

June 2019

Intellectual Property Rights: Film, Pedagogy, and United States Code Title 17

Amy Lazet

College for Creative Studies, alazet@collegeforcreativestudies.edu

Follow this and additional works at: <https://online.vraweb.org/vrab>



Part of the [History of Art, Architecture, and Archaeology Commons](#)

Recommended Citation

Lazet, Amy (2019) "Intellectual Property Rights: Film, Pedagogy, and United States Code Title 17," *VRA Bulletin*:Vol. 46: Iss. 1, Article 5.

Available at: <https://online.vraweb.org/vrab/vol46/iss1/5>

This Feature Articles is brought to you for free and open access by VRA Online. It has been accepted for inclusion in VRA Bulletin by an authorized editor of VRA Online.

Intellectual Property Rights: Film, Pedagogy, and United States Code Title 17

Abstract

This article provides an overview of the *United States Code Title 17*, Sections 107, 108, and 110 as it relates to copyright and films in learning environments. By providing a summary of only the points that are relevant to pedagogy and the viewing of films, the author seeks to help readers understand what is acceptable according to *Title 17* without readers having to wade through the *Code* themselves. The paper also includes relevant information on the 10% rule and interpretations of *Title 17* by such institutions as the American Library Association, and concludes with a brief list of best practices for viewing films in a pedagogical setting.

Keywords

copyright, intellectual property rights (IPR), film, motion pictures, movies, "United States Code Title 17," law, summary

Author Bio & Acknowledgements

Amy Lazet is the Visual Resources Specialist at the College for Creative Studies in Detroit, Michigan. She has been a member of the VRA IPR Committee for 4 years, and presented the research that became this paper at the VRA 2019 Conference in the session "Special Topics in Intellectual Property Rights: Motion Pictures, Archival Footage, and Film in Pedagogy." She has written multiple IPR posts for the VRA website, as well as publishing the article "The Unexplored Ethics of Copywork Image Manipulation" in the *VRA Bulletin* in 2016.

Introduction

In the field of visual resources, many of us are accustomed to working with still images and are familiar with their attendant copyright issues. However, many within the field are finding that their roles have expanded into administering and preserving moving images or providing copyright advice to those seeking to screen motion pictures in various settings. This paper, therefore, seeks to provide a very basic introduction to United States law as it relates to films in an educational context and summarize the relevant points.

In the United States, intellectual property rights (IPR) are provided for in the United States Constitution. Although IPR encompasses several facets, including trademarks, copyright, and patents, this paper focuses on copyright specifically. The Constitution's "Patent and Copyright Clause" states that copyright exists "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹ However, it is the *Code of Laws of the United States of America*, or the *United States Code (USC) Title 17*, that truly delves into the issues surrounding copyright. This paper will highlight the relevant parts of USC Title 17 - §107, 108, and 110 - as they relate to the use of motion pictures for pedagogical purposes.

U.S. Code Title 17: §107

§107 deals with Fair Use, which comprises four factors: (1) the nature of the use (i.e. is the work being employed for educational purposes or advertising? etc.); (2) the nature of the copyrighted work (i.e. how factual vs. creative is it?); (3) the amount and substantiality of the portion used in relation to the work as a whole (i.e. not just *how much* is being used, but also what parts - has the heart of the work been lifted?);² and (4) the effect on the market (i.e. how will this use affect the commercial standing of the work? If a chapter is taken from a textbook and made available, free of charge, to students enrolled in a class, this damages the author(s) because students are precisely the audience for whom the work was written).³

The Courts have stated that, contrary to what some may believe,⁴ these four factors *cannot* be applied in a mathematical way. Although assigning each factor a weight and adding up the points

¹ *U.S. Const.* art. I, §8, cl.8.

² It would be problematic to publicize the last 3 pages of a 300 page murder mystery wherein the killer is named, even though the portion used only amounts to 1% of the whole, as this is the very heart of the work and would effectively damage the market for it.

³ *Copyright Act, U.S.C. 17* (1976), §107.

