Space and Time-Shifting: the state of fair use of a-v streaming in today’s university

UCLA vs. AIME

Julia Kim

Digital Preservation 2010
Copyright Law (as it applies to AIME-UCLA)

• Intent of copyright law:
  to Balance: authors and the good of society:
  commerce and non-profit (education, government)

Primarily “so that the world may not be deprived of improvements, nor the progress of the arts be retarded.” only secondarily, “reward/incentivize labor of authors.”
Copyright law: ambiguous, complex, torturous, incomplete, a... big mess

- Bypassing technological controls, (110) is a violation of copyright... regardless of whether the purpose falls under Fair Use
Copyright Law:

- 1870
- 1909
- 1976: photocopier wreak havoc
  basically codified the fair use criteria
  (developed...1800s by Justice Story in Folsom v. Marsh)
It’s actually really annoying…

COPYRIGHT DURATION AND RENEWAL GUIDE

START

is work fixed?

Yes

created 1/1/1978 or later?

Yes

§ 302

life + 70 years
or
95/120-year rule
for works with no
identified author
or works made for hire

same as § 302, but
minimum of 25 years
(to 12/31/2002)
and if published
before 12/31/2002,
then 70 years
(to 12/31/2047)

No

was work published?

No

§ 303

Yes

§ 304

result depends on when the
work was published & copyrighted.

No

formalities observed?

Yes

§ 304

PUBLIC DOMAIN

... except for some
foreign works
under § 104A...

... but if © was
not renewed
after 1st term...

protected, if at all,
only under non-© law

12/31/1972 or earlier?
(© expired before CTEA)

1/1/1923-12/31/1949?
(in 2nd term on 1/1/1978)

1/1/1940-12/31/1977?
(in 1st term on 1/1/1978)

§ 304(b)

§ 304(a)

finish out renewal term
(25 years)

© runs through end
of 1st term (28 years)

§ 304

Automatic Renewal

Copyright © 2006,
Timothy K. Armstrong.
See below for license terms.
This diagram avoids or oversimplifies
some issues. Although intended for
educational use, it is not a substitute
Fair Use (1976):

• (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational use
• (2) the nature of the copyrighted work
• (3) the amount and substantiality of the portion used in relation to the copyrighted work as a while; and
• (4) the effect of the use upon the potential market for or value of the copyrighted work

Guidelines to be balanced. Do not all need to be fulfilled. (“factors to be considered shall include...” (memphis review”)...however courts consistently rely on this list

“No real definition of the concept emerged” (Raffetto)

Can contradict.

Congress states that one of its major goals' with Fair use was “greater certainty and protection for teachers.”
So...Actually

- No real consistency.
- Fair-use is a toss-up.
  - Decided on a case-by-case basis
  - Ambiguous guidelines negotiate in stakeholder meetings...
  - Fair use sometimes is referred to as an “equitable rule of reason.”
    Since fair use was first recognized in 1841, courts have deferred to
    custom and practice within use communities where there was clear
    evidence of it. Various information industries (trade publishing and
    broadcasting, for example) have noted this fact and created their own
    internal “standards and practices” for fair use (http://
    www.centerforsocialmedia.org/ocw)

- Ambiguous updates to copyright do not clarify
  What constitutes fair use with technological shifts
Other Legal defenses to streaming for school:

• Copyright Section 110(1): exceptions for classroom uses ("face-to-face")
• In 1998"
  – Digital Millennium Copyright Act (DMCA)
• Additional classroom exemption...
• In 2002, 110 updated:
  – Technology, Education, and Copyright harmonization Act (TEACH act).
    -22 prerequisites (ex: only for accredited nonprofit educational institutions)
  – Anti-circumvention clause (also prohibits 3rd parties from aiding in circumvention –ex: creating software to)
    – Given prevalence of DRM controls-
      » No balance
Laws terms (when read strictly) ©

Contracts

Tech. controls on material

DMCA

TEACH Act

FAIR USE

Flexibility for Streaming audio-visual Material For educational purposes

“authors”

universities
• Practices:
  - vary from university to university
  - across different subject disciplines
  - according to ... each faculty member, even
Guidelines, or “treaty,” created by publishers and academic communities, recognized by judges even though not part of Copyright law
Guidelines vary from Universities.
-Most rely on 4 factors...
-Most are stricter or very ambiguous
Most institutions publically dictate very conservative measures ("safe harbor" usage)

