**OPINION NO. 87-108**

**Syllabus:**

1. Pursuant to 17 U.S.C. §106, a school district public library may not, without infringing upon the rights of the copyright owner, permit its patrons to utilize library equipment to view copyrighted videotapes on the library premises.

2. Pursuant to 17 U.S.C. §109(a), a school district public library may, without infringing upon the rights of the copyright owner, loan copyrighted videotapes to its patrons, and may, in conjunction with such a loan, charge a reasonable handling fee.

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**To: William R. Swigart, Fulton County Prosecuting Attorney, Waseon, Ohio**
**By: Anthony J. Celebrezze, Jr., Attorney General, December 29, 1987**

I have before me your request for my opinion with regard to the lending of copyrighted videotapes to the patrons of a school district public library, established pursuant to R.C. 3375.15. In a subsequent conversation with a member of my staff, you noted that the library wishes to allow its patrons to use on-premises library equipment to view videotape cassettes of copyrighted works, such as feature movies. The library also wishes to loan these videotapes to its patrons for their own home use on the condition that the patron pay $1.00 to cover the cost of cataloging, circulating, rewinding, and reshelving the videotapes. In light of this additional information, I have rephrased your questions as follows:

1. Does the Copyright Act prohibit the viewing of copyrighted videotapes by library patrons on the library premises?

2. Does the Copyright Act prohibit the library from charging a "handling fee" in conjunction with the lending of copyrighted videotapes to library patrons?

The Copyright Act of 1976, 17 U.S.C. §101 through §914 (1976), confers certain specific rights upon the holder or "owner" of a copyright. These rights are set out 17 U.S.C. §106:

> Subject to sections 107 through 118, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly. (Emphasis added.)

Under this section, the owner of a copyright is vested with five specific rights. These rights include the right to "distribute copies of the work to the public by sale...." The rights granted by section 106 are each, however, separate and distinct. See Interstate Hotel Co. v. Remick Music Corp., 157 F.2d 744 (8th Cir. 1946); 2 Nimmer, Copyrights §8.01[A] (1983). The copyright owner may therefore exercise his right to make and dispose of copies of a work while reserving all of the other rights granted by section 106. See 17 U.S.C. §202 (the "[t]ransfer of ownership of any material object...does not of itself convey any rights in the copyrighted work embodied in the object"). Thus, in the present instance, the fact that the copyright owner of the videotapes in question has chosen to exercise his right to make copies of the work, and to distribute those copies, does not act as a waiver of the copyright owner's right to control the "public performance" of the work.

The issue which your first question presents is whether the viewing of a videotape by a library patron, on the library premises, and with the library's equipment, constitutes a "public performance" of the copyrighted videotape. The terms "perform" and "perform...publicly" are both defined in 17 U.S.C. §101 (1976). The word "perform" is defined as meaning "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence, or to make the sounds accompanying it audible." (Emphasis added.) In addition, the House Committee on the Judiciary reported that:

> The definition of "perform" in relation to "a motion picture or other audiovisual work" is "to show its images in any sequence or to make the sounds accompanying it audible." The showing of portions of a motion picture...must therefore be sequential to constitute a "performance" rather than a "display", but no particular order need be maintained. The purely aural performance of a motion picture sound track, or of the sound portions of an audiovisual work, would constitute a performance of the "motion picture or other audiovisual work"; but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 63-64. See also Columbia Pictures v. Redd Horne, Inc., 568 F. Supp. 494, 499 (W.D.Pa. 1983), aff'd, 749 F.2d 154 (3rd Cir. 1984). The viewing of videotapes at a library, therefore, would clearly constitute the "performance" of a copyrighted work under this expansive definition: the videotape is an audiovisual work, shown in a manner allowing the images to be viewed in sequence, and making the accompanying sounds audible.

I must next determine whether such performance is a "public" performance under section 106(4). 17 U.S.C. §101 defines the phrase "to perform...publicly" as the performance of the work "...at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered...." In the context of videotape cassettes, this definition has been interpreted in only two decisions. In Columbia Pictures v. Redd Horne, Inc., 749 F.2d 154 (3rd Cir. 1984), the court held that the viewing of videotapes in a store which rented both the tapes and provided booths equipped with a monitor for viewing them constituted a public performance of the copyrighted videotape. In reaching this conclusion, the court focused upon the similarity between such a facility and the public performances provided by a movie theatre:

> Any member of the public can view a motion picture by paying the appropriate fee. The services provided by the Maxwell's [video stores] are essentially the same as a movie theatre, with the additional feature of privacy. The relevant "place" within the meaning of section 101 is each of Maxwell's two stores, not each individual booth within each store. Simply because the cassettes can be viewed in private does not mitigate the essential fact that Maxwell's is unquestionably open to the public. (Emphasis added.)

Id. at 159. Two years later, the Third Circuit Court of Appeals had occasion to reexamine its decision in Redd Horne, and in doing so, again emphasized public access to the general locale, rather than the privacy of the precise location within the building, in determining whether a work was performed "publicly":

> The Copyright Act speaks of performances at a place open to the public. It does not require that the public place be actually crowded with people. A telephone booth, a taxi cab, and even a pay toilet are commonly regarded as "open to the public," even though they are usually occupied only by one party at a time. Our opinion in Redd Horne turned not on the precise whereabouts of the video cassette players, but on the nature of Maxwell's stores. Maxwell's, like Aveco, was willing to make a viewing room and video cassette available to any member of the public with the inclination to avail himself of this service. It is this availability that made Maxwell's stores public places....

