TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 81-503
of	:	FEBRUARY 5, 1982
GEORGE DEUKMEJIAN Attorney General	:	
Ronald M. Weiskopf Deputy Attorney General	:	

THE HONORABLE RUTH L. RUSHEN, DIRECTOR OF CORRECTIONS, has requested an opinion on the following question:

Does the showing of videocassette tapes of motion pictures to prison inmates by correctional authorities constitute an infringement of copyright?

CONCLUSION

The showing of videocassette tapes of motion pictures to prison inmates by correctional authorities without authorization from the copyright owner constitutes an infringement of copyright.

ANALYSIS

The Copyrights Act of 1976[1] declares copyright protection to "subsist," in accordance with its terms in ". . . original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." (§ 102, subsection (a).) Pertinent to our discussion, the term "original works of authorship" is defined to include "motion pictures and other *audiovisual* works"[2] within its rebric. (*Id.*, subsection (a)(6).) Section 106 of the act grants to the owner of a copyright in such a work the "exclusive rights . . . to perform [it] publicly" and to authorize the doing of the same by others, *subject* to the provisions of sections 107 through 118 which provide various limitations, qualifications and exemptions from "the exclusive rights" so granted. (§ 106.)[3] Section 107 compels a finding of noninfringement if the use made of a copyrighted work is a "fair use" under the particular circumstances, while sections 108 through 118 provide specific exemptions for particular situations. Otherwise anyone who violates any of the exclusive rights of the copyright owner is an infringer of the copyright. (§ 501.)

We are told that videocassettes, most of which are of dramatic works and theatrical motion pictures the copyright in which is held by a third party and is not in the public domain, are to be shown by state correctional authorities to the inmates in various California penal institutions under the following arrangement:

---

[1] P.L. 94-553, title I (90 Stat. 2541) codified to title 17 of the United States Code. All unidentified section references will be to title 17 of the United States Code. The act was made effective January 1, 1978 (P.L. 94-553, tit. I, § 102 (90 Stats. at pp. 2598-2599); note prec. § 101) and applies to all recordings made after that date. (*Universal City Studios* v. *Sony Corp. of Amer.* (C.D. Cal. 1979) 480 F.Supp. 429, 442, rev'd on other grounds, *Universal City Studios, Inc.* v. *Sony Corp. of Amer.* (9th Cir. 1981) 659 F.2d 963.) Our efforts are directed to resolving the question under the current act.

[2] The term "audiovisual works" is defined by section 101 to mean ". . . works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied."

[3] The act also grants the owner a similar exclusive right to *display* his motion picture or other audiovisual work publicly. (§ 106, subsection (5).) The *display* of such a work however, in contrast to its *performance*, involves "the showing of the individual images *non-sequentially*." (§ 101, "display;" see also *H.Rept.*, op. cit., *infra* at fn. 6, at pp. 63-64; S.Rept. op. cit., *infra* at fn. 6, at p. 60.) Clearly that is not the case with the showing of motion pictures, which by definition involves the showing of related images *in succession* to impart an impression of motion. (§ 101, "motion pictures;" see also *H.Rept.*, at pp. 63-64; *S.Rept.*, at p. 60.)

The tapes are to be initially purchased by the authorities on a random basis from normal retail outlets at the prevailing retail rate with no special governmental concessions.[4] They are to be played solely within the prison and are to be exhibited to the prisoners over television viewers located in particular viewing areas.[5] In order to view a cassette, an inmate neither has to provide services nor pay compensation; in other words, there is to be no charge for their viewing. Individual inmates would not have free access to the tapes. As a general matter, the authorities of an individual institution are to choose the programming and while inmate preference may be solicited it is not required. Regardless of the popularity of any given video tape, it would only be shown once, or a few times, within the prison system and then returned to a central repository where it may be ordered by another institution. The tapes are only for exhibition to inmates incarcerated within the California prison system and not for any other purpose. Their exhibition is to be to the general prison community and is not to be open to their families or other members of the public. Strict security measures are to be enforced to prevent theft and duplication.

Since the states and state officials are subject to the copyright laws (64 Ops.Cal.Atty.Gen. 186, 191 (1981)), we are asked whether this showing of videocassettes to prison inmates by correctional authorities would constitute a copyright infringement. We conclude that since that exhibition would constitute a "public" performance within the meaning of section 106 and since it would not amount to a "fair use" of the copyrighted motion picture or audiovisual work within the meaning of section 107 nor be covered by

---

[4] As we shall explain in greater detail, the purchase is made through a normal retail outlet which sells the cassettes to private individuals ostensibly for private, noncommercial home use, as opposed to being secured through a distribution outlet which has been authorized by the copyright owner to sell or rent the cassetted copy of the copyrighted work to institutions for unlimited and unrestricted use. The price of a cassette secured from the former source is between $40 and $100; when secured from the latter it will run between $200 and $600. This price differential no doubt reflects section 202 of the act which provides that "ownership of a copyright, or any of the exclusive rights under a copyright, *is distinct from* ownership of any material object in which the work is embodied" and that transfer of ownership of the latter "does not in itself convey any rights in the copyrighted work embodied in the object." (§ 202.) In other words the mere purchase of cassette of a copyrighted work from a retail outlet does not permit use in derogation of the copyright owner's rights. Typically the cassettes so purchased contain a statement that they are for private (home) use only. (See p. *, *infra.*) The question still remains however as to whether that accurately reflects the owner's enforceable rights under the Copyrights Act.