- **No copyright issues**
  - IF YES
    - Is the content in the public domain?
    - Is the content owned by the individual faculty?
    - Was the content created by CU developers?
    - Does the university or the faculty member own a license for the use of the content?
    - Does the faculty member have written permission to use the content?
    - IF NO OR UNKNOWN
      - Seek advice on copyright status from copyright@cornell.edu
      - Determine if use is a fair use
      - Seek advice from the Counsel's Office
      - Secure permission
      - Find an alternative source of content

While copyright investigation, clearance, and support services are available, final judgment rests with each individual.

Revised October 2003, (originally developed by Academic Technology Center)
Copyright Checklist: Compliance with the TEACH Act
Copyright Advisory Office
Columbia University Libraries
Kenneth D. Crews, Director
http://copyright.columbia.edu

Please complete and retain a copy of this form in connection with each copyrighted work considered for your distance education course.

Name: ________________________________

Institution: __________________________

Project: ______________________________

Date: _________________________________

Prepared by: __________________________

The “Technology, Education, and Copyright Harmonization Act,” better known as the “TEACH Act,” is designed to provide educators more opportunity for the use of copyrighted works in distance education programs while still offering adequate copyright protection to those works. In order to qualify for these further possibilities, educators must meet several requirements. As the responsibilities of the TEACH Act will most likely fall upon different entities within any one educational institution, this checklist should be used as an aid to organize and ensure compliance with the TEACH Act for each copyrighted work. Remember, all requirements must be satisfied in order not to violate the law. For a more detailed explanation of any one requirement, click the “Explanatory Note” following each item. The principal text of the TEACH Act is enacted as Section 110(2) of the U.S. Copyright Act (available at: http://www.copyright.gov/title17/).

Keep in mind that if your project does not fit within the conditions of the TEACH Act, you have choices. Your use may be within “fair use” or another copyright exception, or you may secure permission from the copyright owner.
Streaming
If you wish to make video and audio excerpts available within your course LMS, you may want to make the clips available for streaming. A media file that is streamed from a server is not downloaded; only streaming data is sent to the user. Media clips are not retained by the user. Streaming video and audio excerpts within your course LMS is usually considered fair use. As a general matter, streaming copyright restricted media can be posted for class use for only one semester. Please see the Digital Studio132 for information on creating streaming media and requesting an appointment.

http://library.nyu.edu/help/faq.html?category=COPYRIGHT

• The NYU Office of Legal Counsel
The NYU Office of Legal Counsel is the place to turn if you have complicated questions regarding fair use, are a faculty member or administrator seeking permission to use a copyrighted work or if a copyright holder has challenged your use of their material. The Office of Legal Counsel is located at 70 Washington Square South, Room 1148. Phone 212.998.2240.

(Right now the only copyright policy NYU has in place was adopted in 1983 so … we have some catching up to do.)
AIME vs. UCLA

- Fall 2009, UCLA contacts
  - UCLA, in “good-faith” suspends streaming of videos (Jan-March)
  - March 2010: resumes streaming.
  - Releases argument for Fair Use
• **UCLA faculty principles on the use of streaming videos**

  • University instruction has long ceased to be bounded by the four walls of a physical classroom. Students and instructors interact with each other, and with learning resources, on a 24/7 basis. **The virtual classroom is the UCLA classroom of today for UCLA.**

  • UCLA is a leader, but is by no means alone in embracing the virtual classroom. The pedagogical opportunities made possible by Internet technologies, distributed access, and new forms of course content are now critical components of higher education.

  • **Streaming video is an essential type of content for instruction.** It must be available in the virtual classroom, along with other types of educational content that are appropriate to the pedagogy of the course.

  • UCLA use of streaming technologies, whether for video, audio, or other types of media, serves the purpose of time-shifting for students and faculty alike. Time-shifting has significant educational benefits. Students can study and interact with their educational course materials at times that best suit their learning styles.

