Perspectives
on current developments

Karen Silkwood, Federalist

The late Karen Silkwood has been claimed for any number of controversial causes, but the most unlikely must surely be that of federalism. On January 11, however, the Supreme Court ensured that future generations of lawyers will invoke Silkwood's name to defend the prerogatives of state governments against federal preemption. In the case of *Silkwood* v. *Kerr-McGee Corp.*, the Court ruled for the first time that, even though the nuclear energy industry is already subject to comprehensive federal regulation, a state may award punitive damages in civil suits in order to penalize misconduct by the industry.

By the time the case reached the Supreme Court, it no longer bore much relation to the *cause célèbre* depicted in the movie *Silkwood.* The dramatic charge that Silkwood's death was not an accident, for example, never even made it into the trial record. Still, a bit of background is useful.

Karen Silkwood worked in a plutonium-processing plant run by the Kerr-McGee Corporation. In November 1974 routine checks at the plant found indications that she had been contaminated by plutonium. In search of the source, a company decontamination team checked her apartment and found plutonium in several rooms. Some of her personal belongings were thereupon destroyed, and Silkwood herself was sent to the federal lab at Los Alamos for medical tests. A few days later she was killed in an auto accident.

Silkwood's family filed a civil action for compensation for the harm caused to her person and property by the plutonium, and for punitive damages to penalize Kerr-McGee for the way it handled plutonium. The lawsuit was unrelated to the circumstances of her death. A jury awarded the family damages of several sorts, of which the only element that reached the Supreme Court was an award of $10,000,000 in punitive damages.

The U.S. Court of Appeals for the Tenth Circuit reversed the punitive damage award on the grounds that the federal laws that control nuclear energy prohibit states from regulating the area in any way and that punitive damages are a form of regulation. The Supreme Court, however—split along unusual ideological lines that fractured its "liberal" and "conservative" wings alike—voted five to four to reverse and remand the case to the appeals court. Justice White wrote the majority opinion supporting the award, and he was joined by Justices Brennan, Rehnquist, Stevens, and O'Connor. Justice Blackmun, joined by Justice Marshall, filed one dissent; Justice Powell, joined by Chief Justice Burger and Justice Blackmun, filed another.

There are two kinds of federal preemption of state law. The first, called occupation of the field, occurs when Congress decides that federal law should be the only regulation (or nonregulation) in a particular area. If Congress has occupied a field, a state cannot act even if there is no obvious conflict between its action and the federal regulatory scheme. The second kind of preemption arises when there is a direct conflict between state and federal law that makes it impossible for a private party to comply with both, or when the state law would frustrate the federal purpose in some other way.

The majority in *Silkwood* decided that state punitive damage awards were acceptable under both tests. It devoted most of its attention, however, to the occupation of the field test, which is a matter of interpreting legislative intent.

Just a year ago the Court ruled that Congress *had* occupied the field of nuclear safety to the extent that a state could not impose added regulatory burdens on nuclear power plants for the sake of added safety (*Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Commission,* 1983). The *Silk-*

wood Court, however, rejected Kerr-McGee's contention that this precedent disposed of the punitive damages issue. It decided that although state tort remedies created some "tensions" with the federal regulatory scheme, Congress was evidently willing to tolerate them—as evidenced by the Price-Anderson Act, which contemplated civil suits against the operators of nuclear power plants. Moreover, the Court pointed out, punitive damages are a traditional part of tort law.

To some extent this part of the opinion is unexceptionable. No one had argued that people harmed by nuclear accidents should be left with no redress for their injuries, and all nine Justices agreed that Congress had not intended to preclude *compensatory* damages for such injuries.

One can also reasonably doubt that Congress intended to enact a sweeping rule that a state could *never* award punitive damages for nuclear industry misconduct, under any circumstances. For example, a state might plausibly add its own teeth to federal enforcement by awarding punitive damages for violations of federal standards. Congress might even have thought it was promoting the development of nuclear power by reassuring states that they will not lose all control once a facility is built.

