Why Can't I Watch This Video Here - Copyright Confusion and Performances of Videocassettes & (and) Videodiscs in Libraries

J. Wesley Cochran

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

Part of the Communications Law Commons, Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol15/iss4/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
Why Can't I Watch This Video Here?: Copyright Confusion and Performances of Videocassettes & Videodiscs in Libraries

by

J. Wesley Cochran*

Table of Contents

I. Copyright Law ............................................ 845
   A. Brief History ........................................ 845
   B. The Copyright Act of 1976 ............................ 848
      1. Section 102—Works Eligible for Protection ........ 848
      2. Section 106—Rights of Copyright Owners .......... 849
      3. Limitations on the Rights of Copyright Owners,
         Exemptions from Infringement, and Compulsory
         Licenses ........................................... 858
         a. Section 107—Fair Use Limitation ............... 859
         b. Section 110(1)—Educational Use Exemption .... 866
      4. Liability for Infringement ........................ 868

II. Analysis of Viewing Videocassettes and Videodiscs in
Libraries .................................................. 869
   A. Framework ........................................... 869
   B. Public Performances in Libraries .................... 869
   C. Fair Use .............................................. 871
      1. Fair Use & Performances for Students .............. 878
         a. The “Make-Up” Performance .................... 878
         b. The Supplemental Performance ................. 879
         c. The Research Performance ..................... 879
      2. Fair Use & Performances for Faculty Members ...... 880
      3. Fair Use & Performances in Non-Academic
         Situations ........................................ 880
         a. Performances for Public Library Programs ..... 880

* Law Library Director and Associate Professor of Law, Texas Tech University. The author thanks Sharon Blackburn, Laura Gasaway, James Heller, Bruce Kramer, Carolie Mullan, Janetta Paschal, Jayne Sappington, Elizabeth Schneider, and David Shipley for comments on drafts of this article.
b. Performances for Recreation ...................... 881
D. Educational Activities ............................. 881

III. Remedies & Suggested Reforms ................... 884
   A. Obtaining The Permission of the Copyright Owner .... 885
   B. Purchase Comprehensive Licenses .................... 887
   C. Create a Compulsory License ........................ 887
   D. Clarify Fair Use of Audiovisual Works ............. 890
   E. Expand the Educational Exemption ................... 890
   F. Create a Public Library Exemption .................. 891

IV. Conclusion ............................................. 891
Introduction

Libraries, and the librarians who operate and manage them, play a key role in this age of information. Communities, educational institutions, government agencies, and corporations depend on libraries to provide efficiency and economy in serving their information needs. While they may be established for different reasons, depending on the needs of their primary user groups, all libraries share two basic characteristics. First, libraries serve the information and recreation needs of a particular group of people. Second, libraries employ the principle of sharing resources to achieve economy in service. Obviously, there would be no need for libraries if the members of a community could purchase the resources to meet their information needs themselves. However, requiring users to share resources almost inevitably results in instances when two or more people want to use the same resource.

The librarian stands at the tangent point between the collection of limited resources and the users, serving as a gatekeeper, controlling access to the information contained in the library collection. If the members of a community could purchase all of their own information resources, obviously the librarian's role as gatekeeper would not be necessary, and few copyright problems would exist because owners would be compensated through each sale of their intellectual property. Similarly, librarians' copyright concerns would lessen considerably if a library's budget could support the purchase of all the resources needed by its users in advance, and in adequate supply, because copyright owners would again be compensated through the library's purchase. Due to restricted funding in recent years, librarians face a considerable challenge in providing excellent library services within the confines of budgetary limita-

1. An obvious reason for creating a library is the need to store information in a manner that promotes efficient and economical retrieval and use. Other reasons include promoting cultural and intellectual activities, fostering self-improvement, and educating the citizenry. JEAN K. GATES, INTRODUCTION TO LIBRARIANSHIP 5-6, 33-34, 57-59 (3d ed. 1990).

2. Many libraries identify the different groups of their clientele and establish levels of service for each group appropriate to their overall mission. A typical university library, for example, will have one level of service for the faculty members and students of its institution and another level of service for persons not associated with the university. These policies usually concern services such as borrowing materials from the library, receiving assistance in locating information in the collection, requesting the borrowing of resources from other libraries when they are not in the collection and gaining access to information stored in computer databases.

3. Anticipating the information needs of one's clientele is one of the challenges of librarianship. A good librarian selects materials that will help meet the needs of his or her patrons. GATES, supra note 1, at 108.

tions and copyright restrictions. Librarians must therefore balance the rights of the copyright owner with the need of their clientele to gain access to and use of the work.5

The addition of video resources in educational institutions and libraries presents just such a challenge for librarians. In the past two decades, the use of video resources for both instruction6 and recreation7 has increased dramatically, as librarians have discovered the value of adding videocassettes8 and videodiscs9 to their libraries' collections.10 The ease and convenience of collecting and storing work recorded on videocassettes and videodiscs make these formats a popular choice in many libraries. While the size and scope of each collection varies greatly depending on


9. As with videocassettes, several videodisc formats exist, as well as different methods of storing information on the disc. However, one format, the reflective optical videodisc, has established its dominance in the home video market. INFORMATION SYSTEMS CONSULTANTS, INC., VIDEODISC AND OPTICAL DIGITAL DISK TECHNOLOGIES AND THEIR APPLICATIONS IN LIBRARIES 15-31 (1985). See also SAFFADY, supra note 8, at 62-75.

10. In 1988, over 62% of all public libraries had videocassettes or videodiscs in their collections. For libraries serving populations of 25,000 or more, the figure exceeded 85%. Randy Pitman, Video in Libraries 1989: A Review, VIDEO LIBR., Feb. 1990, at 1. Librarians from other types of libraries report that video resources comprise a significant portion of their collections as well. McCormack, supra note 8, at 5; George L. Abbott, Video-Based Information Systems in Academic Library Media Centers, 34 LIBR. TRENDS 151 (1985); Laura N. Gasaway, Audiovisual Material and Copyright in Special Libraries, 74 SPECIAL LIBR. 222 (1983).
the needs and resources of each library, some librarians assert that few libraries can serve their users well without adding some videocassettes or videodiscs to their collections.

The demand for collections of video resources has grown to such an extent that some librarians have written articles and manuals on establishing video collections, and major publishers have developed reference guides and catalogs for locating information on video resources. Librarians in charge of video collections also consult the reviews of new videocassettes and videodiscs that appear regularly in several library pro-

11. An urban public library, for example, may have a large collection containing videocassettes and videodiscs of children's programs, self-help or "how-to" programs, theatrical productions, and popular movies and television programs.

An academic library typically will select only those videocassettes and videodiscs that support the curriculum of its institution. The largest segment of an academic library video collection most likely would be educational programs, though children's materials might be included if the institution has significant course offerings in elementary and secondary education. Similarly, video resources on theatrical productions could also be included to support the curriculum of the drama department.

On the other hand, a special library's video collection is likely to be very specific. A special library will collect only those resources directly relevant to the purpose of the parent organization. Law firm libraries, for example, might collect materials in a particular area of the law in which the firm's members practice extensively. In addition, certain subjects such as trial and appellate advocacy are well-suited to visual presentations, making them particularly appealing.


fessional journals and publishing trade publications.\textsuperscript{15} Videocassettes and videodiscs are now an established part of many library collections, and the effect of these resources on the nature of traditional library operations and services has been studied.\textsuperscript{16}

Because of their susceptibility to damage as well as their popularity, video resources often receive special handling in libraries. Indeed, to protect these resources as well as make them readily available to a large number of users, librarians often encourage patrons to view videocassettes and videodiscs on equipment located in the library. Many libraries have special carrels designed for viewing videocassettes or videodiscs or have special rooms designated for users. Others have in-house transmission systems or film-chain projectors that provide the capability of displaying a video resource at a number of locations in the building. By encouraging use within the library, the librarian can make access easier for others because the resources are never far away.

Requests to view videocassettes and videodiscs in libraries arise in a number of different contexts. Students visiting the library at their educational institution often ask to view programs recommended by their instructors to supplement the material presented in class. Some students miss the presentation of programs in class and come to the library later for "make-up" performances, and still others view programs in connection with research projects. Faculty members also make requests for performances in the library as a part of research projects in which they are engaged. Public librarians also must deal with requests from students and faculty members of area educational institutions for performances related to their research, as well as from members of the general public for self-help education and for recreation. Librarians at corporations, law firms, government agencies, and other institutions must respond to requests for performances in their libraries in conjunction with business meetings and meetings with clients.

These requests raise questions concerning possible copyright infringement as the owners of copyrights in audiovisual works\textsuperscript{17} attempt to protect their rights when librarians provide access to the information

\textsuperscript{15} Library Journal, School Library Journal, Choice, and Booklist, among others, frequently contain reviews of videocassettes.


\textsuperscript{17} The term "audiovisual work" is defined by the Copyright Act of 1976. See infra note 53 and accompanying text.
stored in video formats. Most librarians are unfamiliar with one of the most important rights that a copyright owner has in an audiovisual work such as a videocassette or videodisc—the right to control a public performance of the work. Neither Congress nor the courts have addressed whether viewing a protected videocassette or videodisc in a library constitutes a public performance and, if so, whether the performance is permitted by one of the limitations of a copyright owner's rights or one of the exemptions from infringement. Recent cases provide only part of the answer.

Throughout the library profession, there remains substantial confusion about the application of copyright law principles to performances of audiovisual works. Confusion relating to certain principles of copyright is not limited to librarians, however. Legal writers, publishers, practitioners, and others are also baffled. As a result, librarians receive conflicting instruction and advice from legal authorities and copyright owners, and they develop policies for viewing audiovisual works that


20. A copyright owner of an audiovisual work, such as a program stored on a videocassette or videodisc, has the right to license (or to prohibit by refusing to license) a public performance (viewing) of the program. 17 U.S.C. § 106(4). See infra notes 61-145 and accompanying text.

21. See infra notes 146-221 and accompanying text.

22. See infra notes 86-145 and accompanying text.

23. See Sally Mason, Copyright or Wrong: The Public Performance Dilemma, Wilson Libr. Bull., Apr. 1992, at 76; Troost, supranote 13, at 211-12. The use of protected videocassettes and videodiscs currently ranks among the most widely debated topics in the library profession. James C. Scholtz, Video Policies and Procedures for Libraries 149 (1991). Because many of a librarian's daily responsibilities deal with works protected by copyright, one might assume that librarians as a group generally possess a good understanding of copyright law. The current confusion in the profession concerning audiovisual works provides ample evidence to the contrary. If a particular librarian is knowledgeable about copyright, he or she most likely gained that understanding through continuing education or independent study. Library schools generally do a poor job of teaching principles of copyright. Ben H. Weil, Copyright from the Perspective of Information Users and Their Intermediaries. Especially Librarians, Serials Libr., Nos. 3/4, 1988, at 29.


vary widely among libraries. Further, librarians often fall prey to the exaggerated claims of copyright owners. To avoid claims of infringement, many either restrict audiovisual services unnecessarily or pay license fees for performances that are permissible under the fair use limitation or the educational exemption. Librarians who restrict services deny benefits to their library users that they could legitimately provide, while those who pay unnecessary license fees waste precious budget resources.

This article will discuss the application of copyright law to the viewing of commercially-prepared videocassettes and videodiscs in librarians.


27. Heller, supra note 25, at 316 n.8.
28. Films, Incorporated and the Motion Picture Licensing Corporation market licenses to libraries and educational institutions. See infra notes 323-324 and accompanying text. On a single title basis, the fees for public performance rights for quality videocassettes can range from $9.95 to $800.00. The fees for most home videos usually range from $14.95 to $89.95. Scholtz, supra note 23, at 154.
29. See infra notes 238-296 and accompanying text.
30. See infra notes 297-312 and accompanying text.
31. In the case of publicly-funded libraries, the budget resources wasted for unneeded licenses for performances most likely come largely from taxpayers, raising an interesting question of liability for misuse of public funds. Would the library director of a state university be liable if she executed a licensing agreement that was unnecessary, because all of the performances permitted in the library were protected by the fair use limitation of 17 U.S.C. § 107 or the educational exemption of 17 U.S.C. § 110(1)? It would seem likely that a good faith defense to the charge of misuse of funds should be available, particularly given the unsettled state of the law as it applies to performances of audiovisual works in libraries. This is yet another statement of the need for clarification in this area of copyright law.
32. The copyright implications of other types of videocassettes and videodiscs as well as related media will be left for other writers. See, e.g., Jerome K. Miller, Copyright Considerations in the Duplication, Performance, and Transmission of Television Programs in Educational Institutions, 10 SCH. LIBR. MEDIA Q. 357 (1982) (video recordings of commercially broadcast programs); Stephen A. Shaiman & Howard B. Rein, CD-ROM and Fair Use: A Lawyer Looks at the Copyright Law, LASERDISK PROF., Jan. 1989, at 27.
The law will be presented through an examination of the relevant statutory provisions and case law in the context of several typical library scenarios involving the viewing of videocassettes and videodiscs in academic, public, and special libraries. Additionally, some possible interpretations of the problems raised and some remedies will be discussed, including suggestions for statutory reform to promote important societal purposes while still protecting the interests of the copyright owner.

