

A Practical Guide to Dealing with Copyright Problems Related to Emerging Video Technologies in Schools and Colleges

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PERHAPS ONE OF THE most troublesome areas of day-to-day professional functioning for media and library educators is responding to an increasing number of questions about what is acceptable use of copyrighted audiovisual works in the educational setting. Nearly every professional convention will include at least one copyright session where the latest developments regarding copyright law are discussed, often ending in heated debate. Pressures between creators and users that never used to exist erupt into arguments that end without answers. Audiences leave confused and disgruntled. The response of turning inward and never publicly discussing what is going on in the "real world" of my school or college library for fear of legal suits or peer disapproval, is increasing. The approach of "well, I don't care what the law says" or "I'll do as best I can for the people I serve regardless of what's going on in the courts or the legislature," are other common nonconstructive responses.

Conscientious library/media educators are trying to function and exist in a period of economic downturn with faculties who often question the very reason for the existence of instructional support services. At the same time, media or library personnel have responsibility for staying abreast of copyright developments and making occasional decisions that involve saying "no" to requests for services that infringe current copyright laws. Media professionals have increasingly been thrust into the roles of lawyer, judge and jury. The problem of copyright has evolved into a situation where the development of technology has outstripped the capacity of our laws and legislature to keep up with current events.

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Only through careful study, and a preplanned approach, can we be successful at dealing with the rather sizable copyright problems that confront us on a daily basis. One of the biggest challenges and responsibilities of a library media educator is to apply the maximum amount of knowledge relative to copyright laws and principles to each specific decision rendered. This article will attempt to give a comprehensive background for daily functioning. This discussion focuses on some current events and features of copyright law affecting decisions and policies daily in library media centers. Some strategies will be suggested that have proven effective in creating better understanding and receptive attitudes among school and college faculties with regard to copyright and legitimate restrictions posed by the law.

Key Ideas and Events Governing School Uses of Copyrighted Programming

Most people understand that copyright laws exist to protect the unauthorized reproduction of copyrighted works without payment to the copyright owners. Fewer observers are aware that an equally compelling right of the public to gain reasonable access also exists. Many people understand the act of stealing something tangible such as a wristwatch, but they have a harder time understanding the concept of "intellectual property" as it exists in regard to a copyrighted film. A related area of difficulty for many educators is to understand and accept that the law creates a legal distinction between classroom performances of televised works versus the reception of television programming in the privacy of one's home. Many find it difficult to understand that the act of recording a program is separate from the act of subsequently displaying a program. The law classifies school performances as outside the home and circle of one's friends, and further, such performances are "public" performances. Thus, a teacher who records at home, and later brings a show into a classroom situation, may be in violation of copyright laws depending on the full circumstances of the individual case under consideration. It is highly important for faculty and administrators to work together with mutual knowledge of the consequences of copyright problems.

Exclusive Rights of Copyright Owners

The copyright act establishes five important exclusive rights of copyright owners: (1) to reproduce the copyrighted work, (2) to distrib-

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ute it, (3) to perform it, (4) to display it, and (5) to do *derivative* works. The last right must be understood. In educational terms, to change the format of a copyrighted work (as to videotape a 16mm film) is an exclusive right of the copyright owner. Oftentimes, security or convenience copies of films and other media are made illegally. The making of derivative works is a troublesome area for media professionals. Prior to the passage of the 1976 Copyright Act it had been common practice for teachers to do such things as to transfer records to tape for classroom use because children frequently would damage records. Filmstrips and slide-shows are often transferred to video because of equipment shortages or breakage problems. Still, there are two ways this can be done with certainty that no infringement has occurred. First, such transfers may be made if a letter of permission to copy is secured from the copyright owners. Second, permission to make one or more film-to-video copies as a *written* condition of the sale contract may be stipulated. If you need a security copy, plan ahead! Telephone, or even verbal permission, cannot be stored in a file for years to come. Written records offer the only protection. Exclusive rights are counterbalanced in the law with fair use provisions.

