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James S. Heller

William & Mary Law School, heller@wm.edu

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The Public Performance Right in Libraries: Is There Anything Fair About It?*

James S. Heller**

Two sections of the Copyright Act of 1976 permit public performances in libraries under certain circumstances. Professor Heller explains the public performance right in the context of both owners and users of copyrighted works, and proposes a fair use standard that could provide much needed guidance on the use of copyrighted videocassettes in libraries.

Introduction

Fifteen years after enactment of the Copyright Revision Act of 1976,¹ American copyright law remains difficult to understand. Scholars and attorneys frequently disagree on how copyright should be interpreted, and often arrive at different conclusions to the same question.² Conflicting interpretations about the application of federal copyright law are common, not only with regard to copying printed materials, but also concerning performances of audiovisual works.

For example, in 1982, the Attorney General of California was asked whether state correctional authorities may show videocassette tapes of motion pictures to prison inmates. He responded that, because the tapes were purchased with the "for home use only" notice and presentation to inmates would be a public performance, showing the tapes was infringing.³

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** Director of the Law Library and Associate Professor of Law, Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia.

1. 17 U.S.C. §§ 101-810 (1988). The Semiconductor Chip Protection Act of 1984 is codified at §§ 901-14 of Title 17.

2. For example, former Register of Copyrights David Ladd believed that § 108 of the Copyright Act of 1976 would not permit the type of copying sanctioned by the United States Court of Claims in *Williams & Wilkins v. United States*, 487 F.2d 1345 (1975). See U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS: LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) 130 (1983). Copyright Office Policy Planning Advisor William Patry similarly believes that the copying done by the National Library of Medicine and the National Institute of Health Library was beyond that permitted under § 108. WILLIAM PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 184 (1985). Conversely, the late Melville Nimmer stated that the copying done by NIH and NLM was largely permitted under section 108. 3 MELVILLE NIMMER, NIMMER ON COPYRIGHT § 13.05[E][4]-[c]-[d] (1991).

3. 65 Cal. Op. Att'y Gen. 106 (1982).

In that same year, the Attorney General of Utah stated that the Utah State Prison could not show videotapes of motion pictures to groups of twenty or fewer inmates without violating federal copyright law.⁴ Three years later, the Attorney General of Louisiana was asked whether the State Department of Corrections could show movies on cassettes rented from local home video centers to groups of twenty to thirty institutionalized juveniles and adults. Unlike the California and Utah authorities, the Louisiana Attorney General concluded that such performances were not public and were therefore permissible.⁵ In 1988 the Louisiana Attorney General was asked if rented videocassettes could be shown to an audience of 200 to 300 inmates. The Attorney General reaffirmed the 1985 ruling, but said that showings to audiences of more than thirty inmates were not allowed.⁶

Interpreting the Copyright Act, court decisions, guidelines, and disparate opinions of commentators is a Sisyphean task. It is not surprising, therefore, that many librarians feel overwhelmed when they attempt to establish guidelines for proper use of their audiovisual collections.⁷ The difficulties in articulating permissible uses of audiovisual materials in libraries are compounded by the information that owners of copyrighted works distribute to discourage the exercise of legitimate rights under the Act.⁸

4. Utah Op. Att'y Gen. No. 82-03 (Sept. 22, 1982).

5. La. Op. Att'y Gen. No. 84-436 (Jan. 10, 1985).

6. La. Op. Att'y Gen. No. 88-576 (Dec. 19, 1988).

7. A recent study on the development of copyright policies at American universities and colleges notes not only widely disparate policies, but a lack of thorough planning and coordination in policy-making. KENNETH CREWS, COPYRIGHT LAW AND THE CHALLENGE FOR UNIVERSITIES: SERVING LEGAL LIMITS AND THE ACADEMIC MISSION 113-37 (unpublished manuscript, 1991).

8. The Training Media Association (TMA), which represents training media producers and distributors, attempts to instill fear in users. In "How to Avoid a Copyright Protection Lawsuit Against Your Company: Six Legal Safety Tips for Trainers," Nancy Friedman, the Telephone Doctor, states: "Imagine this scenario. You've just received notice from your company's attorney that a major video training company is seeking \$190,000 in penalties and fines. The reason: the new trainer you . . . hired . . . is duplicating tapes. . . . You must find an extra \$190,000 in the budget or face the humiliation of a trial. . . . This could happen to you. It's happening all over corporate America."

TMA offers a bounty for identifying infringers. One of their pamphlets states that "[a] reward of up to \$5,000 is available to anyone having information leading to the arrest and conviction or successful civil prosecution of any training film or videotape pirate."

The Association for Information Media and Equipment (AIME) offers a Copyright Information Packet. In "A Viewer's Guide to Copyright Law," AIME states that under section 110(1), presentations by guest lecturers do not meet the requirement that the performance be given by an instructor or pupils. AIME also remarks that a student who misses a video presentation in a classroom cannot view it the next day in the library. The first statement is clearly wrong. The second ignores fair use and the possibility that a school library may be considered an extension of a classroom for certain purposes.

The framers of the Constitution gave Congress authority to pass copyright legislation, not for the benefit of individual copyright owners, but for the greater benefit of society.⁹ The Supreme Court of the United States has repeatedly stated that the primary purpose of copyright is to promote the publication and dissemination of knowledge; reward to the copyright owner is a secondary consideration.¹⁰ With that purpose in mind, this article explains and analyzes the rights and limitations on performing copyrighted videocassettes in academic, school, and public libraries, then proposes standards for the use of videocassettes in libraries that fairly meet the needs of owners and users of copyrighted works.

II. The Public Performance Right

The 1976 Copyright Act was the first complete revision of the copyright laws since 1909.¹¹ Under the Act, any "original works of authorship fixed in any tangible medium of expression"¹² may be copyrighted, including works that are performable in libraries, such as motion pictures,¹³ sound recordings,¹⁴ and audiovisual works.¹⁵ Congress gave creators the rights to reproduce the copyrighted work, to prepare derivative works from the copyrighted work, to distribute the work, and to display and perform the

9. Article I, § 8, cl. 8 of the United States Constitution gives Congress the power to promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their writings.

10. The primary objective of copyright is not to reward the labor of authors, but "[t]o Promote the Progress of Science and useful Arts." *Feist Publications v. Rural Telephone Service Co.*, 111 S. Ct. 1282, 1290 (1991) (citing U.S. CONST. art. I, § 8, cl. 8). "[T]he limited grant [of copyright] is a means by which an important public purpose may be achieved." *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 429 (1984), *reh'g denied*, 465 U.S. 1112 (1985). "[T]he ultimate aim is . . . to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

11. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

12. 17 U.S.C. § 102. "Fixation" occurs when the embodiment of the work is sufficiently permanent or stable to permit the work to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. While the mere transmission of images on a television screen does not constitute fixation, making a tape of the broadcast does. *Id.* § 101.

13. "'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." *Id.*

14. "'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." *Id.*

15. "'Audiovisual works' are 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.* Videotapes would be considered audiovisual works under this definition.

work publicly.¹⁶ Unless specifically permitted under the Act,¹⁷ exercise of any of the rights of the copyright owner by another person requires either prior permission of the copyright owner or payment of royalties.

Key terms are defined at section 101 of the Act, including the difference between a performance and a display. To display an audiovisual work means to show individual images nonsequentially,¹⁸ such as showing selected individual images from a film. By contrast, a performance of an audiovisual work occurs when the images are shown in sequence,¹⁹ such as presenting an entire motion picture.

The Act protects not all performances, but only *public* performances, which are defined as follows:

To perform or display 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.²⁰

The purpose of the public performance²¹ right is to prevent a substantial number of people from seeing the same copy of the copyrighted work, whether at one time or over a period of time.²² Therefore, a performance will be considered public if a substantial number of people have the *potential* of seeing or hearing the performance, regardless of the number of people who actually attend the performance.²³

16. *Id.* § 106.

17. Sections 107 through 119 of the Act set forth the rights of users of copyrighted works. Section 110, which will be discussed later, provides an exemption for certain public performances.

18. "To 'display' a work means to show a copy of it, either directly or by means of film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." 17 U.S.C. § 101.