I

Copyright Law

A. Brief History

Copyright protection in the United States began in colonial times, and the drafters of the Constitution recognized the value of establishing legal protection for copyright. Congress may enact legislation "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 first Congress enacted a copyright statute, and, with each revision, Congress has attempted to balance the rights of the copyright owners in their works and the advancement of the public good through reasonable access to those works.

33. Generally, all questions of copyright raised by videocassettes apply equally to videodiscs. However, the reverse is not always true since videodiscs can store and reproduce quality sound tracks. Many producers capitalize on that capability by producing videodiscs of performances by popular musical artists. These musical videodiscs challenge the classification scheme of § 102 of the Copyright Act, because they possess characteristics of both audiovisual works and sound recordings. Since the Copyright Act grants different rights to the copyright owner depending on the classification of the work, the rights will differ significantly if a work is classified as an audiovisual work or as a sound recording. See Rena B. Denham, The Problem of Musical Videodiscs: The Need for Performance Rights in Sound Recordings, 16 U.S.F. L. REV. 133 (1981). Discussion of videodiscs in this article will be limited to those classified as audiovisual works.

34. For purpose of style, the term "videocassette" refers to both videocassetes and videodiscs.


38. 1 PAUL GOLDSTEIN, COPYRIGHT § 1.1 (1989). Some writers argue that historical and current interpretations of copyright law focus too much on the latter portion of the Constitutional authorization—the protection of the copyright owner—to the exclusion of the former portion that states the purpose of copyright protection—to promote the progress of science and useful arts. Proper interpretation requires consideration of the users' rights in addition to those of the copyright owner and the entrepreneur who bring the copyrighted material to the marketplace. PATTERSON & LINDBERG, supra note 35, at 122.
From the enactment of the first copyright statute through the adoption of the Copyright Act of 1909 (1909 Act), the history of major revision of copyright basically followed a forty-year cycle. The period immediately before and after the passage of the 1909 Act saw tremendous advances in the technology of communications and information. The 1909 Act became law while the technologies of motion picture and sound recording were in their infancy and before the development of photocopiers, radio, television, and electronic computers. As the use of technologies spread, problems of statutory interpretation arose. The difficulties of applying the 1909 Act to new technology led to serious attempts at copyright revision.

In 1955, the Register of Copyrights (Register), the head administrator of the United States Copyright Office, began a series of studies to examine all aspects of the copyright statute and its deficiencies. The Register invited commentary from representatives of the industries and institutions likely to be affected by suggested revisions. Thus began a thorough, lengthy process of study that resulted in the introduction of many bills and the publication of numerous hearings and other documents.

---

41. Xerography was developed over fifty years ago, but the first convenient copier was introduced in 1959. Randall Coyne, Rights of Reproduction and the Provision of Library Services, 13 U. ARK. LITTLE ROCK L.J. 485, 485 (1991).
ments, culminating in the passage of the Copyright Act of 1976 (1976 Act or the Act). Although amended frequently, the 1976 Act governs most rights of copyright owners today.

With such a massive historical record, one might assume that courts find it easy to determine legislative intent when applying particular sections of the 1976 Act. Despite the availability of substantial research aids, several courts have avoided looking closely at the 1976 Act in favor of applying legal principles developed under the 1909 Act when deciding copyright disputes. In some respects, Congress did intend courts to consider principles decided in earlier case law. For example, in the important area of fair use, the legislative history of the Act indicates clearly that Congress intended to codify the doctrine as it existed in 1976, so consideration of prior case law in fair use should be expected.

46. Reprints of documents prepared by the Congressional Register during the revision process and hearings conducted, as well as proposed bills and legislative reports, are readily available in a compiled legislative history. OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 1976). A detailed index to the legislative history documents makes thorough research easier and is available in THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976 (Alan Latman & James F. Lightstone eds., 1981).


49. See supra note 46.

50. Many courts have concluded, with little analysis, that the new statute codified the case law decided under the old one. Others have ignored the provisions of the 1976 Act, and referred, without explanation, only to prior cases. Still others, often without explicit reliance on prior case law, have used common law reasoning to reintroduce into the 1976 Act legal doctrine it purports to leave behind.


B. The Copyright Act of 1976

1. Section 102—Works Eligible for Protection

The Copyright Act of 1976 protects: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." Videocassettes fall into the class of "motion pictures and other audiovisual works" under the Act.

The drafters of the 1976 Act made it easy to protect works in new media. The definitions of the terms "audiovisual works" and "device or machine" and the legislative history indicate the intention that new forms of authorship, such as videocassettes, be protected without the necessity of a specific amendment, even if the new forms were not in widespread use when the Act was passed.


53. "'Motion pictures' are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." 17 U.S.C. § 101. Audiovisual works are defined as works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied. Id. The category "motion pictures and audiovisual works," was modified substantially through the copyright statute revision process. One of the first drafts of a revision bill in the process that culminated in the 1976 Act identified the class as "[m]otion pictures, including accompanying sound." House Comm. on the Judiciary, 88th Cong., 2d Sess., Copyright Law Revision, Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft 1 (Comm. Print 1964), reprinted in 3 Omnibus Copyright Legislative History (George S. Grossman ed., 1976). The drafters based this section on an amendment to the 1909 Act that added motion pictures as a class of works eligible for copyright protection. Act of August 24, 1912, ch. 356, § 5, 37 Stat. 488 (repealed 1978).

Educational media producers requested that the motion picture class be expanded during the revision process. The producers argued that their products, chiefly sets of photographic slides, filmstrips, and other media designed for projection to groups, shared characteristics with motion pictures, since these works are produced in relatively small quantities for viewing by groups of people. H.R. Rep. No. 2237, 89th Cong., 2d Sess. 47-48 (1966), reprinted in 11 Omnibus Copyright Revision Legislative History (George S. Grossman ed., 1976). The Committee agreed and expanded the definition to include "audiovisual works." All subsequent drafts of bills during the revision process, including those of the 1976 Act, contained the new class.


55. "A 'device,' 'machine,' or 'process' is one now known or later developed." 17 U.S.C. § 101.


57. Id. at 5664.
2. Section 106—Rights of Copyright Owners

The Act grants all copyright owners the exclusive right to reproduce their work, to prepare derivative works, and to distribute the work to the public for sale, rental, lease or lending. While a copyright owner may exercise these rights personally, the Act also specifically empowers an owner to license others to execute them. Typically, persons owning the copyright in motion pictures or other programs produced commercially and distributed on videocassettes have licensed others to prepare copies and distribute them for sale or rental. Further, despite the statutory language, the “exclusive” rights granted to the copyright owner are subject to several limitations and exemptions.

In addition to the general rights granted to all copyright owners, the 1976 Act provides additional exclusive rights specific to the class of the copyrighted work. The copyright owner may exercise these additional rights subject to the same limitations and exemptions as the general rights of ownership. Copyright owners of audiovisual works have two additional exclusive rights—to perform the work publicly and to display the work publicly. Subject only to limited exemptions found in later sections of the Act discussed below, the copyright owner controls when and how an audiovisual work may be performed or displayed. It is important to note that, as with the other rights in § 106, a copyright owner may license another to perform or exercise the rights.

The general rights granted to all copyright owners, as well as the rights of public performance and public display specific to the copyright owners of audiovisual works, exist independently of the physical object. Each of the rights granted by § 106 of the Act is separate and distinct from the others. For example, absent an agreement to the contrary, the copyright owner of a work recorded on videocassette does not transfer the right to perform the work publicly when he or she sells a copy of the

59. Id.
60. The bill’s approach is to set forth the copyright owner’s exclusive rights in broad terms in § 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in § 106 is made “subject to sections 107 through 118,” and must be read in conjunction with those provisions. H.R. REP. NO. 1476, supra note 51, reprinted in 1976 U.S.C.C.A.N. at 5674. See infra notes 146-148 and accompanying text.
63. See infra notes 146-154 and accompanying text.
64. All rights of copyright ownership exist independently of a copy of the work, and, absent an agreement to the contrary, no copyright ownership rights are transferred by the sale of a copy of a protected work. 17 U.S.C. § 201. See Patterson & Lindberg, supra note 35, at 13-14.
work. Subject only to the limitations of the statute or an express agreement granting the rights to the library, librarians should expect that the copyright owner retains the rights of public performance and public display to all videocassettes that a library purchases or rents.

The right to perform a work publicly has a stronger effect on a library's operation than does the right to display a work publicly. The 1976 Act defines "perform" in the case of an audiovisual work as "to show its images in any sequence or to make the sounds accompanying it audible." "Performing" an audiovisual work is therefore merely the process of viewing the work or playing its soundtrack. While single images from an audiovisual work might occasionally be displayed, the chief purpose of such a work is for a performance. As such, the right to control public performances of an audiovisual work is paramount to the right to control public displays of single images from it. Indeed, the right of public performance has been described as the most important of all of the rights of a copyright owner of an audiovisual work, and courts protect the performance rights of a copyright owner by declining to hold that a license for performances has been created in the absence of an express grant.

For copyright owners of motion pictures, defining a public performance was one of the most important issues considered during the copyright law revision process leading to passage of the 1976 Act, largely because of Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt. Wyatt involved the screening of a motion picture at a private yacht club. The court held that a motion picture should be considered a drama for the purposes of determining the rights of the copyright owner under the 1909 Act. One of those rights was the exclusive right to perform the work

---

66. See infra notes 146-154 and accompanying text.
67. See infra notes 319-324 and accompanying text.
69. The right to display an audiovisual work concerns the public exhibition of still images from the work. In the case of an audiovisual work, still pictures from scenes of the work would fall under this right. Clearly, the copyright owner of an audiovisual work would find the right of public performance much more important.
71. See, e.g., Cohen v. Paramount Pictures Corp., 845 F.2d 851 (9th Cir. 1988) (right to exhibit film "by means of television" excludes right to distribute videocassettes for home viewing because videocassette recorders for home use were not invented or known when license was executed).
72. 21 COPYRIGHT OFF. BULL. 203 (D. Md. 1932).
73. Id.
74. Id. at 204.
publicly. The court considered whether the screening of a motion picture at a private club constituted a public performance. The court analogized the yacht club to a private home. Since entry to both requires permission, the court held that the performance was not public. In what could be considered a harbinger of change, the court stated, "We cannot measure the question [of deciding a public performance] by numbers of persons."

The motion picture industry reacted with concern to the Wyatt case and the revisionists considered the public performance issue one of the most important from the viewpoint of copyright owners of audiovisual works. In response to those concerns, the drafters of the 1976 Act provided that copyright owners of motion pictures and other audiovisual works could control the public performances of their works. The drafters also defined the term "public performance" in a manner that involves a "numbers of persons" approach with which the Wyatt court would likely have disagreed. The definition specifies situations in which performances of audiovisual works are characterized as public and therefore under the control of the copyright owner:

To perform . . . a work "publicly" means—(1) 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; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

The first part of the definition is referred to as the "public place clause," and the second as the "transmit clause." A particular performance may be deemed public when either clause is fulfilled. Clearly, the draft-
ers intended to avoid another Wyatt-type ruling by including the second portion of the public place clause.\textsuperscript{84} Unfortunately, resolving other questions concerning public performances proved difficult,\textsuperscript{85} and so some elements of the definition were left unclear.

Courts and commentators have considered the question of public performances of audiovisual works in a variety of settings.\textsuperscript{86} Several cases involving situations analogous to those found in many libraries provide guidance for interpreting the term “public performance” in a library context. \textit{Columbia Pictures Industries v. Redd Horne, Inc.}\textsuperscript{87} and \textit{Columbia Pictures Industries v. Aveco, Inc.}\textsuperscript{88} both involved video “showcase” operations in which customers paid to watch movies in small viewing rooms,\textsuperscript{89} similar to the rooms that many libraries have for library users to view videocassettes. In \textit{Redd Horne}, customers selected movies to watch in a private viewing room in which a video monitor displayed the image from equipment located behind the counter and operated by a store clerk.\textsuperscript{90} The court found that viewing a videocassette under these circumstances constituted a public performance as defined by the Act. The court reasoned that the video store was no different from a traditional movie theater, allowing “[a]ny member of the public [to view] a motion picture by paying the appropriate fee.”\textsuperscript{91}


\textsuperscript{87} 749 F.2d 154 (3d Cir. 1984).

\textsuperscript{88} 800 F.2d 59 (3d Cir. 1986).

\textsuperscript{89} Redd Horne, 749 F.2d at 157; Aveco, 800 F.2d at 61.

\textsuperscript{90} Redd Horne, 749 F.2d at 157.