Accepting that argument would mean that the relevant inquiry was not occupation of the field but conflict or frustration in the context of the specific award. This was in fact what the *Silkwood* Court decided when it said:

> We do not suggest that there could never be an instance in which the federal law would preempt the recovery of damages based on state law. But . . . preemption should be judged on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard . . . would frustrate the objectives of federal law.

Unfortunately, the Court dismissed these crucial questions in a page and a quarter. The government had argued that punitive damages conflicted with the federal scheme for remedying violations of standards, which is to impose civil penalties. The Court rejected this argument with the assertion that since it was not physically impossible for a violator to pay both fines and damages, there was no conflict. Kerr-McGee had argued that punitive damages frustrated the federal purpose of promoting nuclear energy. The Court rejected that argument as well, on the ground that Congress had disclaimed any intent to promote nuclear energy by means that failed to provide adequate remedies for those injured, and that the award of punitive damages did not frustrate its purpose as so constrained.

The majority failed, however, to discuss some of the most important issues at stake. Many federal health and safety standards represent an attempt to balance the risks and benefits of hazardous but useful activities. Extra-stringent state rules force this balance to a different point. In addition, to the extent that Congress intended to provide the industry with predictability and standardization, subjecting it to a welter of varying and unpredictable standard-setting mechanisms may itself frustrate the federal purpose.

From here on it becomes very difficult to say exactly what the Court decided. The opinion could be viewed narrowly as simply reversing the appeals court's erroneous conclusion that Congress had occupied the field completely on punitive damages. Or it could be viewed broadly—and some of its language suggests this—as endorsing the notion that the actual lower court award of punitive damages in *Silkwood* should be allowed to stand under federal law. The broader reading would have some dramatic implications for the state of the law, for reasons relating to the legal, factual, and procedural background of the case.

There are a number of grounds on which the appeals court could have reversed the lower court decision as inconsistent with Oklahoma tort law, quite aside from issues of federal preemption. For example, it could have found that the evidence was legally insufficient under state law to support the jury's conclusion on punitive damages. The record in the *Silkwood* trial contained no evidence that Kerr-McGee had been guilty of egregious misconduct and only weak evidence that the company had committed any more than minor violations of Nuclear Regulatory Commission standards. Yet the purpose of punitive damages is to punish misconduct that is either deliberate or so grossly negligent as to amount to the same thing, as well as to deter other people from following the defendant's example. (An award of compensatory damages need not imply such misconduct: even

a careful defendant may have to pay compensatory damages for failing to control a dangerous substance, under the rule of strict liability that applies in such cases.)

Alternatively, the appeals court might have decided that a defendant who had substantially complied with a comprehensive system of federal regulation could not be found under state law to have acted recklessly or wantonly. Or it might simply have decided that the jury charge on the issue had not explained the role of federal standards clearly enough. The trial judge had instructed the jury that although the defendant's compliance with statutory or regulatory standards was evidence bearing on whether negligence had occurred, it was not dispositive of the issue. It was for the jury itself "to determine what constitutes the exercise of reasonable care in handling plutonium, or the exercise of reckless and wanton conduct, in the light of the physical characteristics of that material and the risks associated with it." This open-ended standard would be highly controversial in legal circles, for it gives considerable discretion to juries to assess punitive damages on their own.

The court of appeals was presented with all these possible reasons to overturn the lower court. But it did not reach any of them, since its decision was based on the preemption issue. Consequently, they were not really part of the case as it was presented to the Supreme Court.

Which leaves the legal question: did the Court approve punitive damages based on the trial court's charge and evidence, thus upholding a state's right to ignore federal standards in defining wanton and reckless conduct? (The dissenters seemed to think so, as they emphasized the regulatory nature of punitive damages and the amorphousness of the trial court's charge.) Or did it decide only that the Platonic idea of punitive damages did not *necessarily* conflict with the federal scheme, leaving it to the court of appeals to decide whether this *particular* charge and evidence created such a conflict? (The remand said Kerr-McGee could reassert any claims "not addressed by that court or by this opinion," and neither of these took up the permissible limits of the definition of reckless conduct.)