19. "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." *Id.*

20. *Id.*

21. The legislative history of the Act makes it clear that a place may be considered open to the public even if access is limited to paying customers. Performances occurring at clubs, lodges, factories, and summer camps, therefore, are public performances. H.R. REP. NO. 91-1476, 94th Cong., 2d Sess. 64, reprinted in 1976 U.S.C.C.A.N. 5659, 5677-78. Under the current Act, a performance is public if a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered even if the performance does not occur at a place that is freely open to the public.

22. 2 NIMMER, *supra* note 2, § 8.14[C][3].

23. The number of people who actually see or hear a performance may be relevant in determining damages under section 504 of the Act. That, however, is a completely different matter from determining whether a performance was infringing. Damages are calculated only after a court concludes that the performance was performed publicly without permission.

Of course, judges are the ones who ultimately decide whether a performance is public.²⁴ Courts attempting to wrestle with this question frequently cite three decisions from the mid-1980s that addressed public performances in commercial settings. *Columbia Pictures Industries v. Redd Horne, Inc.*²⁵ involved a lawsuit against a video store that, after renting videotapes to the customers, transmitted the tapes to small viewing booths (which could accommodate two to four persons), where the customers could view the tapes in relative privacy. The United States Court of Appeals for the Third Circuit felt that this arrangement was similar to a movie theatre, with the added feature of privacy, and concluded that such performances were public.

Two years later, the same court decided a similar case with a slightly different twist. In *Columbia Pictures Industries v. Aveco, Inc.*,²⁶ the Third Circuit held that a for-profit video store could not rent videotapes and allow renters to play the tapes in small viewing rooms in the store. The only difference from *Redd Horne* was that in *Redd Horne* the store played the tapes for the customers; in *Aveco* the renters played it on equipment located in the viewing room. Coming only two years after *Redd Horne*, the holding in *Aveco* was not surprising. However, the court felt compelled to paint with a broad brush: "The Copyright Act . . . does not require that [a] public place be actually crowded. . . . A telephone booth, a taxicab, and even a pay toilet are commonly regarded as [public places]."²⁷

Courts have held that performances in restaurants are public,²⁸ as are performances in condominium clubhouses that are open to the public for a fee.²⁹ A line was drawn in 1989 when the Court of Appeals for the Ninth

24. Judicial involvement occurs only after a lawsuit is filed, and almost all cases in which the public performance right has been litigated involve commercial establishments. Although attorneys general from three different states have rendered opinions as to whether performances in state prisons are public, that question has yet to be addressed by the judiciary.

Other public performance rights issues may never get to court. For example, in 1990 representatives of the motion picture industry and nursing homes reached a ten-year agreement that licenses nursing homes to show videotapes of motion pictures to residents under certain conditions. There must be no direct charges to the residents; the nursing home must receive no commercial advantage from the performances; there can be no retransmissions of the performance; only equipment similar to that used in a private home may be used; and the performance must occur in a common area or living room of the nursing home. Under the agreement, a nursing home will receive the performance license after the film distributor receives confirmation that a ten-dollar contribution to a nonprofit entity has been made by the home. See Copyright L. Rep. (CCH) ¶ 20,600 (1990).

25. 749 F.2d 154 (3d Cir. 1984).

26. 800 F.2d 59 (3d Cir. 1986).

27. *Id.* at 63.

28. *Paramount Pictures Corp. v. Sullivan*, 546 F. Supp. 397 (D.C. Maine 1982).

29. *Hinton v. Mainlands of Tamarac*, 611 F. Supp. 494 (D.C. Fla. 1985). *Hinton* involved musical performances in a condominium clubhouse that were open to the public for a \$3.00 charge. The

Circuit held that a hotel room, once rented, is not a public place.³⁰ Reasoning that a hotel room is much like a private dwelling, the court concluded that a hotel could rent videotapes to their guests for viewing on equipment located in the rented rooms.

These and other decisions indicate that a court faced with deciding whether a performance is public will focus on the place as a whole, rather than on the particular room or location within the building where the work is performed. Video stores and restaurants are either open to the general public or to a large number of people outside of one's family and friends. Although hotels are accessible to the public, an exception has been made because a rented room is equivalent to one's home.

Following the reasoning in *Redd Horne*, *Aveco*, and other decisions in which courts addressed the public performance right, publicly accessible libraries—public libraries and probably academic and school libraries³¹—are public places, and performances in those institutions are public performances. This does not mean that viewing videotapes in libraries is absolutely prohibited absent permission or payment of royalties, however.

Securing a public performance license for all videocassettes purchased, or on a title-by-title basis, is one means of insuring that library-owned videocassettes can be performed publicly in a library. Licenses may be purchased directly from the person or organization holding the public

court stated that it had no trouble "accepting Defendant's contention that the clubhouse in a condominium association is an 'extension of the owner's living room,'" *id.* at 496, but because the public was invited to attend and was charged for seeing the performances, the court concluded that the performances were public.

30. *Columbia Pictures Industries v. Professional Real Estate Investors*, 866 F.2d 278 (9th Cir. 1989). A federal district court recently held that a hotel's centrally located electronic system, which allowed hotel guests to view videotaped movies in their rented rooms, constitutes a public performance under the "transmit" clause of section 101. *On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787 (N.D. Cal. 1991). Although the court confirmed that hotel guest rooms are not public places, it noted that the electronic system "'communicates' the motion picture 'images and sounds' by a 'device process'—the equipment and wiring network—from a central console in a hotel to individual guest rooms, where the images and sounds are received 'beyond the place from which they are sent.'" *Id.* at 789-90. Citing *Redd Horne*, the court stated that although a hotel room is not a public place, hotel guests *are* members of the public, and that "the non-public nature of the place of the performance has no bearing on whether or not those who enjoy the performance constitute 'the public' under the transmit clause." *Id.* at 790.

31. Some might argue that school libraries and certain academic libraries are not open to the public—and that performances held in those libraries are not public performances—if access is limited to the institution's faculty, staff, and students. Performances in school and academic libraries probably are public performances, however, because those libraries are places where a substantial number of persons outside of a normal circle of a family and its social acquaintances gather. Indeed, the legislative history states that "performances in 'semipublic' places such as clubs, lodges, factories, summer camps, and schools are 'public performances' subject to copyright control." H.R. REP. NO. 91-1476 at 64 (emphasis added).

performance right or through a distributor authorized to include public performance rights with videos sold or rented.³² While acquiring public performance rights with every video purchased is an option that libraries should consider seriously, securing these rights varies from being inexpensive to very costly.³³ It is not always necessary to receive permission or pay royalties for performances of videocassettes in libraries, however, because users of copyrighted works also have rights under the Copyright Act. This article explores those rights, specifically the statutory exemption for certain public performances and the doctrine of fair use.

III. Copyright Owners' Rights

A. Fair Use—Section 107

The right of fair use was acknowledged for the first time by an American court in 1841,³⁴ but was not codified until the passage of the 1976 Copyright Act.³⁵ Each of the exclusive rights of the copyright owner listed in section 106 of the Act—including the public performance right—is subject to the corresponding right of fair use by others. Furthermore, fair use applies to all types of copyrighted works, regardless of format. If a use is fair, permission of the copyright owner need not be received, nor royalties paid, before showing an audiovisual work. Similarly, libraries need not purchase a public performance license for the performance of a copyrighted work in the library if the use is fair or permitted under other provisions of the Copyright Act.

In codifying the common law doctrine of fair use, Congress stated that fair use is a flexible rule of reason and that decisions as to whether

32. The section 106 rights of the copyright owner are divisible, meaning that it is possible that different people or organizations may own various rights. For example, the creator of an audiovisual work may retain the right to create derivative works based on the original work, but may have sold the right to perform the work publicly to a film producer.

33. Films Incorporated Video is one of the larger distributor of films and videos. Purchase price of their videos may be as low as \$29.95. Most of the titles in their catalog include public performance rights in the list price. For other titles, public performance rights, if available, can be acquired for \$10 per tape.

The Motion Picture Licensing Corporation is authorized by several motion picture studios (including Disney/Touchstone Pictures, Lorimar Telepictures, and Warner Brothers) to grant umbrella licenses to both for-profit and nonprofit organizations and institutions for certain public performances of home videos. The cost of a license depends on the amount of usage, the size of the institution's patron base, and the number of viewing sites. An annual site license to perform publicly the more than 3,000 titles in the MPLC catalog can range from one dollar a week to several hundred dollars a week. For information, contact MPLC, P.O. Box 3838, Stamford, CT 06905-0838; (800) 338-3870.

34. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

35. 17 U.S.C. § 107.

particular uses are fair are to be made on a case-by-case basis.³⁶ Although this makes it more difficult to generalize about what is and is not fair (and sustains anxiety in librarians who would prefer specific answers to their questions as to what is and is not permitted), the flexibility of the fair use doctrine permits disputes to be decided equitably. Indeed, each of the exemptions to the section 106 rights of the copyright owner—including the public performance rights codified at section 110 of the Act—is based on what Congress considered to be an equitable balance between the rights of copyright owners and the competing needs of users of copyrighted materials.

Congress mandated that at least four factors be considered in determining whether a use is fair. The first factor is the purpose and character of the use, including whether the use is of a commercial nature or, instead, for a nonprofit educational purpose.³⁷ The preamble to section 107 suggests that uses for purposes such as criticism, comment, news reporting, teaching, scholarship, and research are more likely to be considered fair than strictly commercial uses.³⁸ This helps explain why copying by nonprofit libraries that aids scientific research has been held to be a fair use,³⁹ while reproducing and creating anthologies of copyrighted works for profit⁴⁰ and copying merely to promote sales of a product⁴¹ have been held to be infringing. Nonprofit uses clearly are favored over commercial uses, and the U.S. Supreme Court has stated that although not every noncommercial use is fair, such uses are presumptively fair.⁴² Performances of videotapes in nonprofit libraries generally are done for nonprofit—if not always educational—purposes, and are therefore

36. "Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." H.R. REP. NO. 91-1476 at 65.

37. 17 U.S.C. § 107(1).

38. Congress's use of the phrase "for purposes such as" in the section 107 preamble is evidence that the examples in the preamble are illustrative rather than limiting, and other types of uses may be fair.

39. See, e.g., *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

40. *Basic Books v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

41. See, e.g., *Martin Luther King, Jr. Center for Social Change v. American Heritage Products*, 508 F. Supp. 854 (N.D. Ga. 1981); *Amana Refrigeration v. Consumers Union of U.S.*, 431 F. Supp. 324 (N.D. Iowa 1977).

42. "A challenge to a non-commercial use of a copyrighted work requires proof that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market of the copyrighted work." *Sony*, 464 U.S. at 454. Educational uses have been held to be infringing by a number of courts, however. See, e.g., *Encyclopedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982); *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1963); *Macmillan v. King*, 223 F. 862 (D. Mass 1914).

presumed to be fair. This does not mean that performances of videotapes in libraries are necessarily permitted, however.

The second factor that must be considered in a fair use analysis is the nature of the copyrighted work.⁴³ As a general matter, factual or informational works, such as the news and educational films or programs, are favored over works of entertainment.⁴⁴ However, even nonprofit uses of educational works may require the payment of royalties when the copyright owner clearly is harmed.⁴⁵ At the same time, the Supreme Court has held that home taping of broadcast television entertainment programs for the purpose of viewing those programs at a later time (known as time-shifting) is fair.⁴⁶ It should not be forgotten that one person's entertainment is another's information, and a scholar writing a book on the use of special effects in cinema has as strong a fair use argument to view science fiction films as does another person viewing a documentary on endangered species.

The third factor is the amount or portion of the work that is used in relation to the copyrighted work as a whole.⁴⁷ While this factor seems more appropriate when discussing print media—the more you copy the less likely it is that the use is fair⁴⁸—it applies also to performances of copyrighted works. Simply put, the more of the work that is performed, the less likely it is that the use is fair. Performances of entire works are not necessarily infringing, however. Were that the case, the Supreme Court would have decided the *Betamax* case⁴⁹ differently.

The fourth fair use factor is the effect of the use on the potential market for or value of the copyrighted work.⁵⁰ Harm to the copyright

43. 17 U.S.C. § 107(2).

44. See, e.g., *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 563 (1985); *New Era Publications v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir. 1990); *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989); *Consumers Union of United States v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983).

45. In *Encyclopedia Britannica Educational Corp. v. Crooks*, a federal district court held that extensive and systematic off-air taping of educational programs by a nonprofit school system was infringing. The court emphasized that the defendant's activities harmed the very market for which the works were prepared. Also important to the court was the fact that the school system chose not to utilize available licensing agreements. 542 F. Supp. at 1169.

46. *Sony*, 464 U.S. at 417 (1984).

47. 17 U.S.C. § 107(3).

48. The test is not merely one of quantity, however, for copying even a small portion of a copyrighted work may be considered unfair if the portion copied is particularly significant. See, e.g., *Harper & Row*, 471 U.S. at 539; *Iowa State Univ. Research Found. v. American Broadcasting Co.*, 621 F.2d 57 (2d Cir. 1980); *Basic Books*, 758 F. Supp. at 1522.

49. *Sony*, 464 U.S. at 417.

50. 17 U.S.C. § 107(4).

owner is considered the most important of the four factors,⁵¹ and many nonprofit educational uses of copyrighted works have been deemed unfair.⁵² This does not mean that a use should be considered unfair whenever the copyright owner fails to receive royalties or loses a sale, however, for a fair use analysis requires consideration of at least the four factors listed in section 107.

A proposed fair use standard for the use of videocassettes in public libraries is discussed in greater detail later in this article. Librarians and users of videocassettes also should be aware of other provisions in the Copyright Act that exempt certain public performances from requiring the copyright owner's permission or payment of royalties.

B. The Public Performance Exemptions

Section 110 identifies the following situations in which public performances are allowed without permission: certain classroom performances,⁵³ educational instructional broadcasts,⁵⁴ and certain performances at religious services,⁵⁵ for charitable purposes,⁵⁶ in small commercial

51. "This last factor is undoubtedly the single most important element of fair use." Harper & Row, 471 U.S. at 566.

52. See *supra* text accompanying note 42.

53. 17 U.S.C. § 110(1).

54. *Id.* § 110(2). The instructional broadcast exemption applies only to performances or displays of nondramatic literary or musical works as part of systematic instructional activities of a governmental body or nonprofit educational institution. The performance must be related to and materially assist instruction, the content of the work must be educational or instructional, and the transmission must be made primarily for reception in a classroom or other place devoted to instruction, to the disabled, or for public employees as part of their duties. Because this section is not restricted to nonprofit educational institutions, it could apply to certain programs held in public libraries.

Section 110(2) permits over-the-air radio and television broadcasts and cable transmissions. However, copyrighted videocassettes cannot be transmitted to classrooms via closed-circuit or educational broadcast without permission of the owner. Furthermore, broadcasts of dramatic works, films, and audiovisual works are outside the scope of the instructional broadcasting exemption.

55. *Id.* § 110(3). The exemption applies to performances of nondramatic literary works, musical works, or dramatico-musical works of a religious nature at a place of worship or other type of religious assembly. The exemption would exclude performances of musicals such as *Jesus Christ Superstar*.

56. *Id.* § 110(4). A public performance of a nondramatic literary or musical work is allowed under the following circumstances: (1) the performance must be without any purpose of direct or indirect commercial advantage; (2) fees cannot be paid to performers, promoters, or organizers directly for the performance (but performers, directors, or producers may be paid salaries for duties encompassing the performance); (3) there may be no admission charge (or if there is, the net proceeds are used exclusively for educational, religious, or charitable purposes); and (4) the copyright owner has not objected in writing to the proposed performance at least seven days before the date of the performance. This exemption applies to live performances given directly in the presence of the audience; transmitted performances are excluded. Performances of audiovisual works or motion pictures are not permitted under the charitable purposes exemption. This exemption is discussed at some length in H.R. REP. NO. 91-1476 at 85-86.

establishments,⁵⁷ at agricultural or horticultural fairs,⁵⁸ in record stores,⁵⁹ transmitted to handicapped audiences,⁶⁰ and by fraternal organizations.⁶¹ There is no per se exemption for nonprofit public performances,⁶² and permission of the copyright owner is necessary if the use does not fit into one of the specific statutory exemptions or if the use is not fair under section 107. It is also important to understand that section 110 rights will not attach if the work being performed is an infringing copy.⁶³

C. *Infringing Copies*

Videotapes purchased or rented from commercial vendors typically are legitimate copies, and normally may be used for section 110 performances. This is probably true even if the purchaser or renter subsequently discovers that the tape has a "for home use only" warning label; usage restrictions included in shrink-wrap labelling probably are not enforceable as part of the sale or rental agreement.⁶⁴ As a general rule, you may not reproduce a

57. *Id.* § 110(5). This exemption allows performances of regular (non-pay) radio or television programs (including dramatic and audiovisual works) in small commercial establishments so long as customers are not charged for the performance and commercial amplification equipment is not used.

