The Best of Copyright and VideoLib

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Abstract

This article provides responses to five copyright scenarios—institutional pricing, the face-to-face classroom, video copying and replacement, film clips and streaming video—that are frequently faced by librarians who manage and acquire media. Copyright is a particularly complex area for librarians who work with media. Frequently, librarians are confused about the legality of certain uses of media. This confusion is magnified when vendors sell licenses to librarians when they are not necessary. The Technology, Education and Copyright Harmonization Act of 2002 is a convoluted law that many view as a restriction of fair use rights. Fair use is a copyright exception that can be applied to all of the exclusive rights of copyright including public performances and digital transmissions. This article also suggests that behavior affects how we interpret the law.

Subscribers to the VideoLib discussion list (http://www.lib.berkeley.edu/VideoLib/) are aware of the occasional (sometimes lively) copyright debates that go on for several days, usually spurred on by a copyright question from a list member.[1] Because the "correct" response is often debatable, the same questions and arguments come up over and over again. It is not unusual because our contentions are based on the policy positions we endorse and to which we often have unflagging allegiance. Make no mistake—these copyright disputes are political and affect our notions of who has the power to access and use of information.

For those who are deeply concerned about copyright, political debates can be intellectually stimulating, but for the most part, practicing librarians want informed guidance. They do not want to become copyright experts. They do not have time to find answers in dense copyright books,

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and if they take the time to search the VideoLib archives for an answer to their query, they are bound to find conflicting information. In this article, I will try to cut through the rhetoric to provide some definitive guidance to share with librarians on copyright law and media. Of course this article should not be construed as legal advice, but rather my informed opinion. It also does not reflect the views of the American Library Association.

There are other necessary caveats. First, the copyright law does not provide specific answers to the majority of copyright questions librarians may have (Copyright Law of the United States, Title 17, U.S. Code.). Only a fair use analysis, conducted on a case-by-case basis can provide guidance for most of these questions (Title 17, Section 107). This guidance rarely will be cut and dried because fair use is interpretative, and ultimately only a court can rule whether use of a protected work is noninfringing. This can be frustrating but even so, the most important feature of the copyright law that librarians should know is fair use. Second, there are specific exceptions in the law that address teaching, library, and other uses, but even these have some wriggle room. Third, in the case of a contract (typical with resources that are rented and not owned by the library), license terms are the guiding regulation and not the copyright law. Finally, there is a wide spectrum of behavior regarding copyright law that depends on the policy positions set by individual institutions. Some libraries have more restrictive copyright policies than others, primarily due to a fear of legal action. This fear may be unfounded for a number of reasons, but nonetheless librarians will find themselves constrained by institutional copyright policies.

The Best of VideoLib

After searching the VideoLib archives, I have identified five copyright queries that have appeared several times. With the first four examples, we have fairly definitive answers that are linked to specific copyright exceptions or limitations. The final example, relies on the Technology, Education, and Copyright Harmonization (TEACH) Act of 2002 (TEACH 2002) and explains how fair use can also apply to the use of digital works and networks for nonprofit, educational purposes.

Institutional Pricing

Some video vendors have tiered pricing models where libraries or institutions pay a higher price than an individual. Some vendors argue that libraries pay the higher price for public performance rights. Is this true? Is it unethical to purchase the title at the lower price?

Businesses use tiered pricing to maximize revenue. For independent video producers, higher institutional fees are critical to fund the costly films they produce and then sell to a relatively small market. One rationale for higher institutional prices is that many people at a school, college

or university will ultimately use the work involved. We are most familiar with this practice when purchasing journals at institutional prices.

