

COPYRIGHT PROTECTION, THE RIGHT TO PRIVACY, AND SIGNALS THAT ENTER THE HOME*

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I. INTRODUCTION

The rapid advances in the technology of communication are moving our society ever closer to what scores of futurists have long predicted: A world in which we all sit at home, visiting with one another only through our telecommunication devices.¹ To be sure, that world is still a good way off, but it is unnecessary to keep one's ear to the ground in order to hear the hoofbeats of its advance. The signs of change are all around us, and as the changes come, they continue, as Grant Gilmore once suggested, to unsettle both our law and our selves.²

The law of intellectual property—a form of law that exists at least in part to govern and encourage technological advance—has been no less unsettled than has any other body of law. Copyright law in particular has turned magnificent analytical somersaults in order to accommodate new forms of expression of ideas.³ The literature has been full of recommendations for doctrinal change. Yet through it all, the discussion has been analytic and programmatic, asking the ubiquitous question: *How can we best . . . ?* Far too little attention, however, has been paid to the possibly more important question: *Can we at all?* Here, as elsewhere in our policy-oriented society, there seems to be a rush to regulate in pursuit of some chimeric public good, with questions of morality and even of constitutionality often postponed.

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An earlier version of this Article, entitled "Constitutional Issues in Home Video Recording," was delivered as a lecture at the Harvard Law School under the sponsorship of the Harvard Law Forum and the Committee on Sports and Entertainment Law. It is published here by kind invitation of the Editors. For constructive criticism and other assistance, I am indebted to Enola Aird, Jill Fisch, Dean Hashimoto, Martha Minow, David Rubin, and the students in my seminar on Science, Technology, and the Constitution in the Fall Term of 1983 at the Yale Law School.

¹ See, e.g., A. TOFFLER, *THE THIRD WAVE* (1980).

² G. GILMORE, *THE AGES OF AMERICAN LAW* 65 (1977).

³ See, e.g., *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983) (analyzing problem outside contemplation of amended act), *cert. dismissed*, 104 S. Ct. 690 (1984).

The Supreme Court's decision last Term in *Sony Corp. v. America v. Universal City Studios, Inc. (Betamax)*,⁴ serves to illustrate the problem. In *Betamax*, the Court resolved, at least for the moment, the controversy over the legal status of home recording of copyrighted television programs. As the parties and the Justice framed the case, the central issue was whether when an individual, in the privacy of her own home, records a copyrighted program, the recording is a fair use within the meaning of Section 107, of the Copyright Act.⁵ The subsidiary question—although as a practical matter the more important one—was whether the manufacturers of home video recording equipment are shielded from liability as contributory infringers. For the time being, the official answer to both questions is "Yes." Neither those who record the programs nor those who manufacture the recorders are liable. Yet the battle can hardly be regarded as over. Only the arena has shifted, now to the Congress, where the producers of copyrighted programming hope to regain what they seem to have lost.⁶

One way to look at the issue in *Betamax*—and apparently the only way most observers have considered it—is this: How can copyright law best cope with the problem of recording, a problem unforeseen when the statute was enacted? Fair use may have been the analytical battleground on which the parties met, but everyone knows what the case was really about: The home video recording market is bigger than anyone thought it would be, and the producers of television programming want a piece of the action. Thus despite their loss in the Supreme Court, the producers will continue their efforts (temporarily shelved because 1984 is an election year) to obtain congressional passage of legislation that would tax the sale of home video recorders and blank tapes

⁴ 104 S. Ct. 774 (1984).

⁵ 17 U.S.C. § 107 (1982) provides:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

⁶ See, e.g., Fuerbringer, *Entertainment Industry Vows Fight in Congress*, N.Y. Times, Jan. 18, 1984, at D20, col. 5; Harmetz, *An Unhappy Hollywood Weighs the Next Move*, N.Y. Times, Jan. 18, 1984, at D21, col. 5.

and, through some scheme or other, divide the proceeds of that tax among industry members to compensate them for copyright royalties they are purportedly losing. In other words, even though the *Betamax* lawsuit was styled as an injunction action, the industry does not really want to prevent home video recording. Rather, the industry wants consumers to go ahead and make home recordings but to pay the copyright holders for the privilege.

This fairly simple observation may mask a concern over the problem just mentioned: There are important limits, both moral and constitutional, on government power to rescue the copyright holders. The industry, after all, is fond of pointing out that even though it filed the *Betamax* suit and is lobbying the Congress, it certainly does not want to enter anyone's home to take her video recorder away. That concession is an important one, both for practical reasons—one can imagine the uproar the contrary position would generate—and, as will become clear, quite possibly for good constitutional reasons as well.

That concession also points toward a potential flaw in the industry's theory that it is entitled to share the profits from home taping—and, one presumes, ultimately from many other uses to which consumers might put signals that are sent into their homes. Consider the history of the *Betamax* case. The primary defendants were the manufacturers of video recording equipment. The manufacturers were sued not as infringers, but as contributory infringers. According to the courts, a contributory infringer is "one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another. . . ."⁷ Note the key element of this definition: "the infringing conduct of another" must exist. In other words, as might be expected, one can be held liable as a contributory infringer only if there is an underlying infringement. In the *Betamax* case, the requisite underlying infringement would have been recording by private parties in their homes. The defendants had a judgment because the Supreme Court ruled that the home taping—the conduct the industry labeled infringement—was actually a form of fair use.⁸

This much simply reviews recent history. I would like to go further, however, by discussing an alternate ground for decision

⁷ *Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted).

⁸ 104 S. Ct. at 791-96.

in *Betamax*, one which, unlike the limited issue of statutory construction on which the judgment turned, would have implications far beyond the case, implications that would surely touch any congressional effort to modify the Copyright Act to enable the industry to share the profits it covets. I refer to the possibility that the private, non-commercial use of video recording technology might be entitled to constitutional protection.

The possibility that individuals might enjoy a constitutional right to record signals that enter their homes without paying a penalty has been mentioned in the debate but never discussed in detail.⁹ Yet I think it plain that the possibility merits further investigation. Should a privilege of this nature be found, it would most likely be a branch of the right to privacy. I admit that on first hearing, the notion that the Constitution might protect video recording seems at best implausible and at worst outrageous, but if you will bear with me a bit longer, I will try to paint a picture that will convince you at the very least that the possibility of constitutional protection should be taken seriously.

And why shouldn't it be taken seriously? After all, so many things that are done in the home, from reading obscene magazines to using contraceptives to resisting arrest, have been held by the Supreme Court to be protected by one constitutional provision or another.¹⁰ In fact, as I hope will become clear, it is not at all facetious to suggest that the Supreme Court has drawn a bright line at the door of an individual's dwelling, and that in order to cross that line and punish conduct within, the government must have an awfully powerful reason. When measured against the background that I will shortly sketch, the idea of a right to privacy that protects noncommercial home video recording will, I hope, seem less outrageous—perhaps even plausible. And plausibility is really all I seek to establish.

The implications of a right of this kind are easy to imagine. Suddenly the congressional debate on whether to amend the Copyright Act in the wake of *Betamax* would no longer focus alone on the wisdom or fairness of compensating copyright holders for the home recording of their programs. Instead, the debate would have to consider a question not formally before the Court in the *Betamax* case: Has the government the *power* to regulate home video recording? Because if it lacks the power—if the

⁹ See, e.g., Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth*, 68 VA. L. REV. 1505, 1525-26 (1982) (implying that privacy questions may make direct enforcement difficult).

