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LEGAL ISSUES & LLT



Judy Shoaf
University of Florida

Legal Issues & Language Media: The UCLA Case

Eyes are on “the UCLA case,” where a university has been sued because it undertook to provide video streams on campus without asking permission from the video rights holders. The case is not likely to be definitive but it raises important questions: What constitutes classroom use of a film? Can an institution sign away its fair use rights? Who is responsible for providing the infrastructure for streaming media distribution at an educational institution?

The lawsuit raises obstacles to satisfaction of classroom needs. If the purchased-for-life-of-item hard copy must be replaced by temporarily licensed streaming, streaming will be the format nobody can afford.

In 2005 or 2006 UCLA Instructional Media and Collections Services (part of the Office of Instructional Development) started using Video Furnace to digitize and stream various videorecordings from the collections, via password-protected clients

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on the campus network, for students enrolled in classes where the video was required viewing. Except for the fact that entire theatrical films were streamed,ⁱ the program conforms to the provisions of Section 10 of U.S. Copyright Law (TEACH). The streamed videos can be shown in the classroom, viewed in the library or Media Center, and viewed in some dorms by students enrolled in the relevant classes.ⁱⁱ By July 2010, instructors had requested that over 2500 media items be made available in this way, ranging from *Kill Bill* to *Krapp's Last Tape* to a three-part documentary about the Philippines.ⁱⁱⁱ

Video Furnace is a combination of hardware and software, now distributed by Hai Vision, allowing robust and secure delivery of video over IP. An instructor's classroom lecture can be almost instantly webcast to distance ed sites. Video streams can be produced from DVDs or VHS very quickly, so that an instructor can request a film for a screening and access it on the computer soon thereafter. From an institutional point of view, the infrastructure of Video Furnace is a versatile tool worth the investment.^{iv}

In 2009 an organization called A.I.M.E. (Association for Information Media and Equipment) put pressure on UCLA to stop the video streams.^v A.I.M.E. acted on behalf of Ambrose Video. Although A.I.M.E. includes in its membership 9 other video distributors whose videos had been reformatted and streamed by UCLA,^{vi} it was Ambrose that was pushing for the cease-and-desist order and eventually for a lawsuit against UCLA's Regents and Chancellor.

Ambrose Video has been flourishing since 1987 producing educational videos and also buying up the rights to high-quality made-for-TV series; they sell copies—VHS, then DVD—to schools and libraries. By mid-2009 Ambrose had set up a streaming service offering digital versions to institutions, and was dismayed to discover that UCLA was already streaming Ambrose videos—specifically, some of the BBC Television Shakespeare Plays, dating from 1978-85. UCLA had purchased the complete Shakespeare series twice over, in VHS and DVD.^{vii}

Among the distributors whose works UCLA digitized, Ambrose has a couple of peculiarities. One is that every purchase order constitutes a contract by which the buyer is granted carefully limited "Public Performance Rights":^{viii} "The Content is licensed solely for classroom teaching, research, educational non-commercial multimedia projects, classroom presentations, and individual presentations for use in educational institutions or public libraries."^{ix} All these situations fall under *fair use* as defined in Section 107 of U.S. Copyright Law; these fair use rights were extended into the digital realm by Section 110 (TEACH), but Ambrose explicitly forbids its purchasers from "transmitt[ing media]... on any multi-receiver open or internet system." Ambrose claims that "In most cases titles sold by video and retail outlets are restricted to home use only and do not include [their definition of PPR] rights," which is simply not true in the U.S. Ambrose thus forces purchasers into a contract

in which they give up their fair use rights in exchange for a more limited set of rights.^x

The other peculiarity of Ambrose is that it offers a useful digital product at a reasonable price: a secure high-quality stream on Ambrose servers, for \$25 per episode (e.g. one Shakespeare Play) per semester.^{xi} The streams even have closed-captioning to meet federal disability requirements. For schools which do not have the infrastructure to digitize and stream easily, this is likely to be an attractive product.

All the same, UCLA decided, after a hiatus in streaming during the Spring 2010 term,^{xii} to draw the line. It insists that this use of the media is legal and proper.^{xiii} When A.I.M.E. brought suit, UCLA moved to dismiss the suit.

