

Part I. Videotape and Copyright

Introduction: The Aesthetics of Access

On November 14, 2006, *Variety* ran an odd obituary headlined “vhs, 30, Dies of Loneliness.” A tacky cartoon of a cassette-shaped tombstone inscribed with “RIP 1976–2006” illustrated the article and reflected its mocking tone. This write-up was curious not only for its lack of urgency—given DVDs’ well-established market dominance, this was not breaking news—but also for its distinct lack of reporting: the only quoted source offers the banal assessment “It’s pretty much over.” The only actual news in the piece was that the studios had decided to cease manufacturing feature films on tape in the near future, though it acknowledged that they had not done so yet and some minor players in the industry would continue to vend the format. Despite the subheading “The Home-Entertainment Format Lived a Fruitful Life,” the piece also lacked the reverence or generous historical narrative typically offered in obituaries. Rather, the short, premature, and halfhearted tribute asserted, perhaps all too accurately, “No services are planned.”¹

A month and a half later, with much more fanfare, *Time* magazine named its 2006 Person of the Year: “You.” The first pronoun to earn such a distinction and certainly the most indulgent of its readership, “You” was clearly chosen in large part because of the popularity (and, for its creators, profitability) of the Web video streaming and sharing site YouTube (www.youtube.com). *Time*’s cover image featured an illustration of a white iMac modified so that the screen resembled the frame of a YouTube video, with playback controls and time code display. The screen was made of a metallic plastic, so that the reader’s likeness was reflected when looking at the cover.²

As compelling (and convenient) as the juxtaposition of vhs and YouTube that frames this book might be, let me backtrack just a bit. The *Variety* obituary wasn’t the first time someone tried to kill off vhs, though the rhetorical

homicide has usually been done with a bit more kindness. vhs's death had already been reported years earlier, with a self-reflexively nostalgic eulogy and another image of a gravestone inscribed with "R.I.P. vhs" in the British entertainment magazine *Empire*. But at least this time the image also included the words "in loving memory," and the article actually paid tribute to "a once great format." *Empire's* nine-page feature included a surprisingly useful timeline (dating back to 1951) and sidebar features on the format wars, film flops that found sleeper audiences on tape, and capsule reviews of "video nasties" (violent films banned in the United Kingdom in 1984 for fear they would "deprave and corrupt" audiences).³ My favorite section, however, focused on the most-paused moments in movies—mostly images of gore, nudity, or subliminal messages such as the exploding head in *Scanners*, Sharon Stone uncrossing her legs without panties in *Basic Instinct*, or (news to me) a scene when the clouds spell "sex" in *The Lion King*. This "freeze frame" write-up not only suggested a specific way that viewers used video—and the scenes that inspired such uses—but also acknowledged the aesthetic specificity of such practices. All the images included simulations of video noise streaking horizontally across the frame and the written acknowledgment "It trashed the tape and mostly featured fuzz." In this retrospective celebration of video, the format's limitations not only serve as distinctive markers of the technology but have also become central to its charm. Announcing the death of a technology belatedly acknowledges a kind of vitality. For something to die, it must first have lived.⁴

As a final example, I turn to Radiohead's heart-rending dirge "Videotape," which closes the band's pay-what-you-will download album *In Rainbows* (2007). Rather than a eulogy for technology, however, the song suggests that video mediates the narrator's arrival at the pearly gates and will preserve the life he once lived. The tensions between the analog and the digital are even sonically enacted midway through the song: erratic drum machine beats attack the spare acoustic piano while layers of processed phantom ooohs haunt Thom Yorke's pained vocals. Though the song is not technically an obituary, the connections between videotape and death, between videotape and spinning out of control, and between videotape and better times in the past remain. For any technology to be repeatedly memorialized, it must have significant cultural and personal resonances.

