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Comment: Sony, Fair Use, and File Sharing

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COMMENT: *SONY*, FAIR USE, AND FILE SHARING

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Jessica Litman's article does a wonderful job of describing the method behind *Sony*'s madness.[1] In this short Commentary, I would like to explore just one of the interesting strands developed in her paper—the scope of personal fair use in *Sony*, and its implications for peer-to-peer file sharing. More specifically, I want to reflect on the suggestion that *Sony*'s broad exemption for personal copying has eroded into something unrecognizable, and that it is this erosion—rather than any difference between file-sharing and time-shifting—that explains the courts' hostility to the fair use defense in the peer-to-peer context.[2]

Two of Professor Litman's descriptive claims strike me as undeniable. First, fair use analysis since *Sony* has moved toward a market failure approach that prefers transformative uses and disfavors pure copying.[3] Second, fair use has played only a background role in the legal discourse over file sharing.[4] And it is certainly plausible to posit a direct causal relationship between these two facts. But I think it worth at least pausing to consider an alternative possibility: that *Sony*'s exemption for noncommercial copying was never categorical,

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1 *See* Jessica Litman, *The* Sony *Paradox*, 55 CASE W. RES. L. REV. 917 (2005).

2 *Id.* at 960.

3 Many have criticized this development. For two excellent recent examples, *see generally* Rebecca Tushnet, *Copy This Essay: How Fair Use Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 555-60 (2004); Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 BERKELEY TECH. L.J. 539 (2003).

4 As Professor Litman points out, the *Grokster* defendants made a strategic decision not to raise the issue, making fair use technically beyond the scope of the case before the Supreme Court. Litman, *supra* note 1, at 957. *Cf.* J. Glynn Lunney, Jr., et al., Brief of Amici Curiae Law Professors in Support of Respondents, Metro-Goldwyn-Mayer Studios v. Grokster, 380 F.3d 1154 (9th Cir. 2004) (No. 04-480), *available at* http://www.eff.org/IP/P2P/MGM_v_Grokster/20050301_lunney.pdf (exhorting Supreme Court to consider fair use issue and contending that most file sharing constitutes fair use).

and would not have shielded the vast majority of unauthorized file sharing at issue in today's peer-to-peer wars. If so, the paradox of *Sony* may lie not in the public's continued faith in an obsolete Supreme Court decision, but in the dichotomy between the public perception of *Sony* and the true intentions of the Court.

I. PRIVATE COPIES, PRESUMPTIONS, AND THE *SONY* MAJORITY

Scholars commonly remember *Sony* for its presumption of fair use for noncommercial copying.[5] Both the language of *Sony* and the deliberative process that generated it, however, suggest a rather fragile presumption whose existence and scope may have depended heavily on the facts of that case. The decision by no means represented a wholesale exemption for private copying.

For one thing, as Professor Litman's account makes clear, only Justice Stevens felt unequivocally that all "private" copying should fall beyond the scope of copyright law.[6] The motivations of Justices O'Connor and Brennan, in particular, reflected greater nuance and more ambivalence. O'Connor sided with the majority in large part because of her reluctance to disturb the district court's conclusion that the studios would suffer no "actual or potential" harm from VCR use.[7] Had the studios satisfied their burden of proving "potential" harm to the value of their copyrights, O'Connor would have found infringement, despite the noncommercial nature of the copying and the fact that it took place in consumers' homes. Economics, rather than privacy concerns, drove O'Connor to favor reversal.

The key to the *Sony* fair use puzzle, then, lies in understanding the burden-shifting proposed by O'Connor and adopted in the majority opinion. What kind of evidence from copyright holders could rebut the fair use presumption and justify a finding of infringement by individuals engaged in noncommercial use? The answer to this question requires consideration not only of O'Connor's statements on burden-shifting, but of the views of the other Justices who joined the majority opinion, most notably Justice Brennan.

Brennan held fast to a distinction between time-shifting—which he viewed as fair use—and copying to create video libraries—which he did not.[8] Given the consistency of his position on this point, Brennan

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[5] Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 447-49 (1984); *see also* Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 313, 331 (2003); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 977, 984-85 (2002).

[6] *See* Litman, *supra* note 1, at 930.

[7] *Id.* at 934.

[8] Justices White and Burger apparently shared this view. *See id.* at 929.

almost certainly would not have endorsed an opinion that extended the fair use privilege to those who saved copies to make video libraries. Yet the studios' evidence of the economic effects of "librarying" was hardly more conclusive than their proof of harm from time-shifting.[9] Brennan's distinction between time-shifting and librarying, therefore, must have turned on something other than a difference between the record evidence of accrued harm from the two kinds of use. Arguably, it turned on an instinct as to the probable long-term impact of time-shifting as compared to librarying. The studios simply had not offered a persuasive story in support of the claim that watching a publicly aired program at a later time would reduce demand for their copyrighted works. The nexus between copying and reduced demand, however, followed more naturally in the case of video libraries, which would more likely substitute for television programming.

When we consider O'Connor's presumption in light of Brennan's distinction between time-shifting and librarying, then, it becomes clear that rebutting the *Sony* presumption does not require proof of actual financial injury from a noncommercial use. It requires, instead, a persuasive, logical nexus between the copying at issue and the likely future demand for the copyrighted expression. The language of the opinion confirms this approach:

> A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that *if it should become widespread*, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.[10]

The potential harm from the use, of course, encompasses only one of the four statutory fair use factors. Given the Court's extensive analysis of the first and fourth factors, it is tempting to overlook the role of the other factors in *Sony*, and to assume that they should play no role in cases involving noncommercial use. *Sony* itself, however, turned at least in part on the Court's conclusion that the second and

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[9] *See* Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 467-68 (C.D. Cal. 1979), *aff'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984) (dismissing evidence of harm from librarying).