[5] As we understand the technology, the video and audio signals recorded on the videocassette tapes or disks are converted into electronic signals by playing them in a machine, such as the playback mechanism of a video recorder. The electronic signals are then transmitted to a monitor, such as a television set, capable of reproducing the video signals as pictures on a viewing screen and the audio signals as sound through speakers. (Cf. *Universal City Studios* v. *Sony Corp. of America*, *supra*, 480 F.Supp. at p. 435.)

one of the exemptions provided in sections 108 through 118 a copyright infringement would occur.

Article I, section 8 of the federal Constitution vests Congress with the power 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." (U.S. Const., art. I, § 8, cl. 8.) Pursuant to this constitutional grant of authority Congress enacted a copyright law at its very first session in 1790 (1 Stats. at L. (Peters), ch. 15, p. 124): "An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies During the Times Therein Mentioned"), and from time to time Congress has amended and revised it to reflect new technologies of user and to accord protection to new forms of expression. (See 17 U.S.C. § 102, historical note; *H.Rept.* No. 94-1476 at p. 47.)[6]

Inasmuch as the rights so secured by copyright are wholly statutory, owing their creation to the federal statute passed in exercise of the aforementioned constitutional provision (*American Tobacco Co.* v. *Werkmeister* (1907) 207 U.S. 284, 291; *Bobbs-Merrill Co.* v. *Straud* (1908) 210 U.S. 339, 346; *Holmes* v. *Hurst* (1899) 174 U.S. 82, 85; *Krafft* v. *Cohen* (3d Cir. 1941) 117 F.2d 579, 580), copyright holders have monopoly power *only over those uses* of their works that Congress has protected (*Bobbs-Merrill Co.* v. *Straus*, *supra*, 210 U.S. at pp. 346-347; *Loew's, Inc.* v. *Columbia Broadcasting System* (S.D.Cal. 1955) 131 F.Supp. 165, 173). In other words "the right of an author to a monopoly of his publications is measured and determined by the copyright act." (*Holmes* v. *Hurst*, *supra*.)

As mentioned above, in 1976 Congress adopted a new Copyrights Act (P.L. 94-553 (90 Stat. 2541), 17 U.S.C. § 101 et seq.), revising what was essentially the Copyright Law of 1909. (See fn. 1, *ante*.) In the new act, as also mentioned, Congress has extended "a bundle of rights" to copyright owners in section 106, including the right to perform or authorize performance of a work publicly. (*Id.*, subsection (4).) But that right, as are all rights accorded a copyright owner under section 106, is "made 'subject to sections 107 through 118' and must [therefore] be read in conjunction with those provisions." (*H.Rept.*, at p. 61; *S.Rept.*, at p. 57.) Thus, in answering the question of whether Congress has accorded protection through the Copyrights Act of 1976 to the owners of the copyrights in the recorded audiovisual material from the type of use projected here, our analysis must

[6] The Report of the act (No. 94-1476; 94th Cong. 2nd Sess.) of the House Committee on the Judiciary, cited herein as *H.Rept.*, is reprinted with references given to its pagination in [1976] U.S. Code Congressional and Administrative News (vol. 5) at pages 5659-5809 and without such reference in the annotations following the appropriate sections in title 17, United States Code Annotated. The corresponding Report of the Senate Committee on the Judiciary (No. 94-473), cited herein as S.Rept., is not as available.

be as follows: First, we must determine if the right has been extended, that is in our context whether the exhibition of the videocassettes to prisoners constitutes their being performed publicly so as to violate the exclusive right granted by section 106, subsection (4). If the answer is affirmative and it is concluded that the exhibition projected constitutes a "public performance," we must then determine whether the "fair use" doctrine set forth in section 107 applies and in addition we must examine whether one or more of the other statutory provisions (§§ 108-118) limiting the exclusive rights granted by section 106 might also apply.

1. Section 106, Subsection (4): Public Performance

With respect to the requester's concern, the exclusive right which stands to be violated is that described in section 106, subsection (4), which grants to the owner of a copyright in a motion picture or other audiovisual work the right to control its public performance, thus:

> "*Subject to sections 107 through 118*, the owner of copyright . . . has the exclusive rights to do and to authorize any of the following:
>
> ". . . . . .
>
> "(4) *in the case of* literary, musical, dramatic, and choreographic works, pantomimes, and *motion pictures and other audiovisual works*, *to perform the copyrighted work publicly* . . . ."

We have no doubt that the showing of a videocassette by correctional authorities to prison inmates constitutes *a performance* of the taped work within the meaning of section 106, subsection (4). Section 101 defines pertinent terms (and their variant forms) for purposes of the Copyrights Act, and provides that "to perform a work" "means to recite, render, play, dance, or *in the case of a motion picture* or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." The question though is whether the performance of the work constitutes the type of *public* performance section 106, subsection (4), protects. Our initial instinct of course would be to answer that question in the negative by summarily rejecting the notion that a prison could be considered a "public place," but the copyright law demands further analysis which will belie our initial reaction.

