

July 1, 2021



BOSTON LIBRARY CONSORTIUM

# *Real Tape on Videotape*

Legal Issues in the Preservation of VHS Collections

Katie Loftus, Mayze Teitler and David F. Shea  
with Jessica Fjeld

 **CYBERLAW CLINIC**  
HARVARD LAW SCHOOL | BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY



## **01** *Introductions*

Genesis of the project and  
bird's eye view of findings

## **04** *Q & A*

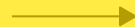
What questions do you have  
for us?

## **02** *Section 108*

Copyright provisions  
specifically for libraries

## **03** *Fair Use*

Additional protections for  
preservation and access



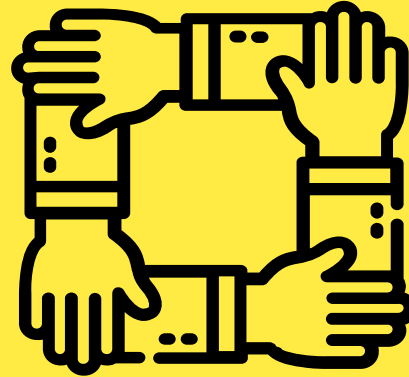
**01**

***Introductions***



# *About us*

- Katie Loftus, HLS '22  
Advanced Clinic Student  
Spring '21
- Mayze Teitler, HLS '22  
Clinic Teaching Fellow Spring  
'21
- David F. Shea, HLS '20  
Clinic Student Spring '19
- Jessica Fjeld  
Assistant Director  
Cyberlaw Clinic



# *Project evolution*

***Fall  
2017***



Clinic students  
Kelly King and Ben  
Shiroma provide  
advice on BLC's  
video preservation  
activities

***Spring  
2019***

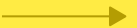


Clinic student  
David F. Shea  
drafts a public  
memo and  
presents it at a  
BLC symposium

***Spring  
2021***



Clinic students  
Katie Loftus and  
Mayze Teitler  
revise the memo  
for publication



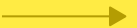
**02**

***Section 108***



# *Unpublished Works*

- Library may make three copies for preservation
- If the copy is in a digital format, it may not be distributed or made available off-site



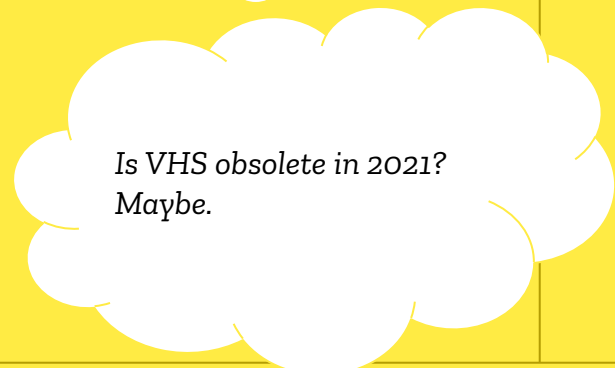
# ***Commercially Unavailable Works***

- "Commercially unavailable" =
  - Published, but
    - Damaged or deteriorating
    - Lost or stolen
    - In an obsolete format
  - Replacement copy not available for a fair price
  - If the copy is in a digital format, it may not be distributed or made available off-site



"Condition check"

"Market check"



Is VHS obsolete in 2021?  
Maybe.





# 03

## *Fair Use*



# ***Four-factor Test***

17 U.S.C. §107

*Purpose and  
character **of**  
the use*

*Nature **of the**  
copyrighted  
work*

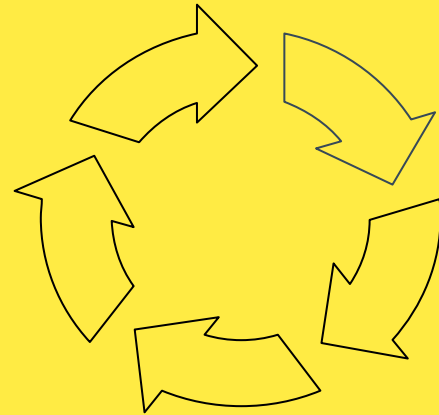
*Amount and  
substantiality  
of the portion  
used*

*Effect on  
market **for**  
copyrighted  
work*



# ***First Factor: Purpose and character***

- Commercial v. educational purposes
- Transformativeness: “altering the original with new expression, meaning, or message”  
(*Campbell v. Acuff-Rose*)



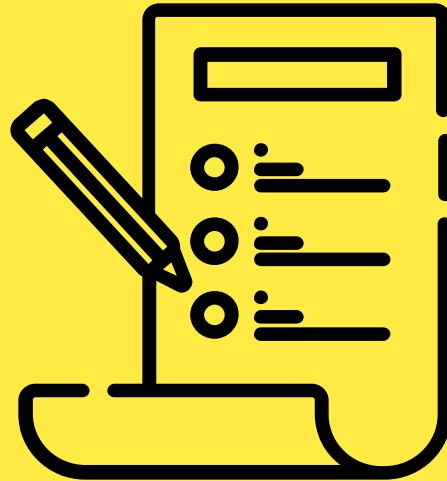
## ***Second Factor: Nature of copyrighted work***

- Is copyrighted work fact-based or more creative?
- Published or unpublished?



## ***Third Factor: Amount & substantiality***

- How much of the copyrighted work was copied?
- Was the portion that was copied the "heart" of the work?



## ***Fourth Factor: Market effect***

- What negative economic effects might the copying have on the owner of the original copyrighted work?
- What impacts would there be on the market for derivative works?
- What would be impacts be if others also copied the work in the same way?
- Harm must be substantial





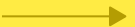
# ***Copying VHS is likely Fair Use***

- First factor: may not be transformative, but is non-profit educational
- Second factor: depends on material copied, but unlikely to weigh heavily
- Third factor: allows copying a whole work when necessary and reasonable
- Fourth factor: only weighs against a library that copies materials that remain commercially available



# ***When is Patron Access Fair?***

- Lending physical digital copies of commercially unavailable material 
- Lending physical digital copies of commercially *available* material with limits on borrowing levels 
- Streaming commercially unavailable material 
- Streaming commercially *available* material  (but see CDL)






# *Thanks*

**What questions do you have?**

cyber.harvard.edu

 @CyberlawClinic

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