¹⁰ See *infra* notes 35-69 and accompanying text.

Constitution prohibits any government effort to control home video recording—then there is no copyright infringement, hence no contributory infringement, and hence no basis for industry complaints about lost revenue.

Naturally, a right of this nature would not necessarily be limited to the narrow circumstances of the *Betamax* case. Entertainment companies send increasing numbers of signals into private homes, whether through cables or through the air. Some homeowners have purchased or constructed devices to pluck these signals from the ether without the consent of the sender. So far, courts have looked askance at this practice.¹¹ But suppose the receiver were to interpose a claim of constitutional right? At the very least, a claim of this kind would raise the discussion to a different plane.

I will not, in this Article, seek to argue that the constitutional right of privacy in some sense “really does” protect home video recording and related activities. As will shortly become clear, I do not think that is even an important question, to say nothing of whether it is a sensible one.¹² Instead, I will seek to assess the likelihood that some federal court, somewhere in the country, might be persuaded that the right to privacy extends this far. In this sense, my Article is less a brief for the benefit of litigants than it is a memorandum to the members of Congress, suggesting that when the inevitable vote on taxing the sale of video recorders and blank tapes arrives—and it will—members ought to pause and wonder whether they are responding to a problem that does not exist, or more to the point, a problem of which the government cannot take official cognizance. In short, I am proposing no more than a thought experiment, but one which will help determine whether the Congress ought to worry about the constitutional status of any measure that is aimed at recapturing from consumers the revenues lost through what may well be constitutionally protected activity.

In painting my little picture to explain why the members should worry, I will begin by using broad strokes to fill in the

¹¹ See, e.g., Gruson, *L.I. Judge Fines 8 in Cable TV Piracy*, N.Y. Times, May 23, 1984, at B5, col. 1. Recently enacted congressional legislation will preempt many state laws against signal piracy. For a discussion of the legislation, see *infra* note 90 and accompanying text.

¹² I do not count myself among those who believe that the less determinate provisions of the Constitution “really do” have inherent meanings, nor am I certain that devices such as “the intent of the drafters” can rescue them. For a general statement of my views on this point, see Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. (March 1985) (forthcoming).

relevant background—the role of constitutional analysis in considering economic regulatory statutes in general and intellectual property statutes in particular. I will then sketch quickly in one small corner of the canvas the analytical method I plan to use—and of course, its justification. From there, I will move on to etch in sharp, bold lines the facets of the modern right to privacy that are most important for the home video recording issue. I will then use lighter, more general strokes to suggest how a court might analyze home video recording in light of that right to privacy. Finally, I will sketch in more tentative lines some possible implications were the courts to decide to enforce a right as broad as the one I am suggesting.

II. THE CONSTITUTIONAL BACKGROUND

A. *The Constitution in Society*

In our maturing constitutional democracy, there is sometimes a tendency, as Henry Monaghan has mused, to view the Constitution as perfect, as guaranteeing any set of rights that someone chooses to assert.¹³ And gazing about the constitutional landscape, it is difficult to resist the conclusion that virtually no provision of law, no matter how artfully drafted, is completely immune from constitutional challenge if a lawyer is sufficiently clever, or from judicial excision if the judge is sufficiently determined. So we have had the Defense Department's policy of suspending contractors who commit fraud struck down as a denial of due process¹⁴ and the provisions of Title VII of the Civil Rights Act of 1964 permitting judges to appoint counsel¹⁵ invalidated as a form of slavery.¹⁶ Naturally, these decisions are sometimes overturned on appeal, but sometimes they are not. And even when they are, the temporarily invalidated statute is shrouded in shadow until the litigation ends. There is, in short, no statute of which we can say with assurance: "This one, at least, does not live on borrowed time."

Nevertheless, there is a tendency to treat economic regulatory statutes as somehow belonging to a different landscape, on which questions about constitutionality should rarely arise.

¹³ See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

¹⁴ See *Old Dominion Dairy Prods. v. Secretary of Defense*, 631 F.2d 953, 964 (D.C. Cir. 1980).

¹⁵ Civil Rights Act of 1964, § 706(f)(1), 42 U.S.C. §§ 2000e-5(f)(1) (1982).

¹⁶ See *In re Nine Applications for Appointment of Counsel in Title VII Proceedings*, 475 F. Supp. 87 (N.D. Ala. 1979), *vacated sub nom.*, *White v. United States Pipe & Foundry Co.*, 646 F.2d 203 (5th Cir. 1981).

The idea that an economic regulatory statute might actually be unconstitutional smacks of *Lochnerism*.¹⁷ In more primitive times, courts treated economic regulatory statutes with the same disdain that greeted other enactments, but in recent years, constitutional challenges to economic regulatory statutes have only rarely met with success. When courts have ruled against these statutes, moreover, the results have been held up to ridicule. As a result, challenges to regulatory statutes usually object to particular constructions placed on them by administrative agencies, and if constitutional arguments are raised at all, they are generally raised as afterthoughts. Yet the provisions of the Constitution form a test that must be passed successfully by all, not just some, legislation, and those protections should not be ignored merely because the statute in question regulates economic life. The mere fact that few regulatory statutes are unconstitutional should hardly be taken as evidence that no one of them is.

B. *Copyright and the Constitution*

The Constitution limits congressional exercises of authority under the Copyright Clause¹⁸ just as it limits congressional exercises of authority under every other clause. This simple truth should be self-evident, and yet, for reasons that are obscure, few defendants charged with infringing someone else's rights in intellectual property have raised constitutional claims. Perhaps they have been cowed by the weak argument that intellectual property rights themselves have a constitutional status.¹⁹ More likely, they have been discouraged by the almost invariable judicial repudiation of the most obvious constitutional claim—that the first amendment serves as a shield for those who would "violate" another's intellectual property right.

Typical of the judicial treatment of this defense in intellectual property cases is the opinion by the District Court for the District of Columbia in *Reddy Communications, Inc. v. Environmental Action Foundation*.²⁰ Reddy Communications was proprietor of a trademark, a character known as Reddy Kilowatt, which was used

¹⁷ See *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁸ U.S. CONST. art. I, § 8, cl. 8, grants Congress 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."

¹⁹ Cf. Goldstein, *The Competitive Mandate: From Sears to Lear*, 59 CALIF. L. REV. 873 (1971) (arguing that the copyright clause forms part of constitutional mandate for a competitive economy).

²⁰ 199 U.S.P.Q. (BNA) 630 (D.D.C. 1977) (denying preliminary injunction). The defendants ultimately prevailed on statutory grounds. See 477 F. Supp. 936 (D.D.C. 1979).

in advertising and promotional materials projecting a favorable image for the electric power industry. The Foundation used a caricature of Reddy Kilowatt in materials critical of the industry. When Reddy Communications sued for trademark infringement, the Foundation raised as a defense the argument that its use of the trademark was political speech and, therefore, an exercise of its first amendment right to free expression. The court rejected this defense, reasoning that the Foundation had available to it other paths for expressing its views, whereas Reddy Communications, the trademark proprietor, had no means other than the trademark laws to protect its interest.²¹ A balancing test analyzing the *content* of speech is alien to most mainstream first amendment analysis,²² but the approach of the district court in *Reddy Communications* typifies the short shrift given arguments of this kind in intellectual property cases.²³

Defendants in copyright infringement cases have fared only slightly better. The well-known case of *Walt Disney Productions v. Air Pirates*²⁴ is generally thought to have laid to rest modern first amendment arguments in the field. There the Ninth Circuit rejected, on grounds similar to those set forth in *Reddy Communications*, an underground comic book's claim that its parody of copyrighted characters was protected as free expression.²⁵ The court recognized that "some tension" exists "between the First Amendment and the Copyright Act," but concluded that the comic book publisher could have expressed its theme "without copying Disney's protected expression."²⁶ That of course is true, but again, it strikes an awkward chord when compared with the usual first amendment melody.