  • If it would be lawful for a teacher to show a particular piece of multimedia to students enrolled in a class that meets in a physical classroom, it should be fair use to permit the viewing or hearing of that multimedia, through time-shifting technologies, in a virtual classroom that restricts access to those same enrolled students.

  • UCLA **must maximally assert its rights to use intellectual property within the bounds of existing copyright laws.**

  • Pedagogical concerns should determine what content, and what portion of any given work, should be required viewing, listening, or reading by students. **Faculty may be asked to specify the pedagogical reasons for requiring students to use (watch, listen, read) any given work.**

  • We will work in concert with other UC campuses and other universities to protect rights for the educational use of materials.

  • The temporary prohibition on use of the OID streaming video service has caused substantial hardship to our educational mission:
“one of the most effective teaching resources on the UCLA campus.”
Welcome to AIME

The Association for Informational Media and Equipment is a non-profit membership organization offering copyright information and support to teachers, librarians, media center directors, producers and distributors of informational film, video, interactive technologies, computer software and equipment. AIME serves as your organization’s copyright resource.

The mission of AIME (pronounced “aim”) is to promote fair and appropriate use of the media and equipment delivering information in a rapidly changing world.

Institutional and Corporate Membership Benefits include:

- Subscription to our quarterly newsletter, AIME News;
- Answers to your copyright questions by legal counsel to AIME;
- The opportunity to network with members who produce, distribute and utilize media products in educational settings;
- Access to membership listing;
- Access to the Copyright Information Packet.

AIME Membership Benefits...

Join AIME Today...
THE TRANSITION TO DIGITAL IS HERE! Visit our new "Video Streaming" website ([ambrosedigital.com](http://ambrosedigital.com)) and try our FREE TRIAL for Hamlet. Over 100 new programs in 2009! We have a variety of education subjects... Science, History, Drama and more! Our content is increasingly shot in HD.

**Disputed as to whether this Service was readily available when inquiries were initially made In Fall 2009.**
About Us

THE TRANSITION TO DIGITAL IS HERE! Visit our new "Video Streaming" website ambrosedigital.com and try our FREE TRIAL for Hamlet. Over 100 new programs in 2009! We have a variety of education subjects... Science, History, Drama and more! Our content is increasingly shot in HD.

We have over 1000 Educational DVDs in our collection including timely science and history topics. New releases include: 8 HUMAN BODY SYSTEMS, Atom (from the BBC), Diarmaid MacCulloch's A History of Christianity, Measuring the Earth's Temperature, Railroads in U.S. History (1830-2010) A History of Jewish American Achievement, and 21st Century Turning Points in U.S. History (2000-2009). Just check out our new releases... something for everyone... A choice you have never had... always high quality! New educational video content designed with clips that target the needs of educators using new digital delivery in the classroom.

Ambrose has it... any digital delivery format you need with professionals who can answer your every query about systems and content with a booming production schedule that excites students and teachers alike.

We are always interested in your feedback and comments.
• Restricted to use by professors and students of a single campus.
• Price per Concept Clip
  • $5.99
• Price per Program (Up to 30 minutes)
  • $17.99
• Price per Program (Over 30 minutes)
  • $24.99
• Price for any 50 hour bundle
  • $889.00
• Order a Bundle of 50 hours54 worth of Ambrose Video Programming and SAVE!
UCLA Video Streaming Damned, Dammed

Created by Steven Worona (EDUCAUSE) on January 30, 2010

Updated Feb. 10, 2010

On Tuesday, January 26, Inside Higher Education reported that UCLA was "Hitting Pause on Class Videos". Under threat of a lawsuit from AIME, the Association for Information and Media Equipment, reporter Steve Kilovich said that UCLA would "stop streaming and save the video, still in the library's system for possible reuse". The library's director said that the preservation is "a good thing" and the professor who requested the streaming said that he was "极大地 "ombostrumbed" by the library's response. The lawsuit was filed because the university streamed a video of a lecture without obtaining permission from the copyright owner, which is in violation of the Digital Millennium Copyright Act. The university has not yet responded to the lawsuit.
UCLA Newsroom

UCLA Will Resume Streaming Video After Legal Dispute
March 2, 2010, 4:30 pm
By Jill Lasser

The University of California at Los Angeles has restored its streaming video service about two months after temporarily suspending the service amid complaints from an educational-media trade group.