The death of vhs, repeatedly imagined, has been driven by DVDs (digital versatile discs or digital video discs), DVRs (digital video recorders, such as TIVO), and YouTube. With phenomenal speed, vhs has been pushed out of the consumer market and the consumer consciousness, thus demonstrat-

ing how quickly a technology that has altered viewing habits and been an everyday presence can become erased from public life. Yet even in their own moment, VCRs were quickly taken for granted. As an industrial history in the mid-1980s commented, “A remarkable change has taken place in our everyday behavior, and yet, like so many things that happen under our noses, it has gone largely unnoticed. Already it is getting hard to remember how strange a device the VCR was when it first appeared, and what a commotion it caused.”⁵ This book queries the strangeness of analog videotape and stirs up some of the “commotion” once again by revisiting its forgotten beauty and conflicts.

Home video emerged amid debates about its suspect legality and potentially damaging uses, and videotape has begun to disappear amid claims about its technological inferiority and aesthetic shortcomings. Consumer-grade videotape was born and now dies through derogatory definitions and discourses of infringement, danger, degradation, distortion, degeneration, inferiority, and obsolescence. To borrow Radiohead’s phrasing, videotape has always been “out of control.” With the transition from analog to digital technologies, tape hasn’t been the only thing at risk of erasure. Technological locks, licenses, and copyright laws that render illegal some uses of media familiar from the analog age have inhibited the rights of audiences and artists. Fair use, non-infringing uses, first-sale rights, and the public domain have all arguably been rendered obsolete as well by policies that seek to protect the content industry from “piracy.” Counter to the prematurely reported demise of VHS and the industry’s—and users’—apparent haste to move on to new formats, I position videotape as an endangered format for popular and institutional historiographies and access while also attempting to describe the aesthetics of home video before we forget what it was like to watch VHS.

The coinciding eras of analog magnetic tape and of fair-use copyright exemptions constitute a significant historical period, one marked by actual and potential democratic participation enabled by technology that gave way to largely taken-for-granted privileges and consumptive uses. This project was conceived in recognition that the ethical imperative to preserve and provide access to media content at times runs counter to what the law permits and what technology allows.⁶ Thus I point toward productive uses of video recording and the ways they have been defined by, prompted revisions of, and often violated, copyright laws; at the same time, I suggest, such practices exaggerate videotape’s formal specificity. I approach these histories through the concept of videotape bootlegging, a set of practices

and textual relationships that open up alternative conceptions of access, aesthetics, and affect. Perhaps a sexier way of saying the same thing is that this book is about desire—the desire for access—and about the aesthetics and ethics related to access.

In this book, I have several agendas: to validate analog videotape as a format by offering an aesthetic reading (something that, surprisingly, has not been done in any extended way in cinema or media studies); to offer a history of video technology that problematizes the binaries of old and new media; to emphasize that home video was embroiled in legal struggles to define and determine its uses and that video in turn helped shape the law; to politically suggest the ways that digital copyright laws build on and betray analog copyright; and finally to indicate what we might learn from looking back at copyright history in terms of arguing for users' rights of access in the present and future. Considered in tandem, these formal and legal issues demonstrate how home recording contributed to the legal definitions of fair use, how taping has served as a method of amateur archiving for ephemeral content, and how reproduction and sharing create new meanings and communities. This book presents a study of the very recent past, one that of necessity takes a historical vantage point because both technologies and policies change too quickly to assess the present or to plausibly predict the future.

“Inherent Vice,” this book’s peculiar title, comes from a phrase librarians use to describe the acidity of chemically processed wood-pulp paper, the manufacturing toxin that supposedly burns through old books, turns the interior pages yellowish brown, and makes them brittle.⁷ “Inherent vice,” perhaps perversely, cuts to the core of videotape. Home video was introduced as a blank format, essentially as a bootleg technology, for the purpose of recording television without permission. As I argue through the concept of bootlegs’ aesthetics of access, the specificity of videotape becomes most apparent through repeated duplication, wear, and technical failure: that is, we recognize videotape as tape through its inherent properties of degeneration.⁸ Its inherent vice, then, points to both its intended illicit uses in recording and its format specificity.