Naturally, those who have claimed first amendment rights—or something very much like first amendment rights—have not always lost their cases. One celebrated case in which a first amendment defense prevailed is *Time, Inc. v. Bernard Geis Asso-*

²¹ 199 U.S.P.Q. (BNA) at 634.

²² Balancing is somewhat more common—if nonetheless controversial—in analysis of time, place, and manner restrictions. See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 103 S. Ct. 2875 (1983); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980).

²³ See, e.g., *Dallas Cowboys Cheerleaders v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *Interbank Card Ass'n v. Simms*, 431 F. Supp. 131 (M.D.N.C. 1977). For a critique, see Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 Wis. L. REV. 158.

²⁴ 581 F.2d 751 (9th Cir. 1978).

²⁵ *Id.* at 758-59.

²⁶ *Id.* at 759.

ciales.²⁷ There a federal court ruled that the doctrine of fair use protected publication of a book on the assassination of President Kennedy, even though the book used drawings admittedly based on the Zapruder film, on which the plaintiff held the copyright. The court did not undertake an explicit first amendment analysis, but it did rule implicitly in favor of the public's right to know, stating that the defendant should prevail because of the "public interest in having the fullest information available on the murder of President Kennedy."²⁸ Apart from that argument, the court indulged a standard fair use calculus, considering such issues as the injury to the copyright owner and the effect, if any, on the market for the copyrighted work.²⁹ But the first amendment overtones of the court's analysis should not be ignored.

There are a few other cases in which first amendment arguments, dressed up as fair use claims, have succeeded, but for the most part, courts hearing both trademark infringement and copyright infringement claims have rejected the free expression defense.³⁰ That result is not surprising; if full first amendment protection were granted for the copying of someone else's work, there would be little or nothing left of intellectual property law. Thus first amendment arguments *must* generally fail, for they strike at the very heart and purpose of copyright and trademark protection.

Still, the necessary failure of first amendment arguments does not mean that defendants should be discouraged from ever raising any constitutional arguments against claims for infringement. The quick dismissals in the first amendment cases might be somewhat intimidating, but the first amendment is not all of the Constitution—there are lots of other clauses! In particular, there is a mass of constitutional common law (by which I mean judge-made law³¹) going under such distasteful names as "substantive due process" or "fundamental rights analysis." One of the most important, as well as the most controversial, of the rights revealed in this manner is what has come to be known as the right to privacy. This is the right that I will attempt momen-

²⁷ 293 F. Supp. 130 (S.D.N.Y. 1968).

²⁸ *Id.* at 146.

²⁹ *Id.* See also 17 U.S.C. § 107 (1982).

³⁰ For general discussions of this problem, see Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge the First Amendment Guarantees for Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970).

³¹ Although other descriptions of constitutional common law have been offered, I am not convinced that any of them makes as much sense as this one. See Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1344-45 (1983).

tarily to apply to the issue of home recording of copyrighted works and to a few other problems as well. First, however, I must pause to set out a justification for my analytical method.

C. *A Note on Method and Meaning*

A constitutional right to privacy, in the sense I will have in mind when I use the phrase, falls within that broad category of rights that the courts label "fundamental" and locate less in the words of the various constitutional provisions than in their emanations. It has become something of a commonplace to assert the analytical poverty of efforts to define this set of fundamental rights, to establish guidelines for discovering them, or to explain why the courts "ought" to be enforcing them. Scholars in increasing numbers have concluded that judges cannot undertake to discover and enforce these fundamental rights except through a self-conscious promotion of the judges' own values.³²

Whatever the merits of this criticism, a scholar writing for the guidance of the Congress must treat the issue in the manner of the man who, when asked whether he believed in Baptism by water, responded, "Sure—I've seen it done." Similarly, bearing in mind Holmes's dictum that the law is no more than a prediction of what a court is likely to do in a given case,³³ it is enough for the purposes of this discussion to agree that judges do indeed purport to discover fundamental rights. Scholarly assaults have not routed the judicial forces into ragged retreat; recent years have witnessed the discovery of as many fundamental rights as ever.³⁴ The Congress legislates less against the backdrop of what scholars think the courts should be doing than against the backdrop of what the courts are actually doing. As long as the judges remain in the business of striking down statutes because they violate notions of fundamental right, the Congress must legislate with the judicial predilection in mind.

This Article is, as I noted a few minutes ago, in the nature of a memorandum to members of the Congress. It is intended to stimulate discussion; it is less a recommendation than a speculation. Thus the purpose of this Article is less to say what the law

³² See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 43-72 (1980); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063 (1981).

³³ O.W. HOLMES, *The Path of the Law* in *COLLECTED LEGAL PAPERS* 167, 173 (1920).

³⁴ To take just one such "discovery" the Supreme Court announced not long ago that an indigent individual sued by the state to recover child support payments made to the individual's putative child has the "right" to a state-funded blood grouping test to aid in disproof of paternity. See *Little v. Streater*, 452 U.S. 1 (1981).

"ought to be" than to present what a court might assert that the law "already is"—and if the law "already is" what I will shortly suggest, then legislation to recapture the "losses" due to home video recording and other uses of signals entering the home is very probably unconstitutional. But the phrase "is very probably unconstitutional" must be understood to mean no more than this: A prediction that a court might very likely so rule. With this understanding, it is appropriate to proceed with analysis of the right to privacy.

III. ONE VIEW OF THE RIGHT TO PRIVACY

A. *The Modern Origins*

Typically, those who want to argue about the right to privacy reach back to the basics—the original 1890 article by Warren and Brandeis³⁵ or Justice Brandeis's 1928 dissenting opinion in *Olmstead v. United States*.³⁶ For the purposes of this discussion, however, it is more appropriate to seek comparatively recent roots.

In its modern form, the constitutional right to privacy stems from the Supreme Court's 1965 decision in *Griswold v. Connecticut*.³⁷ *Griswold*, for those whose memories have dimmed since the final examination in constitutional law, struck down on privacy grounds Connecticut's statute prohibiting the dispensing or use of contraceptive devices or drugs.³⁸ Although the decision was by its terms limited to the privacy rights of married persons, it has subsequently been read far more broadly.³⁹ The Court in *Griswold* cited no particular provision of the Constitution as support for its decision, explaining instead that the right of privacy emerged from "penumbras, formed by emanations from" the provisions of the Bill of Rights.⁴⁰ The critical point in the Court's analysis—and a point to which I will presently return—came near the end of its opinion: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."⁴¹

Thus *Griswold* turned on the Court's willingness to dismiss as

³⁵ Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

³⁶ 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

³⁷ 381 U.S. 479 (1965).

³⁸ *Id.* at 480, 485-86.

³⁹ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁴⁰ *Griswold*, 381 U.S. at 484.

⁴¹ *Id.* at 485-86.

shocking and repulsive the means that would be needed to enforce the ban. The decision may be criticized on just that ground—perhaps no intrusion into the sacred precincts of marital bedrooms would really be necessary for enforcement⁴²—but the decision stands all the same, and it is not likely to be overruled.