The phrase "to perform a work publicly" when used in the Copyrights Act is defined by section 101 to mean either:

> "(1) To perform . . . 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." (§ 101; emphases added.)

Faced with this statutory language, the showing of videocassetted works under the circumstances described appears to mean that they would be performed publicly. Although a prison is certainly not open to the general public with its ingress and egress carefully controlled (see, e.g., 63 Ops.Cal.Atty.Gen. 295, 296 (1980)), it is however still a place where unhappily a "substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." Such a substantial number of persons would be gathered to view the films, bringing the showing of them within the definition of "public performance" set forth in section 101, clause (1). And even if the actual viewing of the videocassettes by the inmates would take place in different viewing areas, that would involve a "transmission" of the works (§ 101, "transmit")[7] to separate places where such a "substantial number of persons . . . is gathered" and would thus constitute a "public performance" of them as the term is defined in section 101, clause (2).

It has been suggested however that the interpretation of the act's language is not that simple and its legislative history must be examined. But the legislative history is at best inconclusive and "it would be highly improper to construe [it] so as to apply [the] statute in a manner inconsistent with its claimed meaning." (*Universal City Studios* v. *Sony Corp. of America*, *supra*, 659 F.2d at pp. 968-969, citing *United States* v. *Wilson* (9th Cir. 1979) 591 F.2d 546.) Thus, although it *is* clear from the legislative history, that by defining public performance as it did, Congress intended to reject a line of cases that had developed under the 1909 act, typified by *Metro-Goldwyn-Mayer Distrib. Corp.* v. *Wyatt* (D.Md. 1932) 21 C.O. Bull. 203, which maintained that a performance was never "public" as long as the audience was in any way limited to a group more restricted than the general public, regardless of size, such as that in a club where only members and invited guests were present (see *H.Rept.*, at p. 64; *S.Rept.*, at p. 60) and appears to have come closer to the more restrictive holdings of another line of cases which held that a performance would not be "public" where those restrictions were effective and meaningful so that a substantial

[7] To "transmit a performance" means "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." (§ 101.)

segment of the public would be precluded from attending (see, e.g., *Lerner* v. *Club Wander In., Inc.* (D.Mass. 1959) 174 F.Supp. 731, 732; *Lerner* v. *Schectman* (D.Minn. 1964) 228 F.Supp. 354, 357-358), still we cannot say that Congress meant to go so far as to bring the showing of videocassettes in correctional institutions within the ambit of "public performance." The legislative history states that:

> "One of the principal purposes of the definition was to make clear that, contrary to the decision in . . . *Wyatt* . . . performances in 'semi-public places such as clubs, lodges, factories, summer camps and schools *are* public performances' subject to copyright control." (*H.Rept.*, at p. 64; S.Rept., at pp. 60-61.) (Emphasis added.)

And the history also states:

> "Routine meetings of businesses and governmental personnel would be excluded because they do not represent a gathering of a 'substantial number of persons.'" (*Ibid.*)

Although a prison is *not open to the general public at all*, and although unlike the club or other quasi-public gathering of voluntary members the viewing audience in a prison is only for *involuntary* participants, still it represents a gathering in a place of a "substantial number of persons outside of a normal family and its social acquaintances" and the showing of the videocassettes thereat would squarely fit the definition of "public performance" Congress has given. So conceived, we conclude that the showing of videocassettes to inmates by correctional authorities would amount to their being "performed publicly" within the meaning of section 101, and that that activity *is* protected from infringement by section 106, subsection (4).

2. Section 107: Fair Use

Section 107, to which a copyright owner's "exclusive rights" granted under section 106 are subject, codifies the doctrine of "fair use" that was developed by courts in cases arising under the 1909 Act as an "equitable rule of reason" to balance the competing interests of the copyright owner and the public generally. (*H.Rept.*, at pp. 65-66; *S.Rept.*, *supra*, at p. 62; cf. *Universal City Studios* v. *Sony Corp. of America*, *supra*, at 480 F.Supp. at pp. 447-448 and cases cited.) Characterized as "the most troublesome in the whole law of copyright" (*Dellar* v. *Samuel Goldwyn, Inc.* (2d Cir. 1939) 104 F.2d 661, 662), the doctrine was used "to create a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without [the owner's] consent, notwithstanding the monopoly granted to the owner." (*Rosemont Engerprises* v. *Random House* (2d Cir. 1066) 366 F.2d 303, 306, cert. den. (1967) 385 U.S. 1009.) While section

107 codified the doctrine and characterized "fair use" as a noninfringement rather than an excused infringement, in enacting the section Congress did not intend to "change, narrow, or enlarge the doctrine in any way." (*H.Rept.*, at p. 66; *S.Rept.*, at p. 62.)

