

VIDEO, LIBRARIES, AND THE LAW: FINDING THE BALANCE

Edited by Thomas J. Galvin and
Sally Mason

Reprinted with permission from *American Libraries*, February 1989.

Editor's Note: the following series of notes on video and copyright from a mix of library and legal professionals is particularly interesting to IALL members because of the diversity of viewpoints and opinions expressed. Interpreting the law is neither an exact science, nor something in which most of us have any real training. While we may not agree with some of the opinions expressed herein, we owe it to ourselves and our schools to be informed in order to avoid legal entanglements. As one author puts it, "How famous do I want to be?"

Just as the video cassette recorder has become a fixture in more than half of American homes, so materials in video format have become indispensable to library collections, services, and programs. A 1988 ALA [American Library Association] survey reveals that an impressive 91% of large public libraries and 62% of all public libraries have circulating video collections.

Videos are equally important for school, college, and many types of special libraries.

Video presents librarians with new service opportunities and new challenges. The balance between educational and entertainment videos in the collection, as well as the question of fees for video lending, are already subjects of wide professional discussion and debate.¹ This symposium focuses on still another set of issues of special concern to both video publishers and librarians—the complex, and to some extent, ambiguous, legal considerations that surround the uses of copyrighted videos in libraries.

Librarians have an inherent respect for intellectual property rights as embodied in copyright law. The library community, as Mark Richie points out, also has an important stake in maintaining a viable, flourishing media industry. Yet the librarian's first and overriding obligation is to maximize effective access to information and ideas in all formats, for all library users.

The 1976 revision of the federal copyright statute, which took effect January 1, 1978, predates the emergence of video as an important medium for libraries. Both librarians and copyright holders have a mutual need to achieve some common

News and Notes by and for IALL members.

understanding of the application of the copyright law to video, which has its own unique characteristics. Librarians must then apply these understandings to the policies and procedures that govern library video use.

Operational ambiguities

Among the issues that currently divide copyright holders and librarians, and present the greatest operational ambiguity for the management of video collections, are: What are the legal limits of "fair use" as applied to copyrighted videos owned by a library? Where does fair use end, and public performance which requires the library to buy performance rights from the copyright holder, begin? Does previewing a video in the library before borrowing for home use, or library viewing by an individual who does not have access to a video player at home, constitute public performance? Does the face-to-face teaching "classroom exemption," which is permitted by copyright law, apply by extension to the school library, the college library, or the public library? What responsibility, if any, does the librarian have to assure that borrowers of videos respect the legal rights of copyright owners? Under what circumstances may a library make an archival copy of a copyrighted video?

To increase awareness and enhance understanding of these issues, we begin this symposium with presentations by two attorneys who have written widely on copyright. Three librarians, each reflecting the special perspective of a different type of librarian, then comment on the operational implications for the management of video collections.

The common goal of the contributors is to highlight key problems and to provide responsible guidance to those who must be attentive to both legal considerations and organizational objectives in the administration of library video resources.

COPYRIGHT: COMPROMISE OR CONFUSION

by Ivan R. Bender

Ivan Bender, a Chicago attorney, has represented media producers and distributors and assisted many educational institutions with copyright policies. He is currently copyright counsel to AIME, the Association for Information Media and Equipment.

When the present federal copyright law became effective on January 1, 1978, those involved in the several years of hearings and meetings to resolve differences sighed with collective relief. Most agreed the final version of the law did not satisfy any group entirely, but rather represented a serious effort to resolve serious differences. What we did not realize was that technology, in particular video technology, would raise new legal issues.

This discussion will be limited to certain aspects of what librarians can and cannot legally do. Not all readers will agree with my position. To some extent, the legal matters raised have not yet been sufficiently tested in the courts to claim legal precedents.

Although the law gives the owner of a copyright, or his or her agent, the right to control and therefore license public performances, in some cases that right has specific exceptions written into the law. The most important exception is the face-to-face teaching or classroom exemption. For this to apply, certain specific requirements must be met. The institution where the performance takes place must be nonprofit and educational, the performance must relate to teaching activities, it must take place in a classroom or other place devoted to instruction, and the teacher, students, and presentation must be in a face-to-face situation, thus ruling out transmissions from outside sources beyond that immediate building.

"Yes, but..."

Performance of a video in a public library requires a license. In my opinion, this is what the law says, and no distinction is made between viewing by an individual, a small group, or a larger group. A public library is a place "open to the public" which is part of the definition of "public performance" in the statute. Some argue that fair-use begins where this exemption ends, but I do not believe fair-use applies in this situation.