⁴ See *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014): Georgia State University digitized portions of texts and made them available to students through course software, for which they were sued by Cambridge University Press, among others. In her ruling in favor of GSU, the district court judge justified the uses as fair by applying the four factors in a mathematical way. This decision was overturned by the Appellate Court because of the reduction of the factors to a simple equation and the case was sent back to the lower court for a new verdict that did not involve reducing Fair Use to a mathematical formula. The Appellate Court said, "...the District Court did err by giving each of the four fair use factors equal weight, and by treating the four factors mechanistically" (*Cambridge v. Patton* 769 F.3d at 110).

both for and against the use (i.e. “this use is fair for three out of four factors; therefore it is 75% acceptable and accordingly considered Fair Use”) is appealing in its solidity, this is not a permissible application of the factors. Each instance of borrowing must be assessed individually, looking at each factor and how it compares to that specific, individual use and the source material. Although Fair Use is often discussed as being applied solely to textual sources, it has broader applications and as such should be considered when screening films in a pedagogical setting.⁵

U.S. Code Title 17: §108

§108 deals specifically with exceptions to copyright for libraries and archives, outside of the scope of §107. For motion pictures and audiovisual works other than news, copies for preservation and access are allowed provided that: (1) there is no commercial advantage to the institution, either directly or indirectly; (2) the institutional collections are not restricted to people affiliated with the host institution - i.e. the collection is either open to the public or is accessible to researchers in the field; and (3) a notice of copyright is included in the duplicate. These allowed uses for copies do not, however, extend beyond the library or archive to subsequent uses, which have the potential to be infringements on the copyright of the work. Subsection b focuses on unpublished works and allows these types of objects to be copied for preservation, security, or deposit in another library or archive if: (1) the work being reproduced is currently in the collection of the reproducing institution; and (2) digital copies are not made available to the public outside the premises of the library or archive.⁶

Subsection c of §108 deals specifically with published motion pictures and audiovisual works other than news. In this subsection, the making of up to three copies for preservation, security, or deposit in another library or archive is permitted. A published work can be duplicated solely for replacement of an original that is damaged, lost, deteriorating, or stolen, or if the format becomes obsolete if: (1) “reasonable effort” determines that an unused replacement is not available at a “fair price;” and (2) digital copies are not made available to the public

⁵ It is worth noting at this point that the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals (Classroom Guidelines),” published in the 1976 report of the House of Representatives Judiciary Committee on the House amendments to the bill that became the Copyright Act of 1976, provides the “magic number” of 10% that is often referenced in the educational realm. This “...not more than 1,000 words or 10% of the work, whichever is less” commonly cited is intended to serve as a “safe harbor” for educators who are hesitant to make their own assessments of fair use. The courts have stated that “...the purpose of the Guidelines was to state the minimum and not the maximum standards of educational fair use.” The 10% rule, therefore, was designed to serve as a guide or suggestion for educators but is not a definitive statement and, according to the District Court of Georgia, Atlanta Division, the “absolute cap” of the “Guidelines” is “not compatible with the language and intent of §107.” These “Guidelines” were in fact never codified into law, having instead been developed by representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, the Authors League of America, Inc., and the Association of American Publishers, Inc., and should not be considered definitive. See “Boon or Bane? The Four Fair Use Factors vs. The 10% Rule” by this author in the list of resources at the end of this paper.

⁶ *Copyright Act, U.S.C. 17* (1976), §108 et seq.

outside the premises of the library or archive. (Notably, both “reasonable effort” and “fair price” are subjective elements in this provision).⁷

Finally, subsection h focuses on the last 20 years of copyright of a published motion picture or audiovisual work other than news, and states that a library or archive may reproduce, distribute, display, or perform these works for purposes of preservation, scholarship, or research so long as: (1) the work is not subject to normal commercial exploitation; (2) a copy of the work is not available for purchase at a “reasonable price;” and (3) the copyright owner does not provide notice that either (1) or (2) is true.⁸

U.S. Code Title 17: §110

Lastly, §110 allows exceptions for certain performances and displays of motion pictures and other audiovisual works. The first part of §110 allows for performances or displays of lawfully-made copies of a work in a face-to-face learning situation at a nonprofit educational institution.⁹ (It is worth noting at this point that, per the IRS, museums, archives, and schools, among other types of institutions, are included in this classification of “nonprofit educational institution”).¹⁰ These are all the restrictions Title 17 places on performances or displays of motion pictures and audiovisual works in face-to-face learning situations; no limits are placed on the amount of the work that is permitted for showing, nor is there any discussion of what types of work are covered by §110, etc.