58. *Id.* § 110(6).

59. *Id.* § 110(7).

60. *Id.* § 110(8) & (9).

61. *Id.* § 110(10). This exemption applies to performances of nondramatic literary or musical works if the performance occurs in the course of a social function organized by the fraternal organization and proceeds are used exclusively for charitable purposes. The exemption is available only to groups whose primary purpose is to provide charitable service to the community. College fraternities and sororities may qualify if an event is held for the sole purpose of raising funds for a specific charitable purpose, however.

62. The 1909 Copyright Act provided that nonprofit public performances of musical or nondramatic works were not an infringement of copyright. 17 U.S.C. § 1(c) & (e) (1976) (repealed 1976). The legislative history of the 1976 Act notes that the line between commercial and nonprofit organizations is increasingly difficult to draw, and that many nonprofit organizations are capable of purchasing copyrighted works or paying royalties. H.R. REP. NO. 91-1476 at 62-63.

63. One may reasonably ask whether videotapes copyrighted in foreign countries may be used for section 110 performances. The Ad Hoc Working Group on U.S. Adherence to the Berne Convention has concluded that "the American exemptions 'to exclusive rights of public performance are substantially compatible with the Berne Convention, particularly in light of the laws of Berne States interpreting these obligations. Minor questions of compatibility exist with respect to [17 U.S.C.] sec. 110(2) and (9)." *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, reprinted as app. in *U.S. Adherence to the Berne Convention: Hearings before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 427, 435 (1986), and in 10 COLUM.-VLA J.L. & ARTS 513, 521-32 (1986).

64. Shrink-wrap licensing describes a practice whereby manufacturers or distributors attempt to limit the use of a product by placing a notice of forbidden (or permitted) uses on the package itself; the buyer/renter purportedly agrees to the terms and conditions upon opening the heat-sealed plastic wrapping on the product. A federal appellate court has held that section 117 of the Copyright Act preempted a shrink-wrap licensing provision that barred computer program purchasers from copying or modifying the program purchased. *Vault Corp. v. Quaid Software*, 847 F.2d 255, 268-70 (5th Cir.

legitimate copy of a videotape and use that second copy to exercise section 110 rights; the second copy probably is infringing. It is also important to realize that renters and purchasers can contract away their rights under the Copyright Act.⁶⁵ Signing a contract that prohibits the use of a rented or purchased videotape in a place other than one's home is enforceable, and it is advisable to carefully read any contracts accompanying purchased or leased works.⁶⁶

A more difficult question is whether a program taped off-the-air may be used to exercise section 110 rights, in light of the 1984 *Betamax* decision allowing off-air home taping of broadcast television network programs for the purpose of time-shifting. It would be erroneous to conclude from *Betamax* that taping a television program for section 110 purposes is permissible, for the Supreme Court pointedly addressed only the issue before them. Furthermore, the decision applies only to programs broadcast on free television; pay television programs such as HBO or Showtime are not included.

1988). See also Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1920 and accompanying notes (1990); Page M. Kaufman, Note, *The Enforceability of State "Shrink-Wrap" License Statutes in Light of Vault Corp. v. Quaid Software, Ltd.*, 74 CORNELL L. REV. 222 (1988); David W. Maher, *The Shrink Wrap License: Old Problems in a New Wrapper*, 34 J. COPYRIGHT Soc'y U.S.A. 292 (1987); Note, *Tear-Me-Open Software License Agreements: A Uniform Commercial Code Perspective on an Innovative Contract of Adhesion*, 7 COMPUTER L.J. 261 (1986); Note, *The Protection of Computer Software Through Shrink-Wrap License Agreements*, 42 WASH. & LEE L. REV. 1347 (1985).

65. The legislative history to the Act states that "[n]othing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract . . ." H.R. REP. NO. 91-1476 at 132. The library exemption of the Act states that nothing in section 108 affects any contractual obligations assumed by the library when it obtains a work for its collection. 17 U.S.C. § 108(f)(4).

66. One commentator has stated that "it may be that the copyright owners, when selling videotapes to libraries and schools, directly or through their agents, are put on notice of ordinary library and classroom uses of the materials. They ought to be aware that ordinary use for these institutions includes use on the premises by patrons and students." Debra J. Stanek, *Videotapes, Computer Programs, and the Library*, 5 INFO. TECH. & LIBR. 42, 48-49 (1986).

In rebuttal, Jerome Miller has stated that it is a mistake to assume that videocassette vendors are the copyright owners. "[A] sale by an independent distributor to a library cannot automatically incur a commitment if the distributor does not control the performance rights to the work. One should never assume the acquisition of performance rights with the purchase or lease of a film or videocassette, unless the performance right is specifically granted." JEROME K. MILLER, *USING COPYRIGHTED VIDEOCASSETTES* 29 (2d ed. 1988).

A law firm representing several motion picture production and distribution companies, including Columbia, MGM, Orion, Paramount, 20th Century Fox, United Artists, Universal, Walt Disney, and Warner Brothers, has stated that "[a]bsent authorization, a library cannot loan any videocassette to any individual or group for public performance." Letter from Sargoy, Stein & Hanft to Robert Wedgeworth, Executive Director of the American Library Association 10 (Oct. 2, 1986) [hereinafter Sargoy letter]. It would be prudent for a library, when ordering a videocassette, to indicate on its purchase order that the tape is being purchased by the library for lending and onsite use by its patrons.

Taping is allowed under certain circumstances, however. Guidelines have been developed for taping off-air television programs by nonprofit educational institutions,⁶⁷ and section 108 libraries may tape audiovisual news programs under some situations.⁶⁸ If, however, a copy was not made for one of the purposes enumerated in the Act or Guidelines, it is an unlawful copy, and may not be used to exercise section 110 rights.

D. Academic and School Libraries

The first of the section 110 public performance rights permits the performance or display of both dramatic and nondramatic works (including videocassettes) by instructors or pupils that take place in the course of face-to-face teaching activities of nonprofit educational institutions.⁶⁹ Known as the classroom exemption, section 110(1) requires that there be an educational purpose to the performance; videotapes played for recreation or entertainment purposes—to reward a class for good behavior, for example—do not qualify.⁷⁰

The face-to-face teaching requirement mandates that the teacher and students be in the same general area in the building, though not necessarily in the same room.⁷¹ While broadcasts or other transmissions from outside locations into classrooms are not allowed, amplification devices or visual enhancing equipment may be used within the building.⁷² The classroom

67. The *Guidelines for Off-Air Taping of Copyrighted Works for Educational Use* allow nonprofit educational institutions to record off-air television programs under certain circumstances. The program may be retained for up to forty-five days after it is recorded, after which time it must be erased or destroyed; the recordings may be used once by individual teachers in their classroom and repeated once for reinforcement; programs may not be regularly recorded in anticipation of requests, and no program may be recorded off-air more than once at the request of the same teacher; a limited number of copies may be made from each recording to meet the needs of teachers; after the first ten consecutive school days, the recording may be used only for teacher evaluation purposes; the programs cannot be altered from their original content; all copies must include the copyright notice on the broadcast as recorded; and educational institutions should establish appropriate control procedures. The full text of the *Guidelines* may be found at 127 CONG. REC. 24,048-49 (1981).

68. "Nothing in this section . . . shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1),(2) and (3) of subsection (a). . . ." 17 U.S.C. § 108(f)(3).

69. 17 U.S.C. § 110(1).

70. Law schools provide a good example of the educational/entertainment dichotomy. While a law school may not show a videocassette of a law-related motion picture to entertain its students under section 110, it could offer a law-in-film series in which law-related films are used for educational purposes. Such a scenario would normally require that an instructor introduce the film, identify certain matters that the audience should look for, and lead a discussion about the film after the showing. A showing of *Body Heat* could be the basis of an lesson in professional ethics and, therefore, a permissible performance under section 110(1), so long as the other requirements of that section are met.