Another performance issue concerns whether a library can qualify as a place where the classroom exemption might apply. The answer is "yes, but..." The teacher, taking his or her class to a library to view a video, can fall within the exemption. However, when a teacher sends a student who was absent during a video presentation to view it alone or with a small group of students, I believe the law is being unduly stretched to say that the exemption applies. Librarians might feel the law *should* apply in that instance, but their responsibility if to perform their work according to what the law permits. As professionals attempting to pass on to students a strong sense of morals and ethics, librarians can and should do no less.

Another major concern for librarians is archival copying. The law permits *certain* libraries to make archival copies. If a library qualifies, this privilege extends only to situations where a video is either an unpublished work, or the copy the library owns is damaged, lost, stolen, or deteriorating and the library has made a reasonable, but unsuccessful effort to locate an unused replacement at a fair price. Once these conditions are met, a single copy is permitted.

Librarians have long been concerned about liability if a library-owned video is used by a patron in an illegal fashion. Generally, my advice is to avoid potential liability by asking persons borrowing videos to

sign a statement assuming all liability for any illegal activity. Liability is a question of fact. If a librarian is aware of illegal activities committed by a patron, then continued lending of tapes to that person is risky. I am not suggesting that librarians act as judge and jury, but some precautions should be followed.

WHAT IS RIGHT IN COPYRIGHT?

by Mary Hutchings Reed

Legal counsel to the American Library Association, Mary Hutchings Reed is a partner in the Chicago law firm Sidley and Austin. She is also author of The Copyright Primer for Librarians and Educators.

Where the law is clear, it is not difficult to follow: An afternoon showing of a feature film in a public library is a public performance. But the law in many instances isn't clear, and the copyright law's four-pronged "fair use" test is sometimes confusing. Perhaps it's easier for libraries to think about what is legal in terms of what is right.

What is *right*? If someone else will be harmed (i.e., suffer economic or other loss) then the conduct probably is "wrong." For instance, producers of video would seem to suffer no real harm if the classroom exemption is stretched to allow an absent student to view a video in the library because he/she was sick during the in-class presentation. The argument that the producer is harmed because it *could* license such a use for a fee is circular.

Since the public or school library is a place "open to the public," performances there are usually public, but may be exempt under the classroom teaching exemption or the fair-use doctrine. The law requires *face-to-face* teaching. Afternoon travelogues with comments by exchange students may not

qualify; story hours almost certainly do not qualify. A *bona fide*, instructional series, even when not part of a diploma or degree program, may qualify if the program is sponsored by a nonprofit institution.

Private viewing of a video in a library to me is fair use—it doesn't seem to harm anyone. There is no legal impediment to circulation. How is the proprietor hurt if, instead of checking a video out, the patron takes it to a private carrel? Considering the importance of equality of access to information, it seems "right" for the law to allow one or two family members to view a video in a private area in a library.

Similarly, I believe academic libraries are free to have video materials on reserve for private viewing by students, in their dorm rooms or in library carrels. Again the producers are not economically hurt by in-library, as opposed to in-room viewing.

Thankfully, while libraries are legally responsible for their own uses of copyrighted video materials, they are not generally liable for the acts of patrons. When renting their facilities, libraries should use written forms requiring the lessee to acquire needed performance licenses; in loaning video, librarians should continue their public education efforts on copyright issues and "what is right."

A PUBLIC LIBRARY PERSPECTIVE

by Ray Serebrin

Ray Serebrin is managing librarian, Department of Media and Public Services, Seattle Public Library.

The issue of video copyright has stirred much debate and confusion. Librarians find themselves interpreting a copyright law that has already been overtaken by changes in information technology. Understanding copyright law is a professional

responsibility for librarians. Interpreting the law, however, is neither an exact science nor a discipline in which most librarians have any training.

As a public librarian, my primary concerns about copyright law are with those aspects that relate directly to public access to video and video services. There is little controversy about most of these issues. Group use of unlicensed videotapes in a non-curricular program setting is certainly a copyright infringement. Under the "first-sale" doctrine, loans for home use are clearly allowable. A video recorder can be loaned too, in my opinion, even if the patron intends to use it to infringe copyright.