The best argument for the narrower view of the case is that the broader one raises too many strange questions, such as: How could Congress, in the Court's view, intend both to preempt state regulators and to let each state (and indeed, each jury) impose, retroactively, its own regulatory vision on the nuclear power industry? And, can a state now pass a law setting nuclear safety standards as long as it enforces the law by punitive damages in common law courts rather than through a regulatory commission?

Even if the opinion is read broadly, and thus raises these questions, there is reason to doubt that its impact will be as great as partisans might hope or fear. First, neither the case nor the underlying argument is over, and the appeals court may now choose to invoke some of the long-standing rules that keep juries from inventing their own legal systems. Application of such rules could greatly reduce, in principle at least, the potential for conflict between state punitive damage standards and federal health and safety standards. Second, even if Congress did not intend to *require* preemption of punitive damages in this area, the case said nothing about whether a regulatory agency created by Congress *may* preempt them if it wishes. As a general rule, agencies can preempt state law when necessary to carry out the functions Congress has given them. It is possible that *Silkwood* might allow the NRC to do this in appropriate circumstances. Similarly, any other federal agency can decide whether states frustrate its purposes when they impose punitive damages for conduct that conforms with the federal standards.

One final aspect of the decision may have more impact in the long term than the issues actually decided. A major concern underlying the formal arguments in the case is the role of juries in complex technical areas. And the four dissenters expressed very serious reservations about that role. This is an issue that has been building in American law for about ten years. Some opinions in antitrust cases have expressed concern that the issues may be so technically complicated that it is unreasonable to expect a jury to understand them. In the academic literature, there are occasional ruminations that perhaps defendants should have a right to a non-jury trial in such cases. These concerns have been increasing as the stakes in civil litigation have risen into the billions of dollars in damages, threatening both corporate survival on the one hand and fundamental regulatory policy on the other.

The Supreme Court has never before paid much attention to these concerns. In fact, it has always been a champion of juries, insisting that they be employed even when trial and appellate courts have been skeptical. The *Silkwood* dissents may indicate that the problem is now unexpectedly open for discussion.

A Bottomless Pit for Federal Coal Revenues?

Members of Congress frequently complain that the Interior Department is failing to charge top dollar for federal coal leases. Whatever the truth of this allegation—and the recent Linowes Commission report on the subject did not find much evidence of wrongdoing—it is made more ironic by the fact that Congress itself is responsible for a number of regulations that depress federal coal-leasing revenues. Typically these regulations take the form of restrictions on how mining firms can work their leases, which lowers the price the firms are willing to pay for the leases. The Linowes Commission report cited "instances where current statutes tend to create obstacles to receipt of fair market value." And although the restrictions have a number of plausible objectives, such as preserving environmental amenities, economists are compiling a growing body of evidence that Congress has chosen some very expensive ways to buy the amenities at issue.

The best-known example may be the "diligence" requirement, under which lease holders must begin mining coal within ten years or forfeit their lease. (See Robert H. Nelson, "Undue Diligence: The Mine-It-or-Lose-It Rule for Federal Coal," *Regulation*, January/February 1983.) There are a variety of other restrictions as well, of which perhaps the most controversial has been the requirement—dating back to the Federal Coal Leasing Amendments Act of 1976—that operators achieve the "maximum economic recovery" (MER) of coal from federal leases.

A forthcoming issue of *Energy Journal* will publish an analysis of the MER controversy by William D. Watson and Richard Bernknopf, two economists with the U.S. Geological Survey. Watson and Bernknopf find that the Interior Department has been faced with an unpleasant dilemma: to apply a "strong" standard that would be economically damaging or a weak one that would render congressional intent meaningless.

