Part I. **Videotape and Copyright**

The aesthetics of videotape are not merely matters of formalist specificity but also engage broader social and cultural issues of circulation, reception, historiography, and regulation. Two premises of U.S. copyright law have informed this project: first, ideas cannot be copyrighted, only specific expressions or fixed forms can be; and second, the public domain and fair use contribute to the public good by enabling access to, and (re)uses, of texts.[19] The first premise recognizes the formal properties of content, whereas the second suggests that such content, once communicated, enriches society. Our public culture and private lives depend on the mass reproduction and usage of texts. Copyright was developed with the understanding that, in the analog world, copies are necessarily material, and tangibility is a prerequisite for access, use, duration, and copyright protection, as well as for aesthetic experiences. For analog technologies, tangible property and intellectual property coexist; whereas the durable good—a videotape, say—may get worn out, broken, or stolen, the ideas expressed by its content are nondepletable. Ironically, the more the analog device is used, the more productive, valuable, and influential the text or ideas it delivers become.[20]

Copyright and Access

The Hollywood studios were initially wary of home video. If audiences could tape movies and TV shows off the air, studio executives feared that the industry would be devastated by revenue losses. According to this line of reasoning, audiences would stop going to cinemas if they could watch movies for free at home, and advertisers would stop buying airtime for commercials if they thought home viewers would fast-forward through them. As it turned out, of course, neither the theatrical film nor broadcast television industries collapsed, and the studios did gangbusters business because video opened up additional revenue streams and aftermarkets. Home video probably increased film and TV consumption by making it more available. (If any industry was devastated by video, it was the 16 mm educational and industrial film market.) But before the home video market was developed and exploited by the studios, the studios waged litigation against VCRs in the famous *Sony v. Universal* (1976–84) case, and the charge was copyright violation.

Copyright law governs cultural works and creative intellectual property. In the United States, copyright law was enacted early on and was designed in tandem with the U.S. Constitution. It strove to inspire publication (literally, the making public) of books, pamphlets, and newspapers—and later photographs, films, and sound recordings—by protecting authors' or publish-

ers' temporary, near-exclusive rights to profit from such publication. These rights were always conditional—such protection was a reward for sharing insights and arts—and audiences always had vested interests in publication and implied or judicially determined rights to use published materials. At the core of copyright is a contradiction between the public interest and private profit[21]—a conflict that might be called copyright's inherent vice.

Although home video was at first ostensibly a domestic system for private viewing, the regulation and uses of the technology have been linked to principles of the public interest. Copyright protection, fair-use exemptions, and the public domain were all established for the purpose of fostering a rich public culture. The fundamental concept is that each of these copyright categories—whether offering legal and economic incentives for creating original works or providing protections for others to create derivative works—stimulates artistic production and encourages distribution. In broadcasting, one of the major topics for policy and debate has been the extent to which broadcasters must serve public interests and the extent to which the public has rights of access to information that trump networks' and stations' financial interests. As I suggest in the case study on the Vanderbilt Television News Archive in chapter 3, off-air recording realized new forms of access—historical—that raised contentious issues of whether rights owners, politicians, the public, or intermediary institutions have the right to determine public access.

The principle of access is foundational to both copyright and videotape and in effect unites them in spirit and practice. In 1969 the U.S. Supreme Court proclaimed through its ruling on *Red Lion Broadcasting Co. v. FCC* that audiences have the right of access to information.[22] This interpretation of "access" relies on a fundamental belief that the availability of cultural texts, information, and knowledge to a general audience is a public good that serves the public interest. Although Federal Communications Commission regulations have no jurisdiction over copyright and vice versa, the Court's logic in the Red Lion decision indicates an indirect precedent for *Sony v. Universal*. In what became known as "the Betamax case," the Court ruled that "to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits," and in effect legalized VCRs.