\textsuperscript{91} Id. at 159.
The court in *Redd Home* was strongly influenced by scholarly analysis. Professor Nimmer, in a treatise published prior to *Redd Home*, foresaw a video “showcase” operation and opined that performances of audiovisual works under such conditions would be “public.”92 The court followed Nimmer’s reasoning closely in its finding that public performances had occurred.93 Further, the court rejected the suggestion that a private viewing room transforms the performance into one that is non-public, stating that “[s]imply because the cassettes can be viewed in private does not mitigate the essential fact that [the store] is unquestionably open to the public.”94 Thus, if the general location for viewing is open to the public, the size of the theater or viewing room is irrelevant.95

The video store also raised a defense of the first sale doctrine,96 but the court disposed of that theory quickly. The court conceded that the first sale doctrine limits the copyright owner from controlling a future transfer of a work, but concluded that the doctrine does not operate as a forfeiture or waiver of the copyright owner’s exclusive rights under § 106.97 As such, the right to control public performances of an audiovisual work rests with the copyright owner, not the owner of the physical copy.98 Further, the court found that there had been no future transfer because the store maintained complete control over the videocassettes at all times.99 No videocassette ever left the store or was sold,100 so the first sale doctrine was irrelevant.

*Columbia Pictures Industries v. Aveco Inc.*101 presented a situation substantially similar to *Redd Home*, except that the customer in that case exercised total control of the viewing process, whereas in *Redd Home*, the video machine was operated by a store clerk. In an attempt to distinguish *Redd Home*, the defendants argued that the performances of

---

93. *Redd Home*, 749 F.2d at 159.
94. *Id.*
95. Whether the screen may be viewed without obstruction is also of no consequence in determining if a performance is public. See *Columbia Pictures Indus. v. Sandrow*, No. CIV.A. 87-3279, 1988 WL 28249, at *2-*3 (E.D. Pa. March 23, 1988).
96. 17 U.S.C. § 109 (1988). The first sale doctrine permits an owner of a lawfully made copy of a protected work to sell or otherwise dispose of the copy. The doctrine serves as a check on the power of the copyright owner, who has the right to distribute or sell copies of a protected work, to continue controlling the sales of a particular copy. Once the copyright owner sells a copy of the work, the owner of the physical copy may then sell or otherwise dispose of the copy. Applied to libraries, the first sale doctrine permits the circulation of videocassettes and videodiscs purchased by the library to library users.
97. *Redd Home*, 749 F.2d at 159-60.
98. *Id.* at 160.
99. *Id.*
100. *Id.*
101. 800 F.2d 59, 61 (3d Cir. 1986).
videocassettes in their stores were not public performances because the videocassette players were located in private viewing rooms, rather than in an open area of the store. The court rejected that reasoning by noting that the holding in *Redd Horne* turned not on the location of the videocassette players, but on the availability of the viewing rooms and cassettes to any member of the public. Thus, *Redd Horne* was directly applicable.

In an attempt to overcome the *Redd Horne* court's finding that the first sale doctrine was irrelevant, the defendants asserted that their customers could rent a videocassette and view it in one of the private rooms in the store or, unlike *Redd Horne*, view it at home. Again the court rejected the first sale defense. The doctrine, codified in § 109, grants purchasers of a copy of a work the right to transfer physical ownership of that copy. Copyright owners do not waive or forfeit their other rights under § 106 by selling a copy of a work.

The following year, the Ninth Circuit, in *Columbia Pictures Industries v. Professional Real Estate Investors, Inc.* held that performances of copyrighted videodiscs in hotel rooms controlled solely by the occupants of the room were not public performances. In that case, a hotel rented videodiscs to its guests, who played them using equipment located in their rooms. The court distinguished *Redd Horne* and *Aveco* by recognizing that hotel rooms give such a substantial degree of privacy to their occupants that they can be protected against unreasonable search and seizure. Thus, while a hotel may be generally open to the public, a rented hotel room is not a public place. As such, performances of a videodisc within a hotel room are not public.

In *Video Views, Inc. v. Studio 21, Ltd.*, a case involving unlicensed performances of videocassettes in private viewing booths, the defendants argued that *Professional Real Estate Investors* had changed the definition of a public performance. The Seventh Circuit disagreed and reaf-

102. *Id.* at 63.
103. *Id.*
105. *Aveco*, 800 F.2d at 61.
106. *Id.* at 64.
107. 866 F.2d 278 (9th Cir. 1989).
108. *Id.* at 279.
109. *Id.* at 281.
110. See *id.* (citing *Stoner v. California*, 376 U.S. 483, 490 (1964) and United States v. Winsor, 846 F.2d 1569 (9th Cir. 1988) (en banc)).
111. *Professional Real Estate Investors*, 866 F.2d at 281.
112. *Id.*
113. 925 F.2d 1010 (7th Cir. 1991).
114. *Id.* at 1019-20.
firmed the reasoning of *Redd Horne* and *Aveco*.115 "The proper inquiry is directed to the nature of the place in which the private video booths are located, and whether it is a place where the public is openly invited."116 Although the court indicated that *Professional Real Estate Investors* had not affected *Redd Horne* and *Aveco*, it declined to follow the former case to the extent that it conflicted with the latter cases.117

*On Command Video Corp. v. Columbia Pictures Industries,*118 the most recent case dealing with the public performance of video programs, involved an electronic delivery system of video signals to hotel rooms. The signals originated from videocassette players located in a hotel equipment room.119 Guests at the hotel operated the system from their rooms, choosing a selection from a menu screen. Only the occupants of one room could view a particular videocassette program at a time.120

In considering whether the transmission system used by the hotel infringed the owner's copyright, the court examined both clauses of the definition of a public performance.121 Applying *Professional Real Estate Investors*, the court reaffirmed that viewing videocassette programs in hotel rooms did not constitute a public performance because a rented hotel room is not a public place.122 However, the court found that the electronic delivery system used by the hotel constituted a means of public performance within the meaning of the second clause of the Act's definition, known as the "transmit clause."123 Under the definition, a public performance occurs if one

transmit[s] or otherwise communicate[s] a performance or display of the work to . . . the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.124

The court found that the hotel's delivery system constituted a transmission under the first part of the clause because the signals were "communicated" by means of a "device or process."125 Thus, if the hotel's

115. *Id.* at 1020.
116. *Id.*
117. *Id.*
119. *Id.* at 788.
120. *Id.*
123. *Id.* at 789-90.
system communicated a protected work to the "public," the transmission would fulfill the definition of public performance. The court, adopting Redd Horne and other cases involving television transmission, held that hotel guests are members of the "public," even though they are not watching the video in a "public place." The court stated, "[t]he non-public nature of the place of performance has no bearing on whether or not those who enjoy the performance constitute 'the public' under the transmit clause." Therefore, playing the videotape was deemed a public performance.

One unanswered question in the area of defining public performances concerns interpretation of the term "substantial number" under the "public place" clause. The Act fails to define the term, and the legislative history reveals little, except to indicate that performances of a work at routine business meetings would not be public performances because the number of persons viewing them would not comprise a "substantial number."

One court has interpreted the "substantial number" portion of the definition of public performance with regard to video transmissions. In National Football League v. McBee & Bruno's, Inc., the League (NFL) brought an action for copyright infringement against tavern owners in the St. Louis area who used satellite dishes to capture televised coverage of St. Louis Cardinals games that were "blacked out" under NFL policy. The court reversed a permanent injunction against one of the defendants who received the transmission of a game but showed it only to three other people, all of them his friends, on a day when his tavern was closed for business. The court compared this situation to one in which someone invites home several friends to watch a game using a satellite dish. "It is conceivable that the owner and a few friends may gather again on an occasional Sunday and use the satellite dish, but even if they do . . . no injury will result to plaintiffs different from the arguable injury they sustain from the few satellite dishes installed at private

126. Id. at 790 (also citing ESPN, Inc. v. Edinburg Community Hotel, Inc., 735 F. Supp. 1334 (S.D. Tex. 1986) (transmission of signals from satellite dish to hotel rooms constitutes public performance)).
128. Id.
129. Id.
132. The definition reads: "To perform or display a work 'publicly' means—(1) to perform or display it . . . at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered . . . ." 17 U.S.C. § 101.
133. 792 F.2d 726 (8th Cir. 1986).
134. Id. at 733.
The small number of people involved convinced the court that there was not public performance. Thus, a “substantial number,” as required by the Act, seems to be more than four persons.

On the other hand, twenty-one persons and their guests have been held to be a “substantial number,” at least in regards to musical performances. In *Fermata International Melodies, Inc. v. Champions Golf Club, Inc.*, twenty-one members of a country club and their guests heard unlicensed performances of musical compositions. The court relied heavily on what legislative history of the Act was available to determine that twenty-one members plus guests satisfied the “substantial number” requirement. As such, the performances were deemed public and subject to the copyright owners’ control.

One other authority advised using a similar threshold number to determine whether a “substantial number of persons” exists. When asked for guidance in determining the number of institutionalized juveniles and adults who could view a videocassette at one time, the Louisiana Attorney General advised that occasional performances to 20-30 incarcerated persons would not constitute public performances. Performances of audiovisual works to prison populations would not be “public” under the first part of the definition because prisons cannot be considered places generally open to the public. Depending on the size of the group, however, a performance of a videocassette to a group of prisoners could be “public” by satisfying the “substantial number” requirement.

---

135. *Id.*
138. *Id.* at 1260. The published record does not indicate the size of the entire audience. Presumably, at least some family members and their guests were present in addition to the twenty-one club members.
139. *Id.*
140. *Id.*
142. “To perform or display a work ‘publicly’ means—(1) to perform or display it at a place open to the public . . . .” 17 U.S.C. § 101.
143. “To perform or display a work ‘publicly’ means—(1) to perform or display it . . . at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered . . . .” *Id.* Obviously, most prisons are places where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered.
McBee & Bruno's and Fermata International Melodies, as well as the Louisiana Attorney General opinion, provide necessary guidance as to what constitutes a public performance, and this general 20-30 person threshold seems to fit within the spirit of the Act. Prior to these cases, library administrators had little on which to rely in establishing policies and operating procedures, resulting in confusion on the part of librarians and differences in policies among libraries concerning on-site performances of videocassettes.

3. Limitations on the Rights of Copyright Owners, Exemptions from Infringement, and Compulsory Licenses

The exclusive rights granted to copyright owners under § 106 of the Copyright Act are not absolute. Sections 107 through 119 impose limitations on the exclusive rights contained in § 106, provide exemptions from infringement for the use of works in certain circumstances, and grant compulsory licenses for the use of several types of protected works. These limitations, exemptions, and compulsory licenses embody congressional attempts to balance the need to protect the copyright owners' investments with the need to provide access to these works to foster certain societal objectives, such as supporting an effective, low-cost educational system. One must consider the effects of sections 107 through 119 in conjunction with § 106 to determine the rights of the copyright owner and the user in a particular situation.

Limitations on the rights of copyright owners designate certain uses of works that are beyond the copyright owners' control, and several of the limitations provide "safe harbors" for libraries. For example, many libraries use the limitation found in § 108 of the Act to make copies of protected works, including copies of entire works lost, damaged, or stolen if replacements are not available at fair prices. Limitations vary in their coverage, just as a copyright owner's rights vary according to the format of the work. Some, such as § 108, cannot be applied to audiovisual works.

144. One attorney general recommended that prison officials stop showing protected videocassettes to inmates because no clear guidelines existed to define a public performance. Utah Op. Att'y. Gen. No. 82-03 (Sept. 22, 1982), available in WESTLAW, AG database.
147. See 1 Goldstein, supra note 38, § 1.2.3.1. See also LEON E. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 8-17 (1977).
150. Libraries may not use § 108 to justify copying audiovisual works other than those dealing with news. See 17 U.S.C. § 108(h).
Exemptions differ somewhat from limitations in that they are uses that normally would be protected but which are declared exempt from copyright control because of policy considerations. That is, exemptions serve to further certain activities that Congress has found to be in the public interest. Without these specific exemptions, many public performances would be subject to the copyright owner's control under §106(4).

Compulsory licenses are rarely available for use in library situations. These licenses concern the use of works in very narrow areas, and they reflect Congress' intention to allow use of protected works for a statutorily controlled fee in two situations: (1) where the costs associated with negotiating individual licenses would exceed the benefit gained and (2) where some social purpose can be furthered. Compulsory licenses differ significantly from limitations and exemptions in that the license does not serve as a justification for conduct that would otherwise be an infringement of copyright. A compulsory license exists to insure that the copyright owner is compensated for use of the work. The 1976 Act, as amended, established five compulsory licenses, none of which applies to the performance of videocassettes in libraries.