From *Griswold*, most discussions of the right to privacy leap ahead eight years to *Roe v. Wade*,⁴³ but I would like to detour instead through the Court's 1969 decision in *Stanley v. Georgia*.⁴⁴ *Stanley* overturned a conviction for knowing possession of obscene matter when that conviction was based on materials seized during a raid on a private home. In rejecting the state's argument based on its right to protect its citizens, the Court labeled as "fundamental to our free society" the "right to receive information and ideas, regardless of their social worth."⁴⁵ The majority added that this right "takes on an added dimension" in the context of "a prosecution for mere possession . . . in the privacy of a person's home."⁴⁶ Why? Because, as the Court explained:

[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. . . . [M]ere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.⁴⁷

Strong language indeed—and here again, as in *Griswold*, the opinion seems to turn on the Court's view that the government conduct needed to enforce the statute is shockingly intrusive, and that the relevant intrusion is one into the privacy of an individual's home.

More recently, the Court has had occasion to discuss the right to privacy in the home with respect to the fourth amendment's protections against unreasonable searches and seizures. In *Payton v.*

⁴² But cf. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 930 (1973) (arguing that the *Griswold* result is more easily defended on an intrusiveness of enforcement ground than on a right to contraception ground).

⁴³ 410 U.S. 113 (1973).

⁴⁴ 394 U.S. 557 (1969).

⁴⁵ *Id.* at 564.

⁴⁶ *Id.*

⁴⁷ *Id.* at 564-65.

New York,⁴⁸ a case that has been celebrated (with a certain sexist nostalgia) as reaffirming the principle that a man's home is his castle,⁴⁹ the Court ruled that in the absence of special circumstances, law enforcement officers may not enter a private home to effect an arrest unless the entry is made pursuant to a warrant.⁵⁰ Said the Court: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."⁵¹ The following Term, in *Steagald v. United States*,⁵² the Court repeated that language in ruling that a law enforcement officer with a warrant for the arrest of one person cannot in the absence of special circumstances search the home of a second person for the subject of the arrest warrant, unless the officer first obtains a separate warrant for a search of the second person's home.⁵³ No matter what burdens the rule might place on law enforcement, the Court explained, the rule was required by the right "of presumptively innocent people to be secure in their homes from unjustified, forcible intrusions by the Government."⁵⁴ Thus in *Payton* and *Steagald*, as in *Griswold* and *Stanley* before them, the most important concern of the Justices seemed to be preventing government intrusion into the peculiarly private sphere of the home.

Obviously, the cases bear no necessary relationship to one another. *Griswold* was about contraception, *Stanley* about obscenity, *Payton* and *Steagald* about search warrants. Who cares if all of them talk about the right of individuals in their homes? The answer should be obvious: Anyone who is more concerned with predicting judicial activity than with engaging in a stilted formalism should care. After all, any of these cases, at the time of decision, could have gone the other way without causing social upheaval. Each could have been decided in favor of the government. But all of them, stretching over a span of nearly two decades, were decided in favor of the right to privacy. And the right of privacy in each case was the right to be free from governmental intrusion in the privacy of the home. This suggests that the Supreme Court has followed a tradition of special solicitude for the rights of individuals in their homes.

⁴⁸ 445 U.S. 573 (1980).

⁴⁹ See H. Block, editorial cartoon, April 17, 1980, reprinted in H. BLOCK, HERBLOCK ON ALL FRONTS 26 (1980).

⁵⁰ *Payton*, 445 U.S. at 583-90.

⁵¹ *Id.* at 590.

⁵² 451 U.S. 204 (1981).

⁵³ *Id.* at 219-20.

⁵⁴ *Id.* at 222.

Some lower courts have also discerned this tradition. For example, in two important cases, one in Michigan,⁵⁵ one in Alaska,⁵⁶ state courts of final appeal have suggested that the state violates the right to privacy when it seeks to prosecute the private possession or use of marijuana in the home. The Alaska case, *Ravin v. State*,⁵⁷ is of particular interest. There the state Supreme Court traced the federal right to privacy through *Griswold*, *Stanley*, and *Roe v. Wade*, concluding: "[T]he federal right to privacy arises only in connection with other fundamental rights, such as the grouping of rights which involve the home."⁵⁸ Later, the court explained that both federal and state constitutional law recognized "the distinctive nature of the home."⁵⁹ The Alaska court concluded its privacy analysis with this language:

The home, then, carries with it associations and meanings which make it particularly important as the situs of privacy. Privacy in the home is a fundamental right, under both the federal and Alaska constitutions. We do not mean by this that a person may do anything at anytime [sic] as long as the activity takes place within a person's home. There are two important limitations on this facet of the right to privacy. First, we agree with the Supreme Court of the United States, which has strictly limited the *Stanley* guarantee to possession for purely private, noncommercial use in the home.⁶⁰ [Here I should interject that the Alaska court is referring to the *Paris Adult Theatre* line of cases,⁶¹ which placed this gloss on *Stanley*. To continue:] And secondly, we think this right must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare.⁶²

On the basis of this standard, the court concluded that the "right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home," unless the state was able to carry a substantial burden of justification—which, the court concluded, the state was not able to do.⁶³

⁵⁵ *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972) (no majority opinion; one Justice discusses right to privacy).

⁵⁶ *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

⁵⁷ *Id.*

⁵⁸ *Id.* at 500.

⁵⁹ *Id.* at 503.

⁶⁰ *Id.* at 504.

⁶¹ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

⁶² *Ravin*, 537 P.2d at 504.

⁶³ *Id.*

If the Alaska court's summary of the Supreme Court's rulings on privacy in the home is accurate—and I believe that it is—then the connection of all of this to the issue of home video recording should be a bit clearer. But before I reach the heart of my analysis, I want to pause and deal with a potential early objection—that these privacy cases have nothing to do with the use of technology.

The objection is not even true with respect to the cases I have already mentioned. After all, contraceptive materials, which were at issue in *Griswold*, are certainly technological artifacts. Moreover, the Court's most controversial privacy decision, *Roe v. Wade*, is perhaps most readily explained as a decision on an individual's right to use a particular medical technology, the technology of relatively safe abortion, to treat a particular condition, pregnancy. If that seems too extreme a reading of *Roe*, it is probably worth noting that a number of lower courts have treated it this way and have even expanded it. For example, in *Andrews v. Ballard*,⁶⁴ the District Court for the Southern District of Texas ruled that the right to privacy is broad enough to encompass the right to obtain medical treatment in general, and to obtain acupuncture in particular. *Roe v. Wade*, the judge contended, turned on the idea that "[o]ne's health is a uniquely personal possession."⁶⁵ If decisions about reproduction are particularly important, the court maintained, "the decision to obtain acupuncture, is of equally substantial import."⁶⁶ Similarly, the argument has seriously been pressed—albeit unsuccessfully so far—that the right to privacy includes the right to choose such innovative (some would say pointless) cancer treatments as the drug laetrile.⁶⁷ I would suggest that while there may be a tendency to protect a right to use medical technology, it is not as clear and unambiguous as the tendency to protect a right to be free from government intrusions into the home. On the other hand, the language of the cases makes plain that use of technology is *sometimes* protected.

Before proceeding, I ought to note explicitly one shortcoming inherent in privacy analysis. Every argument about the right to privacy—in fact, every case raising an issue of substantive due process or fundamental right—reaches a point when a leap of faith is required before analysis may proceed. In *Roe v. Wade*, Justice Black-

⁶⁴ 498 F. Supp. 1038 (S.D. Tex. 1980).

