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IS IT LEGAL TO COPY A DVD ONTO MY SCHOOL DISTRICT'S DIGITAL VIDEO DELIVERY SYSTEM?

WHITE PAPER

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This white paper was created to provide you with general information and may not address your specific question or situation. Your specific question or situation may change the legal implications. In addition, laws have varying interpretations, are subject to change and each jurisdiction has different laws and regulations. Consequently, this article is distributed with the understanding that neither the author nor publisher is rendering legal advice or professional services, nor does it form an attorney-client relationship. Please be sure to consult with an attorney licensed to practice law in your jurisdiction before taking any action on your specific question or situation.

INTRODUCTION

This question is asked of us several times every week, because we are the leading publisher of educational video for K-12 schools in the U.S. (Schlessinger Media), the largest distributor of educational DVD to schools (Library Video Company), and we are a fully-integrated video-on-demand digital delivery system, which includes thousands of digitized educational titles from dozens of producers (SAFARI Montage).

This question is particularly important today, because many school districts are installing digital delivery systems and want to institute solid copyright policies and practices which reflect the latest laws and thinking.

The answer to this question is "It depends".

School districts should have the legal right to copy a DVD or VHS tape or content in any other format onto their digital delivery video network if the content falls into one of the following categories:

- Content that is **produced and owned by the school district** and the school district personnel have obtained permission for the elements (for example, print materials, music, photographs, footage) that appear in the content. Before placing the content on the school district's digital delivery system, it is also prudent for someone to consider whether the content would violate an individual's right of privacy or publicity or if any of the content would defame any individual or entity.
- Content that is in the **public domain** or not copyrightable by law (for example, federal government works).
- Content that is no longer in print and where no copyright holder can be found is generally known as an **orphaned work**; however, caution should be exercised to ensure that the content is truly orphaned before copying it onto a school district's digital delivery system.
- **Copyrighted Content** for which the school has obtained a license from an appropriate party, and the license specifically permits the school to copy the content onto the school district's digital delivery system and distribute the content over the wide area network.
- **Student-created content** that contains one hundred percent student-created original material and the student has provided permission for the content to be copied onto the school district's digital delivery system (if any of the content is not original, see the discussion below on the fair use defense).

If the content does not fall within these listed categories, the copying of an entire DVD or VHS tape onto your school district's digital video delivery network and the subsequent distribution of the content will infringe the copyright holder's exclusive rights unless the school district can show that the use of the content in each instance would be a "fair use" under the U.S. Copyright Act of 1976. A school district's right to use content in the classroom, including when fair use will apply, is addressed below.

First, let's look at the rights of the copyright holder. There are six rights that a copyright holder has exclusively: reproduction, distribution, public performance, display, creation of new works derived from the copyrighted work (derivative works) and the public performance of sound recordings via digital transmission. Three of these exclusive rights are implicated when a DVD or VHS tape is copied onto a school district's digital delivery system and will result in an infringement unless the school district can show that the use is a fair use or is otherwise permitted by the TEACH Act, which amended the Copyright Act and which is more fully described below.

- The first right implicated is the right to **reproduce** the copyrighted work in copies. When a DVD or VHS tape is uploaded to a server, a copy of the content is made in order for the content to be stored on the server and, therefore, the exclusive right of a copyright holder to reproduce the work is infringed.
- The second exclusive right that will be infringed is the right to **distribute** copies of the copyrighted work to the public. When the content of a DVD or VHS tape is uploaded in its entirety to a server and a copy of the content is accessed remotely by students and teachers, the transmission of the content constitutes a distribution to the public in violation of a copyright holder's exclusive rights. There are those that will argue that the "first sale" doctrine found in the Copyright Act would permit such a use, but as we will explore later, the application of the first sale doctrine to *digital* distributions does not have any merit.
- Third, the right of **public performance** of a copyrighted work will be implicated. The right to show the work in public and charge for that performance is the sole right of a copyright holder. Making the content of a DVD or VHS tape available through a school district's digital delivery network to teachers or students constitutes a public performance and would be an infringement, as this denies the copyright holder the exclusive right to do so.

The exclusive rights afforded a copyright holder make it clear that, unless the content falls into one of the five categories listed above or unless the use of the content is a fair use, the copying of an entire DVD or VHS tape onto a school district's digital delivery system is not permissible.