Of the limitations, exemptions, and compulsory licenses found in the Act, those most applicable to performances of videocassettes in libraries are the fair use limitation in §107 and the educational exemption in §110(1).

a. Section 107—Fair Use Limitation

The fair use limitation on copyright owners' rights evolved from the English "fair abridgement doctrine" that permitted an author to abridge another author's work without infringing the copyright. American courts developed the fair use doctrine through a series of cases, leading to Folsom v. Marsh. In Folsom, Justice Story established the more restrictive fair use doctrine as a substitute for the English doctrine. In

151. SELTZER, supra note 147, at 49.
152. For example, if certain conditions are satisfied, exemptions apply to performances of works occurring in a classroom, in an educational institution's regular broadcast programs, during church services, at charitable events, in small stores, at county and state agricultural fairs, in music stores, for persons with visual or hearing disabilities, and by veterans' or fraternal organizations. 17 U.S.C. §110 (1988). Performances in academic libraries often fall under the educational exemption in §110(1). See infra notes 297-312 and accompanying text.
153. 1 GOLDSMITH, supra note 38, §1.2.3.1.
154. See infra notes 328-332 and accompanying text.
155. PATTERSON & LINDBERG, supra note 35, at 67.
156. PATRY, supra note 51, at 18.
157. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).
158. Id.
the copyright revision leading to the 1976 Act, the fair use doctrine was incorporated into the draft of the statute without a clear definition of the concept. The drafters attempted to codify the existing case law, while still providing flexibility. The legislative history indicates clearly that the drafters recognized that fair use “is an equitable rule of reason,” incapable of exact definition. As such, each case “must be decided on its own facts.”

Section 107 allows fair use of a protected work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”

In determining whether a particular use is a fair use, courts generally consider the four factors in the 1976 Act:


163. Id.


166. “[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, . . . or researched is not an infringement of copyright.” 17 U.S.C. § 107 (emphasis added). Further, “[t]he terms ‘including’ and ‘such as’ are illustrative and not limitative.” 17 U.S.C. § 101.

167. Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1178 (5th Cir. 1980) (displaying a copyrighted magazine in television advertising for a competing magazine found to be fair use).

168. The language of § 107 regarding the consideration of the enumerated factors seems to indicate that the statute requires that those factors be addressed. The section states “the factors to be considered shall include . . . .” 17 U.S.C. § 107 (emphasis added). Some writers do not believe that courts must consider the four factors listed. Sigmund Timberg, A Modernized
(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.169

The language of the section here, too, is inclusive rather than exclusive, indicating that courts may consider other factors.170 Despite acknowledgment of this option,171 courts typically focus only on those factors enumerated in the statute.172

The question of whether the rights of a copyright owner in an audiovisual work may be limited by fair use has not received extensive consideration. The Register of Copyright made fleeting references to the fair use of audiovisual works in her testimony during consideration of the 1976 Act, but failed to describe in any detail the circumstances under which she thought fair use could be made of audiovisual works.173

The leading case concerning fair use and videocassettes is Sony Corp. of America v. Universal City Studios, Inc.174 The case dealt specifically with the recording of copyrighted programs broadcast on commercial television and whether the manufacturers of videocassette recorders should be held liable if consumers infringed copyrights by using the recorders. The Supreme Court considered each of the four factors of § 107


170. "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 . . ." 17 U.S.C. § 107 (emphasis added). See PATRY, supra note 51, at 362-63.

171. Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992) ("The section provides an illustrative—but not exhaustive—list of factors for determining when a use is 'fair.'").

172. Triangle Publications Inc., v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 n.10 (5th Cir. 1980) ("[S]ince Congress articulated these four factors and since they are the most important in the pre-1976 Act cases, we believe that normally these four factors would govern the analysis [in determining fair use]."). Triangle Publications ironically expands the purpose of fair use by extending the doctrine judicially to include use of reproductions appearing in comparative advertising, while taking a narrow view of the factors to consider in determining fair use. Commentators disagree over the need for courts to consider additional factors. Scott M. Martin, Photocopying and the Doctrine of Fair Use: The Duplication of Error, 39 J. COPYRIGHT SOC'Y 345, 393-95 (1992) (discouraging the invention of "silly new factors"); Leval, supra note 24, at 1125-30 (rejecting good faith, artistic integrity and privacy as additional factors); Lloyd L. Weinreb, Fair's Fair: A Comment on the Fair Use Doctrine, 103 HARV. L. REV. 1137, 1150-53 (1990) (suggesting general fairness as an additional factor).


to reach its conclusion that fair use protected home videotaping of copyrighted programs.

With the first factor, the purpose and character of use, the Court found that the user's noncommercial, nonprofit activity supported a finding of fair use. The Court considered the second factor, the nature of the copyrighted work, in conjunction with the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The purported infringement involved television programs that were broadcast on commercial stations and were available for viewing to anyone with a television set. While copying an entire work had consistently been held to be beyond fair use, the Court viewed as a countervailing factor the fact that persons videotaping programs for home use could have viewed the programs free of charge initially. Thus, despite the fact that the entire programs were copied, the Court found that the second and third factors favored fair use.

The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, is often viewed as the most important in determining fair use. The Court in Sony Corp. found that the plaintiffs failed to show any significant loss as a result of home-videotaping. In fact, the Court recognized that time-shifting, the act of recording a video program during one time period and viewing it during another, actually increased the audience for a particular program, while posing no significant threat to the rights of the copyright owner. The effect of the use upon the potential market thus was not sufficiently detrimental to warrant a finding that home-taping was not fair use. Considering the four factors together, the Court in Sony Corp. held that recording at

---

175. Id. at 448-50.
177. Id. at 449-50; Sony Corp., 464 U.S. at 449-50.
178. One writer suggests that Sony Corp. would have been decided differently if performances of entire audiovisual works were presumptively infringing. Heller, supra note 25, at 323. However, the Supreme Court never fully considered the question of an infringement of public performance rights in Sony Corp. Instead, the Court affirmed the District Court's determination that the copying of protected works complained of by the copyright owners was for private home use. See Sony Corp., 464 U.S. at 449. Private home performances normally fail to satisfy the definition of a public performance under § 101 of the Act, so the public performance right of the copyright owner is not infringed. Since the performances in Sony Corp. were not public, the Court's holding would not have been affected if performances of entire audiovisual works were presumptively infringing.
181. Id. at 454.
182. Id. at 451-55.
home for noncommercial, nonprofit use constituted fair use. The analysis of the factors relates to the consideration of fair use in viewing videocassettes in libraries, as explained below.

Another important case interpreting fair use with potential application to situations involving performances of videocassettes is Harper & Row, Publishers, Inc. v. Nation Enterprises. This case concerned publication by The Nation magazine of 300 words from a manuscript of over 200,000 words written by former President Gerald Ford. Time magazine had purchased exclusive rights to publish excerpts of the manuscript and was preparing to publish an article of some 7,500 words, when an undisclosed source brought a purloined copy of the manuscript to the editor of The Nation. Recognizing the public interest in the manuscript, the editor of The Nation published a 2,250-word article using 300 words directly from the manuscript. The article in The Nation appeared before Time magazine's planned publication, and Time canceled its article and refused to pay the amount remaining according to its contract with Harper & Row. The Supreme Court determined that this use was not a fair use. In considering the third of the statutory factors for determining fair use, the Court recognized that the number of words used from the manuscript was small, but that the portions used were "among the most powerful passages." The Court held that the qualitative nature of the passages must be considered in evaluating applicability of a fair use limitation, regardless of the total amount of material used in proportion to the original work.

A third fair use case has possible application to performances of videocassettes in libraries, particularly concerning the fourth statutory factor—the effect on the market. Random House, Inc. v. Salinger concerned a fair use claim to portions of unpublished letters written by the famous and reclusive author, J.D. Salinger. Salinger filed suit to prevent the use of his letters in an unauthorized biography. Salinger had no plans to publish the letters himself, but the Second Circuit held that his right to change his mind must be protected. Thus, the court protected a potential market, not one currently established or even foreseeable.

184. Id. at 579 (Brennan, J., dissenting).
185. Id.
186. Id.
187. Id.
188. Id.
189. Id.
190. 811 F.2d 90 (2d Cir. 1987), opinion supplemented and reh'g denied, 818 F.2d 252 (2d Cir. 1987), cert. denied, 484 U.S. 890 (1987).
191. Id. at 99.
This principle has possible relevance when attempting to establish the appropriate market for analysis of fair use claims for performances of videocassettes. Video technologies continue to develop so rapidly that the appropriate market for videocassettes may not always be clear. If courts apply the reasoning in *Salinger* broadly to protect potential markets for videocassettes, many performances in libraries could not be characterized as fair use.

An important case involving the application of fair use in library operations was *Williams & Wilkins Co. v. United States.*\(^{192}\) The plaintiff, a publisher of several medical professional journals, complained that the National Institutes of Health library and the National Library of Medicine infringed its copyright by copying articles from the journals and distributing them free of charge to individuals and other libraries.\(^{193}\) The court held that the photocopy services offered by the libraries fell within fair use.\(^{194}\) In reaching its conclusion, the court considered the educational purpose of the services and the nonprofit nature of the operations, as well as the fact that the copies were made for research and scientific use and not for sale or further distribution.\(^{195}\)

The doctrine of fair use has received significant attention from commentators recently, particularly in the wake of *Sony Corp.* and *Salinger.*\(^{196}\) Fair use has been called the most discussed but least understood

\(^{192}\) 487 F.2d 1345 (Ct. Cl. 1973), aff'd per curiam by an equally divided court, 420 U.S. 376 (1975) (Blackmun, J., not participating).

\(^{193}\) Id. at 1346-49.

\(^{194}\) Id. at 1362.

\(^{195}\) Id. at 1354.

of the limitations on a copyright owner’s rights, and at least one author admits that judges have difficulty applying the fair use doctrine. Much of the trouble may lie in its origins as an equitable rule. Fair use has considerations of fairness not directly related to the statutory purpose. Because of the confusion, scholars have proposed a number of general principles to help identify instances in which fair use is appropriate. Judge Leval asserts that a fair use must stimulate productive thought and public instruction while not “excessively diminishing the incentives for creativity.” Professor Gordon would add the requirement that the user could not obtain permission from the copyright owner because of some failure in the marketplace. In economic terms, if the use of a work carries sufficient value, the user should be able to negotiate permission. However, when the transaction costs of requesting permission from the copyright owner exceed the benefit gained from the use of the work, a fair use claim would be proper.

Professors Patterson and Lindberg argue that deciding the effect on the market of a particular use should include consideration of the accessibility of the work, the date of the work, the economic life of the work, the availability of copies on the market, the price of the work, and any evidence of abandonment of the copyright. To the extent that any of these factors tend to prevent use of protected works, then the argument for fair use is strengthened. For example, a copyright owner who fails to maintain a reserve supply of copies of a work, who demands an exorbitant price for permission to use the work, or who fails to respond within a reasonable time to requests for permission to use the work provides the grounds for a finding of fair use.


198. Leval, supra note 24, at 1105-07.
199. Weinreb, supra note 172, at 1141.
200. Leval, supra note 24, at 1110. Professor Weinreb suggests that most scholars accept Judge Leval’s utilitarian approach, though some might modify it. Weinreb, supra note 172, at 1137, 1141.
203. Patterson & Lindberg, supra note 35, at 204-07.
Some writers suggest that courts should consider factors beyond those listed in § 107 to determine fair use. The factor that arguably could be applied most often is the "good faith" of the user, though some writers dispute the relevance of "good faith," or more accurately, the lack of good faith. Other factors suggested include First Amendment implications, artistic integrity, and privacy. Professor Weinreb argues that courts have failed to identify a simple, non-statutory factor of "fairness" in their analysis. Despite the vague nature of Professor Weinreb's "fairness" factor, it appears well-suited for inclusion because fair use is, after all, an equitable doctrine.

b. Section 110(1)—Educational Use Exemption

During the revision process leading to the 1976 Act, faculty members and administrators from educational institutions testified at various hearings and submitted statements in reaction to many proposals. Although individual comments varied, the main idea of the testimony from many educators can be summarized in one simple statement. "The thrust is to be able to allow the educational material to be where the student is." To maximize the opportunities of the educational process, educators preferred that the provisions of copyright law not force restrictions on when and where materials could be used.

To support the needs of educators, the drafters included § 110(1) in the Act, exempting performances of copyrighted works conducted in the "face-to-face" teaching activities of a nonprofit educational institution.
This "educational exemption" protects academic institutions, including their libraries, from infringement for performances of audiovisual works.

For the exemption to apply in a particular situation, each of the conditions contained in § 110 must be met. First, the work must be performed by the instructor or the pupils in a course. The exemption also applies to performances of works by guest lecturers, though attendance for the performance in all cases must be limited to those enrolled in the course. This requirement however, applies more often to performances of works other than videocassettes, such as those of actors, singers, and other artists.

Second, the performance must be conducted in the course of "face-to-face" teaching activities. Use of the phrase "face-to-face" is intended to prohibit the transmission of a performance of a work, unless it can meet the requirements of § 110(1). The face-to-face "concept does not require that the teacher and the students be able to see each other, although it does require their simultaneous presence in the same general place." If the teacher steps out of the classroom but remains in the general location, the exemption applies just as if the teacher were present during the entire performance.