⁶⁵ *Id.* at 1047.

⁶⁶ *Id.*

⁶⁷ See *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980); *People v. Privitera*, 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431 (1979). The Supreme Court has avoided meeting the issue head on. *United States v. Rutherford*, 442 U.S. 544, 559 n.18 (1979).

mun reached this point immediately after concluding that the Constitution did indeed extend a right to privacy that covered *some* decisions. The reader, having possibly been convinced of that much, is moved to ask: But what about *this* decision? In response, Justice Blackmun invited the reader to take a leap of faith when he added: "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁶⁸ One need not quarrel with the result in *Roe v. Wade* to suggest that this reasoning called for a leap of faith. A reader who was prepared to agree might be completely convinced by this language; but one who questioned whether the right to privacy "is broad enough to encompass" the decision whether to terminate a pregnancy would find nothing here to move her to change her mind.

For those who support the right of judges to engage in a search for fundamental rights, these leaps of faith present an analytical puzzle; and the leaps are easy targets for those on the other side. But for those who merely seek to do positive analysis—to predict what courts are likely to do in concrete cases—the leaps of faith present less a puzzle than an area for reasoned speculation. After all, courts do undertake analysis of this sort, so the leaps do exist. The speculation, then, must focus on the likelihood that the courts will choose to leap in particular cases. To some extent, that speculation can be based on what the courts have done in the past, which is a lucky thing, since reasoning from precedent is what positive legal analysis is largely about. But in the area of fundamental rights, precedent will carry the analyst only so far. In this area, the Supreme Court has handed down decisions that the strict analyst of precedent would deem hopelessly at odds with one another.⁶⁹ Precedent is a starting point, but having started, the analyst must go much further and try to find the reasons for the leaps that the courts have taken before, then use those reasons as the basis for analysis of the next case.

With these points in mind, it is appropriate to move to the most difficult part of the picture I am painting—an effort to speculate on what a court might do if actually confronted with the claim that the right to privacy of the users provides a defense for manufacturers of home video recording equipment and blank tapes who are charged with contributory infringement. I will then use that speculation as

⁶⁸ 410 U.S. at 153.

⁶⁹ For example, John Hart Ely, a harsh critic of *Roe v. Wade*, nevertheless concedes that the result in *Roe* is hopelessly inconsistent with the results in the abortion funding cases. See J. ELY, *supra* note 32, at 245-46 n.38.

background for a brief discussion of the right to privacy and other signals entering the home.

B. *The Hypothetical Case*

At this point, let us pause and pretend that we live in an ideal world. Now I realize that law professors are always asking a moment's grace while we all pretend the world is an ideal one, but the world I wish to hypothesize is not as ridiculous as some. What makes this world ideal is that every idea that a law professor comes up with can be litigated—what could be more ideal than that?—and what I envision in my ideal world is something like this:

Imagine that the Supreme Court has decided the *Betamax* case the other way, ruling that the Ninth Circuit was correct, that home recording of copyrighted works constitutes an infringement, and that the doctrine of fair use confers no protection. As a consequence, absent another affirmative defense, the manufacturers of video recording equipment may be liable as contributory infringers. The mandate issues in due course, and the Ninth Circuit does what it said it would do—it remands the case to the district court for further consideration of Sony's affirmative defenses.⁷⁰ (If this hypothetical stretches credulity, which it should not, try imagining instead that Congress has enacted a small amendment to the Copyright Act, declaring perhaps that home recording is not a fair use unless the manufacturer of the equipment used has paid a tax. An imaginary corporation, which we can call Sony, refuses to pay the tax and is sued for contributory infringement. With minor changes, the analysis that follows would be the same.)

In the trial court, Sony raises for the first time the claim that there is no contributory infringement because there is no underlying infringement, and there is no underlying infringement because home recording is protected by the right to privacy. Assuming that the obvious objections on grounds of standing, laches, law of the case, and so forth are turned aside, the district judge would have to figure out what to make of this affirmative defense. She could, of course, reject it out of hand, and if you believe that there is no chance of any other result, then I suppose you can take a nap until the question-and-answer period. On the other hand, given the special solicitude the courts have demon-

⁷⁰ See *Universal City Studios v. Sony Corp. of America*, 659 F.2d 963, 977 (9th Cir. 1981), *rev'd*, 104 S. Ct. 774 (1984).

strated for claims of privacy *in the home*, there is, I think, every reason to believe that the judge would treat the claim seriously. And if the judge did decide to treat it seriously, her reasoning might go something like this:

"Now, the defendants have made a strong showing that in most cases, the government's interest in regulating conduct stops at the door of the home. The government can forbid the public display of obscene materials, but it cannot forbid the same display in the home. An officer with an arrest warrant can search the streets for the fugitive it names, but without a search warrant cannot search for the fugitive in a private home. The government might be able to prohibit copulation on the back seat of a city bus, but I doubt that it could prohibit the same activity in the home.

"On the other hand, not every activity is subject to a neat distinction of that sort. For example, the government can forbid the strangling of infants whether it takes place in a public park or in a shadowy basement. A husband has no more right to assault his wife in their bedroom than he has to assault a stranger on the steps of city hall. And the government has as much right to prohibit experiments with dynamite in a garage workshop as it has to prohibit the same experiments on the grounds of a nursery school at noon. There are no cases standing expressly for these last few propositions," the judge might muse, "but I'm sure that all the major political theorists are on my side.

"So I've isolated the easy cases," the judge could continue, "but that gives me only a little bit of guidance on where this one falls. Is recording television programs off the air for one's private non-commercial use more like the protected or the non-protected category? At first blush, it seems an awful lot like the protected category. After all, the main motivations behind recording these programs are similar to the main interests that were at issue in *Stanley v. Georgia*. In a very real sense, the person who wants to record programs to watch them later is exercising control over the flow of information into or out of her mind. Oh, I know it's true that most people will be recording *Dallas* and *NFL Monday Night Football* and cable presentations of *Star Wars* and various X-rated films, rather than more wholesome fare such as *Masterpiece Theatre* and *CBS Reports* and cable presentations of *Julia*, but it is awfully hard to argue that all the trash on television has less information content than whatever the defendant in *Stanley* had in his film library. And even if it were possible to draw fine distinctions among the relative values of different programs.

the first amendment exists precisely to prevent the state—of which I am a part—from doing that. So in at least some respects, home recording of copyrighted programs is like the conduct at issue in *Stanley*.

"It's also a lot like *Griswold*. In *Griswold*, after all, the Supreme Court was plainly shocked at the degree of intrusiveness that would be necessary to render the statute enforceable. A similar degree of intrusiveness might be needed here. I know, I know—the industry says no one is trying to take these recorders away, so there would be no intrusion. But that argument misses the point. The purpose of the intrusiveness analysis is not to determine whether it is permissible for the government to intrude, but whether it is permissible for the government to regulate at all. Thus in *Griswold*, even though the Court's intrusiveness analysis was really addressing the enforceability of a ban on *possession* of contraceptives, the Justices used the analysis to strike down a statute that prohibited *distribution*. I'm not sure I immediately discern the difference here.

