

# Copyright Law and Educational Media

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ON 19 OCTOBER 1976, President Gerald Ford signed Public Law 94-553, otherwise known as "General Revision of Copyright Law."<sup>1</sup> This statute, which became effective of 1 January 1978, marked only the second time in the twentieth century that the U.S. copyright laws underwent general revision. Since an omnibus revision of copyright had not taken place since 1909,<sup>2</sup> it was generally agreed by most legal scholars that the former laws were outmoded and had not kept pace with the great technological innovations of our time. Thus, present copyright laws represent an attempt by the Congress of the United States to protect more adequately the creators of copyrighted works, while at the same time providing a reasonable means of serving the needs of users.

## Background

Powers assumed by Congress in passing the copyright law stem from Article I, Section 8, of the United States Constitution, which states in part: "The Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>3</sup> It is therefore obvious that the framers of the Constitution intended that copyright laws, as well as laws pertaining to patents, were within the province of the federal government.

Although some doubt existed before the effective date of the present copyright law whether the federal government had the *exclusive* power

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to enact copyright laws, the present law makes it clear that all other rights falling within the scope of copyright are to be governed exclusively by federal statute. Although any claim of copyright infringement or any other rights that existed under a variety of individual state copyright statutes in effect before 1 January 1978 were not eliminated, any cause of action arising after 1 January 1978 must be governed exclusively by Public Law 94-553.

In the late 1950s, Congress was advised by the Library of Congress that a thorough study of the then-present copyright laws should be undertaken to determine the need for revision. At that time money was appropriated for this study which culminated in the general revision bill enacted in 1976. Although it is not the purpose of this article to review the protracted hearings and controversies which marked the revision process, it is important to note that the educational use of copyrighted works in such places as libraries and classrooms was strongly debated and was a significant reason for the delays which postponed passage of the general revision bill.

The purpose of copyright protection is to afford authors and other creators of intellectual properties the right to determine when and how their respective works are to be used or performed, as the case may be. Most lose sight of the fact that when a person acquires possession of a book, film, or sound recording (or similar creative work), that person has custody of the property of the author of that work, whether the author be an individual or a corporate entity. For example, when a book is purchased the purchaser owns the cover and the paper on which the words are printed, but not the words themselves. It is the unique expression embodied in those words which is the property of the copyright owner. Of course, it goes without saying that the same holds true for any other form of copyrighted work. A basic understanding of this principle is important in dealing with the requirements which the law places upon the users of copyrighted works. However, at the same time, that law makes certain requirements of users; it also requires specific things of authors who claim copyright ownership; and it is these requirements placed upon both parties which will form a major theme of this article.

### **Requirements of Authors**

Copyright law requires that, in order for a work to be copyrightable, it must be original and "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived,

## *Copyright Law and Educational Media*

reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>4</sup> That same section of the copyright law places works of authorship into the following categories: literary works; musical works (including any accompanying words); dramatic works (including any accompanying music); pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings. Copyright cannot be obtained in an idea by itself without some unique expression.<sup>5</sup>

For a copyright interest to be perfected, whenever a work is published with the authority of the copyright owner, a notice of copyright must be placed on all copies of the work in distribution, with the form of notice as may be required by the Register of Copyrights. Failure on the part of the copyright owner to insert a proper notice on each copy of a work may result in forfeiture of copyright, unless the omission is corrected as specified by the statute.<sup>6</sup> Another requirement placed upon those who claim copyright ownership is to register the work with the United States Copyright Office of the Library of Congress, although failure to register a work may only result in the inability by the copyright owner to sue for injunctive relief or statutory damages. Failure to register will not result in the work entering the public domain.

Another requirement placed upon those who claim ownership of copyright is to deposit with the Library of Congress a copy or copies of the work in which copyright is claimed, as specified by law and regulations adopted by the Copyright Office. The deposit requirement is one of the principal methods by which the Library of Congress obtains its own copies of every work on which copyright is claimed as a result of publication in the United States. The system of notice and the requirements of deposit seem to serve the public interest well, although extensive studies have recently been undertaken by the Copyright Office to determine whether these requirements should be retained.