Third, while the statute does not contain the express limitation, the House Report accompanying the Act explains that the performance of a work must be related to the teaching mission of the class; recreational viewing in the classroom is not permitted. The educational institution in which the performance occurs must be nonprofit, and the performance must take place "in a classroom or similar place devoted to instruction." The legislative history of this section specifically recognized that a library could be a substitute classroom. If a library is used regularly as a place for the performance of audiovisual works to classes, those performances qualify for the exemption. Finally, with regard to motion pictures and other audiovisual works, the performance must be accomplished through a copy that is legally made or that the instructor believes is legally made. Libraries should not encounter difficulties with videocassettes purchased from reputable suppliers.

214. See id.
215. See 1 GOLDSTEIN, supra note 38, § 5.8.1.1.
217. Id. at 81.
218. Id.
219. Id. at 82.
220. Id.
221. Id.
4. **Liability for Infringement**

Because of possible liability, libraries need to be concerned with the question of whether viewing protected videocassettes constitutes an infringement of the copyright owner's rights. Section 106 grants copyright owners the right to authorize public performances of motion pictures and other audiovisual works. One who authorizes a public performance of an audiovisual work without permission has infringed upon the copyright owner's rights. Librarians who allow or encourage performances of a videocassette within a library most likely "authorize" the performance under the meaning of the Act. Thus, if the performance of the videocassette infringes the copyright, the library and librarian may be liable.

A library could be held liable for infringing performances of a videocassette either as a contributory or a vicarious infringer, depending on the level of control that the library exercises over the activity. A contributory infringer is one who contributes to or encourages an activity that constitutes an infringement. A vicarious infringer is one linked financially to the infringing activity; specific knowledge that the activity infringes a copyright owner's right is not required. A library typically would not have a direct commercial interest in the performance of videocassettes, so it would not normally be liable as a vicarious infringer for any infringing performances. By simply providing the means for the infringement (i.e., the videocassette and the player), the library most likely would be held liable as a contributory infringer. Thus, a library would incur liability as a contributory infringer for virtually all infringing performances on its premises because it would have provided the opportunity, the materials, and the equipment for the performances.

---

223. "For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance." H.R. REP. NO. 1476, supra note 51, reprinted in U.S.C.C.A.N. at 5674.
224. See 1 Goldstein, supra note 38, § 6.1.
225. Id. § 6.2.
226. Until the passage of the Copyright Remedy Clarification Act of 1990, Pub. L. No. 101-553, 104 Stat. 2749 (1990), libraries at state-funded educational institutions and libraries funded by states and local governments could avoid liability for monetary damages for infringement under the Eleventh Amendment. The logic of the argument was straightforward: states are immune from suit in federal court under the Eleventh Amendment unless Congress expresses a clear intention otherwise, and the 1976 Act contained no such expression. Robert A. Burgoyne, The Copyright Remedy Clarification Act of 1990: State Educational Institutions Now Face Significant Monetary Exposure for Copyright Infringement, 18 J.C. & U.L. 367, 368 (1992). Using this reasoning, several circuits recognized states' immunity from monetary damages. Lane v. First Nat'l Bank of Boston, 871 F.2d 166, 176 (1st Cir. 1989); BV Engineering v. University of California, Los Angeles, 858 F.2d 1394, 1400 (9th Cir. 1988); Richard Anderson Photography v. Brown, 852 F.2d 114 (4th Cir. 1988). Opponents of immunity expressed their objections in terms of "simple justice," arguing that injunctive relief alone did not provide an
II

Analysis of Viewing Videocassettes and Videodiscs in Libraries

A. Framework

In applying copyright law to the viewing of videocassettes and videodiscs in specific library situations, one should first consider whether there has been a public performance. The copyright owner's right of control extends only to public performances; no infringement of the performance right occurs for a private performance. If a performance is public, one must consider whether it falls under the fair use limitation in § 107 or the educational exemption contained in § 110(1).\(^{227}\) If so, there is no liability for the performance. If the viewing constitutes a public performance and does not qualify as a fair use or an educational exemption, it is likely to infringe the rights of the copyright owner, and the library may be liable as a contributory infringer.

B. Public Performances in Libraries

The question of what constitutes a public performance lies at the heart of the confusion experienced by many librarians in dealing with videocassettes.\(^{228}\) The definition of the term "public performance" contained in § 101 of the Act delineates three situations in which the copyright owner retains control of the performance. The first situation defined in § 101 concerns a performance that occurs in "a place open to the public . . . ."\(^{229}\) With regard to public libraries, virtually every performance should be considered public.\(^{230}\) As such, unless the perform-

---

\(^{227}\) Other limitations and exemptions that protect libraries from infringement are generally not available when the use involves protected audiovisual works. See supra notes 146-154 and accompanying text.

\(^{228}\) ALAN L. KAYE, VIDEO AND OTHER NONPRINT RESOURCES IN THE SMALL LIBRARY 5 (Small Libraries Publications No. 16, 1991); Jean T. Kreamer et al., Video and Copyright, SIGHTLINES, Fall 1989, at 15.


\(^{230}\) Ivan R. Bender, Copyright Commentary: 110(1) and the "Face-to-Face" Teaching Exception, SIGHTLINES, Summer 1990, at 34; JEROME K. MILLER, USING COPYRIGHTED VIDEOCASSETTES IN CLASSROOMS, LIBRARIES, AND TRAINING CENTERS 26 (2d ed. 1988); Ivan R. Bender, Use of Video in Libraries, TECHTRENDS, Nov./Dec. 1988, at 31; Debra J. Stanek, Videotapes, Computer Programs, and the Library, 5 INFO. TECH. & LIBR. 42, 47 (1986).
ance is licensed, or either the fair use limitation or the educational exemption applies, it is likely an infringement.

Virtually all academic libraries, particularly those at state-supported colleges and universities, would also be considered public places. In addition to providing services to their students and faculty members, most academic libraries also allow access to their collections to members of the surrounding community and visiting scholars. If it allows this access, performances of videocassettes at an academic library would be considered public under the first portion of the Act's definition.\(^{231}\) Even if a particular academic library is not generally open to members outside its own institution, it nevertheless is likely to satisfy the second part of the definition, in which public performances of a work occur "at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."\(^{232}\) As such, virtually all performances of videocassettes in academic libraries would be classified as "public" under the Act; however, they often fall under either the fair use limitation or the educational activities exemption, and therefore do not incur liability.

Performances of videocassettes in special libraries, on the other hand, typically will not satisfy the first portion of the definition of public performance, since these libraries generally are not open to the public. Government agencies, law firms, businesses, and other institutions establish special libraries to serve only the members of their institution; persons not associated with the institution typically are not admitted. Further, performances in special libraries usually will not fall within the requirements of the second part of the definition. Only if a special library is considered to be a "place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered"\(^{233}\) would the performance be considered public under the Act. In most situations, a videocassette would be performed in a special library as part of a business meeting. As the drafters of the Act envisioned that the typical number of participants at business meetings would not meet the "substantial number" test,\(^{234}\) most performances of audiovisual works in special libraries would be non-public and thus non-infringing. Theoretically, however, the number of those attending an unlicensed performance in a special library could be large enough to satisfy the "sub-

\(^{231}\) "To perform . . . a work "publicly" means—(1) to perform . . . it at a place open to the public . . . ." 17 U.S.C. § 101.

\(^{232}\) Id.

\(^{233}\) Id.

\(^{234}\) "Routine meetings of businesses and government personnel would be excluded because they do not represent the gathering of a 'substantial number of persons.'" H.R. REP. No. 1476 supra note 51, reprinted in 1976 U.S.C.C.A.N. at 5678.
stantial number" test. If this were to occur, it seems likely that the performance would constitute an infringement because the fair use limitation in § 107 and the educational exemption in § 110(1) almost certainly would not apply. 235

The third situation in which a performance of a work would be considered public under the Act is by electronic transmission of an unlicensed performance of an audiovisual work to a remote location. 236 If any library uses a transmission system similar to the one used by the hotel in On Command, 237 that transmission would constitute a public performance, regardless of the elements in the first clause of the definition in § 101. A performance of a videocassette during a tele-conference, for example, would be public, regardless of whether the library is open to the public. As such, all libraries with transmission systems must take special precautions to avoid infringement when performing audiovisual works.

C. Fair Use

The application of the fair use limitation to public performances of audiovisual works, particularly videocassettes, raises some thorny questions. The most important case involving fair use and videocassettes, Sony Corp. of America v. Universal City Studios, 238 concerned the reproduction of works on videocassettes for home use. The Court did not consider whether the performances would be public, however, since homes generally are not places open to the public or where a substantial number of persons outside of a normal circle of family members and social acquaintances gather. 239 As such, the performances of audiovisual works at home were found to be private and therefore did not infringe the copyright owner's right to control public performances.

---

235. The first factor listed in § 107 raises a presumption that uses made in connection with commercial activities are not fair use. Because many special libraries are part of commercial enterprises, unlicensed public performances there would not qualify in most circumstances as fair use. Nor could these performances be considered under the educational exemption since it applies only to performances of works as part of courses offered by nonprofit educational institutions. 17 U.S.C. § 110(1).

236. "To perform . . . a work "publicly" means . . . (2) to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101.


239. The question remains as to how long the guest list for a party must be to transform the performance of an audiovisual work from a private to a public one.
While fair use for public performances of audiovisual works has yet to be considered judicially, some practitioners believe that fair use cannot be applied in most library settings. A restrictive reading of § 107 would indicate that the fair use limitation applies only to reproductions of works, not performances of them. The history of the doctrine, including its judicial interpretation and the record of commentary on fair use, generally supports this notion.

Two reasons account for the predominance of judicial history dealing with reproduction of works rather than performances. First, fair use began as a defense to protect the use of books by others, so books have been subject to fair use far longer than other classes of works. Second, and more importantly, the effects on the marketplace caused by an unlicensed reproduction of a work can be demonstrated more clearly than the effects caused by an unlicensed performance of a work.

A restrictive reading of § 107, however, overlooks the plain language of the Act. The Act defines the fair use of a copyrighted work as "including such use by reproduction in copies . . . ." Section 107 clearly should be read inclusively. "The terms 'including' and 'such as' are illustrative and not limitative." Thus, the fair use section should not be limited to consideration of reproductions; it includes them, therefore, other uses of copyrighted works should be considered under the section as well. Consequently, uses affecting any of the exclusive rights granted to a copyright owner may fall under a fair use limitation, including the right of public performance.

Section 107 of the Act lists four factors to be considered in determining fair use. Others factors may be considered, but courts often focus their analysis only on those listed in the statute. The first factor concerns the purpose and character of the use, including whether the use is for commercial purposes. Typically, courts use this factor in interpreting business or commercial uses of the copyrighted work.

---

240. Letter from Burton H. Hanft & Harvey Shapiro, supra note 25, at 4-6.
241. "The potential error here is that the fair use section of the law, as presently defined, pertains to 'reproduction in copies,' and not to performance rights." MILLER, supra note 230, at 30.
242. PATRY, supra note 51, at 6-63.
244. Stanek, supra note 230, at 49.
248. See supra notes 165-172 and accompanying text.
249. "[T]he factors to be considered shall include—(1) the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes . . . ." 17 U.S.C. § 107(1).
250. See 2 GOLDSTEIN, supra note 38, § 10.2.2.1.
ing the first factor to each of the library scenarios below would tend to support fair use. Uses of protected works in academic and public libraries generally are not competing commercial activities. The nature of the use of a protected work for education and research was supported strongly by the court in *Williams & Wilkins*. Thus, the first factor would tend to support fair use.

If the unlicensed use of a work which is essentially of entertainment value tends not to be fair use, as suggested by *Rohauer v. Killiam Shows, Inc.*, the second statutory factor would weigh against fair use in virtually all scenarios involving the performance of videocassettes in libraries. A number of the videocassettes in public library collections and academic library collections are copies of motion pictures that were produced primarily for entertainment purposes and released first for performances in theaters. Further, the drafters of the 1976 Act included audiovisual works, with motion pictures as a class of protected works, on the basis that they are created for viewing by groups of people rather than by individuals. These considerations would support a finding against fair use for unlicensed public performances of videocassettes in libraries.