Another rationale for higher institutional pricing may be an offer of enhanced services (such as low price replacement copies) or accompanying materials or study guides. Charging a higher price for public performances rights, however, is not a legitimate reason for tiered pricing. Nonprofit educational institutions already have an exception in the copyright law that allows for public performances in the "face-to-face classroom" (Title 17, Section 110[1]). A library does not have to pay more for a right they already have. If a vender uses public performance as a reason for a higher purchase price, it is not unethical for a library to buy the title at the lower, individual price. Some vendors, in asking for the higher price, may sometimes be making an honest mistake because they are unfamiliar with the rights that libraries and educational institutions have in the copyright law. It is important that both vendors and librarians understand that the right of public performance in the nonprofit, educational classroom is allowed under the law because misinformation can lead both vendors and librarians convinced that paying for public performances for classroom purposes requires a license agreement.

The Face-to-Face Classroom

Librarians may face situations where the definition of what is meant by "face-to-face classroom" is under debate. This may occur when library users try to stretch the meaning of the term in order to avoid paying for public performance rights when they are required, for example in such cases as a campus film series or after-school screenings for entertainment purposes. The face-to-face classroom is a place where an actual school class or college course is held. Typically, this is the actual classroom but could extend to an "other place devoted to teaching" if for whatever reason the public performance has to take place at an alternative site. Again, the screening in this case is for students enrolled in a real class or course.

Some public performances have an educational purpose but are not class related (after-school clubs or other extracurricular activities). For these screenings, a public performance license is probably necessary unless a fair use analysis suggests otherwise.

Transferring Old Formats to New Formats or Making Archival Copies

Many libraries are transitioning from the video format to DVD format. In some cases, their educational institution has discarded old video playback machines, so DVD playback is the only option. Can libraries make DVD copies of their video collections? The answer is almost always no, but not because of "changing the format" of the work, but because a work is being reproduced (an exclusive right of the rights holder) that may be available for purchase in the market place. In this case, every video title in a

collection that is available in the DVD or other desired format must be purchased.

There are exceptions to this rule when libraries seek to make a replacement copy of a damaged or missing title. If a lawful copy originally purchased is now damaged, a replacement copy may be made after a "reasonable effort" has been made to locate an unused copy available for purchase (Title 17, Section 108[c]). Some libraries hold in their collection one-of-a-kind videos, perhaps produced locally at the school or campus or other extremely rare videos. When these titles become damaged and need to be replaced, and when there is no other unused copy available for purchase in the marketplace, the library may make a replacement copy in the desired format. Of course, this may not be possible if no other library holds a copy that may be reproduced. If titles in a collection are in "obsolete formats," replacement copies can be made, again only after trying to purchase an unused copy in the market. A format is considered obsolete when the equipment to "play" the format is no longer manufactured (Section 108[c]).

The library, however, may not make archival copies "just in case" a title becomes damaged, stolen or missing. Even if the original is withheld from circulation, and only one copy has been made for circulation, this is an infringement of copyright.

Film Clips

In the past, it was primarily film professors who created film clips to illustrate film style, the "long take," the construction of narrative, and so on. Today, educators and students in all subject areas use film clips, music, and other media. In the digital environment, capturing clips from a variety of digital resources, such as DVDs or YouTube videos is relatively easy but is it legal? Suppose a professor wants his students to check out DVDs from the library and copy bits of them for their media arts projects. What if the projects are posted on the course web site? What if content scrambling technologies have been used on DVDs to prevent such copying? Does this mean that the use of clips is unlawful?

The use of film clips for educational purposes, even when transmitted via digital technology, is a fair use (Section 107), a lawful in-class public performance (Section 110[1]), or covered by the TEACH Act (TEACH, 2002, Section 110[2]). Up to three exclusive rights of copyright can be implicated when creating and using clips—— reproduction, public performance, and distribution (such as when clips are posted on course web sites)—and all are addressed in copyright exceptions. Certain conditions must apply. The DVDs or videos copied must be lawfully acquired copies. The clips must be used for educational purposes only, and if delivered via digital technology must be restricted to enrolled students through password protection or some other method.