Historicizing Home Video

“Video” acts as an umbrella term for *technologies* (broadcast signals, electromagnetic videotape, cathode-ray tubes, streaming digital data, camcorders, editing software, playback decks), *content* (programming and “art”), and

institutions (networks, cable providers, tape rental outlets, galleries, festivals, file-sharing communities, event videographers). Video as a medium is constituted by all these factors. Broadly sketched, the magnetic tape era extended from World War II until the end of the twentieth century. As a popular format for consumers' use and access, one that has been culturally innovative and politically influential, the videotape can be periodized from the late 1960s into the early years of the twenty-first century. Significantly, when videotape was introduced as a consumer format, it was initially in the form of *blank* cassettes for recording television broadcasts. Additionally, VTRS (videotape recorders)—later more commonly called VCRs—were marketed as video *recorders*, not merely playback-only devices.⁹ In contrast to prior vinyl LPs or subsequent CDs and DVDs, magnetic tape allowed people to record their own voices, their own lives, the media, and the world around them to an unprecedented degree. This allowed for a boom both in private tapings and in personal participation in public affairs. Tape also introduced new relationships to network and studio programming, allowing audiences to save and use content at will.

Home video technology was developed and sold to make private recordings, and only years later did prerecorded videos of feature films become widely available. Videotape enabled television audiences to become participatory viewers who interacted with the technology and recorded texts. The extension of magnetic tape's availability to private viewers introduced hopes of media access and use that would threaten the established commercial and political power structures. In small ways, this did occur, although much of the promise proved utopian, like the hype that surrounded the Internet a few decades later. VCR owners rarely purchased prerecorded tapes of movies but instead tended to rent them overnight unless cassettes were priced to own and likely to be watched repeatedly—most frequently this meant workout tapes and kid vids. This marketing pattern was significantly reversed for digital technologies to stave off personal reproduction: CDs and DVDs were introduced as nonrecordable, playback-only consumer technologies, and only belatedly did consumer demand and hardware manufacturers succeed in making them recordable by home users. The delay in making DVD recordable may, in fact, have sustained VHS's life.

"Access" was a buzzword for video in its early activist days, before video became domesticated. For video collectives and artists who used equipment such as the Sony Portapak, "access" referred to new modes of production and the democratization of technology: video introduced means of cultural

production that were relatively affordable and easy to use. In addition, the equipment was portable, and the recordings could be played back instantly for impromptu feedback and group discussions. Media access centers started up in major cities and college towns across the country, and with the rise of cable television, public access resources and programming seemed to increase access to television production and cablecasting. As the discourse of such initiatives suggested, it was imagined that video could become a medium for the people and a viable alternative to broadcast networks' programming.¹⁰ And, of course, the utopian promise of media decentralization and democratized production has reappeared with digital video cameras, user-friendly editing software, and video sharing websites.

Video has been both a tool of media access (in terms of production and distribution) and an access medium (in terms of reception). Even without a progressive ideology behind it, timeshifting—the initially marketed practice of recording tv broadcasts for belated playback—was, at base, about access as well: watching whatever whenever, to quote a common Betamax ad. Audience access suggests a partial reorientation of power, even as the content industry has grown increasingly conglomerated. Tom O'Regan has recognized a central contradiction of video access: “*recentralization* of production and distribution in Western markets occurs, paradoxically, alongside such a *decentralization* of control.”¹¹

Scholars have explored the concept of remote control as representing new modes of viewing in the video age or as employing a rhetorical strategy emphasizing discourses of “control” and “mastery.”¹² (It should be noted, however, that government regulations, copyright policies, and manufactured abilities powerfully function more remotely and yet with even more control.)¹³ Home video technology was designed to give the audience considerable control over the content, so that it could be replayed, slowed down, fast-forwarded, and reproduced. With videotape, content could be played back on the viewer's own terms and schedules for the first time. This meant not only when to start playback but also the options of pausing to run to the kitchen or rewinding to review favorite moments or scanning past boring bits. Each push of a button on a deck or a remote control involves a willed action on the part of the user. Of course, the concept of television viewers as active participants in making meaning extends at least as far back as the “uses and gratifications” studies of the 1960s, and it has been one of the basic premises of reception and cultural studies.¹⁴ Indeed, the very emphasis on the word “uses” in this methodology demonstrates as much. Yet videotape

WATCH WHATEVER WHENEVER.



