

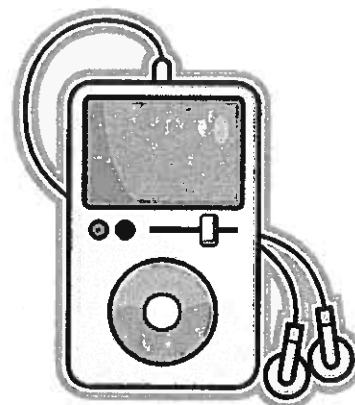
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**DOWNLOADING VIDEO AND AUDIO CONTENT:
THE LOW DOWN**

**ARNOLD P. LUTZKER
LUTZKER & LUTZKER
WASHINGTON, DC**

In the 1970s, when I was studying for the Bar in the District of Columbia, I dutifully attended a bar review course in a dusty office building in downtown Washington. This summer, my son has just graduated from the same law school as his dad, and he now is studying for the California Bar. But unlike me, he's not scurrying off to a remote location in Boston to catch the live wisdom of the bar reviewer; rather, he is reclining in his easy chair (I can hear him chafe at that characterization), listening to the course on his iPod. He's learning and reviewing the course materials wherever and whenever he wants, thanks to the digital revolution.



My son's experience is multiplied thousands if not tens of thousands of times throughout the world of education as more and more content, like museum slides for art history courses, is uploaded and downloaded by schools, teachers and students. Not only is more content being stored in digitally downloadable formats, but also that very content is being made available to be heard and watched on iPods, laptops and PDAs, and the trend is only increasing. Is there a cautionary note to this digital experience? You bet.

What Teachers and Administrators Need to Think About

First, let's take a look at the downloading and use of content from the teacher/administrative perspective. Many schools are looking at preloaded video and audio content for use by students. Here's a checklist of some key issues for the schools to focus on when acquiring the content:

1. Where can the institution use this material? The first thing to resolve before acquiring audio and video materials for educational use is to determine what can be done with the materials. Is the distributor placing any restriction on where the materials can be used? For example, is it for use in the classroom only? Can it be placed on the school's server and made accessible to students via the Internet? Distributors of content cer-

**SPECIAL POINTS
OF INTEREST:**

- **What Teachers and Administrators Need to Think About**
- **What Media Producers and Distributors Need to Think About**

tainly would expect the video or audio materials to be used in classrooms. The copyright law also allows that materials lawfully made and acquired can be performed or displayed in classrooms. The TEACH Act extends that exception to distance learning course uses, but subject to strict statutory requirements, including password protection to ensure that only enrolled students can access the materials.

Nevertheless, a distributor of content may set its own limitations on distance learning uses that can trump the statute. By law, parties can agree in a contract to rules different from the exceptions written in the copyright law, so it is important to read the fine print in any license agreement. Also, under the TEACH Act, students enrolled in a course may not only access content via the Internet, but also, as part of the caching operations of computer, may store the material for a transitory, or longer periods of time. However, works that qualify as "mediated instructional materials," i.e. content produced or marketed primarily for performance or display as part of instructor-based work on a digital network, are not covered by the TEACH Act. Therefore, express authority from the distributor may be required to allow digital storing or downloading.

2. Who may access and use this material? In addition to in-school or network restrictions, the acquiring institution needs to determine if there are any limitations on who may access and use the content. Distributors can set rules, such as limiting access to students enrolled in a particular course, or set a limitation on the total number of students who can download and store the video and audio material. Alternatively, the distributor can vary the license fee according the number of users, requiring the institution to pay higher fees for access by a lecture class of 200 than for a seminar of twenty. Institutions must know these requirements before closing the deal and acquiring the work.

3. What is the duration of the allowed use? The school must also determine the length of the license term. Some institutions may believe because it is acquiring rights to use the materials, a teacher can use the content semester after semester; however, a distributor may have other ideas and could impose a strict timeline, varying from days, weeks or months. In all likelihood, multi-semester uses will require renewal or additional fees. So it is necessary to clarify the term of use up front.