71. H.R. REP. NO. 91-1476 at 81.

72. "[A]s long as the instructor and pupils are in the same building or general area, the exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images." *Id.*

exemption also requires that attendance at the performance be limited to pupils, a guest lecturer, or the instructor; the performance cannot be open to others, such as students' friends or the general public. Qualifying performances must take place in a classroom or a similar place devoted for instruction, which could include the library.

A library is permitted to show videocassette performances that meet all of the section 110(1) requirements. Congress did not address the question whether students who miss class or want to review an audiovisual work in a library may do so under the classroom exemption, however. Nor does the Copyright Act or its legislative history indicate whether students may use a library viewing room to watch videotapes recommended or assigned by the instructor or that are otherwise needed to complete a school-related project. Such performances should be permissible under either section 110 or as a section 107 fair use.

Activities where teacher and student are not both present at the time of the viewing would not be permitted if section 110 is interpreted literally. This narrow construction of the face-to-face teaching requirement is not justifiable when a student wants to use a library viewing room to see for the first time or review a video performed earlier in class, however. Those familiar with the American Library Association's Model Policy⁷³ may remember that ALA considers the reserve room to be an extension of the classroom for the purpose of photocopying and distributing materials for library reserve. An academic or school library similarly should be considered to be an extension of the classroom for purposes of the section 110 classroom exemption, and in-class performances that qualify for the exemption should be allowed to take place in a library viewing room.⁷⁴

Interpreting section 110(1) as allowing a student to view a videotape in a library for other educational purposes when the video was not first shown in class is more tenuous. However, a student who wants to watch a videotape in support of a school-related project—regardless of whether the video was assigned by the instructor—should be able to do so under section 107, the general fair use provision. Two factors concededly work against a finding of fair use: that an entire work is to be performed and that the copyright owner arguably would incur financial harm because royalties were not paid. However, the fact that the use is for nonprofit educational

73. AMERICAN LIBRARY ASSOCIATION, MODEL POLICY CONCERNING COLLEGE AND UNIVERSITY PHOTOCOPYING FOR CLASSROOM RESEARCH AND LIBRARY RESERVE USE (1982).

74. The motion picture industry does not agree. Attorneys from Sargoy, Stein & Hanft state that "students who miss a classroom performance may not view a videocassette of a motion picture in a library and be within the classroom exemption, since the instructor and pupils are not in the same building or general area." Sargoy letter, *supra* note 66, at 11.

purposes, and that the nature of the work presumably is educational or informational, should lead to a conclusion that the use is fair.

It makes little sense to say that a student who saw or could have seen a videotape in a classroom or who wants to view a video to complete a school-related project should effectively be denied the ability to view the same tape in a library viewing room absent permission of the copyright owner, especially when the viewing takes place in an individual viewing room. This is particularly true for performances that originally took place in the classroom, and in *Betamax* the Supreme Court emphasized that time-shifting enabled a viewer to see at a later time a work which he or she earlier could have watched free of charge.⁷⁵ Applying this reasoning to schools, the fair use argument is very strong for performances that originally took place in the classroom.

Those outside academia should note that the classroom exemption is available only to nonprofit educational institutions. Performances of educational or training videotapes in other organizations, such as for-profit schools or corporations, are not permitted under section 110(1). However, the legislative history to the Copyright Act states that routine governmental or business meeting showings are not public performances because they do not involve the gathering of a "substantial number of persons,"⁷⁶ and educational or training videotapes may be performed in governmental or commercial settings under most circumstances without payment of royalties if the number of people attending the performances, at one time or over a period of time, is not substantial.⁷⁷

E. Public Libraries

The extent to which library patrons may view videotapes in a public library not affiliated with an educational institution is a matter of considerable debate. An important point that should not be overlooked in addressing this question is that nonprofit libraries may lend all types of audiovisual works to their patrons. As originally enacted, section 109 of the Copyright Act specified that the rightful owner of a copyrighted work could lend the work to others.⁷⁸ Amendments to the Act have limited the

75. Sony, 464 U.S. at 449-50.

76. H.R. REP. NO. 91-1476 at 64.

77. Guidelines drafted by the AALL Copyright Committee suggest that a for-profit company is not authorized under section 110(1) to show videocassettes in conjunction with continuing education classes. *Guidelines for the Use of Mixed Media*, Topic 9, § 18, Comment e, reprinted in *AUTOMATOME*, Vol. 9, No. 2, 1990, at 12.

78. "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a).

lending of records and audiotapes⁷⁹ and computer software⁸⁰ to nonprofit libraries and nonprofit educational institutions. Thus far, the narrowing of the public lending right has not been extended to videotapes.⁸¹ Should that occur, we would likely see a similar exemption for nonprofit libraries and educational institutions.⁸²

There is no express public performance exemption for showing videotapes in public libraries, nor have there been any court decisions addressing this matter. Consequently, the right to show videocassettes in library viewing rooms is unsettled. Not surprisingly, representatives of the motion picture industry have stated that the sale of a videotape to a library does not give the library the right of public performance, and that libraries cannot set up private viewing areas in the library for their patrons.⁸³ This opinion is shared by the Attorney General of Ohio, who in 1987 decreed that an Ohio school district public library could not allow its patrons to view videotapes in library viewing rooms. The attorney general reasoned that because a public library is accessible to the public, performances of videotapes on the premises—even in individual viewing rooms—are infringing public performances.⁸⁴

79. Record Rental Amendments Act of 1984, Pub. L. No. 98-450 §2, 98 Stat. 1727 (1984) (codified at 17 U.S.C. § 109(b) & (d)).

80. Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5134, 8516-19 (1990) (codified at 17 U.S.C.S. § 109(b) (Law. Co-op. Supp. 1991)). Nonprofit libraries may lend computer programs for nonprofit purposes if each copy of a program lent has affixed to its packaging a warning of copyright prescribed by the Register of Copyrights.

81. A bill was introduced in the 98th Congress that would have limited the right to lend videotapes and motion pictures. The Consumer Video Sales/Rental Amendment of 1983 would have amended section 109(a) with the following proviso:

[U]nless authorized by the copyright owner, the owner of a particular copy of a motion picture or other audiovisual work may not, for purposes of direct or indirect commercial advantage, dispose of the possession of that copy by rental, lease, or lending, or by any other activity or practice in the nature of rental, lease, or lending.

S. 33, Consumer Video Sales/Rental Amendment of 1983, 98th Cong., 1st Sess., 129 CONG. REC. 563 (1983). Introduced by Senator Mathias, the bill died in the Senate Judiciary Committee.

82. One commentator suggests that video store rentals may indeed constitute public performances, but that the motion picture studios have not pressed this point and may have implicitly conceded that video rentals are permitted under the current Act. 2 NIMMER, *supra* note 2, § 8.14[C][3].

83. The law firm of Sargoy, Stein & Hanft makes its position very clear with the following statements. "[W]e disagree . . . that public performances of videocassettes to small groups of persons in libraries would be insulated by the fair use doctrine." Sargoy letter, *supra* note 66, at 3. "Libraries across the country pay fees to obtain licenses for the public performance of copyrighted motion pictures on library premises. Libraries cannot evade established licensing programs and erode established markets by invoking the fair use doctrine." *Id.* at 4. "[A]nalysis of the four fair use factors individually or as a group leads to the inescapable conclusion that unauthorized performances of motion pictures in libraries are public, are not immunized by the fair use doctrine, and hence are infringing acts." *Id.* at 7.

84. [I]t is the public accessibility of the location where the videotape is shown that determines whether the playing of the tape is a public performance of the copyrighted work for the purposes of section 106(4). A school district public library is, as its name

While Ohio librarians may choose to follow the advice of their attorney general, attorney general opinions are not binding on state courts, even though the courts may give them substantial weight.⁸⁵ If a public library may lend a videotape to a patron for home use, as even the Ohio Attorney General acknowledged is allowed,⁸⁶ the question should be asked why that same patron may not view the tape in a library viewing room? Videocassette players are not standard equipment in every home, and to deny those who do not own such equipment the privilege of viewing a videotape in the library effectively denies them access to the work. One commentator has suggested that watching a videotape in a library viewing room is no different than another person reading a book in the library.⁸⁷ A similar argument could be raised regarding the use of microforms. No one would argue that a library may lend microforms to its patrons but deny them the ability to read the microforms on library equipment. These are not compelling arguments, however, for there is a difference between reading a copyrighted book and seeing a performance of a copyrighted videocassette. While copyright owners do not have the right to control who reads their works, they do have the exclusive right to perform their works publicly, subject to sections 107 and 110. There are, however, very good reasons why certain performances of videotapes in public libraries should be considered fair use.