It is the second part of §110 that potentially poses difficulties. This portion is titled the “Technology, Education and Copyright Harmonization (TEACH) Act of 2002” and was signed into law by George W. Bush in consideration of technological advancements that allowed for distance learning.¹¹ The second portion of the section states that the digital transmission of motion pictures and other audiovisual works, provided that a “reasonable and limited portion of any work, or an amount comparable to what is typically displayed in the course of a live classroom session,” is permitted if: (1) the performance or display is directly related to and of material assistance to the lesson; (2) technological measures are applied to reasonably prevent dissemination or retention by recipients; (3) recipients do not do things that could be “reasonably” expected to interfere with technological measures taken to prevent further dissemination and retention (see previous point); (4) the work is transmitted at the direction of the instructor as an integral part of the class session; and (5) the transmission is made solely for and limited to students enrolled in the course.¹²

⁷ *Copyright Act, U.S.C. 17* (1976), §108 et seq.

⁸ *Ibid.*

⁹ *Copyright Act, U.S.C. 17* (1976), §110 et seq.

¹⁰ Treas. Reg. §1.501(c)(3)-1(d)(3)(ii).

¹¹ “The Teach Act,” *Copyright Clearance Center*, 2015, <https://www.copyright.com/wp-content/uploads/2015/04/CR-Teach-Act.pdf>.

¹² *Copyright Act, U.S.C. 17* (1976), §110 et seq.

Interpretations of U.S. Code Title 17: §110, TEACH Act

Given the potentially myriad ways this second subsection can be interpreted, many institutions and associations have published their own analyses in order to help their constituents figure out what is or is not allowed. The American Library Association (ALA) states that this exception only extends to physical classrooms or similar places devoted to instruction but not remote locations, i.e. motion pictures can be streamed to a classroom but not to student residences for the purpose of homework. Furthermore, this allowable exception does not apply if the instructor knowingly shows an unlawful copy of the film, and the exception is *not* overridden by “home use only” statements on films. Lastly, institutions do not need to pay extra for “performance rights” if the motion picture is being shown in a way that is consistent with the copyright code.¹³

Another interpretation, provided by Northwestern College in Iowa (included here to remind readers that copyright decisions cannot be made by applying the law via a mathematical formula), reiterates the ALA’s point that the TEACH Act does not provide exceptions for students to view on their own time, but then falls prey to the seductive application of mathematical quantities as a way of determining if a use is allowed, stating that only a reasonable portion (no more than 20%) of a film or video can be transmitted if it is a dramatic work (i.e. feature film).¹⁴ As mentioned in the discussion of §107 above, this application of math to provide a safe harbor of allowable use is not codified into law, and has been harshly disputed in the courts. Although it may be tempting to follow advice to use “no more than ___%” of a copyrighted work in a variety of circumstances, it bears reiterating that this formulaic application is not in accordance with how the Courts apply *USC Title 17*.¹⁵ Finally, as a counterpoint to the above statements by the ALA and Northwestern, the University of Texas finds §110 far too restrictive and recommends that their faculty rely heavily on §107 (Fair Use) given the very narrow parameters of §110 as it relates to distance learning.¹⁶

Best Practices for Showing Motion Pictures in Distance Learning

The following are some best practices for streaming motion pictures for pedagogical purposes:¹⁷

- Do not use more than the amount needed for the purpose.

¹³ Jonathan Band, Peter Jaszi, and Kenneth D. Crews, “Performance Of Or Showing Films in the Classroom,” *American Library Association*, accessed March 7, 2019, ALA.org.

¹⁴ “Film and video copyright,” *Northwestern College of Iowa*, accessed March 7, 2019, <http://library.nwciowa.edu/forfaculty/copyright/filmvideo>.

¹⁵ See footnote 4.

¹⁶ Georgia Harper, “Copyright Crash Course: TEACH Act,” *University of Texas*, last updated March 5, 2018, <http://doi.org/10.15781/T24J09X6J>.

¹⁷ Andrée Rathemacher, Julia Lovett, and Angel Ferria, “Fair Use and Copyright for Online Education: Examples: Video,” *University of Rhode Island*, 2013, <https://uri.libguides.com/fairuse/examples/video>.