Columbia Pictures Industries v. Aveco, Inc., 800 F.2d 59, 63 (3rd Cir. 1986). Admittedly, there are factual distinctions that may be drawn between the situation you present, and the facts of Redd Horne and Aveco. In your question, the entity which is lending the videotape is not a commercial enterprise, but a body both corporate and politic, created under the statutes of the state. See R.C. 3375.15, R.C. 3375.32-.35. Furthermore, the school district public library is not engaged in a profit-making venture, but is instead charging a nominal fee, intended to cover only the costs associated with handling. Based upon the reasoning in Redd Horne and Aveco, however, I must conclude that these distinctions are immaterial. As these cases indicate, it is the public accessibility of the location where the videotape is shown that determines whether the playing of the tape is a public

performance of the copyrighted work for purposes of section 106(4). A school district public library is, as its name suggests, a place which is open to the public. Therefore, I conclude that the viewing of a copyrighted videotape on the premises of a school district public library constitutes a public performance of the work, and thus would infringe upon that exclusive right of the copyright owner under section 106(4).[1]

Your second question concerns whether a school district public library may require the payment of a $1.00 "handling charge" in conjunction with the loaning of a copyrighted videotape without infringing upon the rights of the copyright owner.[2] As I noted in answer to your first question, pursuant to section 106(3) the owner of a copyright has the exclusive right to make and distribute copies of a work. Where the copyright owner chooses to do so, however, the person who obtains a copy of the work from the copyright owner is also endowed with certain rights under 17 U.S.C. §109. This section provides in pertinent part:

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1 For a detailed discussion of a library's options given these restrictions under the Copyright Act, see J. Miller, Using Copyrighted Videocassettes in Classrooms and Libraries 30-39 (1984).

2 Another issue suggested by your second question is whether a school district public library has the authority to require the payment of such a charge in conjunction with the loaning of a videotape. As a general rule, the board of trustees of a school district public library has only those powers provided by statute, or as are reasonably necessary to the accomplishment of the purpose of the board. 1924 Op. Att'y Gen. No. 2003, p. 652. I am not aware of any statutory provision which expressly authorizes the charging of such a fee. I do note, however, that pursuant to R.C. 3375.15, the authority of the school district public library's board of trustees is governed by the provisions of R.C. 3375.33-.41. Further, under R.C. 3375.40, such boards of trustees are authorized to:

> (E) Establish and maintain a main library, branches, library stations, and traveling library service within the territorial boundaries of the subdivision or district over which it has jurisdiction of public library service;
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> ....
>
> (H) Make and publish rules for the proper operation and management of the free public library under its jurisdiction, including rules pertaining to the provisions of library services to individuals, corporations, or institutions that are not inhabitants of the county.

Presumably, it is under these provisions that each public library has the implied authority to charge a fee when, for example, a book is returned late. It is, however, unnecessary for me to resolve this issue since you question only whether such a charge would constitute an infringement under the Copyright Act.

> (a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title...is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

The House Committee on the Judiciary clarified its intention with regard to this so-called "first sale doctrine" in its report:

> Section 109(a)...restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means....
>
> Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. This does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright. Under section 202 however, the owner of the physical copy or phonorecord cannot reproduce or perform the copyrighted work publicly without the copyright owner's consent. (Emphasis added.)

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 79. The Court in Aveco also applied this doctrine to the lawful sale of videotape copies of copyrighted movies and other copyrighted materials, stating that:

> The first sale doctrine...prevents the copyright owner from controlling the future transfer of a particular copy of a copyrighted work after he has transferred its "material ownership" to another. Redd Horne, 749 F.2d at 159. When a copyright owner parts with title to a particular work, he thereby divests himself of his exclusive right to vend that particular copy. Id. See United States v. Powell, 701 F.2d 70, 72 (8th Cir. 1983); United States v. Moore, 604 F.2d 1228, 1232 (9th Cir. 1979). Accordingly, under the first sale doctrine, [the plaintiff] cannot claim that Aveco's rentals or sales of lawfully acquired video cassettes infringe on their exclusive rights to vend those cassettes.

Id. at 63. In the present context, the owner of the copyright on the videotapes has chosen to make and transfer the material ownership of copies of the videotape to the school district public library, as provided for by section 106(3). Thus, pursuant to section 109(a), the school district public library, as the lawful owner of a copy of the work, may, in the language of the House Report, "lend it under any conditions it chooses

to impose."[3] It may, without infringing upon the rights of the copyright owner, loan copyrighted videotapes to its patrons, and may, in conjunction with such a loan, charge a reasonable handling fee.

Accordingly, it is my opinion and you are hereby advised that:

1. Pursuant to 17 U.S.C. §106, a school district public library may not, without infringing upon the rights of the copyright owner, permit its patrons to utilize library equipment to view copyrighted videotapes on the library premises.

2. Pursuant to 17 U.S.C. §109(a), a school district public library may, without infringing upon the rights of the copyright owner, loan copyrighted videotapes to its patrons, and may, in conjunction with such a loan, charge a reasonable handling fee.

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[3] I note that along with your letter of request, you included a copy of a journal article which concludes that under the Copyright Act, a library may not impose any fee along with the lending of a copyrighted videotape. This conclusion appears to have been based on the assumption that the Record Rental Amendment of 1984, Pub.L. 98-450, Oct. 4, 1984, 98 Stat. 1727, (1984), applies to the rental of videotapes. By its express terms, however, the provisions of this amendment apply only to "nondramatic musical works." See 17 U.S.C. §115 (1984). Thus, because the videotapes in question are considered dramatic audiovisual works under the Act, see Redd Horne, 568 F.Supp. at 499, the provisions of the 1984 amendment are inapplicable. See also 3 Nimmer, Copyrights §8.12[B], n.43.8 (1986).