"Some courts—for example, those that have upheld the right to smoke marijuana in the home—have expressly distinguished laws on possession from laws on distribution.⁷¹ But there the evil to be prevented by the law against distribution was thought to be one the state has a right to prevent. The marijuana itself was thought to be a bad thing. Here the same is not true. Video recorders do have some valid purpose apart from making off-the-air recordings of copyrighted materials.⁷² The making of off-the-air recordings when the copyright holders object (which is not always the case)⁷³ is the *only* putatively invalid purpose for these devices.

"Again, I come back to *Griswold*. The thing that would have been outrageous there was enforcement of a ban on contraceptive *use*. But the thing the state was not permitted to regulate was contraceptive *sale*. Similarly, the thing that would be outrageous here is enforcement of a ban on video recorder *use*. And, by analogy, the thing the state thus would be unable to regulate is video recorder *sale*. After all, the industry asserts—indeed, the industry insists—that it has no desire to ban the recorders. In-

⁷¹ This was, for example, the net result of the several opinions by the Michigan Supreme Court in the *Sinclair* case. See *supra* note 55.

⁷² The industry disputed this claim in the Supreme Court, but the Supreme Court found that the video recorders were susceptible of substantial non-infringing uses. See 104 S. Ct. at 789-96.

⁷³ See *id.* at 789-91.

stead, the industry wants to share the profits made by manufacturers of recorders and tapes. But the industry's argument rests on the presumption that the copyright laws can reach home recording, and following that presumption, the industry is still more like the state government in *Griswold*. There the state's only reason for regulating contraceptive sellers was its inability to reach the conduct of contraceptive users. Here, too, the industry's only reason for seeking to regulate video recorder equipment sellers is its inability to reach the conduct of video recorder equipment users.

"No," the judge would continue, "I'm not quite content with that discussion—it seems to include too many unstated assumptions. Actually, the same point can be reached in a much more direct fashion. The distinction between controlling distribution of marijuana and controlling distribution of home video recording equipment is this: In the first case, possession of marijuana is itself thought to be a bad thing; in the second, distribution of video recorders and tapes is a bad thing *only* if they are used in conduct that amounts to copyright infringement. The defendant here, Sony, ought to be prevented from distributing the devices without a payment to the industry only if it is a contributory infringer. But if the previous analysis is correct, and the outrageousness of enforcement leads to the conclusion that there is no copyright infringement, then there is no contributory infringement either. The state can no more control the distribution of video recording technology for private, noncommercial use, than it can the sale of contraceptive materials for use by consenting adults.

"Well, maybe that's true, but it might be too facile. After all, to isolate a right is not to say that the state can never burden it. What matters is the degree of importance attaching to the state's interest. In the hypotheticals mentioned above, the state's interests in preventing the strangling of children, the assaulting of women, and the explosion of dynamite, are all pretty strong. What makes them strong? Well, in those cases, someone else is *harmed* by conduct that would otherwise be protected because it takes place in the home.⁷⁴

"Okay, but that cannot be all that matters. Oughtn't I to worry how great the harm is? After all, one man might be harmed in some emotional sense by the realization that his

⁷⁴ As it would be expected here to insult the reader's intelligence by citing Mill, or at least Nozick, I shall do neither.

neighbor might, in the privacy of his home, be reading a pornographic novel. The point is, the mere fact of this harm is not enough to enable the state to raid the neighbor's house to protect his neighbor's sensibilities.⁷⁵

"And that's too bad, because I thought I had found a bright line that I could draw at the door of the house. But I haven't. I have found a line that the government can cross in some cases but not in others. From what I can make of the cases, the government's power to cross that line varies with the magnitude of the harm it is seeking to prevent.⁷⁶ So the question for me is, I suppose, whether an economic harm can be great enough to enable the government to step across that threshold and regulate conduct in the home—and if an economic harm *can* be great enough, to next decide whether the economic harm to the industry is sufficient to warrant stepping over the line in this case.

"It's hard to say whether economic protection warrants coming into the home. I am tempted to draw a line at physical harm to others—or perhaps I should say a substantial possibility of physical harm, to take care of the dynamite example—but then, like the libertarians, I would be stuck with a principle in search of a justification⁷⁷ (and a principle not so easy to apply in the hard cases).⁷⁸ Anyway, I am worried that by drawing a line at physical harm, I would leave out too many cases. For instance, I'm not sure I want to strike down government regulations aimed at preventing employers from forcing their employees to take piece work home in the evenings.⁷⁹ Ah, but perhaps I can get around that—because those regulations are aimed at controlling a *commercial practice*. There is no case holding that commercial conduct—conduct, one might say, that interacts with the outside world—is protected by a right to privacy. It is hard to see how it could be otherwise. Once one engages in commercial exchanges, one is no longer acting in a fashion purely private—at least in the way that word has been used by the Supreme Court in its privacy

⁷⁵ *Id.*

⁷⁶ This much should be obvious to students of political philosophy. For a constitutional judge, however, it is a pleasant change of pace to derive principles from the cases rather than from the reading list in introductory philosophy courses.

⁷⁷ See generally Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 475-97 (1980).

⁷⁸ To take perhaps the most troubling example, libertarian theory provides no useful basis for determining when in light of all conditions, an individual's consent to some transaction is not voluntary. See Scanlon, *Nozick on Rights, Liberty, and Property*, 6 PHIL. & PUB. AFF. 3 (1976).

⁷⁹ See 29 C.F.R. § 530.2 (1984).

decisions.⁸⁰

"Hmm—wait. Might not the scope of the commerce power sometimes be such that it will trump a right to privacy? Surely the act of taping a program at home has an effect on commerce, if the taper would otherwise go out and pay money to buy an authorized recording or if the taper is making a library (with commercials excised) and will never again watch the particular program if it is rebroadcast. The main concern of the advertiser, moreover, is the size of the audience. Thus in theory, the making of these libraries should lower the price that producers can demand from broadcasters and cablecasters because it should lower the price that advertisers are willing to pay. In the long run, the lower prices should lead to a smaller supply of television entertainment or perhaps a lowering of their quality, if quality can be measured as a function of production budget.

"Now, my first response to that might be that the incentive structure thereby created would be a good one. We need less television programming, and everybody can go back to reading, or watching their taped programs from what will shortly seem the Second Golden Age of Television. I suppose, however, that the judgment on the incentives needed by producers is for the Congress and not for the courts. But even granting that I should not care what incentives are created, the 'affecting commerce' argument is not as strong as it might first appear."

Now the judge hits her stride: "I will pass the fact that there is precious little evidence that libraries are being built or that prices paid by television networks or their advertisers are going down.⁸¹ (I know, I know—the industry will ask whether it must wait until the harms are great and manifest before seeking redress.⁸² If the issue is of constitutional dimension, then the answer to that is rather an easy *Yes*.) The real problem with the

⁸⁰ The judge might or might not be aware that, as my colleague Henry Hansmann has pointed out, carving out special regulatory exceptions for nonprofit activity cannot always be justified. See, e.g., Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54 (1981); Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

⁸¹ According to surveys performed on behalf of both parties to the *Betamax* case, most unauthorized recording is for time-shifting purposes rather than for building libraries. 104 S. Ct. at 779 & nn.4-5. At least one careful economic analysis has concluded that it is not apparent why copyright holders are likely to suffer harm from the sale and use of video recording equipment. See Liebowitz, *The Betamax Case* (Aug. 1984) (unpublished manuscript). See also Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (a somewhat different and less rigorous approach to ascertaining harm).

⁸² The Supreme Court majority followed the district court in rejecting this argument. 104 S. Ct. at 793-96.