Perhaps the most famous, ambiguous, and debated of all users' rights under copyright is fair use. Fair use is a general loophole that protects otherwise copyright-infringing duplications of texts for culturally edifying educational, critical, or newsworthy uses. Fair use defined and defended the standard legal uses of home video, and videotape, in turn, provided the

medium through which the Supreme Court set its first precedent on fair use. As I will discuss in more depth in chapter 2, the 1976 U.S. copyright code revision introduced the first statutory fair-use exemption. In 1984 the U.S. Supreme Court ruled in a landmark decision on *Sony v. Universal* that VCRs should be allowed in the domestic market because their dominant uses were fair and many potential ones were non-infringing. The eight-year lawsuit not only highlighted the tensions between copyright propriety and audience desires but also served as a major publicity boost for videotape recorders. Much of the early journalistic coverage of home video specifically addressed the lawsuit and the technology's questionable legal status; thus much of the formative public awareness of home video was articulated in relationship to copyright law—an articulation of technology and policy that resurfaced in relation to online file sharing and clouded speculations about the rise of YouTube.

The interdependence of videotape and statutory fair-use exemptions may have started out as a historical coincidence when both appeared in the 1970s, but through the 1984 Court ruling on the Betamax case, they became mutually constitutive as a matter of public policy. As media scholars argued in retrospect of this ruling, "*Sony* did more than legalize home taping and 'time shifting.' It opened up participation in the project of recording the collective memory of this dynamic nation."[23] Fair use also remains critically important to videotape for another reason: individual recordings will not survive long enough, physically or technologically, to ever enter the public domain (when works no longer protected by copyright can be reproduced without permission). A tape's ten-year or twenty-year shelf life before it decays falls far short of the ninety or so years before a work's copyright expires, and preservative reformatting inevitably distorts the text. When the copyright term outlasts the text or the format, fair use may be the only recourse to accessing and using video-originated works.[24] Furthermore, fair use implies that audiences do not merely copy a preexisting work but make *use* of it by interpreting it, building on it, reinventing it. VCRs made television viewers into *users*, and videotapes introduced new *uses* of television.

At first, copyright regulations seemed to favor magnetic recording technology's potential benefits rather than clamping down on potential violations. However, many home recording practices that users have become accustomed to were never explicitly protected by written law; rather, they were deemed legal in the absence of litigation or offered shelter through limited statutory exemptions or judicial rulings. As the technology's domi-

nant uses became domestic, consumptive ones—that is, buying and listening to music or renting and watching movies rather than recording one's own copies—the general perception of magnetic tape shifted away from anxieties about its use as a panoptic means of social control and surveillance (keep in mind that tape technology burst into public consciousness through the Watergate scandal and paranoia thrillers) toward its being a more convenient means of entertaining the self.[25] Despite the music industry's attempts in the early 1980s to claim that home recordings were "killing" the music business or Hollywood's assertions that timeshifting constituted televisual piracy, even everyday recordings of copyrighted material quickly seemed to lack any transgressive edge. Magnetic tape lost its threatening taint, and so citizens perhaps began to take its relatively lax regulation for granted.

Copyright law and litigation have been the most prominent official means of regulating video technology, although increasingly the technology has been designed to go even further in restricting uses and access beyond playback.[26] Restrictive copyright laws, most egregiously the 1998 Digital Millennium Copyright Act (DMCA), have aided and abetted this trend by criminalizing the act of undoing copy-protection hardware or software—even if it is to make otherwise legal or fair uses. These mechanisms are intended to prevent commercial forms of piracy but have seemingly forgotten about important fair and non-infringing uses of reproduction. Together, the law and encryption of digital formats have worked to override many of the fair uses and much of the potential functionality of video; thus, for the time being at least, users can still do more (legally, anyway) with videotape than with digital video, even though the newer formats can offer superior resolution and should allow easier copying and manipulation.

Fair use, I am arguing, is an analog copyright exemption. Fair use is a policy of conditions, ambiguity, and reasonable guesses. Only a judge can say for sure that a particular instance can be defended as fair use, and even then the Supreme Court has final say. Defined by a set of guidelines and few judicial precedents, fair use in the real world rarely operates in a binary way: yes, this is clearly fair use, or no, this is clearly not. Rather, fair use is inexact, approximate, and fluid. In other words, it's analog. The DMCA and especially extralegal technologies to prevent duplication (such as Content Scramble System encoding on DVDs or the absence of a record button on players) instead operate as binary laws: either it's legal or it's not; either it's functionally possible or it's not. These are distinctly digital ways of regulating