Section 107 does not define "fair use," nor was it intended to do so given both (a) the impossibility of providing a general definition for an equitable rule which is to be applied on the varied facts of each case and (b) rapidly changing technology. (*Ibid.*; see also *Universal City Studios* v. *Sony Corp. of America*, *supra*, 659 F.2d at p. 969.) Rather, the section was designed to offer some general guidance to users by providing a number of factors to be considered in determining if the principles of the "fair use" doctrine apply, i.e., whether the projected use made of a work in any particular case is a "fair use." (*H.Rept.*, at pp. 65-66; *S.Rept.*, at pp. 62-63.) Thus, "[t]he line which [is to] be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria." (*Meeropol* v. *Nizer* (2d Cir. 1977) 560 F.2d 1061, 1068, cert. den. (1978) 434 U.S. 1013.)

Section 107 provides:

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

(§ 107, codified almost verbatim from *Williams & Wilkins* v. *United States* (Ct. Cl. 1973) 487 F.2d 1345, 1352, aff'd per curiam (1975) 420 U.S. 376.)

However, as is pointed out in the latest exposition of the fair use doctrine which is binding upon us, to wit, *Universal City Studios* v. *Sony Corp. of America*, *supra*,

659 F.2d 963, (hereinafter, "*Sony*"), before we can proceed to apply the four factors given in section 107 to the facts of our situation, we must first cross the threshold issue of whether the fair use doctrine is even available in it. (659 F.2d at pp. 970, 971-972.) In *Sony* the court viewed the statutory framework of the Copyrights Act to be a grant of exclusive rights limited only by statutory exceptions, and it said courts should not disrupt that framework "by carving out exceptions to the broad grant of rights *apart from those in the statute itself*." (*Id.*, at p. 966.) Accordingly, in copyright analysis it placed the proverbial monkey on a user's back to show that an intended use of a copyrighted work once protected under section 106, *is specifically permitted by a specific exemption* found in sections 107 through 118, and not on the copyright holder's back to show that it is not. (*Ibid.*) Needless to say, with this frame of reference the court took a narrow view of the availability of the fair use doctrine. From the preamble to section 107, it limited the availability of the fair use defense to cases involving "productive" uses of copyrighted material, that is to say the cases where a user adds his own further input to an original work as copyrighted, the types of situations mentioned therein. As the court explained:

> "As the first sentence of 107 indicates, fair use has traditionally involved what might be termed the 'productive use' of copyrighted material. [Citation.] The purposes listed in 107 are simply illustrative and not limitative, but they do give some idea of the general orientation of the doctrine. It is noteworthy that the statute does not list . . . 'entertainment' . . . as [one of the] purposes within the general scope of fair use.
>
> "Leon Seltzer, in his illuminating book *Exemptions and Fair Use in Copyright* (1978) states:
>
> "'The list, casual or studied as it may be, reflects what in fact the subject matter of fair use has in the history of its adjudication consisted in: *it has always had to do with the use by a second author of a first author's work* in order to use it for its intrinsic purpose—to make what might be called the "ordinary" use of it. When copies are made for the work's "ordinary" purposes, ordinary *infringement* has customarily been triggered, not notions of fair use.' *Id.* at 24. [Emphasis in original.]
>
> "The cases have, for the most part, adhered to this aspect of the fair use doctrine. If an alleged infringer has reproduced a copyrighted work to use it for its intrinsic purpose, fair use has not generally been applied. [659 F.2d at p. 970.]

> "Without a 'productive use', *i.e.* when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use." (*Id.*, at pp. 971-972.)

Sony, it is true, involved home video recording, the copying from the air of copyrighted motion pictures[8] while in our situation the movies have already been copies or recorded, and no further reproduction is involved. But as we have seen, another right given the copyright holder by section 106 stands to be violated: that to perform or authorize the performance of the copyrighted work publicly. (§ 106, subsection (*4*).) Since the situation before us and that before the court in *Sony* both involve use of the work for its intrinsic purpose without additional input or embellishment by the user, i.e., since they involve a "nonproductive use," and inasmuch as we are constrained to follow *Sony*, we have to seriously question whether the fair use doctrine is any more available herein than in that case.[9] But as in *Sony* we cover ourselves. Despite its pronouncement that the situation before it precluded an application of the fair use doctrine the court in *Sony* proceeded nonetheless to analyze the four factors listed in section 107 only to find that a contrary

---

[8] Section 106, subsection (1) grants the owner of a copyright the right "to reproduce [and authorize reproduction of] the copyrighted work in copies or phonorecords." The subsection does not require public activity.

[9] The legislative history clearly supports the *Sony* court's statement that the purposes listed in section 107 are simply illustrative and not limitative. (See *H.Rept.*, at p. 65; *S.Rept.*, at p. 62.) However we are not as sure that it supports the court's next statement that those purposes give some idea of the general orientation of the doctrine. The section's emphasis on education is reflective of the fact that "most of the discussion of 107 [in the House Judiciary Committee] . . . centered around classroom reproduction, particularly photocopying." (*H.Rept.*, at p. 66.) That the same standards of fair use would be applicable to other activities has been stated in both the House and Senate Judiciary Committee Reports:

> "The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application *in other areas*. It must be emphasized again that the same general standards of fair use are applicable *to all kinds of uses* of copyrighted material, although the relative weight to be given them will differ from case to case." (*H.Rept.*, at p. 72; see also *S.Rept.*, at p. 65.)
>
> "It is also important to emphasize that the singling out of some instances to discuss in the context of fair use *is not intended to indicate that other activities* would or would not be beyond fair use. (*S.Rept.*, at p. 65.)