IV. A Fair Use Standard for the Use of Videotapes in Libraries

The first factor to be considered in a section 107 fair use analysis is the purpose and character of the use, including whether the use is for commercial or nonprofit educational purposes. The viewing of videotapes

suggests, a place which is open to the public. Therefore, I conclude that the viewing of a copyrighted videotape on the premises of a school district public library constitutes a public performance of the work

1987 Ohio Op. Att'y Gen. 2-715-2-716 (1987) (No. 87-108), Copyright L. Rep. (CCH) ¶ 26,240 (1987) (citing *Columbia Pictures v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984)). The attorney general did not consider it significant that there was no charge to view the videos and that the library is not a commercial enterprise. *Id.* at 2-715.

85. See, e.g., *Calif. Ass'n of Psychology Providers v. Rank*, 793 P.2d 2 (1990); *In re Cronin*, 752 P.2d 40 (Ariz. 1988); *Knight-Ridder Broadcasting v. Greenberg*, 511 N.E.2d 1116 (N.Y. 1987); *McDowell v. Good Chevrolet-Cadillac*, 154 A.2d 497 (Pa. 1959); *Schweinhager v. Underhill*, 141 Ohio St. 128, 132 (1943).

86. [T]he owner of the copyright on the videotapes has chosen to make and transfer the material ownership of copies of the videotape to the school district public library, as provided for by section 106(3). Thus, pursuant to section 109(a), the school district public library, as the lawful owner of a copy of the work, may, in the language of the House Report, "lend it under any conditions it chooses to impose."

Ohio Op. Att'y Gen., *supra* note 84, at 2-717-2-718.

87. Stanek, *supra* note 66, at 48.

by individual patrons in public library viewing rooms for noncommercial purposes should work in favor of such use, even if the use is, strictly speaking, noneducational. The second fair use factor addresses the nature of the work. Although the *Betamax* decision sanctioned home taping of television entertainment programs, it would be erroneous to assume that a court would extend the reasoning in that decision to apply to showings of entertainment videotapes in a library. On the other hand, a patron's viewing an informational or educational work probably would work in favor of fair use. The third factor requires an analysis of the amount of the work used. Although one may argue that this factor makes more sense in the context of copying than performing copyrighted works, the fact that a complete work is being viewed probably leans against a finding of fair use even though the Supreme Court stated in *Betamax* that "the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against . . . fair use."⁸⁸

In the end, the fair use analysis would likely focus on the critical fourth factor—the extent to which copyright owners are harmed by on-site viewing of videocassettes in libraries. Such harm, copyright owners would assert, may occur in several ways, the most obvious of which is the video rental marketplace. Watching a video in a library is most akin to renting a video from a commercial establishment, and may have the effect of reducing business at video rental stores. Given the choice, however, most people probably would prefer watching a video in the privacy of their own home to viewing the tape in a library. It follows that many who would watch videocassettes in a public library do not own videocassette players. It is true that many video stores also rent videocassette players. Renting a videocassette player from a video store is quite expensive,⁸⁹ however, and those who do not own videocassette playing equipment probably do not rent videocassettes very often. Consequently, rather than reducing the market for the work, allowing patrons to view videotapes in the library may actually enhance the market. Libraries might be inclined to purchase more videotape titles, and probably would have to purchase more replacement copies of tapes due to heavier use.⁹⁰

Copyright owners may also argue that allowing patrons to view videotapes of motion pictures in a library would result in lost revenues

88. 464 U.S. at 449-50.

89. In the Williamsburg, Virginia, area the cost of renting a videocassette player ranges from \$5.75 to \$9.95 per day.

90. How often videotapes are replaced varies from library to library. While many libraries will replace a videocassette after it has circulated 250 times, others will let a tape circulate 400 times or more before considering replacing it with a new copy.

from the sale of videocassettes and at theatre box offices. The first argument is readily countered if one accepts the premise that those who view videos in libraries are unlikely to own videocassette playing equipment and would therefore be unlikely to purchase videotapes.⁹¹ As for the second point, library viewing seems less likely than the activities of video rental stores to affect revenues at theatre box offices adversely. As noted earlier, the motion picture industry appears to have sanctioned the activities of commercial video rental stores.⁹²

Copyright owners also profit from their works through payment of royalties, including the sale of public performance rights, and maintain that they are harmed whenever a copyrighted videocassette is performed publicly without remuneration. They maintain that viewing videotapes in libraries cannot be fair if the library forgoes purchasing a public performance license. The problem with this reasoning is that royalties are not required if a use is permitted under section 107. Copyright owners cannot legitimately assert that they have suffered financial harm when royalties have not been paid if a use is indeed fair.⁹³ This is not to say that copyright owners' arguments are frivolous; they are not. The problem is that the courts' emphasis of the fourth fair use factor makes it difficult for users to establish fair use because it is so easy for copyright owners to demonstrate that the potential market for or value of their work has been or will be harmed.

Copyright owners are able to establish a variety of markets for their works.⁹⁴ With regard to books and journals, for example, there is a market not only for the purchase of the book or a subscription to a journal, but

91. In the *Betamax* case, the Supreme Court said that "no live viewer would buy a prerecorded videotape if he did not have access to a VTR." 464 U.S. at 450 n.33. Copyright owners, of course, might argue that more people would purchase videocassette players if they could not watch videocassettes in libraries.

92. See *supra* note 82.

93. In *Williams & Wilkins v. United States*, the U.S. Court of Claims noted the inherent problem of a plaintiff's arguing that a use is not fair because royalties were not paid.

It is wrong to measure the detriment to plaintiff by loss of presumed royalty income—a standard which necessarily assumes that plaintiff had a right to issue licenses. That would be true, of course, only if it were first decided that the defendant's practices did not constitute "fair use." In determining whether the company has been sufficiently hurt to cause those practices to become "unfair," one cannot assume at the start the merit of the plaintiff's position, *i.e.*, that plaintiff had the right to license. That conclusion results only if it is first determined that the photocopying is "unfair."

487 F.2d at 1357 n.19.

94. The author of a recent law review article notes that the linking of copyright protection to market interests "enables an author to recoup revenues generated from all the different uses of his or her work on each of the market segments where it may be commercially exploited, either in original or derivative form." J.H. Reichman, *Goldstein on Copyright Law: A Realist's Approach to a Technological Age*, 43 STAN. L. REV. 943, 956 (1991).

also for portions of books, issues of journals, and journal articles. The Copyright Clearance Center was established not only to make it easier for users to pay royalties to publishers, but also to convey clearly that there is value in, and a market for, excerpts and articles. Because the fourth fair use factor often proves dispositive,⁹⁵ copyright owners may argue convincingly that few uses are fair absent payment of royalties if a price has been placed on the use of the copyrighted work and there exists a convenient mechanism for paying royalties.⁹⁶

In an age when a price has been put on almost everything, emphasis on the fourth factor may no longer be appropriate.⁹⁷ Furthermore, a fair use

95. In the *Nation* decision, the Supreme Court quoted with approval the following passage from the Senate Report on the 1976 Act: "With certain special exceptions . . . a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." 471 U.S. at 568. Nimmer comments that the fourth factor may countervail the first three. 3 NIMMER, *supra* note 2, § 13.05[B] (citing *Haberman v. Hustler Magazine*, 626 F. Supp. 201 (D. Mass 1986)).

96. Paul Goldstein posits that there are two overlapping approaches to a fair use defense. One, a private benefit approach, excuses uses that the copyright owner would have licensed but for insurmountable transaction costs. The other, a public benefit approach, will excuse a use, even in the absence of transaction costs, if the social benefit of the use outweighs the loss to the copyright owner.