FAIR USE FACTORS

Let's now look at the rights of a school district. First, a school district could look to the fair use doctrine which, if applicable, would provide a justification for the use of a copyrighted work that otherwise would be an infringement. When Congress revised the Copyright Act in 1976, it codified the fair use doctrine by adding a statutory provision on fair use as an affirmative defense to infringement. The statute, often criticized as vague and difficult to apply, requires a weighing of the following four factors: the purpose of the use, the nature of the copyrighted work, the amount and substantiality of the copyrighted work used and the effect of the use upon the potential market for the copyrighted work. All four factors should be considered, but Courts have not required that all four factors tip in favor of fair use for the defense to be successful. While each case depends on its specific facts and circumstances, at least two or more of the factors generally must show a finding of fair use. Furthermore, adding additional complication to the analysis, some Courts give some of the factors more weight than the others. When balancing these factors, a school district should carefully consider the following:

- **The purpose and character of the use:** Is the use commercial or for a non-profit educational purpose? Is the use "transformative" (is the copyrighted work being used to produce insight or understanding, which is expressed in the form of a newly created work) or is it simply a reproduction of the same work as it was originally produced? A non-profit educational use would weigh in favor of a fair use, however, if the work is merely being copied then, despite its use for educational purposes, it would probably not be a fair use. However, the use of copyrighted works in student-created homework mashups is more likely to be considered a fair use since the use of the work is often transformative.

- **The nature of the work:** Is the original content informational? If so, this factor is likely to balance in favor of fair use. If the original content is creative (such as a popular movie), then this factor is likely to balance against fair use. However, some Courts have determined that if a work is produced *specifically for* the classroom as opposed to a work created for the general public, then the use of such work in a classroom is less likely to be a fair use.
- **The amount and substantiality of the work being used:** How much of the work is being used in relation to the entire work, and is the heart or essence of the work being used? The use of the entire work or the use of the heart or essence of the work weighs heavily against it being a fair use.
- **The effect of the use upon the potential market:** Does this use have an impact on the potential market for the original work? If so, this factor would balance against a fair use. Courts have determined that a use that acts as a substitute for the original work constitutes harm to the market. In addition, if there is or could be an impact on potential licensing and sale of the copyrighted work in its already existing market or in any not yet exploited markets, the use would balance against a fair use.

A New York District Court applied the fair use factors to the educational use of copyrighted works in Encyclopaedia Britannica Educational Corporation, et al. v. C.N. Crooks, et al. In that case, the New York Board of Cooperative Educational Services (“BOCES”) videotaped educational programs from television broadcasts and provided, upon request, copies to its member school districts for delayed viewing in the classroom and over closed-circuit television. The television broadcasts in question were from local public broadcasters and commercial stations. The copyright holders of these programs sued the BOCES for copyright infringement and BOCES alleged that their actions constituted fair use. The Court, after weighing the fair use factors, found that despite the educational nature of the use, the BOCES violated the copyright of the owners of these programs. The Court’s analysis heavily relied on the fourth factor—the effect of the use upon the market—and concluded that the effect of the massive copying done by the BOCES would eliminate the market for videotape sales and licensing of the programs. The Court also stated that the non-profit educational use is not conclusive of fair use, and the copying done in this case was done on a systematic and massive basis versus a spontaneous and single use by a teacher. Encyclopaedia Britannica Educational Corporation, et al. v. C.N. Crooks, et al., 542 F. Supp. 1156 (W.D. NY. 1983), Encyclopaedia Britannica Educational Corporation, et al. v. C.N. Crooks, et al., 558 F. Supp. 1247 (W.D. NY. 1982), Encyclopaedia Britannica Educational Corporation, et al. v. C.N. Crooks, et al., 447 F. Supp. 243 (W.D. NY. 1978).

When the four fair use factors are applied to a school district’s copying of an entire copyrighted DVD onto its digital delivery system, the copying of such DVD or VHS tape onto the digital delivery system would not constitute a justifiable fair use of the copyrighted content. Although the content is being used for an educational purpose, the weighing of the factors would overwhelmingly result against a fair use because:

- the content is being used in its original form for the very purpose for which it was created,
- the work would be accessible in its entirety by students or teachers, and
- the harm that would result to the copyright holder for the digital licensing of their content would be undeniable.

The fair use defense, however, would be more applicable to student-created homework mashups consisting of originally created works and limited amounts of copyrighted works integrated for the sole purpose of creating a new work that is responsive to a homework assignment. When weighing the fair use factors in connection with the use of copyrighted works within these newly created works, the factors are very likely to tip in favor of a fair use since the use of the copyrighted work would be transformative and the use of a limited amount of the copyrighted work would not have an impact on the potential market for it.