To limit availability of the doctrine to cases involving "productive use" also ignores Congress' recognition that "the *endless variety of situations* and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute." (*H.Rept.*, at p. 66; *S.Rept.*, at p. 62.) Nevertheless application of the fair use doctrine to our facts also does not produce a contrary result.

result was not required. (659 F.2d at p. 672.) Following *Sony*, and ever mindful of the aforementioned characterization of the "fair use" doctrine, we undertake to examine the factors enumerated in section 107:

a. *The purpose and character of the use*. The first factor, the purpose and character of the use, was included as "an express recognition that, as under [prior] law, the commercial or nonprofit character of an activity, while not conclusive to fair use, can and should be weighed along with other factors in fair use decisions." (*H.Rept.*, at p. 66; see also *S.Rept.*, at p. 63.) Clearly the use contemplated here is noncommercial and nonprofit, but that does not conclusively determine the matter, for the statute does not draw a simple commercial/noncommercial distinction. (*Universal City Studios* v. *Sony Corp. of Amer.*, *supra*, 659 F.2d at p. 972; cf. *Meeropol* v. *Nizer*, *supra*, 560 F.2d at p. 1069; *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, *supra*, 366 F.2d at p. 307; *Loews' Incorporated* v. *Columbia Broadcasting System*, *supra*, 131 F.Supp. at p. 175.) Indeed, the 1976 Act was designed to eliminate the outright exemption under the 1909 statute for noncommercial and nonprofit use. (*H.Rept.*, at pp. 62-63; *S.Rept.*, at p. 59.) Furthermore, the factor contrasts commercial and nonprofit *educational* purposes, and we have no reason to distinguish our situation from that in *Sony* where the court observed that "there is no question that the *copying* of entertainment works for convenience does not fall within the latter category." (659 F.2d at p. 972.)

Examining the purpose of the use here contemplated, we must acknowledge that videocassette technology has undoubtedly provided correctional authorities with an important tool to further the rehabilitation and education of inmates, legitimate ends of the penal system,[10] and that it has given them greater flexibility in accommodating concerns of security to presentation of such materials. (Cf. *S.Rept.*, at p. 64 (recording of an instructional transmission for the purposes of delayed viewing by students in a remote area constitutes fair use).) Nevertheless, while the prison exhibition of motion pictures and other audiovisual works using videocassette technology would serve important public interests, the inescapable fact remains that the primary purpose for that showing is *entertainment*. That being the case, it is less likely that a claim of fair use will be accepted. (Cf. *Universal City Studios* v. *Sony Corp. of Amer.*, *supra*, 659 F.2d at p. 972.) As *Sony* observed: "it is noteworthy that the statute does not list . . . 'entertainment' . . . as [one of the] purposes within the general scope of fair use." (659 F.2d at p. 970, fn. omitted.) It is

[10] Motion pictures are not only produced for entertainment but also as a vehicle for contemporary social commentary. Their being such enables them to be utilized as part of the effort made toward the rehabilitation and education of prisoners to help them return as productive members of society. Also as with literary works in a prison library, showing motion pictures to inmates does much to dissipate their isolation in prison and to reaffirm their touch with the "outside."

also noteworthy that while Congress has provided a specific exemption from copyright infringement in section 110, clause (1) for "the performance . . . of a work by instructors or pupils in the course of face-to-face teaching activities," the legislative history makes it clear that that exemption does *not* apply to "performances . . . that are given for the recreation or entertainment of any part of their audience." (*H.Rept.*, at p. 81; *S.Rept.*, at p. 73; see also discussion of § 110(1), *infra*.) Surely then the nature of the use, entertainment, would weigh against a finding of fair use.

A reexamination of the character of the use contemplated herein confirms our conclusion that the first factor weighs against fair use being found. As we have seen, not only has a distinction been made between the "intrinsic use" of a copyrighted work which sees it taken *in toto* and reproduced or otherwise used without further embellishment by the user and the "productive use" of such a work in which a user takes a copyrighted work but adds his own efforts to it toward the creation of something else, but that serious question has been raised as to whether the fair use doctrine is even available to protect the former type of use from a claim of copyright infringement. (*Universal City Studios* v. *Sony Corp. of Amer.*, *supra*, 659 F.2d at pp. 970, 971-972.) Certainly, the use projected here is of the intrinsic genre: Motion pictures are to be taken *in toto* to be reproduced or rather performed without change or further embellishment made to their content or to their original purpose. Accordingly, since the purpose of the use is to be *entertainment* and its character is thus *intrinsic*, there can be no doubt that the first factor weighs against a finding of fair use.

b. *The Nature of the Copyrighted Work*. The second factor in fair use analysis requires an examination of the nature of the copyrighted work.