The production of videocassettes today, however, differs fundamentally from the type of works that the “motion pictures” class was broadened to include. The producers of educational media, such as filmstrips and slide sets, persuaded the drafters that the economics of producing these items and the purpose of their use were essentially the same as for commercial movies. Because the works were viewed by groups rather

251. 487 F.2d 1345 (Ct. Cl. 1973), aff’d per curiam by an equally divided court, 420 U.S. 376 (1975) (Blackmun, J., not participating).
252. 379 F. Supp. 723 (S.D.N.Y. 1974), rev’d on other grounds, 551 F.2d 484 (2d Cir.), cert denied, 431 U.S. 949 (1977). *Rohauer* involved a fair use claim for a performance of a Rudolph Valentino movie, *The Son of the Sheik*. An educational television station obtained a license to duplicate the film on videotape and to broadcast it. The license was granted by the person holding the rights to make a derivative work of the novel on which the movie was based, but the copyright on the novel itself was owned by another person. Because of the provisions of the 1909 Act governing renewal of copyright, the court held that the license granted to the television station conferred no rights to duplicate and broadcast the film. The court considered the absence of a public interest served by dissemination of the work and held that this defeated a claim of fair use. 379 F. Supp. at 733.
253. “[T]he factors to be considered shall include . . . (2) the nature of the copyrighted work . . . .” 17 U.S.C. § 107(2).
254. The exact percentage of entertainment videocassettes in library collections cannot be determined easily. Some studies indicate that most public libraries have at least some entertainment videocassettes in their collections. Jewett, *supra* note 16, at 61. However, a number of public libraries intentionally do not compete with local video stores in their selections, focusing instead on “classic” movies. *Id.* at 93-169.
255. See *supra* note 53 and accompanying text.
256. *Id.*
than individuals, fewer copies of the work were produced, and the costs of production could not be spread out across a large base. Videocassette production today, however, resembles the mass-market production of books more than the production of educational media and motion pictures.257 Most videocassettes are produced in large quantities and marketed for viewing by individuals and small groups. The medium itself is not in need of the protection afforded other audiovisual works. Further, to find against fair use primarily on the basis of the format in which information is contained creates an undesirable status system. Whereas one can retrieve information from a book in the library's collection by browsing or by reading it, one cannot retrieve information in the library from a videocassette if prevented from viewing it there. Thus, the fact that a work is recorded on a videocassette should not automatically defeat a fair use claim.

The second factor should tend to support fair use. This is because commercially-prepared videocassettes are readily available and library users must perform them in order to make effective use of the information they contain.

The third factor in determining whether a use of copyrighted material falls within the fair use limitation concerns the amount of the protected work used.258 The plain language of the subsection seems to indicate that a mathematical measure could be used to determine whether a particular use qualifies, but courts have held that the analysis must examine the qualitative nature of the portion used as well as the quantitative.259 Courts look to the substance of the work and whether the use expropriates that substance, rather than solely the percentage of the work used.260 For example, the Supreme Court found fair use in Sony Corp. even though entire works were copied.261 One year later, the Court found no fair use in Harper & Row262 for 300 words taken from a 7,500-word excerpt of a 200,000-word manuscript.263 Whether for educational, civic, or recreational purposes, most performances of audiovisual works typically involve the entire work.264 Since the most crucial portions would be used in performances of the entire work, an examina-

258. "[T]he factors to considered shall include . . . the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3).
259. See 2 GOLDSTEIN, supra note 38, § 10.2.2.
263. Id. at 544-45.
tion of both the qualitative and quantitative aspects would tend to support a finding against fair use.\textsuperscript{265} That consideration, coupled with the fact that the performance in most library situations would be public, rather than private, would make a finding of fair use unlikely.

On the other hand, several typical situations involving use of video-cassettes in libraries are analogous to the situation considered by the Supreme Court in \textit{Sony Corp.}\textsuperscript{266} where individuals were watching one show on television while simultaneously taping another to watch at a more convenient time. The Court found the fact that these owners could have viewed the programs without charge when originally broadcast militated against the usual finding of no fair use when an entire work is copied. Similarly, a student who misses the original unlicensed performance in the classroom could have viewed it without charge, so the student's subsequent use of the entire work should be a fair use. Thus, application of the third factor to educational performances in libraries may tend to support a determination of fair use.

The fourth statutory factor, the effect of the use on the market,\textsuperscript{267} has been called the least understood and most misapplied of the four factors,\textsuperscript{268} as well as the most important.\textsuperscript{269} The Supreme Court in \textit{Sony Corp.} differentiated commercial uses from noncommercial uses in this factor. Commercial uses are presumptively unfair, because they compete directly with the owner of the rights in the protected work.\textsuperscript{270} While noncommercial uses may be considered presumptively fair,\textsuperscript{271} these claims of fair use may be defeated if the copyright owner proves "either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."\textsuperscript{272} The owner need not show present harm, only "a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists."\textsuperscript{273} The crux of the application of fair use to videocassette performances in libraries then may center on proof of an effect on the market. The plaintiffs in \textit{Sony Corp.} failed to defeat a fair use claim largely because they could not prove that home recording and viewing

\textsuperscript{265} For that reason, one writer suggests that the third factor should not be applied to works involving performances. Timberg, \textit{supra} note 168, at 216-19.

\textsuperscript{266} Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 449-450 (1984).

\textsuperscript{267} "[T]he factors to be considered shall include . . . the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4).

\textsuperscript{268} PATRY, \textit{supra} note 51, at 453.


\textsuperscript{270} \textit{Sony Corp.}, 464 U.S. at 450-51.

\textsuperscript{271} \textit{Id.} at 449-50. This characterization has been criticized by Professor Weinreb. See Weinreb, \textit{supra} note 172, at 1154.

\textsuperscript{272} \textit{Sony Corp.}, 464 U.S. at 451.

\textsuperscript{273} \textit{Id.}
had an adverse effect on the market.\textsuperscript{274} If viewing a videocassette in a library competes with movie theaters, commercial television, cable television, direct broadcast satellites, or some other market for the use of the protected property, then a fair use claim could be defeated. One study concerning general viewing habits involving videocassettes and their effects on other communication media indicates some effect on movie theater attendance, a primary competing market.\textsuperscript{275} The possible effects of viewing performances in libraries, however, have never been studied.

Performances by individuals and small groups in libraries are not likely to affect the market substantially.\textsuperscript{276} First, most library users have a non-public performance alternative available; they may borrow the videocassette from the library and view it at home.\textsuperscript{277} As such, library users typically would not purchase or rent what they could borrow from a library free or for a nominal fee. Second, those library users who do not have access to a videocassette player and would view a performance in a library have little effect on the market. It is widely recognized that someone without access to the necessary equipment is not likely to purchase or rent a videocassette.\textsuperscript{278} Thus, even if viewing videocassettes in libraries became widespread, the effect on the market would not change substantially. Third, many public libraries generally strive not to compete with local video stores by avoiding new releases and limiting purchases to "classic" films.\textsuperscript{279} This further prevents any adverse effect on the market. As such, analysis of the fourth factor for performances for individuals and small groups in libraries would tend to support fair use.

Performances in libraries for large groups might affect the market, however, if the practice became widespread. It is conceivable that at least some portion of a large group would consider purchasing or renting a videocassette not available for performance in libraries. This could encourage video rental stores to purchase more copies of the videocassette or result in more direct sales of the work. Further, few libraries typically purchase multiple copies of video resources for their collections, so the

\textsuperscript{274} Id. at 451-54.
\textsuperscript{276} Stanek, supra note 230, at 49; contra Heller, supra note 25, at 336.
\textsuperscript{278} Sony Corp., 464 U.S. at 450, n.33. See also Heller, supra note 25, at 332-33; Stanek, supra note 230, at 48.
\textsuperscript{279} HOME VIDEO IN LIBRARIES: HOW LIBRARIES BUY AND CIRCULATE PRERECORDED HOME VIDEO, supra note 11, at 89.
demand for a particular resource might result in its unavailability, creating the possibility of purchase or rental by those not able to view it in the library. On the other hand, videocassettes have a limited useful life, particularly in library collections where they are subject to high levels of use, possibly contributing to the earlier purchase of replacement copies.\textsuperscript{280} Even so, it is likely that consideration of the fourth factor for large group performances would tend not to support fair use.

This raises the question of defining a large group. One writer has proposed a bright-line test of four persons, though he bases that test on a general concept of "fairness" and the approximate size of families.\textsuperscript{281} This bright line seems unnecessarily restrictive. Instead, the standard should be the same as that used to define a public performance—"a substantial number of persons outside of a normal circle of a family and its social acquaintances . . . ."\textsuperscript{282} This would add symmetry to the statute both in theory and application, and would prevent copyright owners of audiovisual works from benefiting at the expense of the users.

Considering all four of the statutory factors, it appears that performances for individuals and small groups in public and academic libraries should be found to be fair use, because they do not create any substantial adverse economic impact on the copyright owner even if the practice was to become widespread.\textsuperscript{283} Public performances for large groups would likely not be fair use, because of the potential effect on the market.

1. Fair Use & Performances for Students
   a. The "Make-Up" Performance

   Few students attend every one of their classes during their educational careers. Students who miss classes in which videocassettes are performed often attempt to "make-up" the class by viewing the programs in the library. Many copyright owners believe that this is not allowed by either the fair use limitation or the educational exemption,\textsuperscript{284} but librarians tend to view this situation as one deserving protection as a fair use.\textsuperscript{285}

---

\textsuperscript{280} Some libraries replace a videocassette after it has been played 250 times, while others wait longer. Heller, \textit{supra} note 25, at 332 n.90. Still others replace videocassettes on a highly selective basis only. \textit{See Scholtz, supra} note 23, at 43-44, 81, 89. Videodiscs are a much more durable format and tolerate use and abuse much better than videocassettes, so libraries are less likely to need replacement videodiscs. \textit{Judy McQueen \& Richard W. Boss, Videodisc and Optical Disk Technologies and Their Applications in Libraries, Update, 1986, at 7, 7-8.}

\textsuperscript{281} Heller, \textit{supra} note 25, at 336.

\textsuperscript{282} 17 U.S.C. § 101.


\textsuperscript{284} Letter from Burton H. Hanft \& Harvey Shapiro, \textit{supra} note 25, at 11; Bender, \textit{Copyright Commentary, supra} note 230.

\textsuperscript{285} Heller, \textit{supra} note 25, at 328-29; Stanek, \textit{supra} note 230, at 48-49.
The "make-up" performance for a class missed at a nonprofit educational institution presents essentially the same time-shifting scenario considered in *Sony Corp.*, creating a compelling argument for a similar result. First, the educational nature of the use places it clearly within the purpose of the fair use limitation. Second, analysis of the four specified factors in § 107 support a finding of fair use. Assuming that the course is offered by a nonprofit educational institution, the purpose and character of the use support fair use. Because the information contained in the work is stored in a videocassette format, a performance of the entire work is necessary to convey the information to the student; however, the student would have viewed a non-infringing performance but for his or her absence from class. This militates against the presumption that use of the entire work is an unfair use. Like the *Sony Corp.* users who could have watched a television program free during its broadcast, students could have viewed an unlicensed performance with their class under the educational exemption in § 110(1).

Finally, the performance will have no effect on the market. The student will most likely either borrow the videocassette from the library or skip viewing the performance altogether. If the student chooses not to view the videocassette because of the difficulty of locating the necessary equipment for a private performance, then fair use falls short in one of its most important areas—support of education. Drafters of the 1976 Act intended to provide a broad definition of permissible uses of protected works for educational purposes, so it does not follow that one of the key aims of the statute could be so easily thwarted. These factors clearly support application of the fair use limitation for "make-up" performances in academic libraries and public libraries.

b. The Supplemental Performance

Just as with supplemental or "outside" reading from selected books, a faculty member may require students to view a particular videocassette outside of class. Librarians generally characterize a supplemental performance as a fair use, while copyright owners do not. However, the supplemental performance should be considered a fair use for essen-

---


287. If the institution is proprietary, a presumption against fair use is raised.


290. See supra notes 211-221 and accompanying text.

291. Heller, supra note 25, at 328-29; Stanek, supra note 230, at 48.

292. Letter from Burton H. Hanft & Harvey Shapiro, supra note 25, at 11.
tially the same reasons that the "make-up" performance is so considered. The supplemental performance directly supports education, which places it clearly within the intention of the fair use limitation. Moreover, the four statutory factors for supplemental performances support a determination of fair use in most libraries.

First, assuming that the educational institution is a nonprofit organization, the character and purpose of the use is noncommercial and in furtherance of education. If the institution is a proprietary school, however, fair use likely will not be found. Second, while the student most likely must perform the work in its entirety to derive the educational benefit, performing the entire work does not necessarily weigh against fair use. Admittedly, the supplemental performance does not present the compelling time-shifting argument offered by the "make-up" performance example. Nonetheless, the format of the work requires a performance in order for the information to be conveyed to the student. This diminishes the presumption that a use involving the entire work is not a fair use, while furthering the overall goal of supporting education. Third, as with the "make-up" performance, the effect on the market will be negligible. Most students will either borrow the videocassette to view at home, or they will choose not to view the work at all. All factors support fair use for the supplemental performance in academic libraries and public libraries.

c. The Research Performance

Another typical student use involves a performance of a videocassette as research for a class assignment. As with the other student uses, librarians tend to view this as fair use.293 Research for a class assignment, as part of education, also falls within the specified purposes of fair use. Analysis of the enumerated factors in the statute differs very little from the analysis for the supplemental performance above, supporting a determination of fair use for performances conducted for research in academic libraries and public libraries.