Just what Congress had in mind by "maximum economic recovery" has always been quite unclear. If it means anything, it means that Congress intends to force mining companies to extract more coal than they would like—specifically, to take some seams of coal that are too deep or inaccessible to be worth taking otherwise. (In this it parallels the diligence requirement, which is meant to force mining firms to take coal *earlier* than they would like.)

Some plausible-sounding arguments for such rules will not stand up to scrutiny. It might be argued, for instance, that an MER requirement prevents "wasteful" abandonment of coal seams; but by definition the coal at issue costs more to mine than it sells for, and if it is wasteful to leave any such coal in the ground the same logic would suggest that we devote the entire GNP to reopening abandoned mines. The more persuasive arguments for MER are environmental. The theory is that if miners dig deeper they will not have to spread wider: coal from the deeper, unprofitable seams will displace coal that would otherwise have come from "lateral extension" of existing mines. This lateral extension is thought to have three major undesirable side effects. First, it disturbs more surface area, which causes one temporary disamenity (the sight of a larger strip mine) and one permanent disamenity (the land never looks quite the same even after the legally obligatory process of reclamation). Second, it requires an extension of auxiliary activities such as the building of supply roads and power lines, which do their own environmental damage.

The third side effect is more a socioeconomic externality than an environmental one. Rapid lateral exhaustion hastens the rise and fall of "boom-town" conditions in mining communities. This is alleged to impose high "infrastructure" and social-service expenditures on local and state governments, in excess, that is, of the taxes they derive from the high earnings of boom-town workers. Moreover, preexisting residents of the area may be faced with more crime and a deterioration in public services.

As Watson and Bernknopf point out, mining companies already internalize many of these costs. On the environmental side, the Sur-

face Mining Control and Reclamation Act requires them to restore the land to an approximation of its original contours and to prevent harm to local water resources. The Federal Coal Leasing Amendments Act provides a large number of "unsuitability criteria" under which the federal government can refuse to lease land in environmentally sensitive areas. Thus the MER requirement (1) affects only the least sensitive types of land and (2) addresses only those residual environmental costs that remain after the federal reclamation requirements have been met.

Mining companies pay, directly or indirectly, most of the costs of new power lines and roads. They also pay notoriously high wages to attract "boom-town" workers, which means they are compensating at least their employees (if not the original residents) for the costs of crime and poor public services. These internalized costs already give companies a powerful incentive to slow the lateral spread of their mines.

If significant negative externalities remain, some sort of MER rule might make sense (although as Watson and Bernknopf note, it will tend to postpone the costs rather than eliminate them). But what sort of rule? The Carter administration presided over a big battle on this issue in 1979, when it issued its regulations interpreting the rules, and that battle is still having repercussions to this day.

On March 19, 1979, the Interior Department proposed to define MER as "the amount of coal that can be recovered by prudent mining practices from all seams that are *collectively* profitable" (emphasis added). This meant that a company would have to go on mining unprofitable coal seams until it had dissipated the profit from the more accessible seams. The biggest loser would have been not corporate treasuries—since they would lower their bids so as to achieve the same rate of return on a new lease as before—but federal and state treasuries, since the sale prices of federal leases would have been driven down toward zero. (States get a 50 percent share of lease revenue.) In effect, the federal government would have forgone its rent revenue on coal leases in order to discourage lateral extension. Another set of losers might have been owners of private coal tracts that are mined in conjunction with federal tracts.

The Council of Economic Advisers was on the department like a duck on a June bug. It asked Interior to commission an economic study of the regulation. Watson and Bernknopf were the ones who carried out that analysis, which later formed the basis of their *Energy Journal* article. They found that compared to a "marginal cost" rule, which would require only the mining of individually profitable seams, the department's proposed rule would have cost about $250,000 per acre saved.

The authors examined three typical coal-mining areas in the West where an average-cost rule would require the mining of more seams than a marginal-cost rule. These were areas where one seam lay atop one or more others with layers of "interburden" (materials other than coal) between them. Taken together, the three areas make up a big share (25 percent) of all federal coal in the West.