Unprecedented law

There is significant disagreement, however, about patron viewing of videotapes in the library, on library-owned equipment. Copyright holders contend that such viewings are restricted "public performances" according to the copyright law. The library community claims that such users are, within specific guidelines, authorized "private performances." Since there is no legal precedent that specifically addresses the issue of library viewing (or any other non-profit viewing), it is uncertain whether the standard set forth in the law applies to individual showing in the public library or not. Many attorneys agree with the copyright proprietors and warn that libraries permitting such unauthorized "performances" might be subject to statutory damages of \$250-\$10,000 per infringement. Meanwhile, the American Library Association's legal counsel has developed guidelines indicating that library viewing by individuals is permissible. So where does the public librarian turn for policy guidance?

Appealing counsel

From both a practical and philosophical

standpoint, ALA counsel Mary Hutchings Reed's position is appealing. Video users should have an equal opportunity to browse and "thumb through" the video collection, just like users of other library resources. I have difficulty accepting the notion that there is some sort of "qualitative" difference between sitting at a library carrel reading a book and sitting at a carrel watching a videotape. Until a definitive court test establishes a legal difference between those activities, the profession needs to protect the right of the user and promote access. If such a precedent is ever established, public librarians need to be in the front lines lobbying Congress for a library viewing exemption, and lobbying the industry for establishment of low-cost, public performance licensing fees.

A SCHOOL LIBRARY PERSPECTIVE by Mark L. Richie

Mark L. Richie, executive director, Burlington County (N.J.) AVA Center, is past-president of the National Association of Regional Media Centers, and president-elect of the American Film and Video Association (formerly the Educational Film Library Association).

School librarians are in the vanguard of concern over print and video copyright violations in schools, and often they are alone there. Terms like "fair-use," "Section 110," and "contributory infringement" mean little beyond the library door. Also, many issues affecting schools don't affect public libraries and aren't addressed adequately in professional journals.

For the most part, the controversy over public performance is limited to public libraries. Films and videotapes purchased from major educational film producers have historically included public performance rights in the purchase price. In such cases,

there is no problem with either individual use or showing a curriculum title in the library to a student who may have missed the first showing in class.

Public performance prudence

Most media specialists are reasonably clear about the face-to-face teaching exemption. Conflict may occur, however, when feature films are used to support legitimate curriculum content. Can the student who missed the showing in class go to the media center and watch the tape in a carrel? If the tape does not carry public performance rights, if the teacher is not present, and if the library is not being used as a place of instruction for a class, the face-to-face exemption to public performance does not apply. The prudent librarian will not allow the viewing to take place.

Supporters of the notion that individual viewing of non-public performance tapes in a carrel is analogous to reading a book, and thus allowable, do a general disservice to the profession and place librarians willing to accept their arguments at risk of legal action. Unless the law is rewritten, this, and other points, will have to be clarified by a judge's decision. Any librarian struggling with what is right and what is allowed must ultimately ask the question: "How famous do I want to be?"

Illegal video duplication is a major concern within education. Wholesale and systematic video piracy is a cancer eating away at the non-theatrical and educational video/film industry. The cost of continuing investigation, legal advice, and sending "cease and desist" letters reduces funds available to produce new material and create better programs. The end result is fewer new titles and the elimination of titles in specialized curriculum areas.

There are also grave misunderstandings about the circumstances under which duplicating videotapes is legal for a library.

The confusion is unwittingly compounded by well-intentioned organizations like the American Library Association. *American Libraries* (February 1986, p. 120A-D) contained an insert by ALA's legal counsel concerning videotape and computer software.² The guidance about video duplication, although accurate, hardly illuminates the intent of the law. Unfortunately, it has also been badly misread and misquoted. Some librarians have assumed that rules governing photocopying may also justify video duplication for the same reasons. The important phrase "under limited circumstances" is lost in the translation.

Some librarians will not bother to wade through the details of the copyright statute. But if they reach section 108(h) they will find that only three subsections actually apply to video. One deals with the duplication of audio-visual news programs, a second allows reproduction of *unpublished* works (which rules out most school situations), and the third allows duplication to replace a lost, deteriorating or damaged copy, but only after determining that a replacement copy cannot be found. Unless you are running a film archive, this section has little application to curriculum films. By the time a file or videotape has deteriorated beyond use and is no longer available from the producer, it probably shouldn't be in circulation anyway.

Protecting school and self

Librarians in education have a new and important professional responsibility to protect their patrons from legal entanglements. School librarians should be urging the adoption of an enforceable district copyright policy. Without such a policy, districts open themselves to litigation.