The works before us are copyrighted motion pictures or other audiovisual dramatic works that have been reduced to videocassette. Although we have characterized a purpose for their creation as being one of social commentary or education, and although we have said that *as used* the materials can serve important public purposes, still we cannot escape the fact that the works were primarily *created for* "*entertainment*" *purposes*.[11] It would therefore appear that their nature would not readily serve the general "public interest in the free dissemination of information," a cardinal factor favoring a determination of "fair use" (*Rosemont Enterprises, Inc.* v. *Random House, Inc.*, *supra*, 366 F.2d at p. 307; see also *Time, Inc.* v. *Bernhard Geis Associates* (S.D. N.Y. 1968) 293 F.Supp. 130, 146), and their being characterized as "entertainment" makes it "less likely that a claim of fair use

[11] As we have shown they are also so primarily used, which is why the nature of that *use* is "intrinsic."

will be accepted." (*Universal City Studios* v. *Sony Corp. of Amer.*, *supra*, 659 F.2d at p. 972, fn. omitted.)[12]

It is noteworthy the Copyrights Act treats motion pictures and other audiovisual works with special solicitude reflecting "no doubt, the relatively large economic investment involved in [their] creation and the especial danger posed by unauthorized reproductions." (*Universal City Studios* v. *Sony Corp. of Amer.*, *supra*, at p. 967 and 967, fn. 4, referencing §§ 108(h), 110(1), 112(a).) That Congress was especially concerned about the exposure of those forms of expression to the fair use doctrine is evident from the legislative history. There, even in the favored position given uses of educational broadcasts and classroom reproduction, Congress expected that the availability of the fair use doctrine would be narrowly circumscribed and applied strictly in the case of motion pictures or other audiovisual works. (*H.Rept.*, at p. 65; *S.Rept.*, at pp. 64, 72; but see *H.Rept.*, at pp. 71-72.) Thus in examining the *nature* of the copyrighted work, both the medium in which it is presented (a motion picture or other audiovisual work) and the purpose for which it was created (entertainment) lead us to conclude that the second factor weighs against finding fair use.

c. *The Amount and Substantiality of the Portion Used*. The third factor with which section 107 guides us in our determination of fair use is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." Needless to say, with the showing of video cassetted motion pictures to inmates the amount of the work used is its *entirety*; the complete copyrighted work is "taken" for performance. Without question, that taking (coupled with the fact that the use to which it is put is nonproductive) inveighs heavily against fair use being found. (*Universal City Studios* v. *Sony Corp. of Amer.*, *supra*, 659 F.2d at p. 973.)[13]

---

[12] We recognize that the line between "the transmission of ideas" and "mere entertainment" is often much "too elusive" to draw. (*Stanley* v. *Georgia* (1969) 394 U.S. 557, 566.)

[13] We are aware that the notion of substantiality of a taking defeating fair use developed in a different context; that it properly arose in the context of cases involving "parodies" where the question was whether the parodist appropriated a greater amount of the original work than was necessary to create the criticism or satire (see, e.g., *Walt Disney Productions* v. *Air Pirates* (9th Cir. 1978) 581 F.2d 751, 757 & 757, fn. 13; cert. den. (1979) 439 U.S. 1132; *Berlin* v. *E.C. Publications, Inc.* (2d Cir. 1964) 329 F.2d 541, 544, cert. den. (1964) 379 U.S. 822; *Meeropol* v. *Nizer*, *supra*, 560 F.2d at p. 1070; *Rosemont Enterprises*, *Inc.* v. *Random House, Inc.*, *supra*, 366 F.2d at p. 310; *Loews', Inc.* v. *Columbia Broadcasting System* (S.D.Cal. 1955) 239 F.Supp. 165, 175, aff'd. sub nom. *Benny* v. *Loew's, Inc.* (9th Cir. 1956) 239 F.2d 532, aff'd. (1956) 356 U.S. 43); and that some courts have held that those cases are to be treated differently from other cases. (*Walt Disney Productions* v. *Air Pirates*, *supra*, 581 F.2d at p. 757, fn. 13; *Berlin* v. *E.C. Publications*,

d. *The Effect of the Use Upon the Potential Market or Value of the Copyrighted Work*. The fourth and last factor in the fair use calculus is "the effect of the use upon the potential market or value of the copyrighted work," commonly known as the issue of harm. It was the misapprehension and misapplication of this factor by the court below that the Court of Appeals in *Sony* found most egregious: too great a burden had been placed on the copyright owner to establish actual harm (659 F.2d at pp. 971, 973-974), insufficient attention had been given to the *cumulative* effect of the activity in question upon the owner's potential market (*id.*, at p. 974, 976) and the importance that the economic considerations undergirding the factor of fair use have in the entire copyrights scheme had been improperly minimized. (*Id.*, at pp. 965, 967, fn. 4, 970, 971, 973, 974, 976.) So aware, we proceed with our analysis of the fourth factor in section 107.

