

Federal Copyright Law: How It Affects Academic Video Services

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Few people would argue with the statement that the role of professional media and library educators has changed drastically in recent years due to continual advances in technology which make available more instructional materials for classroom use than ever before. Although technology is providing access to a wealth of educational films and video, it is also providing one of the most troublesome areas of day-to-day professional functioning, as library media professionals try to respond to the growing number of questions about what is acceptable use of copyrighted audiovisual works in the educational setting. "Media professionals have increasingly been thrust into the roles of lawyer, judge and jury, as 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" (F. William Troost, 1983, p. 211).

The scope of this review does not allow a complete study of all areas of what is a very in-depth and sometimes unclear copyright law. It will instead delve into the law as it affects the copying of video for academic use. Various segments of the paper will look at the law itself, pertinent guidelines for educational use, and recent court decisions - all designed to discover possible implications for media policy in academic libraries.

The 1976 Law

On October 19, 1976, President Gerald Ford signed Public Law 94-553, otherwise known as "General Revision of Copyright Law." The statute, which became effective January 1, 1978, marked only the second time in the 20th century that the U.S. copyright laws underwent a general revision. Due to the great technological innovations of the time, it was agreed that the laws were outdated and had not kept pace with technology. Two hundred years ago the framers of the Constitution,

in Article 1, section 8, granted Congress the 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.”

The 1976 law was an effort by Congress to protect creators of copyrighted work while also providing a reasonable means of serving the needs of users. The revised law also attempted to update the concept of “fair use,” an idea that “had been part of our copyright case law since 1841, and is basically a rule of reason in using copyrighted work. It was left to develop as a judicial interpretation for many years, until the 1976 revision — when it was included in our present law in section 107” (W.Z. Nasri, 1986, p. 85).

The fair use doctrine is based on the assumption that if the use of copyrighted material is reasonable and contributes to the advancement of knowledge, then the use is likely to be fair and not in violation of the author’s rights. Fair Use, i.e. section 107, reads as follows:

Notwithstanding the provisions of Section 106, the fair use of a copyrighted work, including such use by reproduction in copies in 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.
4. The effect of the use upon the potential market for or value of the copyrighted work.

Since the copyright law itself is silent in respect to use of audiovisual works, other than works dealing with news, many questions arose as to use of audiovisual materials in classroom teaching and to off-the-air taping (by either teachers or librarians). The fair use clause is the section of the copyright law most often cited by

educators as granting "permission" for off-air copying of non-news shows, but the issue was never clear.

"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" (I.R. Vender, 1985, p. 101). The need for more explicit rules brought about the establishment (by the House of Representatives) in 1979, of a committee made up of 19 individuals representing almost every conceivable interest group which might be affected by off-air guidelines. It was almost a year later that the committee informed Congress of the guidelines it had approved (see Appendix A). The guidelines were recognized in a House report accompanying a revision of the criminal penalties section of the law, but "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" (Bender, p. 103).

The main thrust of the guidelines seems to deal with the idea of spontaneity, or the requirement of a prior request from a teacher rather than recording in anticipation of such a request. Also, the question has

arisen as to whether the off-air taping guidelines are applicable to libraries, since the first numbered guideline indicates they were intended to apply "only to off-air recording by non-profit educational institutions."

Even without a specific reference to libraries, it seems that school libraries and academic libraries/media centers were intended to fall within coverage of the guidelines.

Court Decisions

Several court cases have impacted the copyright law in recent years, but a difficulty in these cases is that decisions made are often limited to the specific circumstances that caused the legal action to be initiated, and many times the case cannot be generalized to other situations.

One such case is known 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 Encyclopedia Britannica (EB). The agency was engaged in recording programs broadcast over the public airwaves, whose rights were owned by the above-mentioned companies. "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 the teachers and without obtaining permission from the copyright owners" (Bender, p. 104). In most

incidences whole programs were copied, and multiple copies were made of many of the shows and then distributed to member schools.

In the original court decision (by Justice John Curtin) the defendants were found guilty of copyright infringement, but the judge indicated that some limited or temporary use of the works might be legal. "After considering the potential harm to the markets —, the judge again sided with the filmmakers" (Phi Delta Kappan, 1973). The BOCES group had suggested a temporary-use period (during which time no royalties would be paid and works could be used and then erased) of one year or 45 days, the latter period recommended by the U.S. copyright guidelines (see appendix A). But, in *Encyclopaedia Britannica v. Crooks*, Curtin ruled that no temporary use of the works is allowed under federal copyright law. Among the criteria for judging fair use of copyrighted works is the effect of the use on the owner's potential market. The judge found it significant that all of the 19 works at issue in the case are available for rental or lease for short or long-term periods, in both film and videotape form and can be rented for as short a time as one to three days" (PDK). In addition, the firms offered many types of licensing agreements for schools, a factor Curtin said "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 market for these

works;—although distribution of copyrighted works may be in the public interest when the information is hard to get, in this case it is evident that copies of the plaintiffs' work may be obtained for short periods through normal channels" (Bender, p. 108). BOCES was fined a total of \$63,500 in statutory damages and assessed court costs of \$15,000.