'affecting commerce' argument is that it can be met with a yawn and a big *So what?* After all, as we have known since the New Deal and certainly since the *Ollie's Barbecue* case,⁸³ there is virtually no conduct in the United States that does not affect interstate commerce. The sale or purchase of contraceptives has an effect on commerce, but that does not lead to the quick conclusion that the government can regulate it. So not just any effect on commerce will do. And the sale of contraceptives might have an adverse effect on the income of—I don't know—obstetricians, perhaps. So not just any economic harm will do. Put otherwise, the fact that something has an economic effect does not render it a commercial practice that Congress has the right to regulate. At the very least, it seems to me, an individual must *invite* transactions with the outside world—transactions, I might add, that are subsequent to or simultaneous with the challenged conduct.

"Thus in *Stanley*, the defendant had a right to view his obscene films as long as he did not invite a neighbor to come and watch—for a fee. The right of wife and husband to engage in sexual activity in the bedroom would not include the right to sell videotapes of the event at the corner drug store. And the right, if any, of individuals to tape copyrighted television programs for their own use would not include the right to offer copies to others for a small price.⁸⁴

"In short, as long as the conduct in the home is kept private and not commercially exploited, and as long as there is no plain and overwhelming harm to others,⁸⁵ the government should not interfere. In the case before me, the home taping of copyrighted programs is kept private and not commercially exploited. The industry, moreover, has been unable to show the sort of overwhelming harm that might let the government reach even purely private conduct. Consequently, the home taping would appear to be protected. If the activity is protected, then it cannot possibly constitute an infringement of plaintiffs' copyrights. And if

⁸³ See *Katzenbach v. McClung*, 379 U.S. 294 (1964); cf. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (commerce power reaches anything Congress reasonably believes to affect interstate commerce).

⁸⁴ Stepping outside the hypothetical case for a moment, I might note that this distinction seems to have played an important role in the reasoning of the *Betamax* majority. See 104 S. Ct. at 792 ("If the [video recording equipment] were used to make copies for a commercial or profit-making purpose, such use would be presumptively unfair"). But see *supra* note 80.

⁸⁵ "To answer the anticipated question," the judge might further reason, "I am not sure what quantum of harm is sufficient to enable the state to cross that line. I am quite clear, however, that the requisite quantum is not present on the evidence before me in this case." See also *supra* notes 83 & 84.

there is no infringement of the copyrights, there is no contributory infringement, and the suit against defendant Sony should be dismissed."

* * * * *

At this point, the hypothetical discussion ends. Assuming that the industry was not able to show overwhelming harm, and assuming the judge could craft this stream-of-consciousness reasoning into a formal opinion, the defendants would prevail. It is conceivable, of course, that congressional amendment of the Copyright Act to overturn the actual result in the *Betamax* case would include a finding of fact that the harm to the industry was in fact enormous. In litigating the case, however, the industry did not build a strong record on the issue of harm. Instead it argued (1) that it is unreasonable to require that harm take place before anything can be done about it, and (2) that in any event, harm is not an element of an infringement action.⁸⁶ (I note in passing, incidentally, that lack of harm is sometimes an element of the affirmative defense of fair use.)⁸⁷ I do not pretend to know whether the industry could show this overwhelming harm if it really tried, but I have my doubts.

Of course, it may be the case that no sane judge would ever seriously entertain the constitutional argument I have just presented, in which case the substantiality of harm might not matter much. Certainly none of the cases considered by the hypothetical judge *demand*s the construction she has given it, and none of the cases standing alone would suffice to support her conclusion. My speculative point has been instead that taken together, the cases might be read to evidence a special judicial solicitude for activity taking place within the private home. I should also note that I do not here *advocate* the view that a court *should* rule that home taping and similar activity is constitutionally protected and thus beyond the reach of the Congress. But I do hope that this hypothetical discussion has made clear that the issue is not a frivolous one. It may be that a final decision would be against the constitutional claim; I am only suggesting that in the meantime, the constitutional argument should not be ignored.

⁸⁶ Section 501(a) of the Copyright Act defines an infringer quite simply as: "Anyone who violates any of the exclusive rights of the copyright owner." 17 U.S.C. § 501(a) (1982). The degree of harm will, of course, play a role in the ascertainment of damages to be awarded.

⁸⁷ See *id.* § 107(4) (harm to market for copyrighted work is relevant to fair use).

IV. SOME FURTHER SPECULATIONS ON THE THEORY

I said at the outset that this paper is speculative, and so it is. I am suggesting mainly that a court *might* be willing to rule that the Constitution protects the right to make home video recordings. There is a certain common sense appeal to that notion: If you send signals into my home without my request or consent, who are you to then try to limit what I can do with them? Were a court to accept the argument I have sketched, what implications might that have for other areas of communication law, areas that may also involve the sending of signals into private homes?

Let me begin with what I hope is a simple example. A woman I know owns a two-family home, living in one part of it and renting the other to a tenant. The tenant has paid for and receives cable television; the owner does not. But here is a curious thing. When the tenant is watching cable, if the owner turns to a particular channel (the same channel, I assume, to which the tenant must tune his set to receive the signal), she sees not a blank screen but the faint yet clear outlines of the cable program the tenant is watching, accompanied by the scratchy but decipherable sound. In other words, with a little eye and ear strain, she can watch cable television without paying the cablecaster's fee.

This is, I would suggest, absolutely protected conduct. One might go so far as to say that the cable television company has assumed the risk of technological obsolescence.⁸⁸ Here, as some of you may be aware, the reason the owner can see the outlines of the program is that the "black box" that connects the tenant's television to the cable is actually a small transmitter of very low power—but power that is apparently sufficient to send a signal through the walls separating the two sections of the house. The cable television company, in other words, is sending into the woman's home a signal she has never requested. Given the privacy interests attaching to conduct in the home, the least the law can say to her is: "Do with this signal what you will!"

Another example that springs immediately to mind is the continuing problem of unauthorized interception of signals and, if the transmission is scrambled, unauthorized decoding. Cable television programmers bounce signals off satellites to earth stations operated by local cablecasters, who in turn transmit the sig-

⁸⁸ On the other hand, one might not. Such an assertion raises normative policy questions beyond the scope of this attempt at positive analysis. We cannot tell where to place the costs until we decide what incentives we want to create.

nals, often after decoding them, to local subscribers.⁸⁹ The cable-casters naturally charge a fee for transmission of their signals and an additional fee if unscrambling is necessary. As a result, two substantial and not-quite-underground markets have developed, one in earth stations, one in unscrambling equipment.

Perhaps you have seen some of the earth station advertisements: "Buy our dish and receive up to 125 cable channels without paying another cent!" In many states, selling earth stations was formerly quite illegal. Just before its adjournment in 1984, the Congress enacted legislation permitting the sale of earth stations but essentially forbidding the unauthorized sale of decoders.⁹⁰ Had Congress not adopted the legislation, the entertainment industry would have had no grounds for fear that the right to privacy I have discussed would lead to protection for the earth station business. Even were a court to accept the argument set forth in this Article, the illegality of using outdoor antennas to intercept signals would not have been affected. Because physical obstructions may destroy the signal, the earth stations must be mounted with a direct line-of-sight to the satellite. So while the signal might be viewed on the inside of the home, the unauthorized interception would take place outside. If, as I have suggested, the Supreme Court has drawn a bright line at the door of the house, anything outside the house is fair game. That may seem a bit formalistic, but it may also be the law. Anyone who has studied the fourth amendment is familiar with the equally formalistic "open fields" doctrine, which essentially holds that those things that are out in the open are not protected by the same privacy rights that protect those things that are hidden.⁹¹ For all that it may be controversial, the doctrine makes lovely analytical sense: If something is not hidden, then it is not private.