What are the principles A.I.M.E. is arguing?^{xiv}

- In purchasing the Shakespeare Plays, UCLA de facto entered into a contract with Ambrose which limits UCLA's fair use rights with respect to the purchased copies.
- What UCLA has done with the Shakespeare Plays series is an infringement of copyright law, which reserves to the owner the right to reformat a legal hard copy of the video and to make the video available via any kind of broadcast or transmission over a distance. It is not fair use, because it has a deleterious effect on the market for Ambrose's own streams and videos.
- UCLA violated the Digital Millennium Copyright Act by circumventing copy protections on the DVDs.^{xv}

What is UCLA arguing?

- If PPR was included in the institutional purchase price, it cannot have been reserved by Ambrose. Reformatting, circumventing encryption, etc. were a means towards a legitimate end.
- The presentation of the streaming video in class and for individual student access is fair use, and specifically educational fair use (Section 107 of Copyright Law). Fair use rarely applies to an entire work; however, the "Betamax case" is invoked, recalling that videotaping entire television programs in order to time-shift viewing was judged legal in the early days of videocassette recorders. As for the allegation that UCLA is depriving Ambrose of its market, Ambrose did not have a product to offer for the first four years during which UCLA streamed the plays. That they eventually produced such a product does not oblige UCLA to purchase it.
- Sovereign immunity: you can't sue a state institution (the Regents) in federal court unless the state consents; the laws and contracts involved

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here are under federal jurisdiction, and the state did not consent to be liable for suit.

- A concept of qualified immunity protects government officials performing their duties in good faith.
- A.I.M.E., which does not allege injury to itself, has no legal status to present the claim against UCLA.

UCLA's "Motion to Dismiss" is full of intense arguments, which the above can only touch on, about who has the right to make what kind of case under what circumstances. Some of it sounds like legal tap-dancing.^{xvi}

The case is an exciting one because of UCLA's arguments for a vigorous interpretation of fair use. However, if the case is dismissed (and dismissal is expected at any time), it will not be because UCLA is considered to have made fair use of Ambrose's videos, but because the judge agreed that the wrong plaintiff is suing the wrong defendant on the wrong grounds.

This may not help to normalize practices (except maybe at state schools). Threats against private schools by more powerful companies would not necessarily be discouraged by the dismissal of the UCLA case. Such a suit has the potential to strangle streaming in its infancy, with schools afraid to use their own facilities to stream but unable to afford the licensing fees demanded by distributors.

RESOLUTION UPDATE: On October 3, 2011, Consuelo B. Marshall, U.S. Judge for the Central District of California, dismissed the A.I.M.E. lawsuit against UCLA's Board of Regents and personnel, discussed in the article above. The decision confirms that the school itself cannot be held liable, because as a state university it enjoys Sovereign Immunity. A.I.M.E. was also declared to be the wrong plaintiff in the case. The complaints that involve circumventing DVD encryption and copying DVDs to a server for purposes of streaming under the provisions of the contract or fair use were dismissed "without prejudice"—the suit can be brought again within the next two weeks, with amendments as to who is suing whom. The statements of the court, however, imply strongly that digitizing material for fair use falls under fair use.^{xvii}

ⁱ The TEACH act (Section 110 of the Copyright Law) specifies that digital delivery of materials for a class should be confined to "reasonable and limited portions" of a dramatic work, "or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session." UCLA is assuming that in these cases the "reasonable portion" is the entire film. It is in fact typical of brick-and-mortar film courses to schedule classroom screenings of films to be studied, and a digital version of the class would necessitate streaming the films.

ⁱⁱ UCLA Media Lab Video Furnace FAQ: <http://www.oid.ucla.edu/units/imlab/faq/vf/>.

