Videotapes: Copyright and Licensing Considerations for Schools and Libraries [Copy]

ED308855
Reed,-Mary-Hutchings
Videotapes: Copyright and Licensing Considerations for Schools and Libraries. ERIC Digest.
ERIC Clearinghouse on Information Resources, Syracuse, N.Y. 1989. 4 p.
Sponsor: Office of Educational Research and Improvement (ED), Washington, DC.

Descriptors: Elementary-Secondary-Education; Guidelines-; Higher-Education; Intellectual-Property; Librarians-; Library-Services; Library-Technical-Processes; Media-Specialists
*Classrooms-; *Copyrights-; *Legal-Problems; *Legal-Responsibility; *Libraries-; *Videotape-Recordings

ABSTRACT

Much of the concern among librarians and educators as to the legality of library lending and classroom use of copyrighted videotapes is the result of "Home Use Only" labeling and other information supplied by the Motion Picture Association of America and some of its members. Much of this labeling and information is misleading and inapplicable to libraries and schools. This document provides guidelines for interpreting the Copyright Act for the classroom and library use of videotape recordings. (GL)

TEXT

While ownership of a copyright is a property right, the type of property involved is not tangible. An important distinction made by the Copyright Act is the separation of ownership of a copyright from ownership of the object in which it is embodied. Owning a videotape of a copyrighted motion picture does not give its owner all the exclusive rights of copyright. The difference is obvious with respect to videotapes and films where the right to play (perform) the tape publicly is separate from the ownership of the tape.

Another complication arises from the use of restrictive license agreements on videotapes similar to those on computer software. This section will focus on purchased videotapes; videotapes that purport to be licensed should be treated like computer software programs. (See ERIC Digest no. EDO-IR-89-2.)

HOME USE

Much of the concern and confusion among librarians and educators as to the legality of library lending and classroom use of copyrighted videotapes is a result of "Home Use Only" labeling and other information supplied by the Motion Picture Association of America (MPAA) and some of its members. Typical "Home Use Only" labels read as follows:

> *Licensed for private home exhibition only. Any public performance, copying or other use is strictly prohibited... (NOTE: The word licensed does not necessarily create a licensing agreement. This language could be construed as intended to restate the copyright law rather than state a condition of sale.)

> *This videocassette is for home use non-public performance exhibition in the United States of America or Canada only. Any other use is not authorized and is prohibited.

Much of this labeling and information is misleading and inapplicable to libraries or schools. The distribution right is one of the exclusive rights belonging to a copyright owner. One important exception to this right is the first-sale doctrine of Section 109. Under it, anyone who owns a lawfully manufactured copy of a copyrighted work may distribute that copy by resale, rental, or loan. Once a particular copy has been the subject of a "first sale" or other transfer of title, the exclusive distribution right as to that particular copy ceases. If this were not so, libraries could not loan their copies of books and other works.

A library or school that resells, rents, or lends a copy of a copyrighted videotape, which it owns, is not infringing on the copyright owner's rights. The actions of the library or school are merely those of distribution--the act of lending does not implicate the copyright owner's other rights of adaptation, public performance, reproduction, and public display. The fact that a fee is charged is irrelevant--the right to distribute a copy includes the right to rent it--for a fee, deposit, or otherwise.

This view is consistent with both the language of the statute and, to some extent, the opinion of the Motion Picture Association of America. The MPAA view seems to be limited in that it states that "libraries which circulate cassettes for use at home do not infringe the Copyright Act." However, libraries and classrooms do not ordinarily inquire where borrowed materials will be used, and such inquiries are not required under the Copyright Act.

It is important to keep in mind that the copyright owner's exclusive rights include the right to authorize others to reproduce, adapt, publicly perform or display, or distribute the work. Therefore, libraries and schools should refrain from appearing to authorize infringements by their borrowers. This can be done rather simply by insuring that the original "Home Use Only" labels remain on the videotapes. Little else is required by the Copyright Act. If a borrower expresses an intention to use the borrowed videotape for an unauthorized public showing (at a public place for a fee, to take the easiest example), the lender is under a duty to state that such a use may be prohibited by the copyright laws.

The same general principles apply to liability for copying by borrowers. In addition to the "Home Use Only" language, most labels also contain prohibitions on copying. If the lender is asked if copying is permitted, or is informed of a borrower's intention to copy, there is a clear duty to state that it is not authorized. Like the situation described above in the context of unauthorized public performances (showings), there is not clear duty to refuse to lend the material. This is not different from the situation librarians or teachers face concerning borrower's copying of any other materials.