With Sony's Betamax SL-8600 video recorder, you can see any TV show you want to see anytime you want to see it. Because Betamax, which plugs into any TV set and is easy to operate, can videotape a show up to three-hours long (with the L-750 videocassette) while you're doing something else—even while you're out of the house, by setting the electronic timer. It can also videotape something off one channel while you're watching another channel. And remember, Sony has more experience in videocorders than anyone (over 20 years!). In fact, we've sold more videocorders to broadcasters and industry than any other consumer manufacturer. We even make our own tape. For years you've watched TV shows at the times you've had to. Now you can watch them at the times you want to.

SONY BETAMAX
THE LEADER IN VIDEO RECORDING

© 1978 Sony Corp. of America. SONY and Betamax are registered trademarks of Sony Corp.

2. The Sony Betamax was marketed as a machine for timeshifting, as exemplified by this prominent print advertising campaign. The slogan “Watch Whatever Whenever” may have been intended to suggest freedom, but it also indicates that content matters less than the technology. The focus here is the machine, not the TV programs to be recorded. Of course, this may also be a corrective: mentioning *Kojak* and *Columbo* in an earlier campaign prompted litigation from Universal Studios. Collection of the author.

changed how audiences become users by introducing new technologies that increased the interactive possibilities for television and introduced expanded practices of controlling, collecting, using, and reproducing texts. In other words, whereas TV audiences had long been conceived of as “active,” through home video, they could become “interactive.” Certainly there are no more interactive forms of spectatorship than hitting the record button, doing aerobics, or getting off to a porno—the three practices synonymous with early home video.

VCRs suggest a critical starting point in what might be called on-demand culture, wherein audiences want access to entertainment on their own terms: what they want, when they want it. With the rise of video rentals and later TiVo, on-demand programming, YouTube, and streaming content on the networks’ websites (not to mention the World Wide Web generally), technology and the market have moved toward an idea (if not an actuality) of infinite and instant access to specific movies or shows whenever the viewer feels the whim. As I suggest in the epilogue, audience attitudes and behavior may suggest a shift toward a sense of access entitlement.

In reality, what viewers actually watch is typically limited by what is available: television programming to be taped or movies released on video. Historically, if viewers forgot to tape a broadcast or its occasional rerun, they just missed out on ever seeing it—unless they found someone else who had taped it. The increasing regularity of the release of new feature films on video, however, introduced an assumption that viewers could just “wait for the video” if they weren’t really that anxious to see a particular film or didn’t want to pay movie ticket and popcorn prices. On the other hand, spontaneous rentals often proved to be less fun than was hoped. Most VCR owners have wandered around video stores, apathetically browsing for a movie when nothing fits their mood and eventually settling for something other than their first choices. Such everyday experiences may in part deflate overstatements of control and mastery over home video by demonstrating that viewers’ choices are often concessionary or impulsive. And different VCR owners will use (or not use) their decks in different ways. Some still primarily use their VCRs for recording broadcasts, while many never did, opting instead for playing rental tapes. And some may have never used their machines themselves at all—for instance, in the cases of grandparents who were given a VCR some decades ago as a holiday gift that really only functioned to entertain restless grandchildren during family visits.

Analog Video and Aesthetics

This project attempts to reclaim analog videotape's format specificity and distinguish it from older analog and newer digital technologies. It undertakes a recuperative mission to recognize that analog generations of consumer electronics profoundly changed the ways audiences became interactive users of technologies and texts and poses an argument that only by looking back to analog formats can we understand the potential innovations and actual limitations of digital ones. Throughout the book, I often use the term "aesthetics" in discussing the specificity of videotape. While I use this term predominantly in reference to formal characteristics of recorded images and sounds, it also suggests a sensory and affective relationship between the audience and (what's on) a given tape and, perhaps in some small way, counters the notions of quality that digital aesthetes use to dismiss analog media. Whereas "analog" has come to more or less mean "not digital," I return to its earlier meaning that indicates mediation and metaphor.