A potentially more difficult issue involves decoders. As you may be aware, most cable companies transmit some signals in the clear and some in a scrambled form. A subscriber pays the cable-

⁸⁹ Home Box Office, probably the most successful provider of cable programming, plans to begin scrambling all its signals early in 1985. See *Home Is Where the Dish Is*, BROADCASTING, Sept. 10, 1984, at 93.

⁹⁰ The Cable Communications Policy Act of 1984 protects the right of home earth station owners to pick up signals for their own noncommercial use. The statute also provides penalties of up to one year in jail and a fine of \$25,000 for commercial use of intercepted signals. See *Backyard Dish Industry Gets Boost From Cable Bill*, BROADCASTING, Oct. 22, 1984, at 84-85.

⁹¹ The classic case is *Hester v. United States*, 265 U.S. 57 (1924). For more recent decisions, see *Oliver v. United States*, 104 S. Ct. 1733 (1984); *United States v. Knotts*, 460 U.S. 276 (1983).

caster and receives a decoder permitting her to unscramble the coded signals. But some companies, without permission of the cablecasters, manufacture and sell these decoders to individual subscribers at prices that undercut those charged by the cable companies. The recent congressional action to permit backyard earth stations does not permit unauthorized unscrambling of signals.⁹² That hardly means, however, that the unauthorized use of decoders is without *constitutional* protection. Now, in the first place, there might well be antitrust problems in efforts by the cable companies to prevent the sale of these unauthorized decoders, but that issue, which is currently in litigation,⁹³ is beyond the scope of this discussion. The question here is whether the right to privacy that I have described would require that individuals be permitted to use these decoders at home, without regard to the congressional enactment purporting to ban them.

I am tempted to offer a quick and easy *Yes*, and indeed, the objections to the use of decoders are much like the objections to the use of home video recorders. Once again, the complaint would be that the sale of the decoders leads to a use which costs the cable company money and thus reduces the prices it can pay to the industry, in turn reducing the supply of high quality entertainment productions, and so on. The defense would once more be that because the conduct takes place entirely in the home and because the cablecaster sends the signals there, the right to privacy protects the use of the decoder. The possible joker in the deck is that the recipient of the scrambled signal must be hooked up to the cable or using an earth station in order to receive the signal (unless the receipt is by accident, as in the case I mentioned earlier, in which case the right to privacy might be a complete defense), and if hooked up to the cable or using an earth station, is receiving the signal because she has asked for it.⁹⁴ In other words, although the signal is sent into the private home, it is not sent without consent of the homeowner. I am not sure whether this factor would entirely vitiate the privacy argument, but the argument must be weaker, or at least different.

⁹² See *Cable Bill Boost*, *supra* note 90, at 85.

⁹³ See, e.g., *Ciminelli v. Cablevision*, 583 F. Supp. 144 (E.D.N.Y. 1984) (rejecting antitrust defense for theft of cable services).

⁹⁴ The point is that the strongest argument for the right to use signals entering the home is that the homeowner is powerless to stop them and might as well be able to use them. However, as former Representative (now Senator) Gore pointed out in the debate over the legislation that became the Cable Communications Policy Act of 1984, even satellite signals that do not enter the home unaided may fall unrequested on private property. See *Cable Bill Boost*, *supra* note 90, at 94.

On the other hand, the objections to the privacy argument might also be weaker than they appear. Although I want to avoid consideration of the efficient allocation of resources, a point that might be relevant to the antitrust issue, I should point out that the cable companies might be able to cure the decoder problem by requiring their subscribers to sign contracts agreeing not to purchase the underground decoders. If every subscriber signed such a contract, then a court might be convinced that the underground decoders had no legitimate use except to breach the contract and might therefore be willing to sustain a ban on their sale. The lack of a legitimate use would arguably distinguish this fact pattern from the one present in *Betamax*, but I would not want to make too much of the distinction. In spite of these and other differences, I find it difficult to resist the instinctive conclusion that if the decoder is used within the home, then under the theory I have here presented, the right to use it ought to be absolute, and to the extent that the congressional statute purports to ban unauthorized use of a decoder, the statute is unconstitutional. At the very least, the equities seem to tilt in favor of the unauthorized user, although I should add that I am not entirely convinced.

A somewhat similar issue involves the right of private individuals in their homes to make copies of copyrighted works that are not sent into their homes, but instead are carried in. I have in mind books that an individual might photocopy and computer software that an individual might duplicate. Again, there are obvious costs—difficult ones to calculate—to the copyright proprietors, but there is also the countervailing consideration that the copying appears to be wholly private activity. It may even be the case, moreover, that the existence of copying equipment has bid up the price already, since a book (or presumably software) is worth more to someone who can copy it than it is to someone who cannot.⁹⁵ For the purposes of the current argument, however, determining whether there is already compensation for the copyright proprietor is less important than recognizing that the conduct takes place entirely within the home. True, absent a windstorm uprooting a nearby library or computer store, a book or floppy disk is not likely to be sent into the home without the owner's consent. Nevertheless, it is not so easy to circumvent the

⁹⁵ For one economist's effort at theoretical and empirical analysis on this point, see Liebowitz, Copying and Appropriability: The Case of Photocopying (Aug. 1983) (unpublished manuscript).

thrust of *Griswold*: Enforcement of a restriction on copying, at least in the home, would surely be outrageous. Royalties could theoretically be collected at the time of purchase, via a tax, but then the case begins to look very much like *Betamax*, and it is not easy to see why the result should be any different.

I should add a note on one type of conduct in the home that the right to privacy on which I am here speculating would surely *not* protect. I refer to the use of home computers and telephone lines to effect unauthorized entry into and perhaps manipulation of other computer systems. This would not be protected because the conduct in the home crosses the brightline. Without answering the metaphysical question of where the tampering actually occurs, it is enough to observe that the entry or manipulation results from a signal sent *out of* the home, and consequently is no more protected than an obscene telephone call or the firing of a gun from a bedroom window.

CONCLUSION

Well, perhaps I have said enough and it is time to sum up. I said at the beginning that this Article is really in the nature of a memorandum to the Congress, and that is how I still choose to think of it. Obviously, consideration of the constitutional issue I here discuss proved unnecessary for decision in the *Betamax* case. My primary hope is that the thoughts I here set out will stimulate some discussion of an issue that has, unfortunately, received scant attention up to this point. I do think that the Congress should give the issue serious thought if and when the time comes for members to be counted on the question whether the Copyright Act should be amended to provide for a tax on the sale of home video recording equipment and blank tapes.

I am not suggesting that the possibility that there is a right to record programs at home makes a tax of this kind *ipso facto* unconstitutional. But I do believe that if home video recording is protected activity, then the Congress should have no part of any scheme aimed at increasing entertainment industry revenues through the device of taxing the sale of equipment manufactured for uses that the government has no right to regulate, any more than it should legislate a tax on the sale of contraceptive materials to compensate obstetricians for the income they may lose to birth control.

Will a court one day rule that the constitutional right to privacy protects home video recording or other private uses of sig-

nals sent into the home? Your guess is certainly as good as mine. But the issue is not a frivolous one, and now that the debate has shifted from the courts back to the legislature, it is one that deserves further thought.