

Copyright: An Issue in Sport and Recreation

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■ INTRODUCTION

Congress enacted the United States Copyright Act of 1909 to protect the work of authors and other creative persons from the unauthorized use of their copyrighted materials and to provide a financial incentive for artists to produce, thereby increasing the number of creative works available in society. It is a law that affects our everyday lives and our lives in the realm of sport and recreation. It was completely revised in 1976 to take into account the changing technology, and to become more inclusive of the types of medium science has produced and would produce in the future. In 1989 the United States became a member of the Berne Convention where an international copyright treaty was created. This created the new revision of the Copyright Act of 1990. What did not have copyright protection in 1976 may have gotten it in 1990. This is a complicated law and, although many know of its existence, some are not aware of its specific contents. The purpose of this article is to discuss copyright, specifically those sections of the law that affect sport and recreation providers. The first section discusses what does and what does not receive copyright protection. The second discusses the rights of the copyright holder. The third section discusses fair use of specific types of copyrighted material, and the fourth section discusses public performance rights that affect sport and recreation.

■ COPYRIGHT PROTECTION

The purpose of copyright is specifically to protect people who have put much time and energy into some creative project. These artists and writers deserve to reap the financial benefits of their work. The law is an economic one protecting the rights of those who provide the many creative endeavors we hear and see daily.

Copyright basically gives the copyright holders the right to control the use of the work they have done (Talab, 1986). There are two fundamental criteria for copyright protection: (1) the work must be original, and (2) it must be in some tangible form which can be reproduced (Copyright Act, 1990).

There are now eight broad categories of copyright protection, including 1) literary works, 2) musical works, 3) dramatic works, 4) pantomime and choreographic works, 5) pictorial, graphic, and sculptural works, 6) motion pictures and

other audio visual works, 7) sound recordings, and added in 1990, 8) architectural works (Copyright Act, 1990). To understand what can be copyrighted, one needs to consider what cannot be copyrighted. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work" (Copyright Act, 1976). Government documents and works in the public domain do not have copyright protection either. Works in the public domain include those with expired copyrights (a copyright lasts 50 years beyond the death of the creator) and works where copyright was not requested (Talab, 1986).

The most interesting area not given protection is ideas. It is not the idea that receives the copyright; it is how it is presented. For example, it would be difficult to copyright a play in basketball. It is an idea. One may write about the plays and how they work; that can carry a copyright. The idea cannot be copyrighted. Once people see the play and determine how it is done, they can use it.

Systems and processes are protected by patents (a law created to protect inventions) but only if they are genuine and unique. A woman devised a system of signing for the deaf that was specific to aerobics classes. She wanted to copyright it. She could copyright pictures or descriptions of the system, but not the movements themselves. There is no way to copyright hand motions. One can copyright choreography for a dance that will be done the same way with the same music every time, but hand motions that represent words, used differently with different music, cannot hold a copyright. Once someone sees them, they can be used.

Processes and systems include devices and forms. No copyright can be held for blank forms which are used to obtain information (Copyright Act, 1976). Therefore, agencies can use anyone's accident report form or registration form. They are designed to gather information and not to convey it.

Works that do not hold originality cannot be considered for copyright (Copyright Act, 1990). This would include standard works such as calendars, height and weight charts, tape measures, and lists of tables (Talab, 1986). This allows freedom to make use of these articles. The outline of a calendar cannot be copyrighted, but the format and the pictures that go with the calendar can be. This allows intramural programs, for example, to use a common calendar and add their own dimensions including pictures, special events, and any additional information specific to their programs.

Works where authorship is small cannot hold a copyright (Copyright Act, 1990). This includes slogans, titles, names, variations, typographic ornamentation, lettering, or coloring. If slogans, titles, names, etc., were copyrighted, there would be a loss of freedom to speak. Such words like "uh huh" would then belong to certain companies like Pepsi, and with those words, Pepsi's right to control how they are used. These short sayings are protected by the trademark laws, which are afforded to companies in order to protect their products from being confused with other products made by other companies (Cheeseman, 1992). It might be illegal for CocaCola to use "uh huh" to sell their product as it may confuse the public, but it is not illegal to use "uh huh" for other purposes.