### **Sole Rights of Copyright Owners**

Section 106 of the copyright law states:<sup>7</sup>

The owner of copyright...has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- (4) in the case of literary, musical, dramatic, and choreographic

works, pantomimes, and motion pictures and other audio-visual works, to perform the copyrighted work publicly; and (5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio-visual work, to display the copyrighted work publicly.

It is important to examine more thoroughly a portion of the exclusive rights just enumerated. The first right—namely, to reproduce the copyrighted work—is the foremost sole right granted copyright owners although, given the state of technology as it exists today, it may not necessarily be the most important. The second right—to prepare derivative works—provides the copyright owner the sole right to do or to authorize such things as translations, musical arrangements, dramatizations, fictionalizations, motion picture versions, abridgements, and the like. According to the definition of derivative work as contained in Section 101 of the copyright law: “Work consisting of editorial revisions, adaptations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work.”<sup>8</sup>

The third right granted to copyright owners—to distribute copies to the public—probably needs little explanation except to say that it is this provision which has given rise to the “first-sale doctrine.”<sup>9</sup> In essence, the first-sale doctrine says that if you purchase a copyrighted work outright you may resell it or reconvey your interest to another party without permission of the copyright owner unless you are prohibited from doing so under a restrictive covenant of a contract. This may soon be modified by Congress as a result of legislation which has been introduced to eliminate the doctrine itself.

The fourth of the enumerated sole rights of copyright owners is probably one of the most important to examine. This gives the copyright owner the sole right to perform or authorize public performances of the work. In the case of motion pictures and other similar works which are designed to be performed, this becomes an extremely critical right. As defined in the copyright law, to perform a work means to play it by means of a device or process. To perform a work publicly, as defined in the copyright law, means “to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”<sup>10</sup> By definition a classroom or a library generally represents a place where a performance of a motion picture or a videotape would constitute a public performance. As defined in the copyright law it does not mean necessarily that the public is invited to attend the performance. Although the old copyright law discussed a public performance

## *Copyright Law and Educational Media*

in terms of whether or not it was for profit, the present law makes no such distinction, whether it be for musical works or any other kind of copyrighted work.

In rendering his decision in the copyright infringement action known as the BOCES case (*Encyclopaedia Britannica Educational Corporation et al. v. Board of Cooperative Educational Services et al.*)<sup>11</sup> Justice John Curtin agreed that a performance of a film or a videotape in a classroom constitutes a public performance for purposes of copyright law. Although there exists an important exception to this particular right of copyright owners which will be discussed later in this article, it is important to bear in mind the public performance issue.

The fifth right of copyright owners, which pertains to a display of a work, is perhaps somewhat less significant for the readers of this article than the other rights previously enumerated. Still it is one which should be kept in mind as the same rights regarding public performance or display relate to this portion of the rights of copyright owners.

### **Fair Use and Other Exceptions to Sole Rights**

At this point, the exploration of the copyright laws will shift from sole rights of copyright owners to certain relevant exceptions. These exceptions will be examined in the order in which they appear in the copyright law itself. For that reason, the discussion begins with the concept of fair use. Much has been written and discussed about the fair use doctrine which, until the present copyright law was enacted, was a judicially applied theory, as the prior copyright law contained no reference to it.

Fair use evolved as a defense to a claim of copyright infringement. It arose out of a need to provide an equitable rule of reason for the purpose of recognizing that the commission of certain acts, such as copying and performance, should not result in a successful claim of infringement because such acts were defensible and, depending on the facts in each individual instance, should not result in the award of damages to an infringement claim. In most instances, when a court ruled that a use was a fair use, the fair use doctrine stated that copying or other similar acts were not substantial and, in the early application of the fair use doctrine, concentrated more upon the amount used rather than on other aspects. Presumably, this was the case largely because duplication of a copyrighted work was the most common infringing act. However, unauthorized duplication has now become but one of many ways in which the rights of a copyright owner can be infringed.

