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Conference on Video Recording for Educational Uses -- Where Do We Go From Here?

When the House Judiciary Committee issued its report on Copyright Law Revision last year (H. Rept. 94-1476), they said that the problem of off-the-air taping of copyrighted audiovisual works in radio and television had proved difficult to resolve. They believed that fair use has some limited application but that development of detailed guidelines would require a more thorough exploration of the needs and problems of the various interests affected than had been possible up to that time. They urged that representatives of the different interests continue their discussions in a constructive spirit under the leadership of the Register of Copyrights.

In response to this problem, the Copyright Office and the Ford Foundation cosponsored a conference on video recording for educational uses July 19 through 22 at Airlie House near Warrenton, Virginia. The purposes of the meeting were: to bring together the interested parties; to identify the scope of the problems with respect to a variety of affected institutions; and to suggest procedures for developing guidelines.

The initial plenary session consisted of opening remarks from the cosponsors-- Barbara Ringer, Register of Copyrights, and Edward J. Meade, Jr., of the Ford Foundation--followed by presentations on the "Impact of Copyright Law on Video Recording" by Ms. Ringer and the "Impact of Educational Off-Air Recording on Copyright Law" by Ken Winslow from the Public Broadcasting Service.

Presentations generally expressing the divergent views of off-air taping by representatives of educational organizations and media producers were made by: Ivan Bender, Association of Media Producers; Harold Hill, University of Colorado, Dept. of Communications; William S. Singer, Prime Time School Television; August Steinhilber, National School Boards Association; and Charles Vlchek, Central Washington State College, Audiovisual Division.

General discussion followed, reacting to the foregoing speakers and then participants (some 70 organizational representatives, including the ALA Washington Office Director) were assigned to working groups for a free-wheeling exchange. The charge to conferees was to share information, consider the range of opinions and exchange ideas and constructive thinking about what might be done next to reach agreement on the problems of off-air taping. A transcript of the entire conference will be published by the Copyright Office sometime this fall. Meanwhile, the final report of one of the working groups is attached for background information. The report of this particular group, chaired by Ms. Ringer, reflects the general format and line of thinking which was covered in each of the four other working groups.

"What Next?" was the theme of the closing session. There was general recognition that fair use does apply to off-air taping--to what extent and what procedures can be established to handle it have yet to be determined. All agreed to continue working on the problem in a spirit of constructive cooperation.

FINAL REPORT
WORKING GROUP I
Barbara Ringer, Leader
Marlene Morrisey, Rapporteur

Conference on Video Recording for Educational Uses
July 19-22, 1977
Airlie, Virginia

1. The present dimensions of the problem. Group I recognized that a great deal of off-the-air taping for educational purposes is currently going on, although one member of the group felt that some estimates of its general pervasiveness were exaggerated. Most of the taping activities take place within educational institutions on the institutions' own equipment, and is either done by teachers or at their instance. For the most part it is not inaccurate to describe the practices as spontaneous, though there are some notable exceptions. Similarly, there is little duplication or use of the tapes outside the educational institution where they were made. There is less off-the-air taping for educational purposes in the lower grades, with the curve rising at the secondary, college, and university levels. The types of programs taped, and the varieties of teaching purposes to which the tapes are put, covered an almost unlimited range. There is little pattern to the various lengths of time tapes are kept before being erased; some may be kept for several years or even indefinitely, and dissatisfaction was expressed by educators with respect to the "seven-day" rule now in use to some extent in educational broadcasting. Organized licensing practices that meet educators' needs to tape off the air or to obtain copies of television programs for classroom use are, with some exceptions, either nonexistent or are not operating very efficiently.

2. Future possibilities. Group I agreed that off-air taping of television programs was certain to continue and to increase substantially, but beyond this it regarded definite predictions as risky. An important but uncertain factor was whether videotape or the video disk would eventually become the dominant form for video-recordings; if disks (with playback but without recording possibilities) achieve market dominance, the copyright owners' control over use of their works would be enhanced. However, the introduction of any form of low-cost video recordings into the consumer market on a large scale seems likely to have a radical effect on traditional forms of broadcasting, programming, and advertising, and to impel copyright owners to take action to defend themselves against unauthorized recording. The Group considered that efforts to introduce jamming signals into programming to impede its taping would be subject to strong criticism and would be likely to prove futile.

