Red Tape on Videotape

Legal Issues in the Preservation of VHS Collections

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

July 1, 2021
<table>
<thead>
<tr>
<th>01</th>
<th><strong>Introductions</strong></th>
<th>02</th>
<th><strong>Section 108</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Genesis of the project and bird’s eye view of findings</td>
<td></td>
<td>Copyright provisions specifically for libraries</td>
</tr>
<tr>
<td>03</td>
<td><strong>Fair Use</strong></td>
<td>04</td>
<td><strong>Q &amp; A</strong></td>
</tr>
<tr>
<td></td>
<td>Additional protections for preservation and access</td>
<td></td>
<td>What questions do you have for us?</td>
</tr>
</tbody>
</table>
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Unpublished Works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

<table>
<thead>
<tr>
<th>Purpose and character of the use</th>
<th>Nature of the copyrighted work</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount and substantiality of the portion used</td>
<td>Effect on market for copyrighted work</td>
</tr>
</tbody>
</table>
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- Published or unpublished?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 & substantiability**

- 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?**

- Loaning physical digital copies of commercially unavailable material 🙋
- Loaning 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

CREDITS: This presentation template was created by Slidesgo, including icons by Flaticon, and infographics & images by Freepik

Please keep this slide for attribution