users' activities and attempts to copy and share media. As a communications and copyright scholar has suggested, "Fair use is . . . antithetical to the design of technologically enforced rules."[27] Technological copy guards (often called DRM, or digital rights management) may prevent even the option of fairly cutting, copying, and pasting, and the DMCA makes it illegal to undo these technologies, regardless of the reason for doing so. Of course, DRM is often ineffectual because anything that can be encrypted can be hacked—and often is, though the law isn't quite so easy to bypass. Therefore, although it may seem that DVD has replaced videotape and the DMCA has to some extent overwritten fair use, videotape and fair use offer lessons in progressive media policy and remain essential tools of media access, even in the era of their apparent obsolescence or irrelevance.

Digital Dilemmas

Access and aesthetics have changed in the transition from analog to digital media and technologies. Even though the predominant analog home video format, VHS, has certain formal limitations, its contribution to the lives of cinephiles and casual viewers alike must not be discounted just because consumers have enthusiastically abandoned it for DVD, TIVO, and streaming video. Some digital formats have made innovations to make media more portable and to make duplication much quicker, and the standardization of letterboxing and higher resolution make DVDs preferable for film buffs. But there have also been trade-offs, losses, and glitches with the turn toward digital home video. Despite the hype, HDTVs are no more "realistic" than old-school tube televisions; instead they are often set to be supernaturally bright and colorful in a way that is transfixing rather than authentic. And, of course, digital technologies are nowhere near as perfect as they are purported to be. Despite innovations in terms of resolution, interfaces, duplication, and distribution, digital media are not necessarily improvements on earlier analog media but rather may be more restrictive of use, duplication, and distribution.[28]

Digital networks have enabled the acceleration of access by reducing texts to data. Technological development does not follow a linear evolution, nor, despite celebrations of "new" media, should we think of current technologies as the final, teleological stage of research and development. The hype of digital resolution as "perfect" and preferable to analog lingers on, despite the failure of "virtual reality" to materialize in the early 1990s and more than

a decade of blocky, jerky, and stalled streaming images.[29] Furthermore, as technologies have developed, they have typically become more complex and more dependent on devices and decoding to access texts or information. Contrary to the myth of increased immediacy, newer technologies typically mediate more than old ones, and they introduce new challenges for contemporary access and future preservation. The more advanced the technology, the more likely there will be multiple levels of mediation—hardware, delivery device, software, operating system, encryption, et cetera—and the more likely that one or more of these will break down, become obsolete, or be incompatible. Future media historians will likely have more trouble accessing electronic and digital content than indexical and analog materials simply because it will be harder to find the right device, reconstruct the proper version of software, or decode encryption. Probably the biggest myth promoted in the celebration of digital media is the technology's infallibility; the more dependent on technology and software a file or format is, the less likely it will be to have longevity.[30] Digitization is not preservation. Although plastic digital discs may not disintegrate in the way magnetic tape eventually does, once a file is corrupted or a DVD is scratched, there is almost nothing to be done to restore it. In addition, digital technologies typically become technologically obsolete in less time than it would take a tape to deteriorate. In 2006, librarians and copyright experts assessed that "all digital materials are inherently unstable."[31] In video history so far, analog formats have outlasted digital ones, regardless of physical durability.

Content and hardware companies have introduced anticopy technologies, engineered incompatibility between platforms, and accelerated obsolescence—all of which work to inhibit how audiences access and use digital media. When technology fails to prevent copying, licensing agreements and the Digital Millennium Copyright Act legally determine what users can or cannot do. DVDs have not introduced more control over the content when FBI warnings and sluggishly paced animated menus cannot be skipped or discs are difficult to cue to specific moments in the middle of chapters. The menus and chapters dictate how the user interacts with the disc, and pity anyone who loses a DVD player's remote control, since the complete range of command keys is rarely replicated on the deck itself. The VHS user arguably has much more agency in videotape playback, and the tape stays on the spot where the user leaves it, which facilitates not only strategic viewing but also educational classroom or conference clips. Analog media, while slower, degenerative, and bound to tangible storage formats, is comparatively more

flexible in terms of what users can do. Engineers, rights owners, and users of digital media have all learned from analog models for both progressive and repressive developments.