Legal Exceptions to the Exclusive Rights of Copyright Owners

One of the most difficult areas for everyone (e.g., judges, lawyers, teachers, administrators) to understand is that portion of the law which describes what we call "fair use." Fair use is a legal concept that has resulted from years of case decisions. The fair use provisions of the law were purposely designed so that they could be applied to a variety of educational situations. Fair use provides educators a *limited* right to copy copyrighted works without permission from a copyright owner. In general, fair use has four key elements:

1. *Purpose and character of the use is the first factor.* The key points of this element are that spontaneous requests by instructors (not by administrators) are contributions to a fair use.
2. *Nature of works copied.* News programs are favored for fair use. Copying of musical scores or things such as consumable workbooks are forbidden and would contribute to a finding of copyright infringement.
3. *Amount and substantiality of portions used.* If a smaller proportion of a work is copied, the use is likelier to be considered fair. Larger portions, or copying whole works, reduce the potential for fair use, but courts have ruled that the copying of a whole work does not

preclude a finding of fair use.

4. *Effect on the potential market.* Copying that clearly removes profit from the originator of a work signals uses that are not fair. Copying materials not commercially available is more acceptable.

A key area of current debate is: How must we make decisions with regard to the four factors? Some judges and attorneys insist that *all four factors must be met* in order for a school use of a copyrighted work to be considered a fair use. Other judges and attorneys take the position that all “fair use” factors must be considered, but you need only to meet a *predominance* (not all four factors)—two or more of the elements of fair use.

In copyright discussions around the country, the author has noticed that the last factor of economic harm is the most sensitive factor to copyright owners, rightly so because it affects livelihood or profit profiles. It should always be carefully weighed in making responsible daily decisions.

A definition from *Meeropol v. Nizer* helps to improve educators’ understanding of fair use. In that case infringement was defined as: “those (uses) which interfere unduly with the monopoly of the copyright holder without bringing a commensurate benefit to the public.” Fair use was defined as “those (uses) which interfere but slightly with the copyright monopoly, while offering much to society.” Two good questions to ask are:

- (1) Can materials be supplied in a reasonable amount of time?
- (2) Can materials be supplied at a reasonable cost?

Unfortunately, many educators, lawyers and others will spend a lot of time copying materials that can be legitimately purchased for less (with all elements such as “time” considered). On another level, library-media supervisors are challenged by the sensitive professional task of overcoming the notion of “anything I do for my students and their learning is a fair use.”

Other parts of Copyright Law Affecting Day-to-Day Functions

Media professionals should be aware of Section 110(1) of the federal Copyright Act. It states:

the playing of lawfully made video tapes/discs of copyrighted motion pictures in a classroom setting is exempt from copyright control where the performance is in the course of face to face teaching activities in a non-profit educational institution...performance must be for

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a specific educational purpose...not for cultural or entertainment values, and must take place in a setting devoted to instruction (such as a classroom).

Many schools have begun to use rented or purchased videocassettes stamped, "For Home Use Only." More than one opinion from counsel in different parts of the country has suggested that as long as the program was lawfully made, classroom use of rental or purchased cassettes is permissible under existing law. At the time this article was written, legislation designed significantly to broaden control of copyright owners over use of this type has been introduced. Those engaged in purchase or rental of programs of educational value might be wise to describe in writing the intended classroom uses as a condition of lease or sale. It will also be necessary to follow legislation in this area.

The next area of concern must be *knowledge of existing legislative guidelines* that bear specifically on the practice of off-the-air videotaping. Under the direction of Representative Robert Kastenmeier (R-Wisconsin) a committee composed of representatives of program creators and users met for more than two years to develop compromise guidelines to govern school use of video recorders to capture and time-shift programming from the public airwaves for educational face-to-face teaching. It is critical to understand that guidelines are not laws, nor do they have the same force as laws. The guidelines have a much lower level of legal authority than actual parts of the law discussed earlier. Indeed, the guidelines were published several years after the Copyright Act of 1976 went into effect. A prominent legal theorist, Melville Nimmer, has suggested that because of the late publication of guidelines, the rules may have a level of assertiveness which is even less than legislative history (often cited by judges in writing their opinions on cases). The guidelines attempt to describe the conditions by which no legal actions would be filed, relative to educational uses of copyrighted programs as agreed to by copyright owners represented on the Kastenmeier Committee. It is hoped that the guidelines describe "safe harbor" for schools. It may be fully possible to exceed the guidelines without being sued, but this is a matter that should be fully explored by top administrators and counsel that represents the institution you serve.

Off-air recording is a particularly troublesome area because schools have been taping off-air for nearly twenty years without disruption. A study conducted by the National Center for Education Statistics (NCES) during 1976 found over 500,000 teachers and 11 million students involved in learning from programs taped off the air. The numbers are certain to have increased since 1976. Teachers who have become

attracted to this technology give up the traditions of past practice very grudgingly. The requirement to erase programs not available for sales creates anxiety, as does the restriction of the ability to use programs at the appropriate teaching moment. The guidelines allow for use of programs in classrooms for ten days after the show was originally aired.