In discussing the potential market for a copyrighted work we must not forget that section 106, subsection (4) gives a copyright owner the exclusive right to authorize its public performance and that section 202 carefully distinguishes between the ownership of that right (in the copyright holder) and the ownership of the material thing in this it is embodied (i.e., the cassette). In other words the mere buying of a cassette does not mean that the purchaser can perform it willy-nilly in derogation of any of the rights of the copyright owner including that of being able to authorize its being performed publicly, unless an exception in the Act (107-118) so permits.[14] (*Universal City Studios* v. *Sony Corp. of Amer.*, *supra*, 659 F.2d at p. 966; see also *H.Rept.*, at pp. 79, 124; *S.Rept.*, at pp. 71-72; and compare 109(a): subsequent *disposition*.)

As we understand the industry practice, exploitation of the videotape medium normally occurs *after* the basic motion picture or other audiovisual work has already been exhaustively exploited in its first runs in motion picture theaters. In other words, with a

---

supra, at pp. 544-545; *Universal City Studios* v. *Sony Corp. of Amer.*, *supra*, 480 F.Supp. at p. 456; contra *Benny* v. *Loew's, Inc.*, *supra*, 239 F.2d at pp. 536-537.) Nonetheless, although their context may be different, the notion found in the parody cases of productive use is not different from the situation we have here. Neither the parodist who over-appropriates nor the intrinsic user who performs an entire original work for its original purpose without further embellishment makes a productive use of the copyrighted material.

[14] For example, as a limitation on the exclusive right granted the copyright owner by section 106, subsection (5) to control the public *display* of his work, section 109(b) provides that the owner of a lawfully make copy "is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located." That of course is not applicable here because we deal with a *performance* and not a nonsequential *display* of more than one image at a time. (See also *H.Rept.*, at p. 80; *S.Rept.*, at p. 72.) In fact, as will be discussed in the third part of this opinion, we find no exception in the Act which should permit the unauthorized performance or showing of videocassettes contemplated by the request.

few possible exceptions, the copyrighted works are made available on the videocassette medium only after their economic potential from their primary original and first use (in the theaters) has been realized, and it is only at this juncture that the copyright holder tries to exploit the work through subsidiary means, such as by showing it on television and in a number of delayed subruns at motion picture theaters, and by having it placed on the videocassette medium. But although a secondary market may be involved, its exploitation is not merely frosting on the profit cake. While the new videocassette technology may have created secondary markets for the copyright owner, still they have very real economic potential for him and are equally deserving of protection by the copyright laws. (Cf. *Universal City Studios* v. *Sony Corp. of Amer.*, *supra*, 659 F.2d at pp. 971, 972, fn. 9, 973, 974, 975.)

Regarding that market, we understand that a dual source together with a two-tiered pricing system exists for the sale or rental of videocassettes, reflecting the contemplated use to be authorized by the transaction. Institutional users can obtain videocassettes from a copyright owner's authorized distributors for a price in the range of $200 to $600, with rights of unrestricted performance, including public or even commercial showing being contemplated and authorized. On the other hand, for perhaps one-fifth the price ($40 to $100), individuals can obtain the same work from a retail outlet but there only private or home use is contemplated and authorized. That restriction is made very clear to the individual retail purchaser (or renter) because a cassette itself will invariably carry a notational warning of the limited nature of its authorized use. Thus on tapes using the Beta and VHS format the following statement appears:

> "The copyright proprietor has licensed the picture contained in the video-cassette for private home use only and prohibits any other use, copying, reproduction or performance in public, in whole or in part."

RCA SelectaVision Video Discs bear the following statement:

> "The copyright proprietor has licensed the program contained in this videodisc for private use only and prohibits any other use, copying, or reproduction in whole or in part. The public exhibition, or any exhibition for which an admission fee or other charge is made to those viewing this program, is strictly prohibited."

Purchasers of videotapes and videodiscs (herein, "video- cassettes") are thus put on notice that the copyright owner has *not* authorized the use of his work for public performances. Needless to say, using cassettes purchased on the normal retail market, where only private use is authorized, for other purposes such as institutional use and public performance without paying the premium therefor would completely destroy the economic potential of

the special market authorized by the copyright owner to accommodate them. Thus while it might well be accepted that the showing of videocassettes purchased through retail outlets to inmates in correctional institutions might not have a harmful effect on the *primary* market of the copyright owner—the inmates not being likely to be able to go to a theater to see the first run in any event nor disinclined to do so because of the institution's showing of the cassetted version (*Universal City Studio* v. *Sony Corporation of Amer.*, *supra*, 480 F.Supp. at p. 468, cf. *id.*, at p. 451)—still a market *does exist* which stands to be affected by that activity. Inasmuch as the Copyrights Act protects a copyright owner's exploitation of that market from that potential harm, we find that the fourth factor weighs against a finding of fair use.

Accordingly, in the context presented herein, a consideration of the four guiding factors offered in section 107 leads us to conclude that the showing by correctional authorities of videocassettes containing copyrighted motion pictures or other audiovisual works to prison inmates would not be a "fair use" of the work within the meaning of and permitted by that section.

3. The Other Statutory Exemptions: Sections 108 through *118*

Section 106, as we have seen, subjects the exclusive rights granted therein to a copyright owner to the provisions of sections 107 through 118. We have just determined that the fair use defense codified in section 107 would not be available in the situation presented by the requester, i.e., the showing of video cassetted motion pictures or other audiovisual works to prison inmates by correctional authorities. Our discussion however cannot be complete without reviewing the other sections to which the copyright owner's exclusive rights might be subject.