GUIDELINES

Because of the difficulty in the practical application of the law and the need for guidance in connection with its use by educators, guidelines have emerged over the years to attempt to apply fair use in the educational setting. While the guidelines have failed to bring certainty to the subjective application of the four-factor fair use analysis, they do provide direction and a minimum standard for compliance with the law to help educators to make real world decisions. Three sets of guidelines that a school district should consider are:

- the Educational Fair Use Guidelines: Distance Learning
<http://www.utsystem.edu/ogc/intellectualproperty/distguid.htm>
- Fair Use Guidelines for Educational Multimedia
<http://www.utsystem.edu/OGC/IntellectualProperty/ccmcguid.htm>
- the Code Best Practices in Fair Use For Media Literacy Education
http://www.centerforsocialmedia.org/files/pdf/Media_literacy_txt.pdf

However, school districts should carefully review these guidelines and their limitations before adopting them.

CLASSROOM EXEMPTION

There is a second set of rights that may be available to a school district that desires to copy an entire DVD or VHS tape onto their school district's digital delivery system for use in a classroom. The Copyright Act contains two provisions that permit use of copyrighted content in the classroom if such use is consistent with certain requirements. In the first provision, instructors in nonprofit educational institutions are permitted to perform or display copyrighted works during face-to-face teaching activities in their classrooms as long as the copy of the work was lawfully made. This is known as the "classroom exemption" and is limited to the *public performance* or *display* of a copyrighted work during "face to face teaching activities", including if the teacher and students are in the same building or general area. The exemption, however, does not permit the *reproduction* or *distribution* of a copyrighted work and, therefore, excludes the ability to broadcast or otherwise transmit content from an outside location into classrooms, whether radio or television and whether open or closed circuit, and would not permit the use of the copyrighted content on a digital delivery system.

THE TEACH ACT

The second provision of the Copyright Act that may permit the copying of copyrighted content on a DVD or VHS tape for use in the classroom is found in The Technology Education and Harmonization Act of 2001, also known as the "TEACH Act". This Act was passed to address the advancements in technology relating to distance education. The TEACH Act, however, was not meant to allow, nor does it permit, all copyrighted works to be used on a digital delivery network for educational purposes. First, copyrighted content that is produced or marketed primarily for instruction via a digital system is not permitted to be copied on a school district's digital delivery system under the TEACH Act. This exclusion to the TEACH Act is specifically intended to prevent the destruction of the primary market for works created for online educational use and to prevent the chilling effect on the creation of such works. Kenneth D. Crews, Professor of Law at the Indiana University of Law-Indianapolis, in *New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act* prepared for the American Library Association, states, "For example, specific materials are available through an online database, or marketed in a format that may be delivered for educational purposes through 'digital' systems, the TEACH Act generally steers users to those sources, rather than allowing educators to digitize [and] upload their own copies." (pg. 8)

Even if a school district can show that copyrighted content is not produced or marketed for instructional use on a digital system, there is a second requirement under the TEACH Act that limits the amount of content that can be copied by a school district onto a digital network. For audiovisual works, the TEACH Act only permits the performance of "reasonable and limited" portions of the copyrighted work. For example, if a school district's history class is learning about the Declaration of Independence and wants to provide the class with a view of Philadelphia including Independence Hall (and the room where the Declaration was signed) and the Liberty Bell, the school district could upload to its digital delivery system three fifteen-second clips from the popular movie *National Treasure* to show the class these Philadelphia locations that were the locale for critical moments in our history. The TEACH Act would permit the use of this copyrighted content since the use is limited to "reasonable and limited" portions of the copyrighted work and the performance is directly related to, and in furtherance of, a legitimate educational purpose.

There is a third limitation under the TEACH Act that precludes the use of a copy of a copyrighted work that is not lawfully made and acquired. If the copy was made without the permission of the copyright holder or if it is not acquired legally (by, for example, purchasing, renting, licensing or other lawful means to obtain the work), then the educational institution may not use it under the TEACH Act.

Furthermore, if the copyrighted work is in analog form (such as a VHS), the TEACH ACT prohibits the work from being converted into a digital form for use on a digital system if the work is already available in digital form or if there are technological protections on the digital version that prevent its use.

If a school district can overcome the limitations imposed by the TEACH Act including that the content is not produced or marketed for instructional use on a digital system, and that the school district's copy of the copyrighted work is lawfully made, then the school district can proceed to analyze whether the remaining limitations in the TEACH Act will permit the use of the copyrighted content on its digital delivery system.