When DVDs or other formats are protected with anticopying technology making it impossible to copy a clip, educators can look for analog counterparts (such as a videotape instead of a DVD) as an alternative format to copy, although this can be time consuming, result in inferior clips quality, or may not be feasible. If the educator circumvents the anticopying technology, he or she may be in violation of the anticircumvention provision of the Digital Millennium Copyright Act (DMCA), even though the resulting use of the clips for educational purposes is lawful (DCMA 1998). Because technology can be used to prevent lawful uses, the Congress requires that the U.S. Copyright Office, conduct a triennial study called a "rulemaking" to determine if certain "classes of works" should be exempted from the regulation (Title 17, Section 1201[a][1][C]).

Can copying certain types of works (DVDs for example) be circumvented without violating the anticircumvention provision? In the 2006 rulemaking study, media arts faculty won an exemption to the anticircumvention rule for a three year time period. These educators were allowed to circumvent CSS (a content scrambling system frequently used for DVDs) to make clips for educational purposes. This exemption expires in October 2009 but may be extended or expanded to allow such use by all college level educators in all disciplines (U.S. Copyright Office, 2009).

In summary: copying and performing film clips in the classroom is not an infringement of copyright, but technological tools may be employed by the rights holder to prevent one from doing so.

Streaming Video

Many educational institutions have technology that makes it possible for a video to be streamed to the face-to-face classroom or to course web sites. Librarians often are consulted whether this use is infringing. This is an area of controversy among vendors, librarians, information technology staff and even copyright specialists and legal counsel, but certain things are clear.

Entire films that have been lawfully obtained can be streamed to the face-to-face classroom under Section 110(1)—public performances using any medium viewed in the physical classroom are fine. There is nothing in the law that says the copy of the video must be in the classroom, just that the performance takes place in the classroom.

The TEACH Act clearly allows that certain categories of works (such as maps, images, art slides, photographs) can be digitized and transferred to course web sites or transmitted for distance education purposes. However, the TEACH Act restricts the performance of "dramatic works" in that only "reasonable and limited portions" of the work can be digitized and transferred (Section 110[2]). This suggests that streaming an entire film is not lawful. In the Congressional history of the TEACH Act, however, Congress was more open to consideration when describing the law. "What

constitutes a 'reasonable and limited' portion should take into account both the nature of the market for that type of work and the pedagogical purposes of the performance" (S. Rep. No. 107–31, 2001).

In addition, the Congressional Research Service in a 2006 report on the TEACH Act states that:

> Although what constitutes a 'reasonable and limited portion' of a work is not defined in the statute, the legislative history of the Act suggests that determining what amount is permissible should take into account the nature of the market for that type of work and the instructional purposes of the performance. For example, the exhibition of an entire film may possibly constitute a 'reasonable and limited' demonstration if the film's entire viewing is exceedingly relevant toward achieving an educational goal; however, the likelihood of an entire film portrayal being 'reasonable and limited' may be rare. (Huber, Yeh & Jeweler, 2006)

For those still not comfortable using the TEACH exception to the screen entire films, fair use is an alternative option according to the U.S. Copyright Office's report on copyright and digital distance education, "the fair use doctrine is technologically neutral and applies to activities in the digital environment; and the lack of established guidelines for any particular type of use does not mean that fair use is inapplicable" (U.S. Copyright Office, *Report*, 1999).

Congress too felt that fair use was viable:

> Fair use is a critical part of the distance education landscape. Not only instructional performances and displays, but also other educational uses of works, such as the provision of supplementary materials or student downloading of course materials, will continue to be subject to the fair use doctrine. Fair use could apply as well to instructional transmissions not covered by the changes to section 110(2) recommended above. Thus, for example, the performance of more than a limited portion of a dramatic work in a distance education program might qualify as fair use in appropriate circumstances. (S. Rep. No. 107–31, 2001)

If the argument is accepted that the fair use exception applies to the screening of entire films via digital transmission—which I believe it does—it is not necessary to buy an additional streaming license if the use is fair.