In order to discuss fair use one must be familiar with its basic premise. Fair use, which is Section 107 of the copyright law, reads as follows:<sup>12</sup>

Notwithstanding the provisions of Section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include—

1. The purpose and character of the use, including whether such use is of a commercial nature, or is for nonprofit, educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; [and]
4. The effect of the use upon the potential market for or value of the copyrighted work.

Next, each portion of the fair use concept will be reviewed. The Congress did not add or detract from the fair use concept as it was developed by judicial decisions before it became part of the copyright law itself. Moreover, although the fair use section is neither lengthy nor explicit, it provides the flexibility needed to interpret fair use depending upon the particular facts in each instance so as to allow courts to balance the needs between authors and users. If on the other hand the fair use section was lengthy and contained specific rules, it might work against the interests of everyone.

The text of the fair use section gives some examples of when to apply the fair use doctrine by enumerating such activities as criticism, comment, news reporting, teaching, scholarship, or research. Again, this is an area which can be expanded upon, although Congress undoubtedly has left that up to the courts.

Examining the four aspects of fair use one at a time, let us first look at the purpose and character of the use. In order to "pass" the fair use test, the first hurdle is the purpose of the use itself which was just discussed. The text also says that one must examine whether or not the use is of a commercial nature or is for nonprofit educational purposes.

The second point, the nature of the copyrighted work, can be best explained by comparing the difference between a textbook and a motion picture film. A textbook is designed and intended for use by one person who perhaps will share it with another in some instances. On the other hand, a motion picture is intended for performance before an audience, and consequently, only one copy of the film is necessary in order to

## Copyright Law and Educational Media

project it for viewing by many people simultaneously. The rather obvious conclusion is that the potential market for the textbook is much greater than that for the motion picture film.

Moving into the third area, which refers to the amount and substantiality of the portion used (also known as the "quantitative test"), it is clear that the more one uses a copyrighted work without permission, the less effective will be the employment of fair use as a defense against an infringement action.

The last aspect of fair use, or the effect of the use upon the potential market for or value of the copyrighted work, is the most difficult one to satisfy. It proves to be particularly difficult because courts look not only upon the detrimental effect of unauthorized use as a result of past acts but also upon the future effect. In other words, if the use made of a work without permission has diminished the potential value of the work for future exploitation by the copyright owner, it is likely that the court would rule against the fair use defense. The United States Senate, in its report accompanying the copyright law, comments upon the fourth aspect of fair use by stating:<sup>13</sup>

This factor must almost always be judged in conjunction with the other three criteria....As in any other case, whether this would be the result of reproduction by a teacher for classroom purposes requires an evaluation of the nature and purpose of the use, the type of work involved, and the size and relative importance of the portion taken. Fair use is essentially supplementary by nature, and classroom copying that exceeds the legitimate teaching aims such as filling in missing information, or bringing a subject up to date would go beyond the proper bounds of fair use. *Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented* [emphasis added].

Although much more might be said about the fair use doctrine, one other area has become of great interest to those who work with media materials. This involves the "Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes." During the final days of consideration of the copyright law revision by the House of Representatives, various educational interest groups argued that some relief under the fair use doctrine was necessary for off-air videotaping by teachers and media personnel as well as librarians for the purpose of using those videotapes in classrooms and in libraries. Because there was little time to consider this complex question, the House of Representatives indicated that it would be open to future action in this area upon presentation of the issues. Referring to the House of Representatives report accompanying the copyright law revision, it said:<sup>14</sup>

The problem of off-air taping for nonprofit classroom use of copyrighted audio-visual works incorporated in radio and television broadcasts has proved to be difficult to resolve. The Committee believes that the fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. Nothing in Section 107 or elsewhere in the bill is intended to change or prejudge the law on the point.

Following the passage of the copyright law, but before its effective date, a three-day conference was held in Airlie, Virginia in July 1977, cosponsored by the U.S Copyright Office and the Ford Foundation. The purpose of this conference was to bring together all the interested parties, identify the scope of the problem, and suggest procedures for developing guidelines. Although it was not intended that the actual guidelines would be developed at the conference itself, it was hoped that the parties concerned would continue to meet and eventually develop guidelines for consideration and adoption by the Congress.