In *Video: The Reflexive Medium*, her recent book on video art aesthetics, Yvonne Spielmann stresses video's status as an electronic medium. Unlike film, in which discrete photographic images are exposed on celluloid and then projected through it, with video, there are no actual or fixed pictures. Analog video sounds and images exist only as electronic signals that are continuously rendered by the television monitor. Even the TV console never reveals a complete image, as the lines of colored pixels alternate—and at a different rate (30 "frames" per second) from film (24 fps). Electronic signals, when stored by magnetic embedding on videotape, are linear and continuous; here they are not images, either, but remain signals that are again to be rendered in real time on the monitor during playback. What is visible within the video screen, then, is never precisely the same or static but always mutable. Videotapes and VCRs, it should be noted, were developed to be used in conjunction with cathode-ray-tube (CRT) monitors. The rise of flat-screen, high-definition LCD and plasma monitors has radically altered television aesthetics (CRT monitors have 480 lines of resolution, whereas HDTVs typically have 720 or 1,080) in ways that exaggerate analog signals' lower resolution.

Electronic video signals, furthermore, are inherently *analog*. Neither indexical nor digitized as binary data, they are representations of the phenomenal world or TV signals reproduced. Whereas analog technologies function through analogy, digital devices operate through abstraction. In digital texts,

the numerical reductions to ones and zeros are not representational in a traditional sense, although through software and interfaces, we experience digital texts as representations rather than as series of digits. Video's existence as electronic cannot be denied. But in this book, I focus more on the delivery device with which audiences interact and onto which anxieties and affection have been projected: videotape cassettes. Stored in a tangible format made of plastic strips and a fine glue (this makes it *tape*), the physical storage technology introduces some of its own artifacts and specificity into the signal.¹⁵

Magnetic tape's inherent functions are recording and erasing, but it is through errors, muck-ups, and decay that users may become most conscious of the tape. Videotape recorders erase tapes before rerecording them, and through human negligence or mechanical failure and quirks, sometimes programs get accidentally taped over or don't get recorded at all. Most home tapers have experienced the frustration of realizing that they have taped over part of a recording that they meant to save, either because the cassette wasn't labeled or cued properly or because the deck was programmed incorrectly. On playback, the viewer may experience jarring accidental jump-cuts between unrelated texts and only then realize that one thing was taped over another. In addition, if commercials are elided or videos are edited using two VCRs rather than higher-end postproduction decks, the transitions between recordings will often produce snowy glitches, squirmy images, or sound distortion as the VCR heads recalibrate.

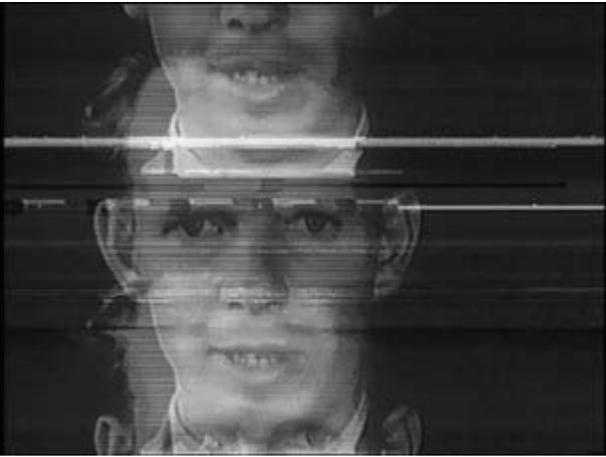
Videotape presented new modes of televisual temporality, existing both over time (as timeshifting, preservation, or decay) and in time (as duration or manipulated playback speed). Timeshifting was the first publicized use of home video, and it implies that, after being viewed, the recording will be taped over with some other program for a similar purpose. Despite being a storage format with the potential for extended shelf life, video's temporality has often been temporary in practice. When videotape was new, video recordings—whether networks' timeshifted programming, conceptual video art and ephemeral happenings, radical collectives' feedback sessions, even home viewers' timeshifting—were often not intended to last. Even video rentals give prerecorded cassettes a temporary life for individual viewers who took them home as one-night stands. These recordings were not as fleeting as TV tube pictures or electronic pulses, yet they were always implicitly subject to erasure.