- Link to the film instead of making an electronic copy if at all possible (since the act of copying a film to make it digitally available runs into other issues related to copyright).
- Do not copy from materials made for the academic market if the film is being shown in an academic setting for teaching purposes.
- Make sure the film is placed in the context of the course.
- Make sure it serves a pedagogical purpose.
- Limit access to the students enrolled in the course.
- Use technology to limit the ability to download, copy, or share the film.
- Provide attributions to copyright holders.
- Notify students that the film is only for teaching, study, and research.

Finally, if, after assessing the proposed use of a motion picture, licensing and permissions are deemed necessary in order to perform or display a motion picture or other audiovisual work, contact the distributor for a license if the copyright owner has given a distributor permission. If there is no distributor, institutions need to identify, contact, and get *written* permission from the copyright owner; if the institution is unable to identify or find the copyright owner, the motion picture might be considered an orphan work (this assessment, however, should be made only after careful research). Lastly, it is worth mentioning that the detailed Terms of Service (ToS) on Netflix and Amazon, among others, may have language explicitly forbidding streaming of subscribed content in classrooms. The ToS contract does, in fact, supersede any applicable copyright exception, and as such, must be adhered to; some streaming services, however, have sections of their content devoted explicitly to streaming in an educational setting.¹⁸

Conclusion

Although there are many restrictions related to IPR that are placed on how motion pictures may be displayed, *USC Title 17* provides educational institutions with a variety of options for allowed exceptions to copyright. In order to successfully serve our users and patrons, it is necessary that professionals in the field of visual resources are equipped to deal with basic issues pertaining to the allowed uses of moving images. It is my hope that this paper will serve to help clarify the language of the law and guide readers towards making informed decisions relating to IPR.

¹⁸ Christine Fruin, "Copyright on Campus: Showing Movies in Class and on Campus," *University of Florida*, last modified March 28, 2019, <http://guides.uflib.ufl.edu/copyright/video>.

References:

- “The Teach Act.” *Copyright Clearance Center*. 2015 <https://www.copyright.com/wp-content/uploads/2015/04/CR-Teach-Act.pdf>.
- Band, Jonathan, Peter Jaszi, and Kenneth D. Crews. “Performance Of Or Showing Films in the Classroom.” *American Library Association*. Accessed March 7, 2019. <http://www.ala.org/advocacy/sites/ala.org.advocacy/files/content/copyright/fairuse/web-digital%20delivery%20in%20classroomrev3psa.pdf>.
- Fruin, Christine. “Copyright on Campus: Showing Movies in Class and on Campus.” *University of Florida*. Last modified March 28, 2019. <http://guides.uflib.ufl.edu/copyright/video>.
- Harper, Georgia. “Copyright Crash Course: TEACH Act.” Last modified March 5, 2018. <http://doi.org/10.15781/T24J09X6J>.
- Rathemacher, Andrée, Julia Lovett, and Angel Ferria. “Fair Use and Copyright for Online Education: Examples: Video.” The University of Rhode Island. 2013. <https://uri.libguides.com/fairuse/examples/video>.

Resources:

- “The Constitution of the United States: A Transcription.” U.S. National Archives and Records Administration. Original written 1787. <https://www.archives.gov/founding-docs/constitution-transcript>.
- Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014). <https://www.copyright.gov/fair-use/summaries/cambridgeuniv-patton-11thcir2014.pdf>; <http://media.ca11.uscourts.gov/opinions/pub/files/201214676.pdf>.
- Copyright Law of the United States (Title 17): Chapter 1. U.S. Copyright Office. 1976. <https://www.copyright.gov/title17/92chap1.html>.
- Lazet, Amy. “Boon or Bane? The Four Fair Use Factors vs. The 10% Rule.” *Visual Resources Association*. 2018. <https://vraweb.org/boon-or-bane/>.
- Treas. Reg. §1.501(c)(3)-1(d)(3)(ii). International Revenue Service. 2013. <https://www.govinfo.gov/content/pkg/CFR-2011-title26-vol7/pdf/CFR-2011-title26-vol7-sec1-501c3-1.pdf>.
- “Reproduction of Copyrighted Works by Educators and Librarians.” U.S. Copyright Office. 2014. <https://www.copyright.gov/circs/circ21.pdf>.