Under the average-cost MER rule, 20 percent of all coal mined from the three regions would have come from privately uneconomic seams. The increased mining costs, over and above the market value of the additional coal, would have totaled $112 million. On the benefits side, the rule would have postponed the mining of an added 456 acres of western land, accounting for seven-tenths of a mile of lateral extension. It would also have postponed for several months the eventual relocation of "boom towns" that affect the living conditions of 50,000 original residents.

The authors use the example of the Yampa/Steamboat Springs area of Colorado to illustrate how these costs and benefits would stack up in one typical area. It would make sense to apply the average-cost rule to the Yampa site if the benefits of avoiding the three kinds of externalities equal or exceed any of various possible combinations. For example, the rule would justify its cost if the benefits of averting land disturbance exceed $63,000 an acre, the benefits of averting the auxiliary costs of lengthwise mine expansion exceed $100,000,000 a mile, and the benefits of avoiding "boom-town" costs exceed $6,000 per original resident per year. Another possible combination that would justify the rule in the Yampa case would be $100,000 per disturbed acre, $10,000,000 per mile of lateral extension, and $14,000 per person in annual boom-town costs (all figures in 1978 dollars).

In Brief–

Unrecognized Hazards. Many discussions of job safety assume that the most lethal workplace hazards occur in manufacturing—the sort of hazards with machinery and chemicals that the Occupational Safety and Health Administration tries to reduce. Not so, according to a Johns Hopkins study of all deaths resulting from work-related injuries over one year in Maryland. The study found:

- Most of the fatal accidents (57 percent) involved vehicles of some kind: road vehicles accounted for 25 percent, non-road vehicles 16 percent, boats 11 percent, and airplanes 5 percent.
- The second biggest group of deaths resulted from shootings, mostly during holdups. Taxi drivers and storekeepers were at high risk, along with police officers.
- Overall, the riskiest job categories include those who drive on the job, those in danger of assault on the job, pilots, and farmers. Only rarely did work-related deaths result from manufacturing accidents.

In other words, most of the deaths involved either workers that OSHA does not cover or hazards that it does not address.

A Pressing Case of Discrimination. Some cities have banned "Ladies' Night" discounts at bars, and others have ordered hairdressers to charge their male clients the same fee that they charge women. Now the authorities are closing in on another group that perpetuates sex discrimination: laundries that charge more to clean women's shirts than men's shirts.

Two such offenders were recently collared by women customers in Montgomery County, Maryland, for charging $2.25 and up to clean women's shirts and a dollar or less to clean men's. The women took a sex-discrimination complaint to the Human Rights Commission in the suburban Washington county. "I think women have to wake up to some of these inequities," said one of the complainants, a sociologist with the Office of Civil Rights in the U.S. Department of Education.

Local laundries explained to the commission that their automatic presses are designed to handle the larger shirts worn by men; smaller shirts have to be pressed by hand, which can take ten times as long. A spokesman for the industry told the *Washington Post* that it is not worth spending $40,000 on special equipment for the smaller shirts because they make up only about 5 percent of all shirt-cleaning business. Some cleaners charge one of two flat rates for shirts depending on whether they fit the automatic presses or not.

Update: Pet Protection Romps to Victory. Another civil rights barrier has fallen. Elderly and handicapped animal lovers have won their historic battle to get their pets into federally subsidized housing. Some managers of such housing projects had been arbitrarily excluding furry cohabitants; pet advocates responded by introducing a bill in Congress that would ban that "form of discrimination," the proposed penalty being, as usual, a cutoff of federal funds to the offenders. (See "Pet Peeves," In Brief, *Regulation*, March/April 1983.) Although Congress was too busy to do much else in its 1983 session, it did find time to enact pet protection as part of the housing/International Monetary Fund bill that President Reagan signed November 30.

On another front, however, some elderly New Jersey residents have turned down the opportunity to live in closer harmony with the animal kingdom. The state has agreed to drop its controversial plan to require the construction of snake shelters in the middle of a retirement community. The snake-shelter plan began when the state ordered the developer of Silver Ridge West, a 400-unit retirement community, to provide a suitable habitat for two threatened species of snakes. Under its terms, the developer was to erect forty piles of pine logs and brush on the grounds of the complex.