Earlier practices before the enactment of the TEACH Act help support this argument. During this period, universities and other educational institutions discovered the benefits of integrating digital technology into the classroom. Faculty learned how to make their own web sites, attach files to e-mail messages, copy and paste content and use a new product called Blackboard. At some institutions, new departments were formed just to focus on the integration of technology in the classroom. At this time, there was no specific exception that said these activities were lawful,

so an implicit understanding of what constituted fair use guided copyright decisions. Librarians, technology staff, and educators made their uses "more fair" by limiting access to protected works with passwords and by using digital technologies that would restrict the possibility of further reproduction and distribution of digital content. Materials were removed from course management systems when no longer needed. Best practices for the lawful use of digital content and technologies developed.

During this period, rights holders were not inclined to initiate legal action against educational institutions for copyright infringement. Perhaps everyone knew that eventually the copyright law would be amended to certify that such use of digital content was indeed lawful. However, during the drafting of the Digital Millennium Copyright Act, stakeholders including publishers, educators, and librarians could not agree on copyright exceptions for digital and distance education. Congress asked the U.S. Copyright Office to conduct a study on the matter. A key part of this study was a series of hearings in which librarians and educators revealed what they were already doing and what they would like to do in the future. In the final report, the Copyright Office said that a new section addressing digital materials and networks should be added to the public performance exception of the copyright law (*Copyright*, 1999). The Copyright Office report confirmed that what educational institutions had been doing for years was lawful.

This illustrates the fact that educational institutions did not really need the TEACH Act to lawfully use digital content and technologies for distance education purposes. Before TEACH, the actions of librarians and educators were based on fair use. It can be argued that it was not in their best interests for law to catch up with technology because once the legislative process began, TEACH became a convoluted, complex exception with numerous conditions that make fair use look easy. The prerequisites of TEACH—use of technological protection measures to reasonably prevent further reproduction and distribution of content, development of copyright educational materials, the assurance that a teacher was really engaged in "mediated instructional activities," and so on—are not required before one can use the fair use provision. In fact, many educational institutions chose not to implement TEACH at all, and instead rely on fair use.

Numerous discussions on VideoLib indicate that librarians have become more confused about copyright because of the TEACH exception. For many, TEACH became the ceiling for fair use in the digital educational environment. If an entire film cannot be screened under TEACH, it must also mean that an entire film cannot be screened under fair use. Worse yet, some people began to believe that fair use was an exception that did not apply to the exclusive right of public performance.

Because of these misconceptions, librarians may be paying additional license fees for uses that had previously been deemed lawful fair uses.

"Streaming rights"—which is not an additional exclusive right of copyright but the use of language to suggest that rights holders have gained an additional exclusive right—were deemed necessary if streaming technology was used to transmit content to the physical and distance education classroom. Rights holders capitalized on the confusion (or were confused themselves), focusing on the new rigor of TEACH. Librarians pay additional fees for a license to stream titles they already have in their collection, when the TEACH Act was meant to actually allow streaming under certain conditions. This behavior legitimizes a new revenue stream for rights holders, and fees are now accepted by some as necessary for streaming a film. Even if we know that fair use can be applied to the public performance right, the fair use argument is more difficult to make because a market for streaming has developed, making a fair use determination less likely because of the demonstrated effect on the market for the work. Of course, there are legitimate reasons to buy streaming rights such as licensing videos "on demand." In these instances, videos are being licensed with an expanded service from the vendor. In addition, these videos are titles that have not been purchased outright. Perhaps, this last example on streaming from VideoLib will raise a few eyebrows, but I am confident that lawfully acquired videos can be streamed without infringing copyright.

It is my hope that this review of frequently asked questions about copyright and media proves to be helpful especially for those who work at smaller institutions and are often the "lone" librarian. I don't expect that it will end copyright discussions on VideoLib—it may spark some new debate.

Notes

1. VideoLib is a discussion list first developed by Gary Handman in 1995 for media librarians to discuss "issues relating to the selection, evaluation, acquisition, bibliographic control, preservation, and use of current and evolving video formats in libraries and related institutions." Copyright is a frequent discussion topic.

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