The Association for Information and Media Equipment told UCLA in the fall that the university had violated copyright laws by letting instructors use the videos, some of which were full-length productions. UCLA decided that beginning this semester it would suspend the password-protected video-streaming service, available only to students in specific classes.

UCLA announced Wednesday that it will restart streaming of instructional content. The university hopes material will be back up by the spring quarter, which begins March 30. J. Amy Blum, senior campus counsel for UCLA, says the university wants to take

“NO COMMENT”

DECEMBER 7, 2010
PRESS RELEASE: Educational Video Publishers Sue UCLA for Copyright Infringement

Dateline: Los Angeles, CA – December 7, 2010

A national trade association of educational video publishers, A.I.M.E., and one of its leading members, Ambrose Video Publishing, today filed a copyright infringement and breach of contract case against The Regents of the University of California and the Chancellor of UCLA.

The educational publishers charge that UCLA has illegally streamed Ambrose’s copy-protected DVDs hundreds of times to students and faculty, both on and off campus, using a technology system called Video Furnace. UCLA, which openly acknowledges the practice, defends online streaming of Ambrose DVDs and thousands of other film titles, as “exempt” from copyright liability and a “fair use” of copyrighted works.

Despite those assertions, the copyright law clearly limits the way in which universities like UCLA can exploit copyrighted content. “When UCLA’s media library licenses Ambrose videos or secures educational videos from other A.I.M.E. members, the school obtains the right to loan those copies to teachers for in-class performances, or show them within the library itself. However, it does not secure the right to stream our programs from a library server to any class and any student whenever it chooses,” explained A.I.M.E. President and Ambrose VP Allen Dehre. Ambrose already offers schools a low-priced streaming option for hundreds of educational programs (called AMBROSE 2.0) and fears that UCLA’s behavior spells catastrophe for the entire educational video market, which increasingly will turn to streaming video options.
• In order to incorporate this material, OCW makers must decide whether to rely on a license (whether open or restricted) or to employ fair use if relevant licensing terms do not prevent it. If these options are not available, they may decide to replace, delete, or obscure the material.

• Until now, it has been difficult for OCW makers and their institutions to be confident in employing fair use, because there is no direct legal precedent clarifying the applicability of fair use to the practice. This has resulted in expending time and resources licensing material that does not need to be licensed, or alternatively, in weakening the educational quality of OCW by the precautionary removal of third-party copyrighted material.

• http://www.centerforsocialmedia.org/ocw
Arnold P. Lutzker, DC Bar No. 101816, PRO HAC VICE to be applied for
Jeannette M. Carmadella, DC Bar No. 500586, PRO HAC VICE to be applied for
Lutzker & Lutzker LLP
1233 20th Street, NW, Suite 703
Washington, DC 20036
Telephone No. 202-408-7600 Ext. 1
Fax 202-408-7677
Email: amie@lutzker.com

James M. Mulcahy (SBN 213547)
jmulcahy@mulcahyllp.com
Kevin A. Adams (SBN 239171)
kadams@mulcahyllp.com
Mulcahy LLP
One Park Plaza, Suite 225
Irvine, California 92614
Telephone No. (949) 252-9377
Fax 949-252-0090

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ASSOCIATION FOR INFORMATION MEDIA AND EQUIPMENT, an Illinois nonprofit membership organization; and
AMBROSE VIDEO PUBLISHING, INC., a New York corporation,

Plaintiffs,
New York corporation,

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a California corporation;
DR. GENE BLOCK, CHANCELLOR OF THE UNIVERSITY OF CALIFORNIA,
LOS ANGELES, an individual,

Case No.: CV10-09378 CBM (MANx)

COMPLAINT FOR:

(1) Breach of Written Contract;
(2) Copyright Infringement;
(3) Violation of 17 U.S.C. § 1201;
(4) Breach of Written Contract;
(5) Copyright Infringement;
(3) Violation of 17 U.S.C. § 1201;
(4) Breach of Covenants of Good Faith and Fair Dealing;
(5) Unjust Enrichment; and
(6) Tortious Interference with Business Relationships