Government works or works paid by tax dollars cannot hold copyrights. Works

found in the government document section of the library are for public use (Copyright Act, 1976).

Facts cannot be copyrighted. Information in newspaper articles can be used by others if they are published facts. Research data cannot be copyrighted for the same reason. They are fact. It is not the data that are copyrighted; it is the way the data are used. Any raw data collected can be used by anyone. In *Feist v. Rural Telephone Service Co.* (1991), Feist Publication published a telephone book. They had done all the research to put it together. Rural Telephone Service used the Feist book and reorganized it using addresses as the listing. The court found that Feist had published facts. Rural Telephone used the facts, just in a different way. It was not infringement.

■ RIGHTS OF THE COPYRIGHT OWNER

A copyright gives its owner certain rights to the works, including (1) the right to reproduction; (2) the right to preparation of derivative works which includes translation from language to language and from form to form; from book to movie, from movie to play; (3) the right to public distribution; (4) the public performing rights which include live renditions that are face to face, on recordings, broadcasts, and retransmissions by cable; and (5) the right to the public display, specifically written for art work (Copyright Act, 1990).

The last section has been strengthened with the Visual Artist Rights of 1990. Among the rights afforded artists by this law is the right to prevent any intentional distortion, mutilation, or other modification of that work. This allows the artist to control the visual art work until his or her death. If a wall mural was painted at a sport club, that wall mural could not be changed or removed without the artist's permission until the artist dies. The rationale behind the law is to preserve the work for posterity as an artifact of our present culture (Gorman, 1991). The only way it could be removed if painted after the 1990 law is if permission were granted from the artist in writing.

■ FAIR USE

An important section of the law for those who are not creators, but are the users, is the fair use. It is a specific section of the law created to strike a balance between the copyright monopoly and the greater interest of society (Hohensee, 1988). There are four tests to ascertain fair use, (a) the purpose and the character of use, whether it is for commercial or for nonprofit educational purposes; (b) the nature of the copyrighted work; (c) the amount and substantiality of the material used in comparison with the whole; and (d) the effect of the use on the potential market or value of the work (Copyright Act, 1990).

Educational use

Educational use was the primary reason for the creation of the fair use section. In sports and recreation there is classroom copying and copying of rules and articles which are directly affected by the educational guidelines defined in the law. The educational fair use test is based on three rules: (a) brevity (using small parts of the

whole), (b) spontaneity (if there is time to request permission, it should be requested), and (c) cumulative effect (how will it affect the creator?). For multiple copies the material should only be copied for one course, there should not be more than nine instances of multiple copying in any one course, and each copy must include the notice of copyright. It is never appropriate to copy consumable materials (Copyright Act, 1976). To copy coloring book pages for latch key programs is not legal. See Appendix A for the guidelines.

The case that has gotten the most publicity in the area of educational fair use is *Basic Books, Inc. v. Kinkos Graphics* (1991). Kinkos makes professors' packets. The professor brings in a series of articles that directly relate to one course and has them bound as supplementary reading. The judgement went against Kinkos. This was mostly due to its commercial enterprise. Kinkos was directly profiting from the works of others. They advertised and did their best to get the business of professors. According to Martin (1990), the case was not decided using the fair use test. If that was the case, in his opinion, there should have been joint infringing against the professors as well because the professors provide the material to be copied and it is to be used in their courses. No professors were named in the case. Instead, the court looked at the profit motive and the amount of commercialism used by a national corporation selling copyrighted works.

Copying of music

The parts of the music that are performed by band and chorus should be purchased. There are guidelines in Section 107 that are similar to the educational copying guidelines. Single copying for educational purposes is legal and altering music for simplification is also legal. It is not legal to make multiple copies of music for performance purposes even in an educational setting.