For a variety of reasons such meetings did not occur, and the House of Representatives, recognizing that the problem needed some resolution, established a committee to negotiate guidelines in March 1979. The committee consisted of nineteen individuals representing almost every conceivable interest group which might be affected by off-air guidelines. Approximately one year later, the committee informed Congress of the guidelines which it had approved, although even the negotiating committee did not unanimously adopt these guidelines. The guidelines read as follows:<sup>15</sup>

1. The guidelines were developed to apply only to off-air recording by nonprofit educational institutions.
2. A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable retransmission) and retained by a nonprofit educational institution for a period not to exceed the first forty-five consecutive calendar days after date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. "Broadcast programs" are television programs transmitted by television stations for reception by the general public without charge.
3. Off-air recordings may be used once by individual teachers in the course of relevant teaching activities and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster or campus, as well as in the homes of students receiving formalized home instruction, during the first 10 consecutive school days in the 45 calendar day retention period. "School days are school session days—not counting

## *Copyright Law and Educational Media*

- weekends, holidays, vacations, examination periods, or other scheduled interruptions—within the 45 calendar day retention period.
4. Off-air recordings may be made only at the request of and used by individual teachers. They may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.
  5. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each additional copy shall be subject to all provisions governing the original recording.
  6. After the first 10 consecutive school days, off-air recordings may be used up to the end of the 45 calendar day retention period only for teacher evaluation purposes, i.e., to determine whether or not to include the broadcast program in the teaching curriculum, and may not be used in the recording institution for student exhibition or any other non-evaluation purpose without authorization.
  7. Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.
  8. All copies of off-air recordings must include the copyright notice on the program as recorded.
  9. Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

Upon official notification of these guidelines, Congressman Robert Kastenmeier did not hold hearings, but did recognize the guidelines by referring to them in a House report accompanying a revision of the criminal penalties section of the law. As a result of this process, the question has often arisen as to whether the guidelines have any legal standing. Most legal copyright authorities have taken the position that the guidelines would be taken seriously by a court faced with a claim of infringement based upon off-air taping for educational purposes.

Although the guidelines for off-air recording are reasonably clear, there are some points worth highlighting. For one thing, it should be noted that the principal thrust of the guidelines deals with the concept of spontaneity, which basically requires a prior request from a teacher rather than recording in anticipation of such a request. During the discussion leading up to the drafting of the guidelines, this issue was thoroughly discussed because copyright owners were fearful of the possibility that the guidelines would lead to indiscriminate copying. As a general rule, fair use has seldom been interpreted as permitting the copying or performance of an entire work. Consequently, the off-air guidelines have broken substantial new ground in this respect. The concept of spontaneity also retains the original thinking which went

into the development of the "Guidelines for Classroom Photocopying in Not-for-Profit Educational Institutions" and "Guidelines for Educational Uses of Music" which were developed as part of the copyright law revision and which appear in the House of Representatives report.<sup>16</sup> The issue of spontaneity is prevalent throughout those guidelines and seems to meet the needs of educators, who have always stressed the need to be able to use copyrighted works in certain instances without permission because of the "teachable moment."

From time to time, the question has arisen whether the off-air taping guidelines are applicable to libraries, since the first numbered paragraph indicates that they are intended to apply "only to off-air recording by nonprofit educational institutions."<sup>17</sup> Without a specific reference to libraries, it seems clear that school libraries and academic libraries were intended to fall within the province of the guidelines. Whether public libraries are included is a bit more difficult to answer, although it does appear that public libraries currently may avail themselves of the terms and conditions of those guidelines.

### **The BOCES Case**

In the fall of 1977, three educational film companies filed a copyright infringement suit against an educational institution, making one of the rare times during the course of copyright history that such an event has occurred. The plaintiffs were Encyclopaedia Britannica Educational Corporation, Learning Corporation of America and Time/Life Films, Inc. The defendant was the Board of Cooperative Educational Services (BOCES), First Supervisory District, Erie County (Buffalo, New York).<sup>18</sup> In addition to the BOCES itself, several individual media supervisors were accused of violating the copyrights of various films owned by the three plaintiffs through the off-air videotaping of television broadcasts of the plaintiffs' films. The copying was apparently conducted on a massive scale, and until the lawsuit was filed BOCES made a practice of videotaping programs from all of the major networks and the local PBS station without regard to any request from teachers and without obtaining permission from the copyright owners.