School media specialists who casually check out two video decks and dub cables to a teacher for a weekend, or turn their back on violations of fair use, do so at their own peril. Almost any copyright complaint

against a school could cite the board president, superintendent, building principal, and media specialist for contributory infringement, along with the actual button pusher. Even if no charges are filed, a lot of time can be wasted answering legal correspondence and conducting internal investigations. An active risk management program can help prevent problems and save districts a tremendous amount of time and embarrassment.

That so many points of law remain controversial militates for erring on the conservative side when deciding how, where, and when video shall be used in school. The argument that "all films can be educational" is no longer a valid justification for utilization. The larger questions are, "Is it curriculum related?" and "Is it legal to use?"

AN ACADEMIC LIBRARY PERSPECTIVE

by Debra H. Mandel and Marjorie Madoff

Debra H Mandel and Marjorie Madoff, are respectively, media services librarian, Wentworth Institute of Technology, Boston, and head, Learning Resources Center, Northeastern University, Boston.

In the current controversy over the Copyright Act and its application to the use of *home* videotapes in libraries, the academic library as a special case has received little attention. We feel that academic libraries meet requirements for the classroom exemption. We must remain cautious, however, because neither the video producers nor ALA have addressed this issue at the policy level.

Videotape viewing crucial

In institutions of higher education, students are encouraged to work independently. To conserve precious class time,

instructors assign the viewing of videotapes in media center carrels just as they assign outside reading or research. Academic librarians work closely with faculty to integrate media into the institution's curricula.

Feature films have long played a significant instructional role in colleges. The independent study carrel of such videotapes as *Death of a Salesman* or *Amadeus*, when related to a sociology or music course, is certainly a legitimate educational activity, enriching classroom instruction and conceptual understanding. Producers do not acknowledge this; they market feature film videotapes as "Home Use Only," insisting that they are solely for "entertainment."

Before Jerome Miller's book, *Using Copyrighted Videocassettes in Classrooms, Libraries and Training Centers* (2nd ed.), most publications discussing copyright law ignored the educational uses of carrels and failed to distinguish between academic and public libraries. Miller succinctly highlights this difference: "The teaching exemption has obvious applications for school libraries or learning resources centers (hereafter libraries)..."³

Carrel use still ambiguous

Librarians in the Boston Area Library Media Association (BALMA) agree with Miller, but remain concerned about the ambiguity of library carrel usage. BALMA's Copyright Subcommittee has pushed for legislative clarification but has made little progress.

Until the broad statements about library carrels and infringement explicitly differentiate between public and academic libraries, we feel forced to seek double protection. We attempt to track and secure written permission from individual producers to use "home" tapes in our libraries. This laborious process can take months and may prove futile; legal departments are often unwilling or unable to identify rights or state them

in writing.

Librarians respect artists' rights to collect royalties for their creative works, and equally, educators' rights to provide access to information. Decisions are needed to wed these legitimate goals. Some publishers are beginning to offer options. Some forward-thinking companies now market videotapes with public performance rights available at a reasonable additional charge. Others have tried a different approach—inadequate we believe—because they offer renewable, "umbrella" licenses, instead of the usual life-of-tape license.

We greet these new proposals with mixed feelings because we are convinced that academic libraries meet the educational exemption. Until the law is clarified, however, academic librarians will continue to struggle to provide access to valuable resources for their college and university communities.

NEEDED: A FORMAL UNDERSTANDING BETWEEN COPYRIGHT HOLDERS AND COPYRIGHT USERS

What's right? What's fair? What's practical? All of these questions arise from the foregoing essays. The contributors are all professionals respected in their special fields. Others in those fields would have different opinions. The bottom line is that the copyright law *is* ambiguous. There *are* no simple, unambiguous answers to these troubling questions. What we can do is clarify what the problems are and what options are available to address and potentially resolve them.

It seems clear that, while there are important questions for libraries surrounding liability, duplications, archival copying, and professional ethics, the most troubling dilemma for all types of libraries concerns "public performance." Does one person viewing a video in a public library carrel pose an economic threat to the producer?

Does it make a difference if the setting is a school library media center? If it does make a difference, where does the academic library fit? And since the law is ambiguous why hasn't something been done about it?

Three options

There are three options for clarifying the law, none easily achieved. The first is to ask Congress to amend the Copyright Act. This is a long and arduous process, as those who worked for the face-to-face teaching exemption can testify. And success is by no means guaranteed.