3. General views

a. Working Group I as a whole did not accept the view that off-air taping should be free of copyright restrictions in all cases and under all circumstances, nor did it accept the opposite view that unauthorized off-the-air taping should be considered copyright infringement in every case, without regard to the doctrine of fair use. One member of the Group felt that, at least philosophically, there should be no restrictions on off-air taping for nonprofit educational purposes. A representative of organized performers, while not ruling out the possibility of applying the fair use doctrine to off-air taping in certain cases, was constrained not to discuss general guidelines for fair use in this area, at least until after licensing procedures had been worked out.

b. Within Group I there was no expressed opposition to the making of off-air recording by libraries for archival preservation, or to the use of the tapes by individual scholars for research purposes, under the fair use doctrine. The librarians on the group expressed the need for clearer guidelines as to the meaning of fair use in this area. The Group agreed that a distinction must be drawn between archival preservation and research use on the one hand, and use of tapes in classroom teaching on the other.

4. Fair use

a. With the exception of one member representing organized performers, Group I concluded that there are fair use principles applicable to off-the-air taping for educational purposes, and that the extent to which a work can be used under the fair use doctrine without payment should be considered before attempting to define the procedures for clearance, licensing, and payment for uses beyond fair use. The need for eventual guidelines governing specific practices permitted and prohibited as fair use was recognized. Educators in Group I agreed that teachers want to know the applicable principles so they can abide by them.

b. At the same time, it was noted that the breadth or narrowness of the fair use definition will interact with whatever licensing procedure is agreed upon beyond fair use. Where clearances are necessary beyond fair use, educators want simple, efficient, and effective licensing procedures that will allow them timely access to the material they need.

c. With the exception already noted, Group I determined that the following principles are worthy of discussion within the various groups and interests affected by off-air taping for educational purposes, and of further consideration among these groups and interests:

1. It is essential to define the limits of fair use for educational purposes as the first priority. This definition should precede consideration of licensing. Licensing would apply only to the use of audiovisual materials beyond the permitted fair use.

2. The definition of fair use should include the privilege to reproduce televised works off-the-air in whole or in part, and to retain and use these reproductions in noncommercial classroom situations and in other systematic noncommercial instructional activities, for teaching purposes, for a limited period of time, as explained in paragraph below.

3. Where an entire work is reproduced, the appropriate credits and the copyright notice should be included in all cases. Where an excerpt is reproduced, the work from which it is taken should be identified, and the copyright notice should be reproduced unless impracticable (e.g. stock footage).

4. The following practices would be prohibited under the doctrine of fair use:

a. the making of more than a single copy by or for a particular teacher;

b. any transfer, distribution or use of the copy made under the fair use doctrine outside the educational institution;

c. Reproduction of "theatrical" or "feature" films (i.e., films previously distributed for public showing other than on television), inasmuch as these are available through licensing arrangements for educational use.

d. Off-air taping of broadcasts by an educational institution, not at the specific instance of an individual teacher.

5. Duplication or multiplication of additional copies of a work by or for the same teacher would not come within the doctrine of fair use.

6. There was general agreement that tapes made under the fair use doctrine should be erased at the end of a limited period, but the Group reached no conclusion as to what that period should be, and agreed that more exploration is needed as to the availability of licenses and patterns of use. Various possibilities were discussed: a period based on "school days"; on a particular number of classes scheduled in a course; on the length of a curricular unit such as a semester or quarter; or on the number of uses. The Group was unable to agree as to whether the relevant period should start from the first broadcast of a particular program on television, or from any broadcast, even if a rerun. There was some interest in the possibility of having variable standards based on whether, at the time of a rerun, the program was available for licensing.

7. There was general acceptance of the principle that any guidelines worked out should be enforced, to the extent possible, by the authorities of the educational institution involved, but no consensus was achieved as to what this would mean in practice as to record-keeping and active policing.

8. There was some feeling that the standard of spontaneity was an important factor in applying the doctrine of fair use, and that this had bearing on the length of time a tape could be retained and used before erasure. The Group as a whole, however, did not adopt a definition of spontaneity as a basic requirement of fair use in this area.

9. It was agreed that off-air taping for purposes of archival preservation and for research use in libraries and archives comes within the doctrine of fair use. However, it was not agreed that the presence of tapes in an archive available to teachers carries with it the privilege to use the tape for classroom teaching purposes.

5. Licensing Procedures

a. There was no support among Working Group I for alternative approaches to licensing of educational taping beyond fair use, such as tax credits or levies on tape recorders or tapes.

b. At the present time, there were no members of Group I advocating any sort of compulsory licensing scheme, although the educators did not rule out the possibility for the future. Instead, the Group saw a pressing need for a central organization from which educators could readily obtain information about clearances and through which licensing arrangements could be made. Educators were primarily concerned about uniformity, ease and efficiency of access, and reasonableness of fees; the view was expressed that producers generally should work toward licensing in large enough quantities to allow the economics of scale to bring fees down to a level educators can pay.