4. Can clips be made and used and are they subject to the same restrictions as the entire work? Many students may wish to incorporate portions of materials into their own papers that may be separately published or posted for an audience broader. Can they do so without risk of reprisals? While fair use will apply to any use a student makes of the underlying materials, the scope of fair use is always debatable. A school may seek a license that will afford a safe harbor specifying the scope of licensed permissions. Anything beyond those



Before considering preloaded video and audio content for use by students, these questions should be answered.

enumerated may be debated as a fair use, and it is possible that a distribution agreement may try to limit the definition of fair use of the particular content.

In some cases, the original materials exist only in analog format, such as art slides in a school library. Can a teacher digitize a school's slide collection and allow students to download JPEGs for private study? There's not a simple or single answer to that common question. If the slide collection was acquired decades ago, there may be no formal agreement or understanding with the producer as to how to handle such a request. Should the school go back to the source producer and find out whether the slides can be digitized, or whether JPEG files can be acquired now? The short answer is yes, because absent clear entitlement, the school and faculty may only be able to rely on a fair use defense to a claim of infringement, and fair use will not sanction wholesale digitization of slide collections.

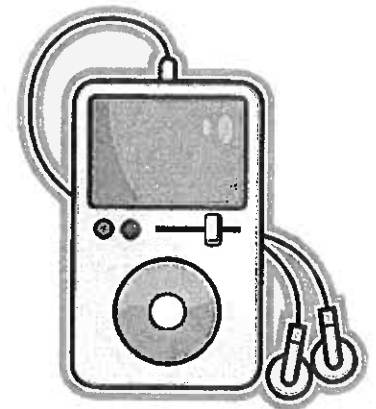
5. Are there any access limitations encoded into the content?

Digital content, especially video content, may contain encoded software that enforces restrictions, such as the authorized number of allowed users and duration of permitted use. If an attempt is made to bypass or circumvent the access codes, such action could be a violation of the Digital Millennium Copyright Act (DMCA). A school may be obligated to notify faculty and students about these limitations and caution about the need to respect the access limitations and the DMCA rules. Penalties for violation of the DMCA can apply not only to students but also to institutions that facilitate the violations.

What Media Producers and Distributors Need to Think About

The producers and distributors of the content have their own set of concerns. As the licensors of the content, they must be certain they too have secured all the necessary rights from third party sources of content to enable them to grant the schools and students complete permission to authorized uses. Here's their digital checklist:

1. Was the work produced by an employee? Media content can be divided into two broad categories: works produced by the employees of the producers and works produced by independent contractors. Generally, under copyright law, when an employee creates a work for his or her employer in the course of employment, the company owns that content. However, if the individual is an "independent contractor," (i.e. not a regular employee) or if an employee is doing creative work that she was not hired to do, then that individual – not the producer – will be deemed the copyright owner of the finished work. In that case, a written, "work made for hire" agreement, detailing the scope of the work to be performed and grant of rights to the producer is needed. Many such contractor agreements contain the "magic" language of copyright; namely, that "the content created shall be deemed



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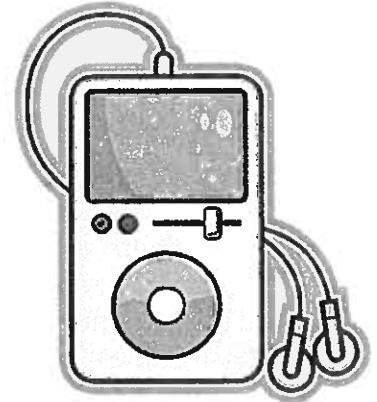
a work made for hire under the copyright laws of the United States.”

Simply stated, producers and distributors who market content to schools and others should ensure that they actually own the works they are licensing by reviewing all employee and free-lance or independent contractor understandings. If an individual or team of people creates a work, each of them needs to be under written contract with the producer so that their rights granted to the schools are ones held by the production company. This is a doubly important legal check, because one standard clause in any digital rights agreement will be the *representation and warranty* by the producer that it owns the rights being licensed. That guarantee is an enforceable obligation and if by chance all necessary rights have not been secured, then the school could hold the media producer or distributor liable for any third party claim that might be made.