The "Betamax Trial" is another major case impacting copyright in the area of video or off-air copying. 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" (Bender, p. 105). The case went through all levels of the federal judiciary, being first resolved in favor of the defendants by the District Court. It was finally decided by the Supreme Court in January of 1984. The Supreme Court ruled (5-4) in favor of Sony, finding that "the sale of videotape recorders by the Sony Corporation to the general public does not make the machines' manufacturers and marketers responsible for potential infringement..." (R.B. Williams, 1987, p.3). By the time the Sony case was finally decided by the Supreme Court in 1984, "time and technology had

changed the nature of the issues (original action began in 1976). The videotape recorder had become less expensive and more accessible to the consumer — Congress had failed in two attempts to create legislation regarding the VTR and copyrights” (Williams, p6).

In essence, the Sony decision ruled that off-air recording for time-shifting purposes is legitimate fair use, a major implication for school library use. the Supreme Court also made clear its overriding intent in their decision through two statements:

“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology” (Sony, *supra note 5, at 431*).

and

“...it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgement of the Court of Appeals must be reversed” (Id. at 456).

“Clearly, the Court refused to do

what it saw as the job of Congress, to legislate policy related to a new technology. The Court accomplished this goal by narrowly defining the issues in place and time. Betamax was considered only on its merits as a single case” (Williams, p.8), not on the implications it could hold for the entertainment industry as a whole or on how it affects the academic world.

Most typical school or university library media personnel would probably be frustrated by review of the previous court case. All the information available in court decisions has been case-specific, with very little possibility for generalization. In addition, most of the specifics of video copying/usage are based on “guidelines” that have never been tested as having the weight of law. This requires an even more careful consideration of the law when school or university policy is being planned or written. William Troost, who is a college media consultant and Chairman of the Instructional Media Committee of the Los Angeles Community College District, lists several “techniques that have been successful in dealing with faculties —as far as practical functioning under current copyright regulations.” All the techniques should be considered for adaptation to videotaping policy:

1. Assign one person the responsibility for delivering ongoing and current information about copyright to the faculty.

2. Develop written policies that establish procedures for the use of all video-related equipment.
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. Also include sample permission letters for contacting copyright owners. 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. Strive to assure that 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; this 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. Support of administrators should be enlisted, and all persons should be made aware of penalties if legal action is taken;
7. Communicate your feelings and experiences to your elected representatives if you believe the current laws need revision" (Troost, p. 218).

Copyright is a problem area that will always be with those library media professionals who are asked to copy off-air for faculty members. The issue is continually complicated as newer and more advanced technologies emerge, but so far the Congress has been unable to agree on a more specific law that would answer many of the questions with which educators are left. The current law makes no provision at all for emerging technologies, so in the event that more specific legislation is not forthcoming, certainly more litigation will be. There are also other areas that media administrators question - such as the legality of transferring "old, out-of-production" 16mm film onto video before the

film is no longer usable. The current law does not address this area, and it is difficult to develop a policy that will be both legal and at the same time reasonable for the real issues of today's Media Centers. The most important issue in policy-making at the university level is being conscientiously aware of the law as it is, including the fair use provision, and the guidelines for off-air taping. The best course of action, though also the most conservative, would seem to be that of giving all rules and guidelines the weight of law, if only to be sure of complete compliance (see sample policy in Appendix B). As far as activities that have no mention in federal law, it falls to the university and media administrators to decide the best course of action in an attempt to be fair to all copyright owners and at the same time provide instructional materials to both faculty and staff to the greatest extent possible.

Appendix A

Guidelines for Off-Air Recording of Broadcast Programming For Educational Purposes

1. An off-air recording, made at the request of an individual teacher, may be retained for 45 days, but then must be erased or destroyed immediately.
2. The teacher can use the recording once in a classroom or similar place devoted to instruction and repeat such

use once during the first ten days of the 45 day period for instructional reinforcement, but for the remainder of the period the recording can only be used for teaching evaluation purposes.

3. A specific program can be recorded off-air only once for the same teacher.
4. Additional copies may be made but are subject to the same restrictions applicable to the original recording.
5. All recordings and copies must include the copyright notice as broadcast.
6. Programs need not be used in their entirety, but must not be altered, combined, or merged with other recorded material.

Appendix B

Sample Policy Pertaining to the Use of Copyrighted Video Recordings

1. Copyrighted video recordings are restricted to use in the Media Center or campus classrooms.
2. Copies of video recordings licensed by the copyright proprietor for private home use only and not for public display or for library use may be used only for teaching, research, and educational

purposes as permitted under Section 107 of the Copyright Law. Use of programs that are essentially educational in subject matter is considered educational use. Use of programs that were produced for entertainment purposes is considered non-educational use unless the user specifies otherwise.

3. Off-air recordings of broadcast programs may be used in the Instructional Media Center (MC) for educational purposes in a manner consistent with fair use. The "Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes" published in House Report no. 97-49, April 29, 1982, and summarized in the following attachment, offer some assistance in determining appropriate use. Questions should be referred to the President's Office. Off-air recordings copied for educational use with the permission of the copyright proprietor are not subject to these guidelines.

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