- ⁱⁱⁱ The number is obtained from Exhibit 2 in the case, available online at <http://www.AIME.org/news.php>. Nearly all these items were for the humanities, fine arts or social sciences; none of them involved telecourses or materials made specifically for the educational market. This is significant since the use made of the streams can be defined as “transformative”: using an item made for entertainment or information as the basis of class discussion and criticism. See Deg Farrelly’s notes from 8/10/2011 at <http://www.mail-archive.com/videolib@lists.berkeley.edu/msg05162.html>.
- ^{iv} See Hai Vision Video Furnace information: <http://www.haivision.com/products/furnace>.
- ^v The documents in the case are available on the web in the A.I.M.E. dossier: <http://www.AIME.org/news.php>. In particular, the Amended Complaint offers a history of the case on which my summary is based. I have also made extensive use of UCLA’s Motion to Dismiss.
- ^{vi} Determined by comparing Exhibit 1 and Exhibit 2 in A.I.M.E.’s case as posted at <http://www.AIME.org/news.php>.
- ^{vii} UCLA Shakespeare Plays holdings <http://media3.oid.ucla.edu/htbin/wwform/214?T=S0347>.
- ^{viii} Public Performance Rights (PPR) as understood in general is the right to show a film in a public venue, such as at a film festival, school treat, civic or religious event or fundraiser, etc. PPR thus defined are not invested in the owner of a copy of the media, and must be purchased; they are usually tailored to the specific event (whether admission is charged, for example, and the size of the audience expected). U.S. law provides for an exception to this process of obtaining/purchasing PPR permission for face-to-face teaching in classes in not-for-profit educational institutions (Section 107, educational fair use). In other countries, such as Canada, however, there is no educational exception and schools must budget for PPR for any film shown in the classroom.
- ^{ix} This and other quotations in the paragraph are from <http://www.ambrosevideo.com/order.cfm#terms>.
- ^x The Ambrose policy of ignoring the legal concept of educational fair use is not unique. For example, Bullfrog Films has similar wording (<http://www.bullfrogfilms.com/orderinfo.html>), and California Newsreel will sell a customer a home-use copy for a small price, but “At two to three points during home video videocassettes or DVDs script will appear over the image stating that this videocassette has been purchased for home use only and may not be used in class, circulated in an institutional library or be exhibited to the general public” (<http://newsreel.org/California-Newsreel-FAQ>). Some companies do include in the institutional price PPR beyond fair use, though: a school or library gets the right to free showings of video purchased from Icarus Films <http://icarusfilms.com/ordering.html> or New Day Films <http://www.newday.com/orderinfo.html>. All these companies are A.I.M.E. members, and their institutional prices for one copy of a timely documentary start around \$200 and go up.
- ^{xi} Some film distributors sell the *right to stream* rather than an actual stream, leaving it up to the school to digitize and serve up the video. They may charge as much for streaming or streaming rights (temporally limited) as for a hard copy. Some distributors, however, can’t sell streaming rights because they don’t own them.
- ^{xii} Re. the cessation of streaming, see the Daily Bruin article of 1/24/2010: <http://www.dailybruin.com/index.php/article/2010/01/ucla-professors-banned-posting-videos-online>.
- ^{xiii} UCLA Information Technology and Planning Board statement of principles as of 2/2010 http://www.itpb.ucla.edu/documents/ITPB_IP_Video_Principles_Memo.htm. See also the Chronicle of Higher Education article at <http://chronicle.com/blogs/wiredcampus/ucla-will-resume-streaming-video-after-legal-dispute/21594>. UCLA did at this time institute a more intense scrutiny of the relationship between the videos chosen and the courses for which they were required.
- ^{xiv} Kevin Smith, Duke University’s Scholarly Communications Officer, provides a strong analysis at <http://blogs.library.duke.edu/scholcomm/2010/12/12/the-other-shoe-drops/>. I am ignoring some types of arguments, e.g. that UCLA and Hai Vision are somehow colluding.
- ^{xv} No such protections would be present on the VHS copies owned by UCLA. However, UCLA is arguing that the circumvention was necessary to access the content.
- ^{xvi} Kevin Smith clarifies that the arguments are all important. UCLA is attacking the premise that, in this case at least, licensing of copyrighted material can contractually limit the legal rights of a purchaser to use the media. While the normal assumption is that a contract trumps the law, they argue that in this case copyright law (fair use) is at issue and pre-empts the contract. See <http://blogs.library.duke.edu/scholcomm/2011/02/08/contract-preemption-an-issue-to-watch/>.
- ^{xvii} Judgment: <http://www.aime.org/news.php?download=nG0kWaN9ozI3pMICGRm&u=111005120000>
Kevin Smith’s analysis of dismissal: <http://blogs.library.duke.edu/scholcomm/2011/10/04/streaming-video-case-dismissed/>.

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ABOUT THE AUTHOR

Judy Shoaf has a Ph.D. in French and Medieval Literature from Cornell. She has directed the Language Learning Center at the University of Florida since 1993. She maintains a website on copyright law & educational media that can be accessed at <http://www.clas.ufl.edu/lc/Copyright>.