Digital copyright protections and technological encryption are premised on digital media's distinction from analog media; digital data can be replicated without change, whereas analog copies exhibit degeneration. Rights owners fear, therefore, that users will be less likely to pay for media if they can easily make digital clones that are the same as the original for free. Through online networks, digital data can also be exchanged rapidly, anonymously, and without analog technology's prerequisite baggage of tangibility—two more factors that have accelerated content sharing. Just as historians and communications scholars warn against technological determinism (the idea that the device determines how it will be used), so progressive legal scholars also argue against what might be called legal determinism: regulations that would likewise inhibit how technologies are designed and what potential uses can be engineered or rigged.[32]

Bootlegging

Personal recording, within and outside the law, has consistently been practiced and, I argue, exposes analog videotape's formal properties and its fundamental purpose of accessibility. Taping and sharing works can derive from ethical impulses to preserve and provide access to content that may run counter to (and eventually change) the law. While compelling work already exists to advocate for the cultural benefit of appropriation, sampling, and remixing, I suggest that the argument for access should be expanded to include academic and everyday uses of complete works.[33] I advocate certain productive forms of copyright-infringing or legally dubious dubbing while also reflecting on the aesthetics of purloined media.

Bootlegging illuminates the aesthetics of analog videotape because it so often involves multiple generations of reproduction and offers practical models that have challenged, expanded, or provided alternatives to existing intellectual property paradigms. I define bootlegging broadly to include most noncommercial practices of timeshifting, tape dubbing, importing, and sharing of media content that is not reasonably available commercially. Bootlegging functions to fill in the gaps of market failure (when something has not been commercially distributed), archival omissions (when something has not been preserved for historical study), and personal collections (when something has not been accumulated or cannot be afforded). Extending the

Supreme Court's Betamax definition of timeshifting, I consider bootlegging to be fair use of video technologies. In the digital video age, bootlegging also includes excerpting and sharing culturally significant or newsworthy corporate media clips. "Fairness," as a word or ideal, suggests both beauty and justice.[34] Fair-use bootlegging can be a beautiful thing.

Despite the often negative or criminal connotations of the term, I use "bootlegging" to reclaim its productively illicit meanings, its intoxicating pleasures, and its amorous relationships between texts and audiences.[35] In distinction, I define "piracy" as commercial duplication and sale of knockoffs of readily available videos.[36] Pirates steal for profit, not for the egalitarian or productive redistribution of culture and information. Though the terms "piracy" and "bootlegging" are often used interchangeably in industry rhetoric, there is a significant distinction between the two as I use them. Admittedly, gray areas and contradictions in my differentiation remain; bootleg vendors (such as those described in the book's first and second video clips) make money at the same time that they make foreign or obscure tapes available to fans, scholars, and collectors. Yet even in such instances, videotape bootlegging has never really disrupted or threatened the mainstream political and economic power structures. In spite of numerous market misfires and whining about piracy, the technology manufacturers and studios still reap enormous revenues and will surely find new business models to continue doing so.

The Motion Picture Association of America and the Recording Industry Association of America have waged major publicity and legal campaigns against "piracy" in the wake of speculative and actual downturns in the film and music markets as a result of peer-to-peer file sharing and other modes of content reproduction and exchange. Jack Valenti and the MPAA devised rhetoric that suggested that the valuable content industry in the United States would collapse owing to piracy, though there was no actual economic evidence or necessarily even legal grounds for Valenti's claims; rather, he relied on appeals to morality, patriotism, and fear—an all-too-familiar political strategy for the early years of the twenty-first century. The press, the government, and to a lesser extent the public have too often accepted these warnings without sufficiently distinguishing between piracy and productive, if legally ambiguous, non-infringing media reproduction and sharing. Such campaigns reduce the complexity of copyright to a binary of paid uses and piracy. Especially in educational materials aimed at schoolchildren, attempts to train youth to respect the law actually misrepresent it by eliding concepts such as the public domain, fair use, free use, and first sale—the elements

of copyright law meant to benefit society.[37] As one of the most insightful digital copyright scholars argues, such lobbies have "succeeded in persuading a lot of people that any behavior that has the same effect as piracy must *be* piracy, and must therefore reflect the same moral turpitude we attach to piracy, even if it is the same behavior that we all called legitimate before."[38] In part, I seek here to shift the discussion away from framing questions of piracy or creativity toward issues of users' rights, access, and preservation, and from a focus on the digital present and future to the recent analog past. To be quite clear, I am advocating for bootlegging rather than piracy.