Because of the first-sale doctrine, a library or school that lends videotapes is not a direct infringer of the copyright owner's exclusive rights. Additionally, since libraries can't control their patrons' activities, it is unlikely that a library could be held to be

contributory infringer.

A more significant problem arises when video equipment is loaned with videotapes; however, here too it is unlikely that the lender would be liable for the unsupervised use of the equipment. This situation is similar to that of unsupervised library copying machines. Section 108(f)(1) of the Copyright Act provides that a library is not liable for infringing use of unsupervised copiers on its premises as long as the equipment bears a notice that making such a copy may be subject to the copyright law. Nothing in Section 108(f)(1) limits its applicability to paper copiers (therefore video equipment capable of copying would be included), but the notice is only required for equipment on library premises. A notice on recording equipment to be used outside the library is not required; however, it would be a good idea to use one to both educate and warn patrons. It could read:

> *Notice: The copyright law of the United States governs the making of reproductions and the performance of copyrighted material; the person using this equipment is liable for any copyright infringement.

The main concern with in-house use of copyrighted videotapes by library patrons and students is the performance right. The Copyright Act states the public performance right in broad terms and then provides specific exemptions for educational and other nonprofit uses. However, the specific exemptions are not exclusive: The same general standards of fair use are applicable to all kinds of showings (performances).

CLASSROOM USE

Section 110(1) specifically limits a copyright owner's exclusive performance and display rights. It states: *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 audiovisual work, the performance, or the display of individual images, is given by means of a copy the was not lawfully made...and that the person responsible for the performance knew or had reason to believe was not lawfully made...[is not an infringement].

All of these requirements must be met in order for the classroom exemption of Section 110(1) to apply. Most educational classroom uses of videotapes fall under Section 110(1). As long as 110(1) applies, it is not necessary to purchase special licenses in order to publicly show copyrighted materials in the classroom. To the extent that the exemption does not apply, the fair use doctrine may permit some other classroom showings.

LIBRARY USE

Because a library may be "a similar place devoted to instruction," the classroom exemption also protects public showing of videotapes in libraries that meet the requirements of Section 110(1) discussed above. Where such performances do not fall under 110(1), they may be considered infringing. It is clear that a library's showing a videotape to a large group of persons would, in fact, constitute a public performance as it

is defined by the Copyright Act. In addition, previewing, in which prospective borrowers are permitted to view portions of the videotape before borrowing it, could be considered by some to constitute an infringing public performance, if done in public areas. However, both previewing by an individual and viewing a videotape in a private room in a library should probably be considered fair use.

What about libraries that permit individuals or small groups of persons to watch videotapes in private viewing rooms? These showings may be thought to be public performances, but they may also be a fair use of the materials and therefore not infringing. In addition, recent case law indicates that a hotel room is an extension of a person's home for purposes of determining what is a public performance. By extension, it is reasonable to assume that a private viewing carrel at a library is an extension of a person's living room. This case law mitigates some of the problems with the statutory definition of "publicly."

A single viewer is a minimum. A larger audience might also constitute a fair use (i.e., a parent and child, several members of a film class, etc.). However, charging a user fee or permitting more than one person to view the work increases the likelihood that the use would not be fair since there is also case law that holds the repeated showing of videotapes for small groups of people in mini-theaters to be public performances. Permitting a greater number would also put librarians in the position of inquiring and making judgments about the purposes of the use, which is not in keeping with other library policies concerning rights of access, privacy, and intellectual freedom.

Libraries with meeting rooms that are open to the public may also face questions of liability for public performances (showings) that take place in them. The library might be liable by appearing to authorize such public showings or performances (rather than actually doing the showing) under circumstances in which it might be in a position to control the use of the copyrighted works. While generally a landlord is not a contributory infringer merely by virtue of the fact that he or she provides the premises whereon infringing works are publicly performed or sold, active supervision of the place where the performances occur (plus perhaps commercial gain from the operation and benefit from the actual performance) could make one an infringer. Even in the absence of commercial gain, the most prudent course, upon being informed of or bring asked about a potentially infringing use, is to state that the proposed use is not authorized. The case here seems slightly stronger for refusal to lend the materials or give access to the room, although the duty is still not clear (and may depend upon the individual library policies concerning such rooms). A safe course would be to require those using meeting rooms to secure all necessary licenses and to indemnify the library for any failure to do so.

This publication was prepared with funding from the Office of Educational Research and Improvement, U.S. Department of Education, under contract no. RI88062008. The opinions expressed in this report do not necessarily reflect the positions or policies of OERI or ED.