

Inter-Library Lending and
Online School System Union Catalogs:
A Lesson in Copyright Liability
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Last fall, a group of educational video companies asked me to take a close look at a problem that was threatening their livelihood. With the encouragement of New York State, the New York Nassau County BOCES had developed an online, electronic catalog system, known as the Nassau BOCES Union Catalog. With over 500,000 records, including over 40,000 records of video and DVD holdings from more than 160 school libraries in Nassau County, the Union Catalog was designed to help schools and libraries facilitate inter-library lending of works from their collections. However, neither New York State nor the Nassau County BOCES ever realized the legal need to distinguish the treatment of books and magazines (works that are purchased outright and that may be freely loaned under the copyright first sale doctrine) from videos and DVDs (works that are typically acquired subject to license restrictions, such as site, use and term). Under the provisions of the license agreements and copyright law, many DVDs/videos, like computer software, should not be used for inter-library loans without permission of the DVD/video distributor or program owner; yet, the posting of the lending information about videos within the Union Catalog and the BOCES statement that they were “available” for loan was encouraging the inter-library lending of these works without due consideration of special circumstances.

A. Neither First Sale, Nor Fair Use Guarantees Free Loaning of DVDs/Videos

Briefly, the first sale doctrine, Section 109 of the Copyright Act, provides that the *owner* of a copy of a work, lawfully made under the Copyright Act, may “sell or otherwise dispose of the possession of that copy.” For decades, the first sale doctrine has been the legal underpinning of inter-library lending. However, the first sale privilege does not extend to any person who has

acquired possession of the copy “by rental, lease, loan, or otherwise, without acquiring ownership of it.” §109(d) of the Copyright Act.

From their inception, educational distributors determined not to “sell” most VHS or DVDs programs to schools and libraries; rather, aware of the inter-library lending rules, they decided to license them, usually for particular locales, periods of time or purposes. For example, a school may acquire a video for a “single site” at a cost of \$100 and a term of 5 years. This means that the right to exhibit the video is limited to the acquiring institution during that period. If an institution wants to share the video with other schools, it must secure a “multi-site license.” Similarly, once the 5 year term expires, the video must be returned or warehoused (check the contract for what to do) or be renewed by paying an extension of term fee. To meet multi-site needs, many school districts, like Nassau County, operate Media Centers. Media Centers purchase rights to circulate videos among all schools by paying a higher fee, for example, \$500 for the video that would be available on a single site basis for \$100.

For purposes of the Union Catalog’s inter-library lending program, the limitations, such as a single-site license or “home use only,” mean that the institution has acquired a copy by “lease or otherwise” and is a licensee, not an owner. As a result, free lending between schools and libraries cannot be presumed without consideration of the license and, if appropriate, permission of the copyright owner or the distributor.

To further complicate the Union Catalog’s plan, the inter-library lending authorization in Section 108 expressly notes: “Nothing in this section ...in any way affects ... any contractual obligations assumed at any time by the library or archives when it obtained a copy ... of a work in its collections.” In short, when a copy of a video program is obtained with the understanding that it is to be used in a single location only or subject to other restrictions, the inter-library lending scheme of the Copyright Act does not permit it to be circulated in violation of the license

terms. Moreover, the Fair Use Doctrine of copyright law, the safe haven for many educational uses, does not authorize the inter-library lending of such works, first because most contractual or license terms must be honored, and second, because unfettered public distribution of copies of video or DVD programs obtained subject to license restrictions would undermine “the market for and value of the original,” one of the barriers to a finding of fair use.

Aside from copyright, the Nassau BOCES Union Catalog’s procedures raise other legal concerns. Aware that certain video or DVD titles may be substituted one for another in the course of classroom teaching and educational use, the Union Catalog enables the loan of one video or DVD title to replace the marketplace purchase of another. In short, if third party videos or DVDs are improperly circulated via the Union Catalog, the educational distributors may be deprived of the opportunity to compete fairly and are likely to lose business.

B. Notice to BOCES Leads to Negotiations and Settlement

When the educational DVD/video distributors learned that many of their video programs were listed in the Nassau BOCES Union Catalog and were identified as “available” for lending without consideration or specification of license restrictions in their contracts, they asked me to alert the Nassau BOCES that the Union Catalog could be contributing to unauthorized distribution of their programs. What ensued was a warning, followed by negotiations, which ended in the Nassau BOCES agreeing:

1. To modify data available on its Union Catalog website and particularly the suggestion that videos are “available” for loan, and
2. To notify all school districts that listing of video/DVD titles in its online catalog system did not authorize lending of video and DVD programs.

Over the summer, the Nassau BOCES eliminated any suggestion that videos/DVDs in its Union Catalog may be freely loaned without regard to contracts by permanently posting the following warning notice on the Nassau BOCES Union Catalog Search Page:

The Videos and DVDs in the Union Catalog are listed for informational purposes only. All Videos and DVDs are subject to copyright law and may be subject to contractual use limitations covering site, term, home use only, etc., which restrict interlibrary lending. Every school district library is cautioned to carefully review all contracts by which it secured copies of such works for any use and loan restrictions and abide by the terms of such contracts.

In addition, the Nassau BOCES notified Superintendents of every School District in Nassau County of the distributors' concerns and urged them to review DVD/video contracts and acquisitions with library staff and legal counsel to insure that library lending practices are in accord with copyright law and contractual limitations. Additionally, a letter from me explaining the issues was included.

C. Settlement Resolves Legal Claims Only Against Nassau BOCES, Not Individual Institutions in Nassau County or Other School Districts Around the Country

As a result of the settlement, the Nassau BOCES resolved potential legal claims based on contributory copyright infringement and interference with contractual relationships. Copyright infringement carries potential liability for statutory copyright damages ranging from \$750 to \$30,000 for every registered program infringed. The parties agreed, however, that nothing in the settlement would relieve individual schools and libraries that abuse copyrights or contracts of potential liability. In addition, many other counties and schools districts have their own Union Catalogs, designed to facilitate inter-library lending, which should be reviewed for copyright compliance. Coming on the heels of the U.S. Supreme Court's ruling in *MGM v. Grokster* (the filing sharing case in which the Court clarified circumstances that can trigger contributory liability for copyright infringement) and a 9th Circuit Court of Appeals ruling, *ACRA v. Lexmark* (affirming the enforceability of license terms on packaging of ink cartridges restricting refilling), this significant settlement underscores the importance of schools and libraries having a clear and consistent policy with respect to copyright law.

Vendors who joined in the settlement, and who all support copyright compliance, include Annenberg/CPB, Bullfrog Films, Chip Taylor Communications, Landmark Media, Lucerne Media/Classroom Media, Inc., Tek Data Systems, Inc., Advantage Source, Inc., Film West Associated, International Television Services, Pyramid Media and Woman Make Movies.

D. Copyright Compliance Seminars and DVDs

With copyright issues in the forefront of the minds of many educators and in light of the challenges posed not only by the Union Catalog practices but also file sharing by students using school servers, my law firm is establishing a seminar program to train faculty and students, librarians, AV directors, media specialists, administrators and vendors to better understand and comply with copyright rules. Anyone interested can contact me at 202-408-7600 or arnie@lutzker.com for further information.

In addition, with Chip Taylor Communications, we will produce “The Copyright Compliance Series,” a soon-to-be released collection of DVD/Video programs that will address the serious issues of educational copyright compliance. Information on the series is available from Chip Taylor Communications (www.chiptaylor.com) or 800.876.2447.

Until then, as always, stay tuned.