2. *Is all content within the digital work cleared for intended uses?* Few digital works are produced that do not incorporate something from another source – whether it be quoted materials, film clips, photographs, charts, graphs, news tidbits, you name it. One job of a producer of content is to review every element of a digital work that comes from an independent source and evaluate what rights need to be cleared. Take a photograph, for example. If the media work includes a picture taken by someone else, then that photo needs to be sourced and cleared for use in the work to be licensed. If not, the producer and the institution could be held liable for copyright infringement. If the producer has offered its warranty to the licensed institution, it may stand alone responsible for all the allowed exploitations.

Knowing what content your employees and contractors are including in your works and making sure all rights necessary for intended uses have been secured is absolutely essential. Recognizing the importance of this step, it would be good practice for a media producer to develop its own third party clearance checklist and provide that list to all employees and contractors who participate in the creation of the finished work. Those who are creating the works in the first instance should have the burden of following the producer’s clearance policy so as to avoid claims that the works being licensed to schools are infringing products.

3. *Will the works contain access restrictions?* Digital delivery of video and audio content is a sophisticated business. Most media producers want to have some way of ensuring that content that was expensive to produce and distribute is secure against unauthorized copying and use. To do this, one may need to incorporate underlying software that protects the works. Like all third party materials included in content, the access control software must be licensed from a proper source and the terms of the license followed. Since licensing such works have their own costs, digital producers need to determine the costs and benefits of including such software with their works.

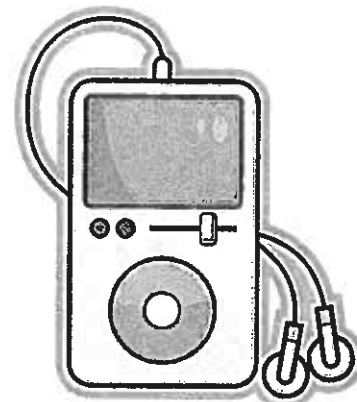


One standard clause in any digital rights agreement will be the *representation and warranty* by the producer that it owns the rights being licensed.

4. *What happens when the license term ends?* The distributor needs to think about what steps its licensee must take when the term is over. Do you want the materials returned? Do you want a further assurance that all copies have been destroyed or disabled? Will the work contain a password that can be disabled or its own “self destruct” code to prevent post-term exploitation? Such actions may not only be necessary to comply with licenses that the producer secured from third parties, but also to prevent unauthorized uses into the future. Enforcement of such rules can be complex, but at least a signed statement by a responsible person at the institution (faculty or administrator) attesting to compliance is appropriate.

These checklists, for both educational institutions and producers and distributors form the core of the understandings that need to be worked out if the distribution and loading of digital content on new media, such as computers, iPods and PDAs, is to occur in responsible fashion. Until that is done, we always urge you to “Stay Tuned.”

Arnold Lutzker serves as legal counsel for AIME.



NEW RESOURCES AVAILABLE

Lindworth Publishing, publisher of professional development resources for K-12 educators, has published *Copyright for Administrators*, by Carol Simpson, EdD (ISBN: 1-58683-323-5/128 pages). Written by a well-known expert in the field of copyright law and schools, this new resource explains what the school administrator needs to know to stay legal and in compliance with copyright law.

Lindworth Publishing has also recently published *Library Blogging*, by Karen A. Coombs and Jason Griffey (ISBN: 1-58683-331-6/168 pages). This new resource is an overview of the world of blogs in school, academic or public libraries. Options available for a library blog, including setting up and hosting, can be found here.

The Library of Congress has released new issues of the *Digital Preservation Newsletter*. News about the growing Digital Preservation Network is included. Visit <http://www.digitalpreservation.gov> for details.

CoSN (Consortium for School Networking) had released a new white paper, *Full E-mail Archiving Strategy Needed in K-12*, and an online resource, *Broadband Knowledge Center*. For additional information, visit www.cosn.org.

Administrators need enough background to intelligently assess copyright compliance and to discuss issues with legal counsel.