It was not until 31 March 1983 that Justice John Curtin released his decision, finding the defendants guilty of copyright infringement. He fined the defendants a total of \$63,500 in statutory damages and assessed court costs of \$15,000. The defendants' own legal fees exceeded \$200,000.<sup>19</sup>

Judge Curtin did not accept a claim of fair use on the part of the defendants. In one portion of his decision, he wrote that "any temporary

use by BOCES of plaintiff's copyrighted works would interfere with the marketability of these works, and the cumulative effect of this temporary videotaping would tend to diminish or prejudice the potential short-term lease or rental markets for these works."<sup>20</sup> Although there are substantial differences of opinion in terms of how far-reaching Judge Curtin's decision is, some have seen his rejection of a fair-use claim as an indication that the off-air taping guidelines will have little or no application in the future. On the other hand there is language in the decision which seems to state otherwise. At one point the judge says that "the court notes the possibility that some limited or temporary use of plaintiffs' televised works might be considered fair use under the New Act."<sup>21</sup> One must bear in mind that the facts of this case and the cause of action required the judge to make his decision based upon the law in existence at that time, as the new copyright law did not become effective until 1 January 1978. To be sure, it is safe to assume that film belonging to the three plaintiffs in this case did not fall within the scope of the guidelines since these three organizations publicly stated that they did not want to adopt them.

Industry analysts have felt that, if the guidelines were in effect at the time the facts surrounding the BOCES case emerged, there may have been no infringement simply because the Erie County BOCES group would have adhered to the guidelines. While such a position is conjecture, those who have favored the development of the guidelines maintain that it is a positive step in reconciling the needs of copyright owners and the desire of schools and libraries to have greater access to copyrighted works.

### **The Sony Case**

In 1976 Sony Corporation of America was sued by Universal City Studios and Walt Disney Corporation for copyright infringement, alleging that consumers purchasing the videotape recording equipment manufactured by the defendant were using it to record films owned by the plaintiffs and that these videotapes were illegal and violated the copyright statute both in terms of illegal copying and illegal performances.

The case made its way through all levels of the federal judiciary system, being first resolved in favor of the defendants by the District Court, whose opinion was reversed by the U.S. Court of Appeals for the 9th Circuit. The case was finally appealed to the U.S. Supreme Court and decided on 17 January 1984.<sup>22</sup>

The Supreme Court ruled in favor of the original defendant, Sony Corporation of America. The Supreme Court found that use of videotape recorders by individuals for performance of videotapes made of television programs by off-air recording for private, noncommercial time-shifting in homes "satisfies the standard of non-infringing uses both because the plaintiffs had no right to prevent other copyright holders from authorizing such time-shifting for their programs, and because the District Court's findings revealed that even the unauthorized home time-shifting of plaintiff's programs is legitimate fair use."<sup>23</sup>

The Supreme Court stated that the U.S. Congress should clarify the situation regarding home recording and home use of off-air videotapes. Subsequent to the Supreme Court decision several bills have been introduced in the legislature to do just this. However, as of early 1985, no legislation had yet been enacted although the opinion of the highest court of the land is definitive on the point.

There is a significant and critical distinction between the Sony case and the BOCES case, dealing with the issue of public performance. It is clear from the opinion in the BOCES case that Judge Curtin reaffirmed the concept that the use of videotape in a classroom constitutes a public performance as defined in the copyright law. On the other hand, the Sony case did not involve or concern itself with the issue of public performance. As mentioned earlier, public performances are one of the rights reserved to copyright owners, although there is an important exception to this sole right.