The school district must comply with a specific list of requirements including being an accredited, non-profit institution, and only allowing the use of the content as part of instructional activities limited to a specific number of students enrolled in a specific class, and only during a synchronous (live) or an asynchronous (one-way playback) class session. The TEACH Act also requires that the school district protect the copyright holder's interest by: (i) instituting policies regarding copyright; (ii) providing informational materials to faculty, students and staff that promote compliance with the Copyright Act; and, (iii) providing notice to students that course materials may be copyright protected.

Additional requirements in the TEACH Act provide that a school must also apply technological measures to reasonably prevent the retention of the work in an accessible form by recipients of the transmission for longer than the class session, and to prevent the unauthorized dissemination of the work by such recipients to others. Furthermore, the school district's use of digital transmissions may not interfere with the technological measures used by a copyright holder to prevent unauthorized user retention or dissemination. For the complete list of the requirements, see the TEACH Act at <http://www.copyright.gov/title17/92chap1.html#110>.

When determining if the TEACH Act will provide a permissible use of a copyrighted work and, therefore, an exemption to copyright infringement, the first question a school district must ask is whether the content's primary market is the educational digital network environment. School districts will not always know the answer to this question for most of their DVD or VHS tape unless they ask. Schlessinger Media-branded content, for example, is marketed broadly today primarily for use on the digital delivery system called SAFARI Montage. Schlessinger Media-branded content, therefore, cannot be copied to a digital network without our permission. In the case of another publisher's content, if a school district proceeds with copying a copyrighted DVD or VHS tape onto its digital delivery system without inquiring about its primary market, and the content is deemed to be excluded from the TEACH Act, the school district could subject itself to unplanned licensing fees.

FIRST SALE DOCTRINE

There is one final provision of the Copyright Act that has sometimes been cited as support for a school district to copy a DVD or VHS tape onto a digital delivery system. This provision is known as the "first sale doctrine". The first sale doctrine is generally considered to be a limitation on a copyright holder's exclusive right of distribution and permits a lawfully made copy to be sold or otherwise disposed of by the one in possession of the copy.

There is no support, however, that this provision of the Copyright Law would permit a DVD or VHS tape to be copied and the content transmitted over a digital delivery network. First, if a copy is made in order for the content to be uploaded to the network, then the making of a copy would result in a violation of a copyright holder's exclusive right of reproduction and the ensuing copy would be illegal. The first sale doctrine does not apply to a copy that was unlawfully made. Second, the policy behind the first sale doctrine as interpreted by the Courts has been to enforce the common law rule against restraints on the transfer of tangible property. The transmission on a digital delivery network of content on a DVD or VHS tape does not relate in any way to the transfer of physical property. Instead, the school district is exercising control over the content through its creation of a copy rather than by controlling the dissemination of the physical media. Third, because a physical copy will become worn with time and use, and a digital copy has an endless life span that does not experience any wear and tear with reproduction or dissemination, the existence of a copy in digital format on a digital delivery system will eventually result in a negative impact on the market demand for the original digital copy much more so than would a transfer of physical DVD or VHS tape copies.

Although some companies in the educational industry that sell digital video distribution hardware systems do offer the advice to prospective customers that it is legal to copy DVD and VHS tape onto a school district's digital delivery system and transmit the content throughout the district as long as only one user has

access to the content at any one time, this advice is not supported by the Copyright Act. This position ignores the original purpose for which the first sale doctrine was created—to allow the owner of a lawful physical copy to transfer that copy—and does not take into account that the copying of a DVD or VHS tape onto a digital delivery network will violate a copyright holder’s exclusive rights under the law.

As a producer/publisher, a distributor for 500 publishers to 90,000 schools and a digital video-on-demand and digital media management company, we have always treated the responsibility for copyright compliance and the protection of our customers as our highest priority. In fact, that is the reason that the SAFARI Montage software is designed with digital rights management protection to help school districts comply with many varying types of copyright licenses. Examples of the complexities of properly managing digital rights include managing which content is accessible from home versus which is not, which content may be downloaded to teachers’ desktops and which may not, and managing subscription expirations.

In order to be copyright compliant with Copyright law, school districts are encouraged to create clear, well-informed copyright policies for addressing the copying of DVD and VHS tape onto their digital delivery systems. When drafting these policies, a copyright holder’s exclusive rights and the limitations on these rights found in the doctrine of fair use and the TEACH Act should be carefully considered. The Copyright law also provides an abundance of guidance to school districts regarding the use of content in educational settings, including taping of off-air broadcasts and the creation of multimedia lesson plans that incorporate copyrighted works. Continue to watch our website for articles on these topics.

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