According to published reports, residents of the development did not react to the plan with the proper preservationist zeal; in fact, they threatened to picket the governor's office to show their displeasure. The state decided to abandon the scheme when the developer agreed to buy several dozen acres of land near the complex for an alternative habitat.

These estimates may be compared with some actual estimates of externality costs by researchers in the past. One 1978 study found that uncompensated boom-town infrastructure costs ran at about $800 per person per year. Studies published in 1974 and 1980 estimate the environmental costs of strip-mining to be somewhere between one-fourteenth and one-twenty-second as high as the amounts assumed above.

The possibility might remain, of course, that some sort of MER rule might be applied selectively in order to force the recovery of just-barely-uneconomic seams for which the externality factors might be a decisive tipping factor. Watson and Bernknopf warn, however, that such a rule would be extremely difficult to apply. It would require the government to duplicate, with a high degree of accuracy, the expensive analysis that coal companies now go through before deciding which seams to mine. Moreover, even small swings in the price of coal could invalidate an analysis that applied to the marginal situations where the MER approach might make sense.

The Interior Department retreated quickly in the face of these considerations. In its final regulations of July 19, 1979, it fell back to a simple marginal-cost requirement. But it could

do so, of course, only by rendering the statute's "maximum economic recovery" requirement essentially moot, since a marginal-cost rule merely makes mandatory what companies have an incentive to do anyway. Faced with the choice of turning Congress's language into a dead letter or wiping out the net economic value of federal coal, the department chose damage to legality over damage to substance.

Such compromises are never really satisfactory, and although this one escaped the most obvious pitfall—that is, no one sued—it has come back to haunt the coal industry. The Reagan administration, in drawing up regulations for its new coal-leasing program, has expanded the 1979 MER regulations. The thrust of the revisions is to keep the marginal-cost rule intact but to increase the burdens to companies of certifying that they are obeying it—that is, that they are indeed doing what is most profitable for them to do. In the old joke, the young mother said, "Do whatever you feel like — now let's see you disobey *that*!" At least she didn't insist on verifying compliance with her orders.

Betamax Goes Free

As Robert Goldwin has pointed out, the original Constitution (before it was amended) contained only one clause that explicitly used the word "right": Article I provides that "the Congress shall have 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."

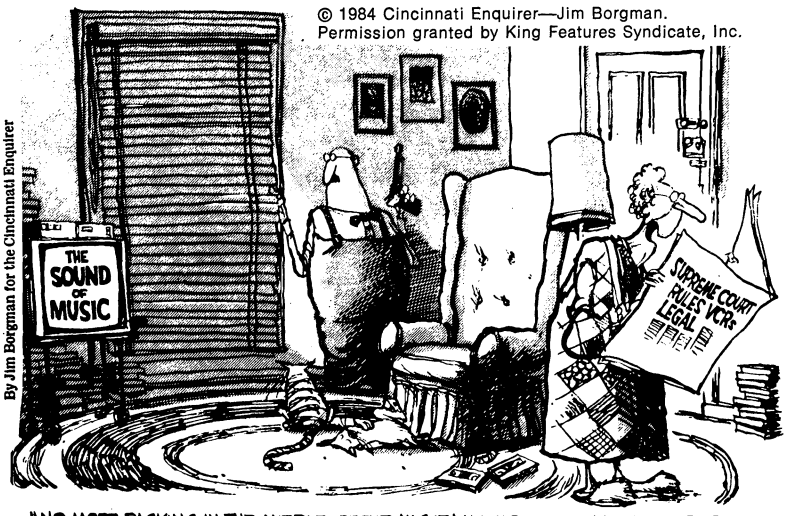
The Founders had seemingly good reason to worry that intellectual property would be perpetually insecure in a democratic system, since its owners are so few and its consumers are so many. Little could they know that the threat to the welfare of authors might turn out to come not from politics but from the advance of technology. Such inventions as the photocopier, the personal computer, and the videotape recorder have made it easier than ever before to copy material. It is frequently contended that scholarly journals lose revenue because of mass photocopying and that classical musicians fall victim to home taping; in both cases the technology involved is so widely disseminated that the law, and the copyright owner, are virtually helpless to prevent unauthorized copying. The Supreme Court's January 17 decision in the so-called Betamax case is significant not only for its immediate effect—which is to declare legal, for the time being, at least, some home taping of television programs—but also because it may foreshadow the way the courts will handle some of the other new technologies that make copying easier.