### **Exempt Public Performances**

No doubt, one of the most critical aspects of the copyright law for those involved in teaching is entitled "Section 110, Limitations on Exclusive Rights: Exemption of Certain Performances and Displays." The only portion of this section which is explored here is Section 110(1), which reads as follows:<sup>24</sup>

Notwithstanding the provisions of Section 106, the following are not infringements of copyright: (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audio-visual work, the performance or the display of individual images is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made.

Although educators may avail themselves of the privileges contained within the exemptions so stated, this one section has given rise to

more erroneous interpretations than any other. In order to understand more fully the requirements of this section, it would be well to examine each phase separately. First, the performance must take place in the course of face-to-face teaching activities of a nonprofit educational institution. A House of Representatives report states in part:<sup>25</sup>

"Face-to face teaching activities"...embrace instructional performances and displays that are not "transmitted." The concept does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase, "in the course of face-to-face teaching activities," is intended to exclude broadcasting or other transmissions from an outside location into classrooms, whether radio or television, or whether open or closed circuit. However, as long as the instructor and pupils are in the same building or general area, the exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images.

Most legal authorities agree, therefore, that a closed circuit television system confined to a single building would qualify for the face-to-face aspect of the 110(1) exemption. The meaning of a nonprofit educational institution speaks for itself and does not need any elaboration.

The next requirement is that the performance must take place "in a classroom or similar place devoted to instruction." Here again, the House of Representatives report says in defining this that "performance in an auditorium or stadium during a school assembly, graduation ceremony, class play, or sporting event, where the audience is not confined to the members of a particular class, would fall outside the scope of the clause (1)."<sup>26</sup> By the same token, there are instances when a particular locale can become a classroom in spite of the fact that the location is not typically used as a classroom. This would, of course, depend upon the facts in each instance. The essential element, however, is that a teaching activity is being carried on. The House of Representatives elaborates upon this portion of the statute by stating that "the 'teaching activities' exempted by the clause encompass systematic instruction of a very wide variety of subjects, but they do not include performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience."<sup>27</sup>

Finally, the copy of the film or videotape which is used in a performance, in order to qualify for the Section 110(1) exemption, must be given by means of a copy which was lawfully made, or at the very least, that the person who is responsible for conducting the performance did not have reason to believe that the copy was not lawfully made.

The question has often arisen whether Section 110(1) applies to the use of videotapes in libraries. Except in extremely rare instances, and confined to those instances where *all* of the qualifications of Section 110(1) are met, the use of a videotape in a library, which constitutes a public performance, would not be permitted unless specific permission is given by the copyright holder or its authorized agent.

Why is this subject so critical today? The answer is probably well known to most of the readers of this journal, as it would appear that *any* lawfully made videotape may be publicly performed without permission if it meets the qualifications just reviewed. Of course, this applies to videotapes put into distribution for the primary purpose of home viewing as well as videotapes supplied by companies which provide a public performance license to those who license or purchase the videotape or film in question. When a film or videotape is purchased from a company which is authorized to grant public performance rights, there are usually no restrictions on where the public performance may take place. However, if a videotape is purchased or rented from a source which does not grant public performance rights, then the *only* public performances which are legal are those which are prescribed by Section 110(1).

There are some basic distinctions between the process by which videotapes and films get into the marketplace, depending on the purpose of the marketing effort. For example, the home video market is much broader and the potential is much greater than in the case of, for example, the classroom and library market for audiovisual materials. Because of market limitations, the copyright owner of a film licensed for classroom and library use generally receives a far greater royalty per unit sold or licensed than that same copyright owner would receive per unit in the home video marketplace. Although the rights being granted are valuable in each instance, the realities of the marketplace determine royalty rates, royalty guarantees, and consumer prices. Although it is not illegal for an organization involved in distributing to the home market at the same time to sell or rent to the educational marketplace, the purchaser or licensee must use extreme caution as to the manner and place where the videotapes are being used. It should be apparent from this discussion that Section 110(1) is not intended to be an overall "educational" exemption, but rather has critical and important limitations.