The second is to ask the courts to decide. While there have been court cases dealing with the public performance issue, none has yet dealt specifically with a library. This type of case is usually prolonged and expensive. Most libraries are reluctant to make the investment in time and resources that would be required.

The third solution involves a formal understanding arrived at through dialogue between copyright holders and copyright users. Such an understanding existed with the old copyright law (prior to 1978). This so-called "gentlemen's agreement" was a written document that clarified certain aspects of the act, notably fair-use. This is really the most attractive solution, and one towards which some exploration has already been made in the form of on-going dialogue between ALA, the Association for Information Media and Equipment, and the Motion Picture Association of America. The achievement of such an understanding will first require that the ALA Council formulate, with the advice of appropriate ALA units, a clear, unambiguous statement of Association policy concerning fair-use of copyrighted videos in libraries.

In the meantime, where does this leave the individual library? ALA is certainly ready to provide information and expertise, but the organization does not provide legal

counsel. It is essential, therefore, for individual libraries to develop well-considered policies based on knowledge of a variety of opinions, and advice from the library's own legal counsel.

COPYRIGHT GLOSSARY

Archival copy: A videocassette kept for the purpose of replacing a library's copy when and if needed.

Blanket license/umbrella license: A license purchased from certain commercial organizations permitting the public performance in the library of all videocassettes which are specified to be under the "blanket" or "umbrella," regardless of "home use only" labeling.

Classroom exemption/face-to-face teaching exemption: The statutory exception to the exclusive public performance rights of a copyright owner which permits certain showings of videocassettes in a non-profit classroom setting as part of a planned curriculum and with an instructor present, even if labeled "home use only." 17 U.S.C., Section 110 (1)

Contributory Infringement: Indirect infringement by an individual and/or institution arising out of a user's conduct; might be an issue when videocassettes loaned by libraries are used illegally by the borrower (e.g., for a public performance). 17 U.S.C., Section 504 (c)(2). See also Fair-use, Section 107.

Fair-use: Certain limitations on the copyright owner's monopoly which reserves to others the right to make reasonable uses of copyrighted materials without the specific consent of the author (e.g. previewing and research). 17 U.S.C., Section 107.

First sale doctrine: The section of the Copyright Act which limits a copyright owner's control over the resale, rental, or loan of a work after it is purchased,

therefore protecting the right of a library to circulate legally purchased videocassettes. 17 U.S.C., Section 109 (a)

Home use only: The restriction some copyright owners attempt to impose limiting legal showings of specific videocassettes to those by an individual, family members, or small gathering of friends in private settings.

Public performance: The showing of a videocassette in a setting open to the general public. 17 U.S.C., Section 101. The right to license such is retained by the copyright owner. 17 U.S.C., Section 106 (4).

**FOR FURTHER READING
(AND VIEWING):
A SELECTED BIBLIOGRAPHY**

- Copyright Law: What Every School, College and Public Library Should Know* (videocassette), A.I.M.E. (Association for Information Media and Equipment), 1987.
- Information Technology and Libraries*. 1987. Letters. 6(September): 242-248.

Miller, J. K. 1988. *Using Copyrighted Videocassettes in Classrooms, Libraries and Training Centers*, 2d ed., Copyright Information Service.

Reed, M. H. 1987. *The Copyright Primer for Librarians and Educators*. ALA, NEA.

Stanek, D. 1986. Videotapes, Computer Programs and the Library. *Information Technologies and Libraries* 5 (March): 42-54.

NOTES

1. Sally Mason, "Where Do We Go From Here? Video Collections in the 90's," *Sightlines*, 21 (Summer 1988): 30-32.
2. Mary Hutchings Reed and Debra Stanek, "Library and Classroom Use of Videos and Computer Software," *American Libraries*, 17 (February 1986): 120A-120D.
3. Jerome K. Miller, *Using Copyrighted Videocassettes in Classrooms, Libraries and Training Centers*, 2nd ed., Copyright Information Services, 1988, pp. 21-22.



An exciting, 24 hour multi-lingual satellite network that brings you the best in contemporary programming from around the world.....

News, first run dramas, motion pictures, sports, variety shows and more!

From Europe

*German
French
Russian
Italian
Portuguese*

From Asia

*Chinese
Japanese
Filipino
Vietnamese
Hindi
Cambodian
Thai
Korean*

From the Middle East

*Arabic
Hebrew
Farsi
Armenian*

*For information on how your college or university can receive the **International Channel**, call Karen Livingston at (617) 734-7815.*