The courts have become involved in copyright issues mostly by default, since Congress acts in this area only occasionally, after considerable pressure has built up for change. Strong discontent with the Copyright Act of 1909 arose as early as the late 1950s, but Congress dawdled until 1976 before finally making its revisions. A major sticking point was Congress's inability to determine the proper copyright treatment of a new technology, cable television.

When home TV taping arose in the mid-1970s, therefore, it was only natural that Universal Studios and Walt Disney Productions, two Hollywood firms with valuable film properties to protect, should decide to seek a judicial rather than a legislative remedy. In 1976, apparently concluding that it would be both politically and logistically difficult to seek damages against ordinary users for taping programs at home, the two firms instead sued Sony, then the largest manufacturer of video recorders, along with Sony's advertising agency, a number of retail dealers, and a token consumer. In addition to seeking damages for past infringements from all parties except the token consumer, the studios sought an injunction against the manufacture and marketing of recorders and blank tapes. They may have hoped that in lieu of such an injunction the court would require the makers of recorders and tapes to negotiate with copyright holders for production rights. Alternatively they might have hoped that the Court would impose on the manufacturers a blanket licensing arrangement similar to that now used to collect revenues from cable television systems when they retransmit distant broadcast signals (see Henry Geller, "Making Cable TV Pay," *Regulation*, May/June 1981).

The trial court rejected the Universal/Disney claim, but the U.S. Court of Appeals for the Ninth Circuit found Sony to be liable and remanded the case for a determination of relief.

By a five-to-four vote, however, the Supreme Court reversed the court of appeals (*Sony Corporation of America et al.* v. *Universal City Studios, Inc., et al.*). The Court found that Sony was not a contributory infringer because videotape recorders are capable of "substantial" noninfringing uses of two kinds. First, the machines can be used to record noncopyrighted material such as home movies. Second, and more controversial, the owners of videotape recorders do not, in the Court's view, violate copyright law when they record broadcast programs simply in order to watch them at a more convenient time. Because of these noninfringing uses, the Court held that, even though certain home taping might be an infringement, liability could be imposed only on users, not on the maker of the machine.



"NO MORE PACKING IN THE MIDDLE OF THE NIGHT! NO MORE RUNNING FROM THE BETAMAX PATROL! HERBERT, DARLING, WE'RE CLEAN!"

Article I may have invited Congress to make authors' rights "exclusive," but lawmakers and the courts have carved out numerous exceptions. One such exception is the doctrine of "fair use," which permits copying for such purposes as scholarship and news reporting. Congress has been silent, however, on whether home recording of television programs constitutes fair use. And as so often happens, both sides felt free to interpret the lawmakers' silence in accord with their own views. "One may search the Copyright Act in vain," said the majority opinion, "for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible." The minority drew just the opposite inference from the legislators' silence. "When Congress intended special and protective treatment for private use . . . it said so explicitly."

Was the Owner Harmed? The Court distinguished two reasons why viewers tape programs off-the-air. One is "time-shifting," in which a viewer records a program, watches it at a more convenient time, and then usually erases it by recording another program on the same tape. The other is "library" use, in which a viewer records a show and keeps it on the shelf, expecting to view it more than once and perhaps show it to friends and neighbors. Building a library is more expensive than time-shifting, since it means buying more and more blank tapes as time goes on.

