproductions of the cards can only be made by an analog dub through a headphone jack,<sup>102</sup> the digital quality of the MP3 file will not survive reproduction and the sound quality will be lost, reducing the demand for already-programmed flash memory cards.<sup>103</sup>

Next, like uses of copyrighted material in *Williams & Wilkins* and *Betamax*, the use of the MP3 files by the Rio user are private and noncommercial.<sup>104</sup> While a commercial use by the person originally placing the music on the Internet would weigh against a finding of fair use, in most cases of music piracy on the Internet, the person placing the music on the Internet is not seeking to sell the music, but rather only to make it available to those wishing to listen to or download it. Moreover, this commercial nature should not affect the Rio user, who lies downstream in the copyright violation scheme. Thus, the noncommercial nature of Rio flash memory cards weighs in favor of fair use.

As far as retaining the unauthorized copies, the Rio scenario falls closer to the situation in *Betamax*, rather than in *Williams & Wilkins* and *Texaco*. While videotapes can be erased and reused and the flash memory cards for the Rio cannot be erased, users will likely retain the cards only for short periods of time and will soon try the selections on the card, merely record over (but not erase) them, and produce a new set of portable MP3 files. Users probably will not store flash memory cards like photocopies because of the short life span of popular music and expensive quality of the cards themselves. The unauthorized use of MP3 files will be short-lived, and as a result, the first factor weighs in favor of fair use.

### B. *Nature of the Copyrighted Work*

In the *Betamax* case, the taped televised programs at issue were placed on public airwaves at no charge to the viewer. In the case of the Rio,

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101. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1354 (Ct. Cl. 1973).

102. See *RIAA Sues Over Internet Music Recorder*, *supra* note 1, at 2.

103. This argument also falls within the four-factor analysis, but will not be discussed here again.

104. The marketability of flash memory cards as a commercial use, or lack thereof, is also discussed under the four factor-analysis of fair use, *infra* Part IV, but Rio technology contemplates that users will make flash memory cards for their personal use, much like the *Betamax* user tapes a program for his or her personal use. While the tape may be shared with others, such occurrences are likely minimal among VCR users, as they will be with Rio users, such that the court in *Betamax* was not particularly concerned with this use.

the material is also, arguably, placed on the Internet free of charge. The user has no control over what information already exists on the Internet and merely uncovers it by Internet surfing (like channel surfing on television). Of course, it matters who originally placed the copyrighted material online, but the Rio user commits no greater infringement by taking pirated music off the Internet and reproducing it than he does if he reproduces licensed MP3 files. It can also be argued that because the Internet user must pay for Internet service, the material is not provided free of charge. However, this argument presents a case similar to a VCR user taping a cable or pay TV program, and such actions have been implicitly permitted under the *Betamax* holding.<sup>105</sup>

Although the holding in *Betamax* and the transformative doctrine indicate that copying for entertainment purposes generally weighs against fair use, such use can be favored if it contributes to a new or transformative use of the work.<sup>106</sup> In *Betamax*, the court found the use permissible despite the entertainment nature of the work because several copyright holders would not object to the use even though the user did not obtain permission to copy the work.<sup>107</sup> Similarly, many musical artists and copyright holders to musical works would not object to their work being downloaded off the Internet and would instead view it as an opportunity to increase the public's access to their music.<sup>108</sup> Finally, in light of the possible music manipulations that are not possible in videotaping, such as parody and remakes, MP3 files (and obtainment of them by the Rio user) may help facilitate these transformative uses of the original work. Thus, the second factor can weigh in favor of fair use.

### C. Amount and Substantiality of the Work Used in Relation to the Copyrighted Work as a Whole

Like the other fair use cases discussed in Part III that involved copying in entirety, a Rio user will record or download MP3 files in their entirety as well. This could consist of piecemeal recording—recording individualized tracks off the Internet—or recording an entire album. This ability weighs against a finding of fair use since each song on an album has

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105. See Lupovitz, *supra* note 55, at 88.

106. See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 971-72 (9th Cir. 1981).

107. This reasoning is also discussed more completely under the fourth factor of fair use *infra* Part IV.D.

108. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 425 (1984) (encouraging fair use where the infringement increased public access to information).

separate marketability in addition to marketability of the entire album. Therefore, this factor weighs against a finding of fair use.

*D. Effect of the Use on the Potential Market for and Value of the Copyrighted Work*

Like the VCR in the *Betamax* case or the photocopier in *Williams & Wilkins*, although the Rio is *capable* of infringing uses, it is also capable of substantial noninfringing uses. Like the copyright holders of television programs that do not object to the taping of their programs, many musical artists would not object to users downloading their music for use with the Rio. Because of the Rio's limited capabilities, music listeners will still remain interested in purchasing CDs to use with their other music equipment, and the availability of MP3 files may actually increase records sales.

Several artists have embraced MP3 technology because it provides an affordable and easy method by which they can disseminate sound clips or select tracks from their records, encouraging listeners to sample the music inducing legitimate sales of the CD.<sup>109</sup> Indeed, others have utilized the availability of MP3 files to actually profit by selling the files themselves over the Internet.

As in *Betamax*, where Universal was unable to show that home videotaping would result in decreased regular television viewing, here the recording industry will also only be able to speculate as to damages, alleging that Internet piracy will decrease legitimate sales of CDs or legitimate purchases of MP3 files. While the recording industry has figures representing the estimated sales lost generally to music piracy, it cannot show that the Rio specifically will contribute to these losses.

Thus, the recording industry's attack on the Rio and similar devices likely represents an attack on technology, as opposed to an attack on the users who utilize the technology to harm others.<sup>110</sup> As a result and for the reasons indicated above, the recording industry would likely fail in a copyright infringement suit against the users of the Rio and similar devices.

## V. CONCLUSION

Although piracy currently presents copyright infringement problems for the music industry, because the fair use defense is available to those with access to the pirated music, the recording industry can use new

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109. See Michael Colton, *More Piracy of the High C's? The Recording Industry Wages War Against the Rio*, WASH. POST, Nov. 1, 1998, at G5.

110. See Neil Gross, *Target Pirates—Not Technology*, BUS. WK., Nov. 2, 1998, at 40.

technology to its advantage. Many people in the music industry predict that MP3 files will soon replace the CD. This opens the door for a new market where the recording industry can sell its products in addition to its current marketing methods, leading eventually to an entire virtual music store. The music industry would be wise to learn from the *Betamax* technology, which increased marketability of copyrighted works in the long run by creating a market for videotape rentals, sales, video sequels and the like, instead of suppressing the marketability for copyrighted works simply because a VCR owner could record a program. MP3 files and devices like the Rio can create new markets for the music industry, while maintaining a demand for existing music products (CDs, tapes, etc.) and increasing overall sales.