2. Fair Use & Performances for Faculty Members

Faculty members typically view performances of videotapes in libraries as part of either class preparation or research activities. Both uses fall within the enumerated purposes that fair use supports. Further, analysis of the four statutory factors for both uses supports a determination of fair use. The purpose and character of the use is noncommercial and educational. As with the "make-up" and supplemental perform-

293. Heller, supra note 25, at 328-29; Stanek, supra note 230, at 48-49.
ances for students, the faculty member can access the information stored on the videocassette only by performing the work, generally in its entirety. The effect on the market again would be negligible. Faculty members usually have private performance alternatives readily available, such as videocassette players in their offices or homes, so they would not purchase or rent a copy of the videocassette. Considering all the factors, faculty usage for class preparation and research should be a fair use.

3. Fair Use & Performances in Non-Academic Situations

a. Performances for Public Library Programs

Most public libraries offer a number of special programs each year to the members of their communities. Public libraries exist, among other reasons, to enhance the general educational standards of the community. In addition to literacy programs and children's story hours, many public libraries offer programs in parenting skills, automobile repair, home improvement, civic awareness, and a variety of other topics. The public library satisfies the support of education, one of the overall purposes of fair use, with each of these activities.

Analysis of the statutory factors for performances of programs in public libraries tends to support a finding of fair use, though the factors do not weigh as heavily in favor as in scenarios involving student and faculty usage. Although public library programs clearly are not activities by nonprofit educational institutions, they are noncommercial, so the first factor weighs for fair use. Consideration of the second and third factors, however, differs sharply from the academic scenarios discussed above. In those scenarios, the students and faculty members had the opportunity to view a non-infringing performance in class, in a private office, or in another location. Performances in a public library program often do not provide or have no corresponding opportunity for the participants to an unlicensed performance, so the second and third statutory factors would not be mitigated, as they were in Sony Corp. As such, these two factors support a finding against fair use. However, performances for individuals and small groups have no demonstrable adverse effect on the market. As with students and faculty members, most public library users have non-public performance alternatives available; they may check out videocassettes for viewing at home. In fact, performances of works in connection with public library programs, such as during a story hour for children, may increase the market for these products. Parents may wish to purchase videocassettes performed during a story hour for their children, to save trips to the library. Because the purpose is noncommercial and there would be little, if any, adverse effect on the
market, a finding for fair use would be appropriate for performances to small groups as part of library programs.

b. Performances for Recreation

Performances for recreation at both academic and public libraries generally fall outside the scope of the fair use limitation. First, the Act does not support unlicensed performances for entertainment or recreational purposes generally. Second, the factors enumerated in §107 do not support a finding of fair use for recreational purposes. The copyright owner's right to control public performances should be protected to the extent that it does not conflict with another objective of the Act, and, while the purpose of a recreational use is noncommercial, there is no corresponding educational benefit or public interest served. As such, the fair use limitation is not available for recreational public performances in libraries.

D. Educational Activities

Many performances of videocassettes in libraries are protected by the educational exemption contained in §110(1) of the Act. The educational exemption permits the performance 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...." Under this provision, a performance must be for a class in a nonprofit educational institution. Libraries at proprietary institutions are not eligible for the exemption. Second, a performance must be considered within the course of face-to-face teaching activity. The statute and the legislative history are silent regarding whether the teaching activity must relate to courses for credit. Non-credit classes and continuing education programs are part of the teaching activities of the institution, so, presumably, these classes are exempted.

Another element of the educational exemption concerns the location of the performance. The legislative history of the Act indicates that the drafters intended the library of the educational institution to be consid-

294. For example, the educational exemption does not apply to performances of works in classrooms solely for recreation. See infra notes 310-312 and accompanying text.
296. Copyright law seeks to provide a structure in which intellectual property can advance progress in science and the arts. The law attempts to strike a balance between protection of the copyright owners property as an incentive for further production, and use of the property by others for educational and research purposes as well as for their own creative achievements. 1 GOLDSTEIN, supra note 38, § 1.1.
ered as a possible substitute for a classroom. To be eligible for the exemption, the library must "actually [be] used as a classroom for systematic instructional activities."

A typical academic library would have little difficulty establishing that it is used for "systematic instructional activities" if it is a regular location for bibliographic instruction classes and other programs in which videocassettes are shown. Such usage falls precisely within the exemption. Performances in public libraries for classes from a nonprofit educational institution could qualify for the educational exemption, provided all the requirements of the exemption are met. The Act does not require that the performance be at a specific location, other than at a "similar place devoted to instruction."

If a public library serves as the regular location for classes of a nonprofit educational institution and provides performances of audiovisual works for these classes, it could satisfy the requirements of the educational exemption, but public libraries generally do not.

The exemption also requires that an audiovisual work shown as part of teaching activities be a lawfully-made copy. If the copy was not lawfully made and the person responsible for the performance knows or has reason to know it was not lawfully made, this exemption does not apply. Provided that libraries purchase their copies from reputable sources, this requirement should not cause difficulty.

When a class comes to a library during a regularly-scheduled class time to view a videocassette, the performance meets the requirements of the educational exemption if the instructor is present or nearby and the library can be considered a substitute classroom. Questions arise when the entire class cannot view the performance at the same time. If the viewing facilities of the library cannot accommodate an entire class, it seems likely that the students could be divided into smaller groups and still satisfy the exemption. Otherwise, classes using video resources could be no larger than could be accommodated by the largest classroom or alternate location devoted to instruction. This artificial limit would frustrate the clear purpose of the educational exemption, as well as the general purpose of the Act.

It is disputed whether the educational exemption applies to the situation in which a student misses class when the performance is viewed and attempts a "make-up" performance in the library. Some writers con-
tend that "make-up" performances for students constitute an infringement, arguing that the "make-up" performance falls outside the "face-to-face" character of teaching activities. This overlooks the clear legislative history of the exemption and the specific term "face-to-face." The drafters never intended that the term "face-to-face teaching activities" would be interpreted literally. The drafters chose to use that term for §110(1) in order to exclude the broadcast of audiovisual performances, not to unduly inhibit the educational process of the classroom. The legislative history makes clear that the class instructor is not required to be physically present at the performance of an audiovisual work, only in the same general area. Interpreting the phrase so as to prevent a "make-up" performance conducted in the library defeats the purpose of the exemption. Provided that the subsequent performance takes place during a regularly-scheduled class time and that all other elements of the exemption are met, there should be no infringement. Moreover, if the "make-up" performance occurs at a different time, there should also be no liability because of the application of the fair use limitation.

The supplemental viewing scenario, in which an instructor requires her class to view a videocassette outside of regular class time, may fall outside the educational exemption. To qualify for the exemption, the librarian must be considered a substitute instructor and the library a substitute classroom. While it is clear that the drafters intended for libraries to serve as substitute classrooms, the legislative history does not include librarians as substitute instructors. Arguably, a librarian should be afforded at least the same status as the guest lecturer, who can perform a work within the exemption. The chief objection, however, concerns the time of performances. Copyright owners contend that the educational exemption applies only to a performance conducted within the regular meeting time for the particular class. The supplemental viewing scenario presumes students will be able to view a performance at their leisure. The legislative history does not specifically address the question of whether supplemental viewing falls within the exemption; however, the requirement that the instructor be in the proximity of the performance

303. Bender, Copyright Commentary, supra note 230.
304. "Use of the phrase 'in the course of face-to-face teaching activities' is intended to exclude broadcasting or other transmission from an outside location into classrooms, whether radio or television and whether open or closed circuit." H.R. Rep. No. 1476, supra note 51, reprinted in 1976 U.S.C.C.A.N. at 5695.
305. Id.
306. See supra notes 284-290 and accompanying text.
308. Bender, Copyright Commentary, supra note 230.
indicates that supplemental performances fall outside the educational exemption. Nonetheless, performances of videocassettes outside the classroom should be considered within the fair use limitation.\textsuperscript{309}

The easiest question to answer regarding usage of an academic library's video collection and the application of the educational exemption concerns recreational viewing. By using the language "teaching activities,"\textsuperscript{310} Congress clearly intended the exemption for educational, not recreational purposes. Performances must be directly related to the educational purpose of the class. Thus, an instructor may not schedule a performance of an audiovisual work as a reward for a class,\textsuperscript{311} and a student who wishes to view a particular videocassette in the library for recreation may not do so under this exemption.\textsuperscript{312}

\section*{III
Remedies & Suggested Reforms}

Some public librarians have reported that representatives of the Film Security Office of the Motion Picture Association of America have monitored the use of video resources, possibly for future litigation.\textsuperscript{313} Further, major motion picture companies send periodic reminders to libraries concerning the ownership of performance rights.\textsuperscript{314} These companies typically are not reluctant to pursue legal action when they perceive that their rights have been infringed,\textsuperscript{315} and some librarians consider the possibility of future litigation likely.\textsuperscript{316}

Currently, the restrictions and confusion concerning the use of videocassettes and videodiscs in libraries, real or imagined, place librarians in the professionally uncomfortable position of monitors. To completely protect the rights of the copyright owner, presumably librarians must intrude into the affairs of each library user to inquire why he or she wishes to view a particular audiovisual work. Librarians should not have to accept the role of video police officers. Forcing them to inquire into the motives for using particular library resources raises eerie recollec-

\begin{flushright}
\textsuperscript{309} See supra notes 284-290 and accompanying text.
\textsuperscript{310} 17 U.S.C. § 110(1).
\textsuperscript{312} Arguably, students cannot view performance videocassettes for recreation under the fair use limitation either. See supra notes 294-296 and accompanying text.
\textsuperscript{313} SCHOLTZ, supra note 23, at 143.
\textsuperscript{314} Id. at 143-45.
\textsuperscript{315} "Yet movie distributors are not exactly a powerless lot, likely to surrender the first time they are presented with hard choices by a theater operator; nor are they reluctant to precipitate a showdown when they believe their rights are being infringed." United States v. Syufy Enter., 903 F.2d 659, 672 (9th Cir. 1990).
\textsuperscript{316} KAYE, supra note 228, at 5.
\end{flushright}
tions of the "Thought Police." Further, librarians generally lack the legal expertise to evaluate the claims made by copyright owners and to recognize misleading or incorrect information.

Remedies for the problems raised here could range from action on the part of librarians to request permission from copyright owners for performances, all the way to proposed Congressional action. At the very least, library and information science educators should seriously consider including copyright in their curricula, so future librarians will not be at such a disadvantage. Other possible solutions, however, raise their own sets of problems, as presented below.

A. Obtaining The Permission of the Copyright Owner

One obvious solution to problems raised by viewing videocassettes and videodiscs in libraries is for the librarian to obtain permission from the copyright owner. Subject to certain limitations and exemptions, the copyright owner may place whatever limits on the performances that he or she chooses. The owner might restrict viewing to single individuals, which could prove difficult for the library to administer, particularly when a small study group requests to view a videocassette as a group.

A more intrusive restriction from the librarian's viewpoint concerns restrictions on the intended use of the performance. A copyright owner might restrict performances in a library to educational purposes only, prohibiting recreational viewing. This would require the library staff to inquire into every user's intentions when he or she requests to view a particular videocassette.

These limitations on performances would be unduly burdensome for library staff members to administer. The scope of library staff training programs would need to expand dramatically, and, as the system of record-keeping for each videocassette grew larger and more cumbersome, mistakes would be inevitable. Some form of reporting mechanism to in-

318. See supra notes 23-31 and accompanying text.
319. Some librarians include a letter with each videocassette program order requesting permission for performances within the library or other appropriate rooms, and describing how the program will be performed. For example, a hospital librarian might request permission to perform the program both in the library and in individual patients' rooms from a player attached to a single monitor or through a transmission system. The order requests that the letter be signed by an appropriate official and returned to the library.
320. Some videocassette vendors offer performance rights to libraries for specific titles. Films, Incorporated can license performance rights for a number of works, though prices vary dramatically. Heller, supra note 25, at 320-21. Alternatively, a library can purchase a comprehensive license covering all or most of the works by a particular producer. See infra notes 323-324 and accompanying text.
sure that performances were within the scope of the copyright owner's permission would thus be required. Further, the owner of the copyright could demand some form of compensation for performances that exceeded the scope of the permission granted. Indeed, limitations on performances would be too burdensome for many libraries to administer.

Even assuming that copyright owners did not place a limitation on performances within a library, they might demand payment for their permission. In this regard, if the price demanded by the copyright owner is exorbitant from the library's economic viewpoint, the library has few alternatives. The library can always attempt to negotiate a better price, but library directors typically have little experience in the marketplace of intellectual property. There would be no equality in bargaining position, because copyright owners hold their property as a monopoly. The library therefore cannot bargain for the rights of performance.