2 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 10.1 (1989). Professor Reichman states that Goldstein

links the "private benefits" flowing from the fair use exception to uses that the copyright owner would have licensed but for insurmountable transaction costs. Search and negotiation costs present the typical case, although he warns that technical advances (such as computer retrieval systems) or institutional innovations (such as clearinghouses) could drastically lower these and other transaction costs over time, and thereby alter the legal result.

Reichman, *supra* note 94, at 960 (footnote omitted). According to Reichman, Goldstein recognizes that a market failure analysis will not "resolve 'public benefit' claims that tend to 'excuse a use, even in the absence of transaction costs, if the social benefit of the use outweighs the loss to the copyright owner'." *Id.* (quoting GOLDSTEIN, *supra*, § 10.1. Reichman then states that to avoid the danger that a public benefit analysis could swallow section 106 rights because of the ease in characterizing access to copyright at reduced costs as promoting the public interest, Goldstein "proposes to confine public benefit analysis to the kinds of uses enumerated in the preamble to section 107." *Id.* at 960-61.

97. According to Goldstein, the copyright law does not draw a line between markets entered and not yet entered, and except for specific statutory exemptions, "there are no limits to the reach of section 106's exclusive rights." GOLDSTEIN, *supra* note 96, § 10.2.2. He proceeds to say that the burden should always be on the defendant in a copyright suit to demonstrate why the plaintiff's rights do not embrace the defendant's activities, but notes that "the occasional judicial resistance to this approach is understandable, for the approach's *reductio ad absurdum* is that any use made by a defendant will invade a potential market for the copyrighted work, with the result that if the fourth factor is given effect, few uses will ever qualify as fair." *Id.* To avoid this dilemma, he states that courts have been able to draw lines

between those uses that threaten the potential market for, or value of, a copyrighted work and those that do not, by focusing on the concept of "the normal market for the copyrighted work." This concept, espoused by the 1975 Senate Report, separates those uses of the copyrighted work that the copyright owner may reasonably be expected to make, or license others to make, from those that it could not reasonably be expected to make.

Id.

analysis based only on the four factors is not always justifiable in light of the text of section 107, which states that "[i]n determining whether the use made of a work in any particular case is fair use the factors to be considered *shall* include"⁹⁸ While courts may acknowledge that the four factors are not exhaustive, other factors rarely are considered.⁹⁹

Nimmer comments that "the *Nation* case highlights the inherent limitations of the four Section 107 factors."¹⁰⁰ His concern is echoed by Harvard Law School professor Lloyd Weinreb (albeit with a different conclusion), who states that fair use ought to be what its name suggests—"an exemption from copyright infringement for uses that are *fair*."¹⁰¹ Weinreb comments that other scholars who suggest that courts focus on a utilitarian justification of copyright share a common mistake—they neglect to include consideration of "other social values or, more simply, fairness."¹⁰² Weinreb believes we would be truer to the intents of the drafters of the Constitution and Congress if "factual and normative elements not relevant to a strictly economic assessment or a more general utilitarian approach"¹⁰³ were used in determining whether a use is fair. He concludes that "[t]he reference to fairness in the doctrine of fair use imparts to the copyright scheme a bounded normative element that is desirable in itself. It gives effect to the community's established practices and understandings and allows the location of copyright within the framework of property generally."¹⁰⁴

Academic libraries typically allow their students to view videocassettes in small viewing rooms. I argued above that this practice should be considered an extension of the classroom for purposes of the section 110(1) exemption, and that most student viewing of videotapes in the library should, in any event, be considered fair under section 107. By contrast,

98. 17 U.S.C. § 107 (emphasis added).

99. "Indeed, the statute indicates that these four factors are not necessarily exhaustive. . . . However, since 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." *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1175 n.10 (5th Cir. 1980).

100. [I]t appears that the dissent has advanced stronger arguments for fair use under the first two factors, while the majority has demonstrated that the last two factors weigh against fair use. More importantly, however, it is clear that powerful arguments exist on both sides of each factor. For given the general language of the factors contained in Section 107 and the absence of guidelines for their implementation, reasonable minds can look at different aspects of a single situation and reach opposite conclusions regarding purpose, nature, amount of copying, and market effect.

3 NIMMER, *supra* note 2, § 13.05[A][5].

101. Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138 (1990).

102. *Id.* at 1150.

103. *Id.* at 1158.

104. *Id.* at 1161.

performances in public library viewing rooms cannot ordinarily be justified under section 110.

A copyright owner could easily establish harm if a public library fails to receive permission to perform copyrighted videocassettes in library viewing rooms. Library patrons should be permitted to view videotapes in single-person viewing rooms, however; as Weinreb suggests, it seems fair. Because many public libraries already permit this activity, such use also "gives effect to the community's established practices and understandings."¹⁰⁵ Allowing small groups to view videotapes in the library concededly is more problematic. However, a reasonable argument may be made that small groups of family members or social acquaintances should be allowed to view a videotape in the library if they could have viewed the tape in the privacy of their home.¹⁰⁶ Small groups of students similarly should be able to view videotapes in academic, school, or public libraries without permission.

If one accepts the proposition that *some* viewing of videotapes in public libraries is fair use, the next question is how many people should be permitted to watch a videotape in a library viewing room at one time? My answer is four. There is no magic to this number. Some numbers just seem right, and with regard to library viewing rooms, four seems to be the right, or fair, number.¹⁰⁷

Viewing videotapes is nearly as common today as was turning on a television in 1976, the year the Copyright Act was enacted, and allowing individuals or small groups the privilege of viewing videotapes in libraries simply seems fair.¹⁰⁸ Users' rights are not limitless, of course. Balancing the

105. *Id.*

106. The legislative history to the Act states that "'a family' in this context would include an individual living alone, so that a gathering confined to an individual's social acquaintances would normally be regarded as private." H.R. REP. NO. 91-1476 at 64.

107. It just may be the long-lasting impact of all the television programs from the 1950s and 1960s that featured four-person families (*Ozzie and Harriet*, *Donna Reed*, and *Leave It To Beaver*, to name a few).

108. Jerome Miller has suggested that librarians consider pushing for an amendment to section 110 that would allow nonprofit libraries that are open to the public to perform or display motion pictures and other audiovisual works if "(a) the performances and displays are open to the public at large; (b) there is no direct or indirect admission charge; and (c) the performances are without any purpose of direct or indirect commercial advantage." Conceding that the chance of getting such legislation passed would be difficult, Miller still suggests that "serious effort" in advancing such an amendment may encourage the film industry to offer more attractive licenses. MILLER, *supra* note 66, at 35-36.

It would be unwise for libraries to lump all public performances together, however. Reasonable distinctions should be drawn between large screen showings open to the public that compete with movie theatres or with video rentals or sales, and providing individual or small group access in small library viewing rooms using equipment similar to what one might use at home. If legislation is proposed, libraries should push for the latter, more limited, exemption.

relative rights of owners and users of copyrighted works necessarily involves drawing lines, and it is appropriate to delineate appropriate limits on the fair use of videocassettes in libraries.

VI. Guidelines for the Use of Videocassettes in Libraries

Librarians understandably worry about both personal and institutional liability for copyright infringement, because a library and its employees could be considered direct or contributory infringers, depending on the nature and extent of their involvement in the infringing activity.¹⁰⁹ Indeed, damages for copyright infringement can be substantial, particularly if the infringement was willful. However, statutory damages will not be assessed against employees of nonprofit educational institutions or libraries if the infringer believed or had reasonable grounds for believing that the use was fair under section 107.¹¹⁰ The unsettled nature of the use of copyrighted videocassettes in libraries makes it extremely important that a library have written policies providing guidance to their staff and patrons in the use of copyrighted videocassettes.¹¹¹

109. The legislative history to the Copyright Act states that "[t]o be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation and either direct or indirect benefit from the infringing performance." H.R. REP. NO. 91-1476 at 159-60 (emphasis added). While ignorance of the infringing activity is not a defense, court decisions seem to require that the defendant derive a financial benefit from the infringing activity. *See, e.g.,* Sony, 464 U.S. at 435 n.17; *Demetriades v. Kaufmann*, 690 F. Supp. 289, 292-93 (S.D.N.Y. 1988).

Contributory infringement, on the other hand, may occur when someone with knowledge of the infringing activity "induces, causes, or materially contributes to the infringing conduct of another." 690 F. Supp. at 293 (quoting *Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1159, 1162 (2d Cir. 1971)). To be held liable as a contributory infringer, there must be some knowledge that another person intends to commit an infringing act.