Many school officials have made the guidelines available, but research surveys should be conducted to determine how the guidelines are serving student education needs, as well as the needs of copyright proprietors. Kastenmeier himself has suggested that revision of the guidelines may be required in the future.

Decisions in Court Cases Contributing to Media Center Administration

Court cases should be followed because their level of legal assertiveness is very high—especially relative to the guidelines. A difficulty with court cases is that the decisions are often limited to the specific circumstances that caused the legal action to be initiated, and usually cannot be generalized to other unique situations. One such case is referred to as the BOCES (Board of Cooperative Educational Services) case. BOCES is a single agency that serves approximately 100 schools in western New York state. The BOCES group was sued by Learning Corporation of America (LCA), Time-Life Films (TLF) and Encyclopaedia Britannica (EB). The BOCES agency was engaged in recording programs broadcast over the public airwaves, whose rights were owned by the above-mentioned companies. As of this writing, most of the issues in this case have been decided by Judge John Curtin. The ruling went mostly in favor of the copyright owners. During the course of the trial, the plaintiffs were able to convince and prove to the judge that widespread and systematic BOCES copying reduced the potential sale of films owned by LCA, EB, and TLF. The copying did not usually occur on a spontaneous basis, and it did not occur on school sites. In most every incidence, whole programs were copied, and multiple copies were made of many shows. Catalogs listing the off-air videotape holdings were widely distributed among BOCES member schools. The film distributors were able to say that BOCES catalogs offered free video copies of films the distributors had for sale. The judge limited his decision to the particular circumstances found in the BOCES operation, but denied the film companies' contention that copying entire television shows could never be "fair use." Another fact mentioned in the trial decision was that LCA reported it withdrew from the educational television market because only 1.5-2 percent of its sales were derived from this source. Encyclopaed-

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dia Britannica reported 5 percent of its revenue derived from showing products on educational television.

The final verdict seems based on the fact that the judge found BOCES in violation of all four of the fair-use criteria. Even though the case dealt with off-air taping by schools, the nature of the BOCES' procedures are not considered by most observers to be typical of in-school, off-air recording practices across the nation.

The Betamax Trial (*Sony v. Universal City Studios, Walt Disney Productions*) is the other major case. As this article goes to press, the Supreme Court has accepted the case which attempts to determine whether off-air taping in the homes is "fair use." The Ninth Court of Appeals (Justices Kilkenny, Canby, East) ruled that fair use was not appropriate in the home. Fair use was then described as "more productive" use, such as to be found in educational or study situations. Home use of off-air tapes was labeled as a less productive, or an "intrinsic" use. Another significant result of the Betamax trials was that a "continuing royalty"—or compensation to copyright owners for shows recorded in peoples' homes—was suggested as a possible remedy for inevitable future recording. A royalty fee could be added to the cost of blank tapes and/or new video recorders sold. This idea was originated by Melville Nimmer. In both the original trial and the appeal, it was recognized that to attempt to outlaw off-air taping equipment or technology would not represent a feasible solution. Perhaps the main decision to be made by the Supreme Court is: Does recording in the home constitute infringement? If the answer is yes, some remedy will be required.

There has been a large legislative response to the Betamax issue. More than ten amendments have been introduced. At the time of this writing, most amendments have stalled in anticipation of action of the Supreme Court. Many observers feel that because of the investigative powers of the Congress, the legislature should be the institution to develop a remedy to the problems of off-the-air videotaping. Lobbyists for the consumer electronics industry or the motion picture industry will surely apply pressure if the court decision goes against their cause. Legal authorities claim that judges will sometimes design their decisions in such a way that the legislature is encouraged to modify the situation.

Satisfying the Requirements of the Copyright Law and Patron Needs

A typical school or college media person observing the foregoing information is probably frustrated. All of the information must be

applied to each decision rendered, and this can appear a bewildering task. We must learn to function with existing information. There are some techniques that have proven valuable in dealing with faculties and others as far as practical functioning under current copyright regulations.

