Intellectual Property

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I. P. meets IT

Let me begin by introducing myself. I'm Judy Shoaf, of the Language Learning Center at the University of Florida. I got my LLC job about 10 years ago, and was lucky enough that my predecessor was still "on the premises" to advise me. One of the first and most enduringly fascinating problems in which she indoctrinated me was copyright restrictions. Over the course of the years I have learned to say "Yes," "Hmm..." and "Absolutely not!" to a pretty wide variety of requests for duplication, digitizing, and performance. Stimulated by Susan Kornfield's electrifying presentation on the subject at last summer's IALLT conference, I decided to volunteer to take the long-vacant position of Intellectual Property columnist.

Kornfield's talk made a number of powerful points for us, among which I would pick out two:

(1) what constitutes "fair use" is very much subject to debate, and even well-understood principles may still be tested and changed by the courts.

(2) educational institutions have a responsibility (under the Digital Millenium act) to formulate policies for fair use of media. If our schools formulate restrictive policies, fearing litigation, they risk losing rights the law actually gives us to use media in our classes.

In a sense, her talk encouraged us to say "Hmm...." and to be sparing with the "Absolutely not!"'s. Every "Never!" is a self-fulfilling prophecy, or at least a legal precedent. In that spirit, but with a long history of saying "No," I want to try to look at a problem that affects many of us in language labs: videotaping foreign-language TV. I'm afraid however that this article will be one long "hmmmmmm....."

The VCR on Campus

In January 2003, when our LLC first got Dish Network channels (seven languages' worth!) I formulated a policy on videotaping and then asked the LLTI listserve members what they thought of it. I was pointed to the Kastenmeier Guidelines (which can be reviewed at many places on the Web, for example http://www.lib.berkeley.edu/MRC/Kastenmeier.html) Congressman Kastenmeier in 1979 appointed a committee representing educational interests, copyright holders, and creative artists, and the committee's guidelines were read into the Congressional Record in 1984.

According to these guidelines, institutional personnel could honor the request of an instructor to tape a particular program off the air, for the purposes of (1) showing it in class once only within the 10 days after the broadcast (plus a second time if needed) and/or (2) evaluating it for purchase for 45 days, after which it had to be erased.

This pattern did not fit my needs, which had to do with making sure taped, recent material in all 7 languages was available in the lab at all times (I would not be taping a particular program at an instructor's request, but rather taping almost at random primarily for independent viewing by students or instructors), but the consensus of LLTI was that my plan to erase all taped material within a week honored the spirit of the guidelines.

Kastenmeier Katzenjammer

In January 2004, a discussion on Media-L, a listserve from SUNY Binghamton, forced me to start rethinking these issues. The question came from an AV services director at Hamilton College, who had been asked to videotape a program from HBO, received via satellite, by a faculty member. Basically she wanted the list's support in saying "No"–because one of the specifics of the Kastenmeier Guidelines is that the programming involved must be broadcast to the public at no charge. HBO, as the earliest pay channel, is historically excepted from fair use. See http://listserv.binghamton.edu/archives/media-l.html

In the ensuing discussion on Media-L, it was pointed out that the video-copying situation in 1979, and even in 1984, was very different from today's. The committee was trying to deal with videotaping in its early days, and it seems to visualize the process as taking place in the institution, not at home. It was a period when a home VCR was a luxury, and the three big TV networks still constituted what most people thought

of as TV. (Home cable TV was probably in around half of American households, however, and HBO had been flourishing since the early 70s as a "premium channel.") Thus it made sense to assume that most programming was "broadcast to the public at no charge"–and to protect HBO and the few other pay channels in existence at the time, whose best material (high-profile sports events, recent films), probably didn't belong in the classroom anyway.

The Educational Market vs. Educational Fair Use

The committee distinguishes between a legal copy, for which the institution has paid (and which can be used in the classroom, with some restrictions), and the temporary copy it has made for a single use and evaluation. This however ignores the situation where the instructor has popped a tape in the VCR at home to tape a program, and wants to show that tape in class, or place it on reserve for students to view independently. Is this copy "legal"? It seems that such a copy is legal to own but not to show one's students in class....

At the moment, it seems that the various channels themselves have stated policies about taping, which I found at http://www.aacps.org/aacps/boe/INSTR/CURR/LMS/trcopyright.htm

I was surprised to see that AMC and TMC, which show so many films in the public domain, forbid taping for educational use. Other channels offer licenses to make legal copies of their programming (a process some of us will be familiar with from having purchased licenses to tape Destinos or French in Action). There is in fact a magazine, Cable in the Classroom, dedicated to making it easy to purchase permissions to tape desired programs. Of course it is precisely educational programs that are protected from "fair use"–they are created with the intention of exploiting the institutional market, and will not tolerate freeloaders in the schools.

The VCR in the Language Lab

Nowadays the broadcast of a particular program or miniseries on cable TV is often simply an advertisement for the video version, and the final credits roll next to a number to call to order the deluxe DVD, with extras. The importance of designating some kind of budget for the purchase of some materials may be obvious. It is a "no-brainer" that a taped program ought to be replaced ASAP with a purchased

version.

None of this meditation, unfortunately, really addresses this language lab director's question, which is–what constitutes fair use of current foreign-language satellite broadcasting? Here we have a tremendous resource – the next best thing to being in the country....

Some of the simplifying or complicating factors:

(1) The copyright law of the U.S. applies in the U.S.–so there's no need to worry, or get our hopes up, about laws in other countries.

(2) Satellite TV is a separate regulatory category from cable TV, so far as the FCC is concerned. So as laws evolve, it may also.

(3) Many of the foreign-language channels do not produce their own programs, and others produce only certain programs. Sometimes at least they are willing to give instructors the right to make and keep copies of their own programming for classroom use. Deutsche Welle and Univision have both been cooperative in this way.

(4) For materials licensed by the channel, the channel can't give permission to tape and re-show the programs. For example, TV5 has an "FAQ" whose first question is: "Where can I get a copy of a particular program?" This is carefully chosen to explain that TV5 does not have the right to make commercial copies – or to authorize copying. On the other hand, it does not actually address institutional videotaping.

(5) Foreign-language TV channels often have a strong, even aggressive, educational mission. This will vary from channel to channel. The French of course have always viewed their own culture as a universal patrimony; Deutsche Welle seems to be directed towards helping emigrés and their children stay in contact with home, whether in German, Spanish, or English; some of the Latin American channels provide pure entertainment for American Latinos.

Well, I am still erasing the tapes after a week....!◆