While the distinction between vicarious and contributory infringement is not always clear, the absence of commercial gain would seemingly render nonprofit libraries not vicariously liable as direct infringers. Conversely, a library that knowingly permits infringing public performances to occur on its premises could be held responsible as a contributory infringer.

110. Section 504 of the Act sets forth the damages provisions for infringement. A copyright owner has the option of choosing between actual or statutory damages. Actual damages are those suffered by the copyright owner as a result of the infringement, including the profits (if any) made by the infringing party. Statutory damages may range from \$500 to \$20,000 per infringing act, at the discretion of the court. If the court finds that the infringement was willful, it may increase the award of statutory damages to \$100,000. Statutory damages may be reduced to \$200 if the court finds that the infringer was not aware and had no reason to believe that his or her acts were infringing. Statutory damages will be remitted entirely if the infringer believed and had reasonable grounds for believing that the use was fair under section 107, and the infringer was an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment.

111. A 1986 insert to *American Libraries*, the official news medium of the American Library Association, included guidelines on the use of copyrighted videotapes and computer programs in

First, libraries should insure that the viewing rooms are small and can accommodate no more than four persons. Although monitoring may be difficult, it would be prudent to make sure that those watching a videotape are either classmates, family members, or social acquaintances. The equipment on which videotapes are shown should be of the kind typically used in a private home;¹¹² large-screen televisions that might dilute theater revenues should not be used. To avoid the appearance of profiting from the performance of videotapes, libraries should not charge their patrons to view videocassettes in the library.

A related question is whether libraries may lend video playing or recording equipment to their patrons. Copyright owners see this activity as creating two potential threats: that patrons might unlawfully reproduce copyrighted videotapes, and that the tapes might be performed outside the library before large groups using library equipment. Libraries have a responsibility to avoid participating, either directly or indirectly, in infringing activities of their patrons, and should monitor the use of their videocassettes, equipment, and viewing rooms.

libraries. The authors of the guidelines noted that not all uses are permitted under the Act, and that permission can always be sought from the publisher if a particular use would be infringing. After listing the circumstances in which in-classroom performances are permissible, the authors offered the following guidance for the use of videocassettes in public libraries:

1. Most performances of a videotape in a public room as part of an entertainment or cultural program, whether a fee is charged or not, would be infringing and a performance license is required from the copyright owner.
2. To the extent a videotape is used in an educational program conducted in a library's public room, the performance will not be infringing if the requirements for classroom use are met. . . .
3. Libraries which allow groups to use or rent their public meeting rooms should, as part of their rental agreement, require the group to warrant that it will secure all necessary performance licenses and indemnify the library for any failure on their part to do so.
4. If patrons are allowed to view videotapes on library-owned equipment, they should be limited to private performances, i.e., one person, or no more than one family, at a time.
5. User charges for private viewings should be nominal and directly related to the cost of maintenance of the videotape.
6. Even if a videotape is labelled "For Home Use Only," private viewing in the library should be considered to be authorized by the vendor's sale to the library with imputed knowledge of the library's intended use of the videotape.
7. Notices may be posted on videorecorders or players used in the library to educate and warn patrons about the existence of the copyright laws, such as: MANY VIDEOTAPED MATERIALS ARE PROTECTED BY COPYRIGHT. 17 U.S.C. § 101. UNAUTHORIZED COPYING MAY BE PROHIBITED BY LAW.

Mary Hutchings Reed & Debra Stanek, *Library and Classroom Use of Copyrighted Videotapes and Computer Software*, 17 AM. LIBR. (1986) (insert after page 120).

112. Section 110(5) of the Copyright Act allows small commercial establishments to transmit radio and television broadcasts to their patrons using standard home-style equipment. According to the legislative history, commercial sound systems are not permitted, nor may home-style equipment be augmented with sophisticated or extensive amplification equipment. See H.R. REP. NO. 91-1476 at 86-87.

Libraries that lend equipment should seriously consider making available to their patrons only equipment that can play but not record videotapes. Libraries may also decide to prohibit patrons from taking library-owned equipment out of the library. A library employee who has reason to believe that a patron plans to copy a videotape or show it to a large audience (an unauthorized public performance) has two options. First, the staff member could inform the patron that unauthorized uses are prohibited by law and provide the patron with the text of the pertinent provisions of the Copyright Act. Alternatively, the library may refuse to lend the tape or library equipment.¹¹³ This latter conduct, however, places a staff member in the position of making legal conclusions as to whether certain activities are infringing, which has its own risks.¹¹⁴ In any event, a copyright notice should be affixed to library-owned equipment and videocassettes, notifying users that copyrighted videotapes are protected by copyright and that unauthorized copying and public performances of the tape are prohibited by law.¹¹⁵

Caution should also be exercised when a group requests to use a room in the library to view videotapes. Libraries should not permit large

113. Other provisions of the Copyright Act prohibit copying by libraries if the library knows or has reason to believe that the intended use of the work is prohibited under the Act. The section 108 library exemption provides that a library may make one copy of an article or small portion of a work if the copy becomes the property of the user, and "the library or archives has had no notice that the copy . . . would be used for any purpose other than private study, scholarship, or research . . ." 17 U.S.C. § 108(d)(1).

114. Library staff should not tell their patrons that certain contemplated acts are infringing. Librarians—even those with law degrees—may not engage in the unauthorized practice of law. While library staff may inform patrons that certain types of activities *may* be infringing—and give a patron a copy of sections 107 and 110 of the Copyright Act and, perhaps, references to illustrative literature—they should never tell a patron that an intended use is or is not an infringement. *See, e.g.,* Virginia State Bar, Unauthorized Practice of Law Op. No. 127 (Feb. 2, 1989).

115. The Sargoy, Stein, & Hanft attorneys state that libraries knowingly renting equipment or cassettes to patrons for unauthorized copying or public performances are infringers. "Courts have consistently held that persons who make equipment available for unauthorized duplication of tapes are infringers even when they do not supply the copy of work being duplicated." Sargoy letter, *supra* note 66, at 8-9 (citing *RCA Records v. All-Fast Systems*, 594 F. Supp. 335 (S.D.N.Y. 1984) and *Elektra Records Co. v. Gem Electronic Distributors*, 360 F. Supp. 821 (E.D.N.Y. 1973)). The attorneys cite *Aveco* for the premise that renting equipment alone, for purposes of unauthorized public performances, constitutes infringement. *Id.*

17 U.S.C. § 108(f)(1) states that a library will not be liable for infringement for the unsupervised use of reproducing equipment located on its premises if the equipment displays a notice that the making of a copy may be subject to the copyright law. Stanek wisely suggests that libraries post on their equipment or in their viewing rooms a notice that videotaped materials are protected by copyright and that unauthorized copying may be prohibited by law. Stanek, *supra* note 66, at 49.

It would be appropriate for the notice to address both copying and public performances issues, such as "THIS MATERIAL IS SUBJECT TO THE UNITED STATES COPYRIGHT LAW (17 UNITED STATES CODE); UNAUTHORIZED COPYING OR PUBLIC PERFORMANCE OF THIS WORK IS PROHIBITED."

groups—arguably more than four persons—to view videotapes on the premises unless one of four conditions has been met: (1) the use meets the criteria of one of the section 110 exemptions; (2) permission to perform the work publicly has been received; (3) royalties have been paid; or (4) a public performance license has been obtained for the work. Libraries also might be well advised to limit in-library performances to library-owned tapes and prohibit patrons from bringing their own tapes to the library to be performed on library equipment.

VI. Conclusion

Performances of videocassettes in publicly accessible libraries are public performances and are permissible without the copyright owner's permission or payment of royalties only if allowed under the section 110 public performance exemption or as a section 107 fair use. While the public performance exemption permits certain performances in academic or school libraries, that exemption rarely would apply to the activities of nonacademic libraries. However, the fair use exemption should be construed to permit, under the circumstances enumerated in this article, performances of videocassettes in public libraries.

There has yet to be a judicial decision interpreting the application of the public performance right in libraries. Still, copyright owners are aggressively asserting their perceived public performance rights. Users also have rights, and librarians should not shy away from the challenge of drafting policies that balance copyright owners' public performance rights with the corresponding rights of their users.