Of course, many tapes never were erased or taped over. Though they may now be dusty and damaged, video allowed for a new kind of amateur

archiving.¹⁶ As mass media, films and particularly television broadcasts were once simultaneously everywhere and ephemeral. The fact that so much popular entertainment was fleetingly accessible drives the preservative impulse behind recording and keeping collections of tapes. Of course, some have suggested that it's just as well that so much of TV has been lost. In a newspaper feature on "the taping mania" among early home tapers, one journalist posed the skeptical question, "What can you say about a culture dedicated to preserving *My Mother, the Car?*"¹⁷ By no means archivally pristine, home recording nonetheless works to timeshift texts on a semipermanent basis when they become part of a bootleg collection to be saved; if shared, these tapes can serve personal or even cultural-historical interests. Even video rental stores may become de facto repositories for movies that have gone out of print or have never been released on DVD.

If we think of aesthetics as relational, technologies of access, such as videotape, alter the reception of texts by opening up the dynamic between audience and text; audiences can rewatch, fast-forward, pause, or simply turn videos off. In analog video, real time meets reel time. Analog video, because the tape must physically pass the VCR heads to play, exists in "wind" time rather than in nonlinear digital chapters, thus marking temporal distinctions between the experiences of using the two types of technologies. When scanning a videotape in rewind or fast forward—that is, pushing either button while in play mode—the audio cuts out, and the image track often squirms with a few horizontal bars of white noise and slightly skewed picture. Upon returning to play mode, there is often a moment of squiggly distortion when the VCR heads reorient their tracking; heavily used tapes are often stretched out, which aggravates this phenomenon. Yet the viewer will see a continuous moving image as it scans by at an increased gallop. When using DVDs, in contrast, each individual image looks pristine, but the motion is jerky because digital scanning involves skipping entire frames in sequence. After finishing a tape, rewinding often takes several minutes, as the wheels whirl and then abruptly stop with a resounding thud that, depending on the VCR, sounds as if it could snap the videotape off the reel. Such aesthetics of playback and fast forwarding call attention to this technology as specifically linear.

By seeing recording errors, the linearity of playback, and especially signs of wear, we begin to see video as videotape. Analog tape emerges as visible and audible through the way the image and soundtrack degenerate through (repeated) reproduction or aging. Each format has a specific aesthetic of failure, and analog videotape has unique modes of decay. Old phonographs



betray crisp crackles, and used celluloid prints bristle with pops, scratches, and splotches; digital media's "corruption" skips, freezes, exhibits blocky interference patterns, or becomes wholly unreadable and inoperable. In contrast, videotape's wear tends toward the softening interference of muffled rainbow flares (called video moiré), skewed images at the top and bottom of the frame (called flagwaving or skew error, caused by stretched or distorted tapes), white specks (called dropout), lines of distortion (called noise bars), exaggerated pixels, jittery framing, and muted sounds. In more extreme cases, tapes damaged by VCRs can cause tracking problems or trigger a default blue screen if the heads cannot detect a video signal. I consider these technical faults to be indexical evidence of use and duration through time. Here the technology becomes a text, and such recordings become historical records of audiences' interactions with the media objects, whether through use (stress from repeated contact between the tape and the VCR heads) or reproduction (analog softening of image and sound). Audiences learned to ignore analog video interference and to filter out the mediations and artifacts, but distortion was always present and perceptible.

Analog media, for which duplication involves degeneration, reflect an aesthetic of access. The altered look and sound of a text through its reduced resolution present both a trade-off for our ability to engage with it and indexical evidence of its circulation and use. We see this in analog photocopies, microfilm, videotapes, and even digital PDFs and streaming videos. And though I hesitate to make reference to the overly cited (though wondrous and inspiring) Walter Benjamin, it strikes me that this is a source of his ambivalence about reproductions of art in the modern age. Artworks lose their physical presence, ritual function, and authenticity when they are reduced to images, yet such images vastly expand the potential audience that may come to learn from and about them. Reproductions exchange aura for access.¹⁸ My dual emphases on videotape's reproductive innovations and decay may seem contradictory, even counterintuitive. But I suggest we cannot experience one without the other.

3a–c. These images were taken from a personal dub of an aged video store copy of *Gizmo!* (Howard Smith, 1977, now out of print), a compilation documentary about odd inventions. Figure 3a shows dropout and noise bars common to old videotapes. Figure 3b shows more severe damage, including flagwaving—the sideways V-shaped skew in the image across and beyond the man's forehead. Figure 3c shows a jittery image that has lost its vertical stability, creating ghostly effects.

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 profit²¹—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.