Geographically, I have focused this book on the impact and uses of videotape recording in the United States, in part because copyright laws, formats, and market factors are territory specific, but also in part because academic work on "piracy" has typically focused on illegal media circulation "over there" in Asia, Africa, and Eastern Europe while ignoring domestic activities.[39] Yet the entertainment and electronics industries have been working overtime stateside: they have restricted access to, and uses of, content through encryption and have successfully lobbied for laws that make circumventing such encryption illegal. Still, I should note that, perhaps even more than in the United States, video has been seen internationally as a threat to intellectual property claims and local governance—and has served a public good. A study of early VCR adoption suggested that the phenomenon was from the start global and largely facilitated by the black market, whether smuggled (in some cases, strapped to camels' backs) to elude laws forbidding foreign media or simply to undercut import taxes. Alternately, migrant workers might bring VCRs back to their home countries, thus introducing the technology in places where it was not yet commercially available.[40] Of course, bootlegs imported from overseas to diasporic populations in the United States demonstrate that such borders and distinctions are porous, as suggested in my first video clip (after this introduction).[41] The materiality of the video image in such bootlegs testifies to the distance between audiences and their homelands and to the illicit network that smuggles videos into circulation: "Video decay is especially significant for emigrants and exiles who treasure old, hard-to-get, or bootlegged tapes from 'back home.' Because they are so hard to find, these videos quickly lose their status as mechanically reproduced media and become rare, unique, and precious objects."[42] Here, there, and in between, the contemporary transition from analog to digital video necessitates a retrospective, qualitative consideration of the specific properties and practices of analog videotape before the format becomes obsolete.

Video taping and sharing can be understood as both public and personal. A scholarly study of concert bootleggers suggests that personal live recordings reclaim popular music as *popular* cultural production. "The larger implications of these bootleggers' accounts is that they help reframe the meaning of popular culture as an ongoing source of cultural production—one that is constantly renewed and revitalized through individual efforts to seek out personal and social relationships. . . . Bootleggers recognize themselves as law-breakers, overly-passionate fans, or self-appointed archivists."[43] Another study asserts, "Bootlegs call into question just what rights the public should have in copyrighted but unavailable material."[44] Yet another proclaims, "An essential element of creativity separates the bootleggers from their piratical cousins."[45] Analog reproduction changes the content recorded, and these variations can be read as personalizing individual recordings. Bootlegging—the private reproduction of copyrighted content for noncommercial personal, scholarly, creative, and community-building uses—is a dynamic practice where policy, preservation, and personal investments intersect.

At times, copyright restrictions erect barriers between what the law allows and our wants as audiences, our needs as scholars, or our intentions as preservationists. When the law acts against the people rather than for them, or when a text that has shaped our culture or our lives becomes inaccessible, what rights of access do we have? And how do we intervene? Often the best option is bootlegging, even though this covert practice may seem morally dubious or even alter the text itself. In response to an earlier incarnation of this project, Lawrence Lessig challenged me to think about copyright policies beyond fair use, the "analog hole" that has so long protected home taping. How else could one reasonably argue for bootlegging? It was a tough question, one for which I didn't have a ready answer. In part, this was a problem of my intended historical frame: I was arguing (and still do) for prior interdependencies of fair use and home video, looking at past legal definitions and working through codes that already exist. Upon reading Lessig's foreword to Kembrew McLeod's *Freedom of Expression*, I realized that he was challenging me to think beyond copyright as we had known it and to advocate for an alternative, future form of copyright.[46] The law is to be questioned, interpreted, and expanded. This is exactly what the Supreme Court justices did in deciding that recording television programs with a VCR could be considered fair use. And it's what they have so far failed to do in the age of digital technologies. I look to video recording practices that have reconceptualized copyright in progressive ways. This book, thus, is an ode to analog tapes and the virtues of their vices.