The majority found that most recording was for purposes of time-shifting, and that the plaintiffs had "failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works." This question of burden of proof may be one of the more significant aspects of the decision. The majority opinion places the burden on a copyright holder to prove that it has been harmed. It says that "the concept of 'fair use' requires . . . the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law." The dissent, on the other hand, would have put the burden on the user to demonstrate that "he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work." The difference is important in principle, since it might be hard to prove either case.

The evidence of harm that the majority sought was limited to any reduction in advertising revenues caused by off-the-air taping. It agreed with the trial court in rejecting the movie studios' contentions that measured ratings would decline or that the audience for re-

runs would fall. "Harm from time-shifting is speculative and, at best, minimal," it found. Indeed the majority could point to statements by the plaintiffs that no actual harm had actually occurred.

Aside from the fact that limiting the search for harm to the advertising market increases the likelihood that no harm will be found, it should also be noted that in 1976, when the case was brought, fewer than 50,000 video recorders were in use in the United States. The present figure is about 10 million and some projections are that the number will grow to 50 million by 1990. It is not altogether surprising that it was hard to detect any reduction in advertising revenues in the years just after recorders were introduced. Somewhat amusingly, Sony was able to point to statements from copyright owners such as the sports leagues that they were unconcerned with the off-air tapings of their programs. More recently, some of these same interests have changed their tune, perhaps because of the large increase in the number of recorders.

What Sort of Harm? The Court split sharply on the question of what constitutes harm to a copyright holder. The majority seems to think that a copyright holder is harmed only if its revenues actually decline, while the minority holds that harm occurs if copying prevents the owner from exploiting new markets. These would include not only markets such as those for pre-recorded tapes, but also the market for the service of "time-shifting" itself—since that is a service that viewers would presumably be willing to pay for.

The dissent drew a distinction between "productive" copying that leads to "external benefits from which everyone profits" (such as copying for purposes of criticism or comment), and copying that is done "for the sole benefit of the user." It added that it knew of no case in which the latter had been held to be fair use. It did concede, however, that some *de minimis* "nonproductive" uses do not harm the author so that, in those cases, because "no purpose is served by preserving the author's monopoly . . . the use may be regarded as fair."

Should Manufacturers Be Held Liable? The plaintiffs argued that Sony and its codefendants were contributory infringers because they had sold the recorders knowing that their principal use would be off-air taping. Indeed, Sony's advertisements had prominently described such uses. Sony responded that it could not be held liable because its product was a "staple article of commerce" that could be put to a variety of uses, not all of which involved infringement. Examples are recording of noncopyrighted broadcast programs or of private or family occasions.

Bringing suit against the manufacturer of the copier itself, while not without precedent, is highly unusual. Book publishers have brought actions against photocopy shops whose business relies heavily on illegal copying. But no publisher has ever tried to sue Xerox or Canon for supplying the machines.

The division in the Court on this issue turned on the distinction between the actual and potential uses of the machines. The majority said that Sony could escape liability if its machines were *capable* of "substantial" noninfringing uses, while the minority said that such uses had to be "significant" in actual practice. Since the trial court had not ruled on the factual question of whether the noninfringing uses were significant (it had declared that taping for time-shifting was fair use), the minority would have sent the case back for further consideration on that question.

It may be argued that the scope of the Betamax decision is limited, since it applies only to off-air taping of "free" broadcast television programs for purposes of time-shifting (it does not, as the minority points out, establish whether viewers may legally tape cable or pay-TV programs). Moreover, the Court seems to have reserved its right to ban time-shifting if copyright holders can prove harm in some future case. Some of the Court's language, however, is rather ominous for owners of intellectual property. The Court seems to be inviting "noncommercial" users to infringe on a copyright unless the holders can demonstrate harm —and it may demand that that harm consist of cutting into the existing profits of producers, not just depriving them of opportunities for additional profits. It is reasonable to predict, therefore, that other "noncommercial" users will begin testing the limits of the new doctrine, and that the Court will have to return to this subject again.