Above all, the process of seeking permission for public performances is frequently time-consuming because the vendors of the videocassettes and videodiscs that libraries typically buy are not generally the copyright owners. Thus, a library seeking permission for performances must undertake a frenetic search, restricted by a time frame imposed by the library user. In the case of academic libraries, faculty members often make requests for materials only days or weeks before they are needed. Locating the copyright owner and negotiating a price that the library can afford within the time frame requested can be difficult, if not impossible. To ease this situation, librarians should encourage the establishment of a network for requesting permissions for public performances, similar in nature to PUBNET Permissions, established recently by the Association of American Publishers, to simplify the process of requesting permission to reproduce printed materials. If a similar network for processing requests for permission to perform videocassettes and videodiscs was established by the major copyright owners, libraries could provide more timely service to their users.

321. The difficulties with obtaining permission for audiovisual materials are similar to those encountered by many faculty members who request permission from publishers to reproduce their printed works for class. The recent decision, Basic Books v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991), convinced many educational institutions to revise the method by which their faculties prepare course materials. As a result of the decision, many faculty members requested permission from publishers for the first time. The results demonstrate some of the conflicts inherent in a copyright statutory framework that attempts to support the educational process while also protecting the property rights of the copyright owner. Many publishers take an inordinate amount of time to respond, and some never do. Royalty fees vary widely, with some publishers requesting fees as high as $100 per page. Raymond Tackett, Copyright Law Needs to Include "Fair Use" for Course Materials, CHRON. HIGHER EDUC., Feb. 12, 1992, at B3.

Assuming that a better price cannot be negotiated and the library cannot pay the asking price for permission for performances, the library has only two options. First, the library could decide not to purchase the resource. This has the distinct disadvantage of denying all library users access. Second, the library can purchase the videocassette or videodisc without seeking permission for public performances. This raises the probability that the library will have permission from some copyright owners for performances of their works in the library, but not have permission from other owners. The problems in administration of the video collection alluded to earlier would be present, requiring library staff members to monitor the collection carefully. Thus, librarians often find it difficult to seek the copyright owner's permission as a solution to the copyright dilemma posed by videocassettes and videodiscs.

B. Purchase Comprehensive Licenses

For libraries wishing to license public performances that fall outside of the fair use or the educational exemption, the Motion Picture Licensing Corporation (MPLC) and Films, Incorporated offer comprehensive licenses for audiovisual works produced by a number of major producers. Comprehensive licenses obviate the need to request permission for each performance of a work from certain producers. When the audiovisual work to be performed falls under the license, the library has permission to perform the work. The fee for the license usually is based on a number of different factors, including the number of viewing carrels or rooms in a library.

C. Create a Compulsory License

Compulsory licenses are provided for in several sections of the 1976 Act, and these sections grant permission for the use of protected works in two basic situations, both of which arguably could apply to the performance of videocassettes in libraries. Congress has established licenses for several situations in which the costs of negotiating a license exceed the value obtained by the use of the work, and for situations in which the use contributes to some higher social purpose. Moreover, the situations covered by compulsory licenses generally involve the use of new technology. Congress' chief justification for compulsory licenses is to en-

---

323. P.O. Box 3838, 2777 Summer Street, Stamford, CT 06905-0838; (203) 353-1600, (800) 338-3870.
324. 5547 North Ravenswood Avenue, Chicago, IL 60640; (312) 878-2600, (800) 826-3456.
325. See 1 GOLDSTEIN, supra note 38, § 1.2.3.1.
courage and maintain use of certain categories of protected works. In
theory, the transaction cost of negotiating, contracting, and enforcing an
agreement for obtaining a license would exceed the value gained by use of
the work.327

The 1976 Act, as amended, contains five compulsory licenses that
allow recording of nondramatic musical works,328 secondary transmis-
sions by cable systems,329 secondary transmissions by satellite,330 per-
fomances of musical works through jukeboxes,331 and performances of
nondramatic musical works by public broadcasting stations.332 A com-
pulsory license creates a forced contract; copyright owners of works sub-
ject to such a license cannot choose with whom they do business.333

Writers have questioned the value and operation of compulsory
licenses.334 Critics question whether a free marketplace would not be
better than statutory license fees at keeping the industry operating at
maximum efficiency.335 This view, however, assumes that various works
can compete against each other. The selection of a particular copy-
righted work for use, however, represents a choice based on some feature
unique to that work. Further, despite general criticism of compulsory
licenses, some writers argue for the creation of a licensing scheme for the
copying of broadcast television programs in response to Sony Corp.336

Performances of videocassettes in libraries raise many of the same
issues involved in situations where compulsory licenses are applicable.
The transaction costs of obtaining a license for individual performances

327. Midge M. Hyman, The Socialization of Copyright: The Increased Uses of Compulsory
329. Id. § 111.
330. Id. § 119.
331. Id. § 116.
332. Id. § 118(d)(2).
333. Lee, supra note 326, at 211-12.
334. See Robert Cassler, Copyright Compulsory Licenses—Are They Coming or Going?, 37
J. COPYRIGHT SOC’Y 231, 232-35 (1990); Scott M. Martin, The Berne Convention and the U.S.
Compulsory License for Jukeboxes: Why the Song Could Not Remain the Same, 37 J. COPY-
RIGHT SOC’Y 262 (1990); Scott L. Bach, Note, Music Recording, Publishing, and Compulsory
Licenses: Toward a Consistent Copyright Law, 14 Hofstra L. REV. 379 (1986); Marilyn S.
Wise, Trials of the Tribunal: Toward a Fair Distribution of Jukebox Royalties, 16 Sw. U. L.
REV. 757 (1986); Hyman, supra note 327; Frederick F. Greenman, Jr. & Alvin Deutsch, The
Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect, 1
CARDOZO ARTS & ENT. L.J. 1 (1982); Lee, supra note 326; Bruce Schafer, Are the Compul-
sory License Provisions of the Copyright Law Unconstitutional?, 2 COMM. & L. 1 (1980); Lorna
Veraldi, Note, Cable Television’s Compulsory License: An Idea Whose Time has Passed?, 25
N.Y. L. SCH. L. REV. 925 (1980); E. Fulton Brylawski, The Copyright Royalty Tribunal, 24
336. Hyman, supra note 327, at 130-137.
of a videocassette are typically very high in relation to the value gained, and thus tend to discourage use of videocassettes generally. Further, the societal good of allowing performances in libraries in an easy and convenient manner, particularly in pursuit of educational purposes, fits the second general purpose of compulsory licenses.

Practical impediments prevent serious consideration of a compulsory license for performances of audiovisual works in libraries. One problem is the structure of the system itself. Compulsory licenses require an agency to collect license fees from users, to disburse royalties to copyright owners, and to monitor compliance. For the other types of intellectual property governed by compulsory licenses, trade associations such as ASCAP perform these functions, but this raises the question of the appropriate vehicle for videocassettes. One suggestion would be to designate the Motion Picture Association of America (MPAA), on the theory that most videocassettes in library collections are movies. However, a substantial portion are not "movies" in the broad commercial sense, and the MPAA would have no particular interest in monitoring compliance for these resources. Moreover, compulsory licenses require some type of established fee schedule, and devising such a scheme to cover the wide range of financial interests present in the motion picture industry would be difficult. The costs of producing motion pictures vary greatly, depending on a number of factors. Devising a statutory scheme that would compensate all productions fairly would be an impossible task.

The motion picture industry would also be likely to oppose the creation of a compulsory license. Congress sought compromise throughout the copyright revision process, preferring that controversies be settled among those affected before enacting the statute. It is unlikely that Congress would initiate this reform without first offering copyright owners a substantial opportunity for involvement in the formation of any legislation. Finally, current sentiment weighs against compulsory licenses because licenses may affect the return on investment needed to encourage

---

337. Some would argue that comprehensive licenses provide a good alternative. See supra notes 325-327 and accompanying text.

338. See supra note 11 and accompanying text.

339. Movies tend to be classified in three groups according to production costs: those with modest budgets ($10-$15 million), average-sized budgets ($15-20 million), and large budgets (more than $35 million). Lawrence Cohn, 1990s Midsise Pix had Compact Earnings, DAILY VARIETY, Mar. 4, 1991, at 3, 3. The size of the budget for a movie often has no predictable relation to its box office draw or videocassette rental market. Some movies with the lowest budgets draw the largest audiences at the box office and in the videocassette rental market. Id. at 10; Gerald Putzer, "Terminator 2" Takes Ring in $200 Mil Year, DAILY VARIETY, Jan. 6, 1992, at 5, 7. Devising a compulsory license that takes into account widely-varying production costs, and market draw at the box office and in rentals, would be a formidable task.

340. Litman, supra note 50, at 870-79.
the creation of works subject to the license.\textsuperscript{341} Thus, creation of an additional license would be suspect, and Congress would be reluctant to view the proposal favorably. For these reasons, the creation of a compulsory license would not be a likely solution.

D. Clarify Fair Use of Audiovisual Works

Clarification of § 107 of the Act, which deals with fair use, would eliminate the confusion surrounding the performance of audiovisual works in libraries. To dissipate any doubt about its applicability, the section should be revised to state expressly that performances of audiovisual works come under the fair use exemption. Further, since § 107 has been applied most often to reproductions of copyrighted works, Congress should clarify the types of uses for which fair use may be applicable to audiovisual works beyond those the Supreme Court announced in \textit{Sony Corp.} Fair use should apply to “make-up” performances and supplemental performances for students in academic libraries, research performances for students and faculty members in academic and public libraries, and library program performances in public libraries.

E. Expand the Educational Exemption

Congress should expand § 110(1) of the Act to eliminate confusion over the education exemption’s application to “make-up” performances and supplemental performances in academic libraries by students. Section 110(1) permits performances of videocassettes and videodiscs during regularly-scheduled class time, but commentators disagree as to whether this exemption applies to “make-up” performances and supplemental performances. This hinders the instructor unduly by requiring that limited class time be devoted to performances, rather than allowing students to view a particular videocassette or videodisc at their convenience.

F. Create a Public Library Exemption

Public libraries generally have only the fair use limitation in § 107 to permit performances of audiovisual works,\textsuperscript{342} though copyright owners dispute whether fair use is even available.\textsuperscript{343} The educational exemption in § 110(1) applies to public libraries only in very limited circum-

\textsuperscript{341} 1 GOLDSTEIN, supra note 38, §§ 1.2.3.1, 1.2.3.2.
\textsuperscript{342} Fewer applicable limitations and exemptions exist for performances in public libraries. Many performances in academic libraries are exempted under § 110(1). Most performances in special libraries are beyond the copyright owner’s control because they are not public. See \textit{supra} notes 233-235 and accompanying text.
\textsuperscript{343} Letter from Burton H. Hanft & Harvey Shapiro, \textit{supra} note 25, at 11; Bender, \textit{Use of Video, supra} note 230.
stances. This restricts public libraries' effectiveness and value to their communities. For example, the children's librarian cannot show a videocassette during story hour without worrying about the possible consequences. An exemption similar to section 110(1) would give public libraries the flexibility needed for effective service. Recognizing this, the 1991 White House Conference on Library and Information Services passed a resolution requesting Congress to revise the Act to provide public libraries exemptions equivalent to those of educational institutions.

IV

Conclusion

The questions raised by performances of videocassettes and videodiscs in libraries pit strong, competing interests against each other. On one side, the copyright owner attempts commercial exploitation of the property which he or she created. Also intricately involved in the process is the entrepreneur who took the financial risks in bringing the property to the marketplace. On the other side, libraries seek to make information in all forms readily available for a variety of purposes, including education and recreation. Currently, librarians must be careful to avoid infringement when dealing with performances of videocassettes and videodiscs, because the definitions of permissible activities are not always clear.

Of the three major types of libraries, special libraries encounter the fewest copyright problems when performing videocassettes and videodiscs. Because a special library is generally not open to the public, as long as a substantial number of persons has not gathered, a performance of a videocassette or videodisc will not be public and therefore subject to the copyright owner's right of control. As such, special libraries enjoy considerable freedom in performing these works.

The educational exemption in § 110(1) provides academic libraries with an exemption for many performances, but Congress should consider a clarifying amendment to cover instances in which students are absent on the day their classmates view an audiovisual work, as well as when instructors assign students to view works outside regularly-scheduled classes. While the author believes that these instances are covered by the

344. See supra notes 300-301 and accompanying text.
exemption in § 110(1) or by the fair use limitation in § 107, copyright owners generally disagree. The confusion over the applicability of the educational exemption and the fair use limitation creates and maintains a climate in which copyright owners can take advantage of librarians and deplete library budgets through the sale of unnecessary licenses.

Public libraries would benefit the most from a copyright law revision. Because § 110(1) applies to public libraries only in very limited circumstances, these libraries have only the fair use limitation for protection from infringement for performances of audiovisual works. Further, given the debate concerning the application of the fair use limitation to performances of videocassettes and videodiscs, public librarians are left uncertain regarding which services they can legally provide to library users.

The debate concerning the application of the fair use limitation and the limits of the educational exemption will continue as videocassettes and videodiscs gain in popularity in library collections and Congress either must clarify the Act or courts must provide much needed statutory interpretation in order to broaden the fair use limitation to include the fair uses described in this article. Ultimately, Congress should affirm the rights of library users to view videocassettes and videodiscs in public libraries.