[10] *Sony*, 464 U.S. at 451 (emphasis added).

third factors should have little bearing in the unique circumstances presented by that case. In particular, *Sony* involved a type of work—off-the-air television broadcasts—that copyright holders had offered for free to the public, and that that consumers simply wanted to watch at a more convenient time. The free, broadcast nature of the television programs led the Court to minimize the significance of factor two—the expressive nature of the works—and factor three—the amount of the work copied. It is significant that the Court deemphasized these factors not because of the noncommercial nature of the copying, but because of the unrestricted nature of the distribution of the works by the copyright holders. Presumably, the Court would not so easily disregard these factors in a case that did not involve public broadcasts.

Of course, the constellation on the Court has changed quite substantially since *Sony*, making even the most careful analysis of the Justices' motivations of limited use in anticipating where this Supreme Court would lean today. But both the contingent nature of the *Sony* presumption and the fragile nature of the coalition that endorsed it strike me as important when choosing whether to emphasize similarities or differences between Betamax time-shifters and users of peer-to-peer networks.

II. TIME SHIFTERS AND FILE SHARERS

Professor Litman's article mentions some of the similarities between home recorders and peer-to-peer file sharers.[11] But there are important differences as well—differences that, in light of the above discussion, arguably should matter in evaluating file sharers' fair use claims.

Nature of the Works. Unlike *Sony*, works traded on file-sharing networks are not works being picked up from a public broadcast, for watching at a later time. Whether or not a particular downloaded file would substitute for a legally purchased copy, unauthorized downloads clearly provide users with a permanent copy of content to which they have no prior entitlement.

Nature and Scale of the Copying. The *Sony* majority was careful to limit its fair use ruling to single copies of television programs made for purposes of time-shifting. Even Justice Stevens, the strongest proponent of fair use, seemed motivated primarily by a concern to protect individuals' ability to make single copies for their own personal use.[12] File sharing is different both in nature and in scale.

[11] *See* Litman, *supra* note 1, at 951-52.

[12] *Id.* at 930.

Unlike a unilateral act of taping a television program, file sharing involves a global, collaborative copying and distribution process among individuals who rarely know one another. File sharing, moreover, usually does not entail the making of single copies. While a single individual may download only one copy of a particular song, the scale of the copying and distribution of content on file-sharing networks simply bears no relation to the isolated acts of off-air taping that the Court considered in *Sony*.

Privacy concerns. In *Sony*, the very detection of the copying would have required invasion into people's homes. People who trade music files, however, deliberately reach outside of their homes and achieve their copying and distribution through a public, global network. This is not to suggest that investigations into individuals' use of networks do not raise privacy concerns; certainly they do.[13] But the nature of the privacy concern is at least different in the peer-to-peer context, where investigations can yield preliminary evidence about file-sharing patterns even before identifying a particular culprit, let alone physically entering an individual's home.

Potential harm. On the facts of *Sony*, the Court found that the plaintiffs had not proven injury because of the implausibility that time-shifting would harm any identifiable market. People would not stay away from theaters just because they could now choose when to watch their favorite television program; perhaps more significantly, the evidence failed to suggest that the Nielson ratings, the benchmark tool for setting advertising rates, would ignore home recorders.[14] A clear majority of the Justices, however, were willing to presume that economic harm would occur if individuals kept tapes of recorded programs without erasing them.

The likelihood of harm from widespread, legalized file sharing appears at least as strong as that from librarying. In particular, at least some copies distributed through file sharing networks are likely to substitute for lawfully acquired purchases. While fair use proponents point to surveys minimizing the economic impact of the file sharing phenomenon,[15] such an argument misses two points. First, *Sony* never required clear evidence of lost profits; the Court insisted only on a "showing . . . that some meaningful likelihood of future harm

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[13] In part for this reason, courts have appropriately insisted that copyright holders file lawsuits before they may obtain the identity of individual file-sharers. *See, e.g.*, Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Serv. Inc., 351 F.3d 1229 (D.C. Cir. 2003).

[14] In the age of TiVo, it seems quaint that the Justices assumed that time-shifters would watch all commercials, but they appear to have made exactly that assumption. *See Sony*, 464 U.S. at 452 n.36, 454-55.

[15] *E.g.*, Litman, *supra* note 1, at 952-53; Lunney, *supra* note 5, at 1027-29.

exists."[16] Second, the surveys study patterns over the past several years, in which file sharing has come under intense scrutiny and copyright holders have pursued an aggressive end-user campaign. If file sharing were declared presumptively fair, it is hard to deny the "meaningful likelihood" that many music fans would acquire their music from peer-to-peer networks rather than paying for an authorized version.

It may well be that the defendants' reluctance to embrace a fair use defense in *Grokster* resulted more from frustration over changes in the law than from the differences between file sharing and time shifting. Yet it seems equally plausible that those differences make unauthorized file sharing a completely different case that would have failed on fair use even under the majority view(s) in *Sony*.

[16] *Sony*, 464 U.S. at 451.