Cartoon characters

Fair use affects the use of cartoon characters that we find so familiar in our lives. These are considered drawings and they do have a life of their own (Kurtz, 1986). If an agency used Snoopy but drew him doing something no one else has, for example Snoopy playing on an agency's brand new playground equipment, this is copyright infringement. The Snoopy character who is familiar to everyone belongs to his creator. A literary figure, however, does not have the same protection. It is a figure that is described, and there is no picture that goes with it except in the mind of the reader. Cartoon characters carry a specific mental image. If it is a trademark figure, there is no question that it is illegal. Mickey Mouse is a trademark. He comes from Disney; he depicts Disney. Trademark of characters affects the use of university logos and mascots. Permission must be granted and rights paid for their use.

■ PUBLIC PERFORMING RIGHTS

In the areas referring to public performance there is a distinction between public and private. According to the Copyright Act (1990), a performance or display is public if it is 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. This

includes any place where people are not specifically invited. When there is use of music or video displays, for example, a license must be obtained. This even includes nursing home public areas. Both in 1987 and in 1990 there was an attempt to get exemption for nursing homes and long term care medical facilities so that these facilities could show movies without a license. According to the *Congressional Record* (1990), the lobbying by the motion picture industry was so strong that this exemption did not pass. Nursing homes who often use videos as a leisure activity for their residents must obtain a license to show them in their public areas even though they do not charge a fee for viewing and the people who would be watching live in the facility. The following are other areas specific to public performance.

TV and radio broadcasting

It is legal to have TV or radio broadcasting in a fairly small, for-profit facility. In the *Twentieth Century Music v. Aiken* (1975), Aiken had a chicken restaurant which had four speakers wired to a central radio set. The radio broadcast throughout the restaurant, and Twentieth Century Music brought suit for playing music without a license. The court allowed the broadcasting. In 1976, primarily as a result of this decision, Congress enacted Section 110(5) to limit the exemption rights granted copyright owners under Section 106(4). It exempts liability from communication of a transmission on a single receiving apparatus of a kind commonly used in private homes, unless a direct charge is made to see or hear the transmission or the transmission thus received is further transmitted to the public. Thus the clause exempts small commercial businesses that use standard radio or television equipment in their establishments to provide entertainment.

The exemption clause does not include rebroadcasting. It is not legal to tape a show and show it at another time in a public setting. The broadcasting rights of time and place are reserved for the broadcasters. On the other hand, it is legal to tape a show for later viewing if you do it in the confines of your own home with friends and family. This is considered time shifting and is legal in non-public settings because of *Sony v. Universal Studios* (1984). Universal Studios tried to prohibit the making of home VCR's that could tape movies as it would allow copying of movies that were owned by Universal Studios. It would allow people to tape a TV show to view later. The court did not find that inhome time shifting would offer any actual harm to Universal Studios and allowed the manufacture of VCR's. This case did not affect the right to time shifting in public places, which is illegal.

Video

Today, video tapes, so easy to both copy and to rent to view, have become a major issue in copyright. In order to show a video in a public setting, one must have a license. This can be bought from several companies. Films Inc. and Swank are two of many. The cost of a license depends on the size of the facility, the hours it is open, and the number of times movies will be used (Fitch, 1992). Universities buy site licenses for dormitories so that they can show movies in their lounges. Even though the students live in the dorms, the public areas are still considered public and not home.

In *Paramount Pictures Corp v. Labus* (1990), Labus, the owner of a resort, had

taped from TV 436 pictures owned by Paramount Pictures. He decided to rent VCR's to his resort clientele for \$10.00 for an evening. For that money, he also let the VCR renter select three movies from his library. Paramount claimed he was profiting from their movies, brought suit, and won damages in the amount of \$436,000. Even though the movies were shown on his resort and they were his guests, it did not constitute time shifting as it was not considered private.