DEMAND FOR JURY TRIAL
transmissions” fall under different rules than doing something like posting an article or link. To make matters a bit more complicated, there are two categories of “transmissions:” those that are done under the TEACH Act (i.e. by institutions that are TEACH Act compliant) and those that are done without the benefit of the TEACH Act (and therefore must rely on other rules of law such as fair use). UCLA is relying on fair use.
Fair Use: "reasonable minds can disagree"

• Is it a right? According to educators-yes!
  – Related to First Amendment rights: an exercise of freedom of expression

• A defense of last defense?

http://www.utsystem.edu/OGC/IntellectualProperty/copypol2.htm#test

Most people think that the fair use test is difficult. Actually, it's not so much difficult as it is uncertain - susceptible to multiple interpretations. Two people can review the same facts about a proposed use and come to different conclusions about its fairness. That's because one must make many judgments in the course of weighing and balancing the facts.

• A protection for commercial innovators/distributers/copyright holders
This factor asks, "If the use were widespread, would the copyright owner be losing money?" Well, actually, it asks, "If the use were widespread, **and the use were not fair**, would the copyright owner be losing money?" After all, if the use were fair, the copyright owner would not be entitled to any money at all, so he couldn't "lose" what he never would have had to begin with.

http://www.utsystem.edu/OGC/IntellectualProperty/copypol2.htm#test
Some fair use cases:

- **Not a fair use.** A nonprofit foundation presented a program called "Classic Arts Showcase," for broadcast principally to public television and cable channels. The foundation used an 85 second portion (of a five-minute performance) by an opera singer from a two-hour movie, "Carnegie Hall." **Important factors:** Although the court considered the use to be educational, noncommercial and to consist of an extremely small portion of the work, those factors were outweighed by the potential loss of licensing revenue. The copyright owners had previously licensed portions of the work for broadcast and the court determined that the foundation's use affected the potential market. (Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Found., 2005 U.S. Dist. LEXIS 26302 (S.D. N.Y. 2005).)

- **Not a fair use.** A television news program copied one minute and 15 seconds from a 72-minute Charlie Chaplin film and used it in a news report about Chaplin’s death. **Important factors:** The court felt that the portions taken were substantial and part of the "heart" of the film. (Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting Sys., Inc. , 672 F.2d 1095, 1100 (2d Cir. 1982).)

- **Fair use.** The makers of a movie biography of Muhammad Ali used 41 seconds from a boxing match film in their biography. **Important factors:** A small portion of film was taken and the purpose was informational. (Monster Communications, Inc. v. Turner Broadcasting Sys. Inc., 935 F. Supp. 490 (S.D. N.Y. 1996).)

- **Fair use.** In a lawsuit commonly known as the Betamax case, the Supreme Court determined that the home videotaping of a television broadcast was a fair use. This was one of the few occasions when copying a complete work (for example, a complete episode of the "Kojak" television show) was accepted as a fair use. Evidence indicated that most viewers were "time-shifting" (taping in order to watch later) and not "library-building" (collecting the videos in order to build a video library). **Important factors:** The Supreme Court reasoned that the "delayed" system of viewing did not deprive the copyright owners of revenue. (Universal City Studios v. Sony Corp., 464 U.S. 417 (1984).)

- http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-c.html#2
• 2) courts seem increasingly willing to let the fourth factor of the fair use analysis trump all the other factors so that where there is a market for permissions, "fair use is negated." This was the position articulated by the majority in the recent MDS117 decision.

• Under this strictly economic analysis, in those circumstances where a ready market for permissions exists, such as permission for coursepacks, fair use shrinks - perhaps in time as well as in other dimensions. But the opposite is true, too. Where the permissions market is dysfunctional, fair use expands, both in the amount one may use and in time. For more information about this, see Advanced Topics in Copyright Law118, the third section addressing issues in a College of Fine Arts.

• http://www.utsystem.edu/OGC/IntellectualProperty/copypol2.htm#test