1. Assign one person the responsibility for delivering ongoing and current information about copyright to the faculty. This normally is the media specialist or the local supervisor in charge of the video equipment. It should be that person's function to be knowledgeable about, not only the laws, but of all activities on campus (all programs copied and/or used for instruction).
2. Develop written policies that establish procedures for the use of all video-related equipment. They should have approval from uppermost administrators, and they should be distributed and understood by all people who might use available technologies. The lessons of the BOCES trial should be incorporated in day-to-day policies. Many institutions circulate such policies to legal counsel for written approval before they are distributed. Standard forms for job requests such as off-air tapes should be available (e.g., see appendix A).
3. Maintain a file of materials including copies of the law itself, pertinent journal articles, circulars from the U.S. Copyright Office, and make it accessible to all staff. There should also be sample permission letters available for contacting copyright owners should a staff person have the need (see appendix B). The source materials may then be used to support and verify decisions relative to uses of video technologies at your campus. The address of the Copyright Office is: United States Copyright Office, Public Information Office, Library of Congress, Washington, D.C. 20559 (many of the official materials are free). A copy of the Senate and House legislative history on the copyright law is an especially recommended resource. Copies of the print and off-air guidelines should be distributed to all staff members.
4. Update and educate staff members with a newsletter on copyright. One of the best techniques is to give people information about things you are unable to do before requests are made. This takes pressure off a situation if you can show that a policy has existed and has been publicized. Strive to insure your staff is aware of current law and guidelines, as well as your local policies.
5. Invite an outside speaker to come and present a session devoted to copyright problems. A successful technique might include some examples of common requests, followed by a discussion of whether

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- they do or do not constitute fair (i.e., classroom) use of materials. Relying on a speaker or a copyright consultant is especially helpful if there is discontent about copyright restrictions or newer guidelines.
6. Avoid violations or copying where there is obvious circumvention of payment to the copyright owner. The unauthorized videotaping of a film lent on preview is an example of a request that should be denied. The support of administrators responsible for the library media center should be enlisted for particularly troublesome situations. All persons involved (e.g., faculty, staff, and administrators) should be aware that penalties can be very severe if legal actions are taken. Tremendous damage to public relations of an institution are at stake if an infringement action were successful. Lawyers' fees, confiscation of equipment, and fines (nonwillful copyright infringement may carry a fine up to \$10,000) are to be considered. It should also be noted that the law provides that statutory damages are not available to a plaintiff if a teacher had reason to believe his/her act was a fair use.
 7. Communicate your feelings and experiences to your elected representatives if you believe the current law needs revision. Educators must do a better job of letting legislators know their needs. Finally, after considering everything else, a quotation from *Cicero* is appropriate: "No one can give you better advice than yourself."

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Appendix A

**LOS ANGELES TRADE-TECHNICAL
COLLEGE**

REQUEST FOR OFF-THE-AIR VIDEO TAPING

Please list all information on this form exactly to insure accurate recording

Name of Show to be Recorded

Date of Showing

Time of Showing..... Length of Program

Channel and Network

Instructional Topic(s) Covered:.....

.....

.....

.....

.....

Name of Requesting person(s):.....

.....

Campus Phone:.....College Department:

Notice: Unless otherwise arranged or specified, recordings may be erased after a period of 7 days. Instructors are requested to secure and become familiar with the college off-the air taping policy - available from media services (x-502). Requests should be made at least 3 days in advance.

Release: I certify that this request is in accord with the established college policy and the program is not readily available for sale, or rental from the county contracts or local University film libraries. This information is available from Audiovisual library clerk at x491.

Signed.....

requestor's signature

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Appendix B

SAMPLE REQUEST FOR PERMISSION

April 2, 1976

Permissions Department
XYZ Company
111 Main Street
Anytown, U.S.A. 11111

Dear Sir or Madam:

I would like permission to use five frames from one of your filmstrips. These frames, showing the ring-formation of a young tree, will be combined for presentation with frames from filmstrips from two other companies showing the development of the tree through the years.

Title: Trees and Their Importance
Collaborator: William M. Harlow
Color Film Number 2392

Material to be Duplicated: Frames 245, 246, 247, 248, and 249.

Type of Reproduction: Color slides will be made of each frame.

Number of Copies: Only one copy will be made of each frame.

Use to be Made of Copies: The five slides will be shown in sequence with three slides each copied from two other filmstrips.

Distribution of Copies: The slide presentation will be shown via carousel projector to three classes of sixth grade science students. Average class size is 35.

A self-addressed envelope and a copy of this letter for your files are enclosed for your convenience.

Please let us know what conditions, if any, apply to this use.

Sincerely,

John Smith
Media Director

JS:cmh

Permission granted: _____
Signature Date

Conditions, if any: _____
Signature Date

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