Nobody wants to be in the position of being sued for copyright infringement, especially since the penalties, if stated only in terms of statutory damages, can range from \$250 to \$10,000 per infringement.<sup>28</sup> By multiplying the statutory damage principle by the number of times a

## *Copyright Law and Educational Media*

film or videotape is illegally performed, one can readily see how damages can add up to an astronomical amount if the situation is left uncontrolled and unsupervised. One must also bear in mind that, in copyright litigation, individuals as well as the institution can be named in the lawsuit, which can prove an unhappy experience for all concerned.

### **Computer Software**

Questions have recently emerged concerning the applicability of the copyright law to computer software. There currently appears to be some uncertainty as to the application of all sections of the copyright law to this technology. Nevertheless, copyright can protect a computer program. The laws regarding copying without permission and the concept of fair use undoubtedly apply to computer programs as well as to other copyrightable materials.

Two years ago, Section 117 of the copyright law, entitled "Limitations on Exclusive Rights: Computer Programs," was amended slightly in order to permit the limited "copying" of a computer software program if such was needed in order to use the program. However, the amendment made it clear that copies thus made cannot be sold or otherwise distributed without permission of the copyright owner and must remain with the original licensee.<sup>29</sup> Without a doubt, copyright law will be examined and reexamined in the near future in order to cope with the complexities surrounding the development and use of computer software.

### **Conclusion**

This article has attempted to review those sections of the copyright laws that are most relevant to media librarians for the purpose of creating an awareness of the requirements and privileges which the law affords. The attempt has not been to provide a total review of the law, for to do so would require a much more lengthy exploration. Nor has it been attempted to promote the views of any particular group, whether users or copyright owners.

My career in the educational media industry has taught me that those engaged in the creation of intellectual works and those who use them in academic activities are bound together in a symbiotic manner. We all need each other. We must, therefore, always be cognizant of each other's needs, and copyright law represents a decent compromise of all the interests affected by it.

## References

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2. Act of 4 March 1909, ch. 320, 35 Stat. 1075; and 17 U.S.C. §1 et seq.
3. U.S. Const. Art. I §8.
4. 17 U.S.C. §102, 90 Stat. 2544-2545.
5. *Ibid.*
6. 17 U.S.C. §405, 90 Stat. 2578.
7. 17 U.S.C. §106, 90 Stat. 2546.
8. 17 U.S.C. §101, 90 Stat. 2541-2544.
9. H.R. Rep. No. 92-487, 92d Cong., 1st Sess. (1971), pp. 7-8.
10. 17 U.S.C. §101, 90 Stat. 2541-2544.
11. Encyclopaedia Britannica Educational Corporation et al. *v.* Crooks et al., 542 F. Supp. 11566 (WDNY 1982).
12. 17 U.S.C. §107, 90 Stat. 2546.
13. S. Rep. No. 94-473, 94th Cong. 1st Sess. (1975), p. 65.
14. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), p. 71.
15. Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes." Cong. Rec. E 4750 (daily ed. 14 Oct. 1981, Remarks of Hon. Robert W. Kastenmeier); see also Nimmer, Melville. *Nimmer on Copyright*. New York and San Francisco: Matthew Bender & Co., 1963- , §8.15 [B], and esp. §13.05 [F], note 152.
16. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), pp. 68-71.
17. "Guidelines for Off-Air Recording."
18. Encyclopaedia Britannica Educational Corp. et al. *v.* Crooks et al., 542 F. Supp. 1158 (WDNY 1982).
19. Encyclopaedia Britannica Educational Corp. et al. *v.* Crooks et al., 558 F. Supp. 1247 (WDNY 1983); and see also: Nimmer, *Nimmer on Copyright* §13.05 [F].
20. *Ibid.*
21. *Ibid.*
22. 104 S. Ct. 774 (1984).
23. *Ibid.*
24. 17 U.S.C. §110(1), 90 Stat. 2549.
25. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), p. 81.
26. *Ibid.*, p. 82.
27. *Ibid.*, p. 81.
28. 17 U.S.C. §504(c)(1).
29. 12 Dec. 1980, Pub. L. No. 96-517; and see also: Nimmer, *Nimmer on Copyright*, App. 2-27 §117, note 1.

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