We can summarily pass over sections 111 through 118 since they apply to entirely different types of works. (§§ 111 (secondary transmissions), 112 (ephemeral recordings), 113 (pictoral, graphic and sculptoral works), 114 (sound recordings), 115 (nondramatic musical works on phonograph records), 116 (nondramatic musical works in juke boxes!), 117 (computers), 118 (noncommercial broadcasting).) And because they deal with different activity we can similarly skim over section 108 (reproduction by libraries and archives) and section 109, subsection (a) (second sale or other disposition (cf. § 202; and see *H.Rept.*, at pp. 79, 124; *S.Rept.*, at pp. 71-72).) Section 109, subsection (b) also would not be germane to the situation with which we deal because it grants an exemption from the provisions of section 106, subsection (*5*) dealing with the exclusive right to *display* copyrighted works, which concept requires a nonsequential showing. (§ 101, see fns. 3, 14, *ante*.) Moreoever, even with respect to display, the exemption was not meant to effect a copyright owner's market for reproduction and distribution of copies. (*H.Rept.*, at p. 80; *S.Rept.*, at p. 72.)

We are left with section 110 which declares certain types of performances not to be infringements of copyright and thus merits closer examination. Most of the exemptions contained in section 110 obviously do not apply to our situation,[15] but those provided in clauses (1) and (5) might appear to do so.

Clause (1) declares not to be an infringement of copyright the: "performance . . . of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction . . ." But here, even though the use for which the exhibition of the videocassettes is made in the correctional setting might be characterized as being in part educational, it is only so in a different sense from that contemplated by the phrase "teaching activities" in clause (1). The latter is more personal, systematic, programmed, designed and purposefully instructional than general "education" of prisoners. Furthermore, as we discussed above, the legislative history makes it clear that while "the reference to 'teaching activities' exempted by the clause encompasses systematic instruction of a very wide variety of subjects . . . they do *not* include performances . . . that are given for the recreation or entertainment of any part of their audience." (*H.Rept.*, at p. 81; *S.Rept.,* at p. 73.) The legislative history also points out that the reference to "similar place devoted to instruction" was included to refer to the term "classroom" and not to the term "non-profit educational institution." (*H.Rept.*, at p. 82; *S.Rept.*, at pp. 73-74.) Given that understanding we cannot neatly fit the purposes of education such as they are in the penal institution into section 110(1). In any case, the demand that the teaching activity be face-to-face would preclude the application of the clause where the educational message is contained *in the film itself*. (*H.Rept.*, at p. 81; *S.Rept.*, at p. 73.)

We are left with subsection (5) which declares a noninfringement of copyright:

> "[The] communication of a transmission embodying a performance . . . of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> "(A) A direct charge is made to see or hear the transmission; or

[15] Clause (3) deals with performances of works in the course of religious services. Clauses (2), (4), (6), (7) and (8) relate to the performance of nondramatic literary or musical works, which we have assumed is not the type of work being exhibited to the inmates. Furthermore clause (6) applies to the performance of a nondramatic musical work by a governmental body . . . in the course of a fair or exhibition, and clause (7) to its being performed by a vending establishment. Clause (8) applies only to the adaption (performance) for the blind of a nondramatic literary work.

"(B) The transmission thus received is further transmitted to the public."

This exemption however was designed to protect someone "who merely turns on, in a public place, *an ordinary* radio or television receiving apparatus of a kind commonly sold to members of the public *for private use*" (*S.Rept.*, at p. 86) under the rationale that "the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no . . . liability should be imposed." (*Ibid.*) It was not meant to cover situations where standard radio or television equipment is augmented "with sophisticated or extensive amplification equipment" to improve the aural or visual quality of the performance. (*S.Rept.*, at p. 87; cf. *Twentieth Century Music Corp.* v. *Aiken*, *supra*, 422 U.S. 151 (four ordinary loudspeakers grouped within a relatively narrow circumference of the set is permissible).) In the situation envisioned herein, there would be a sophisticated and extensive augmentation of the versatility of the monitor. Although that might not necessarily be from an amplification of its audio or visual capacity, still the system would involve more than the ordinary and unembellished television receiver, and therefore we do not believe its use falls within the spirit of the exemption provided in clause (5). Were we to interpret it otherwise, the exemption would consume the "exclusive rights" granted the copyright holder by section 106.

We therefore find that none of the clauses of section 110 is applicable to the situation presented in the request, and that none of the statutory exemptions contained in sections 108 through 118 affords basis upon which to conclude that noninfringement of copyright takes place.

Accordingly, having determined that the exhibition by correctional authorities of videocassette tapes of motion pictures or other audiovisual works to inmates in state prisons would amount to the copyrighted work being performed publicly within the meaning of section 106, subsection (4), and that the "fair use" doctrine of section 107 would not be available under the circumstances, we conclude that the showing of those works to prison inmates by correctional authorities without authorization from the copyright owner would constitute an infringement of copyright.

*****