Music

There are several areas of music that are affected by copyright. Playing of cassette tapes, for example, in a public place is prohibited without a license. If a manager of a fitness center wants to play background music in the center and people paid to be members, the manager must obtain a license. If that same center has aerobic instructors who play tapes during exercises, the center must have a license, especially if there is profit (Bath, 1992). It is not the responsibility of the aerobics instructor to get the license; it is the responsibility of the center in which the class is being given. It is not particularly expensive and the amount is decided by the size of the facility, the amount of use (whether it is background music and instructional music or just one or the other), and the number of participants in the program. The copyright law recognizes three performing rights societies by name in the legislation: Broadcast Music Inc.(BMI), The American Society of Composers , Authors and Publishers (ASCAP), and Society of European Stage Authors and Composers (SESAC). The first two are still in existence.

Several cases were found citing music public performances. In *Tallyrand v. Stenko* (1990), Stenko owned a skating rink and played music. Stenko allowed his patrons to bring tapes which he played. In *BMI v. Melody Faire* (1990), Melody Faire was a club where musical compositions were performed by live artists. Melody Faire did not have a license. In *Tallyrand Inc. v Charlie Club Inc.* (1990), Charlie Club was a health club that had a license for their restaurant and bar, but not for the aerobics classes and the health club portion. In all three cases, the agencies were warned by the performing arts groups more than once that they needed a license for what they were doing. They chose not to comply. In all three cases the defendants lost and paid more than three times what it would have cost them to get a license in the first place.

Chorus and band productions

Performance of music is legal without paying royalties if it is for nonprofit and all money goes to charity. This exemption is explained in Section 110 of the Copyright Act. Music and dramatic works can be performed in classrooms, for religious assembly, and for transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to its performers, promoters, or organizers. There can be no direct or indirect admission charged unless the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain (Copyright Act, 1990). This exemption does not include music played at conferences even though one may define that as an educational setting (Dickson, 1990).

■ SUMMARY

The educational stipulations do not allow blanket copying by anyone. There is still a requirement for licensing for the use of videos and music in public. The laws exist to protect the economic value of these works. Without the motivation of the artists to continue to produce the works which are used, there would be a severe loss in our society. There must be a balance between use and abuse, and no one is immune from prosecution for violation.

Appendix A EDUCATIONAL GUIDELINES Title 17 §107 U.S.C. 1976

I. Single Copying for Teachers

Single copies may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class.

- A. A chapter in a book.
- B. Article from a periodical or newspaper.
- C. Short story, short essay, or poem, whether or not from a collection.
- D. A chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed, in any event, more than one copy per pupil in a course) may be made by or for the teacher giving the course, for classroom use or for discussion, provided that:

- E. The copying meets the tests of brevity and spontaneity as defined below.
- F. The copying meets the cumulative tests as defined below.
- G. Each copy includes a notice of copyright.

III. Brevity tests

A. Poetry

- 1. A complete poem if less than 250 words or not more than two pages.
- 2. From a longer poem, an excerpt of not more than 250 words.

B. Prose

- 1. Either a complete article, story, or essay of less than 2500 words.
- 2. An excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less.

C. Illustration:

One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

D. Special Work:

Certain works in poetry, prose or in poetic prose often combine language with illustration and are intended sometimes for children and at other times for a more general audiences. Many fall short of 2500 words in their entirety and may not be reproduced in their entirety. However, an excerpt, comprising not more than two of the published pages of such special work and containing

not more than 10% of the words found in the text, may be copied.

IV. Spontaneity

- A. Copying at the instance and inspiration of the individual teacher.
- B. Inspiration and decision to use work too close to expect a reply to a request for permission.

V. Cumulative Effect

- E. Copied material is only for one course.
- F. Not more than one short poem, article, story, essay, or two excerpts from same author, no more than three from same collection.
- G. No more than 9 instances of multiple copying per course in one term. (This does not include current news articles.)

VI. Following is Prohibited

- A. Copying shall not be used to create, replace, or substitute for anthologies, compilations, or collective works.
- B. No copying of "consumable products": Workbooks, exercises, standardized tests, and answer sheets.
- C. Copy shall not:
 1. Substitute for purchase of a text.
 2. Be directed by higher authority.
 3. Be repeated with respect same item/same teacher/term to term.
 4. Be charged to student beyond the actual copy cost.

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