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Christian Lear

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Controlled Digital Lending of Video Resources: Ensuring the Provision of Streaming Access to Videos for Pedagogical Purposes in Academic Libraries

Christian Lear, Kennesaw State University Library System

Author Note: Correspondence regarding this article should be directed to Christian Lear, Resources Management Librarian and Librarian Assistant Professor, Kennesaw State University Library System, clear@kennesaw.edu.

Abstract

This article examines a current crisis within media librarianship regarding the challenges for academic libraries in providing streaming access to video resources despite the growing need for users to have streaming access. The article discusses this crisis largely within the context of COVID-19 (Coronavirus Disease of 2019) and how the pandemic has exacerbated the problem. This article also posits a possible solution to the issue through the application of controlled digital lending (CDL) to video resources for a pedagogical purpose. The article demonstrates the extent of the crisis, examines how other media librarians have addressed the problem, and shows the limitations to the solutions that have so far been offered. It then broadly discusses the concept of CDL and how this practice could be applied to video resources to address the frequent inability of libraries to provide streaming access to videos.



Introduction

It is commonly acknowledged that delivery and consumption methods for films and television series undergo major transformations roughly every generation due to technological changes (King, 2014, p. 295). Primary means of distribution have gone from 16-millimeter formats, to video home systems (VHS), to digital video discs (DVD) and Blu-ray discs, and now to streaming video. This article posits the view that we are no longer in the middle of a transition away from physical formats and toward streaming access; instead, that transition, especially in terms of consumer behavior, is complete. Although DVD collections will continue to be used, physical formats will likely continue to grow more obsolete within the coming years. The effects of the Coronavirus Disease of 2019 (COVID-19) also played a major role in completing this shift away from physical formats. As will be demonstrated, streaming access to video content is now a requirement for consumers. Media librarians, broadly defined in this article as any librarian or library staff member whose work deals with the acquisition and delivery of this content in academic libraries, must find ways to deliver streaming access to users when video content is needed for instruction. However, this kind of delivery is very difficult to achieve because of substantial limitations imposed on libraries regarding institutional access to streaming content within the marketplace, even during the pandemic. This article will discuss the limitations that media librarians and others responsible for the distribution of video content face in attempting to deliver streaming video resources, including documentary films, feature films, and television series. It will also examine the literature to determine how other academic librarians have dealt with those limitations in order to provide streaming access. Most of these solutions deal with licensing streaming video content, which, as will be shown, is an unsustainable and undesirable practice for libraries. From there, this article will discuss the relatively new concept of controlled digital lending (CDL) of library resources and its potential application to video content that is being used by instructors for the purpose of teaching.

As will be demonstrated, the practice of CDL could be permissible under the fair use and first sale doctrines of US copyright law (Hansen & Courtney, 2018). After introducing the concept of CDL and its potential application to video resources, the article will then deal with some of the barriers that would have to be confronted by librarians in the implementation of CDL for video content as well as some potential solutions to address those barriers. The goal of this article is to suggest a path forward for media librarians to be able to deliver certain video

content to library users in support of instruction. This path would allow librarians to continue to fulfill their missions to library patrons.

It should be noted at the outset that CDL can only serve as one part of a broader strategy to make video content more accessible to the communities served by academic libraries. This is because CDL is only a viable access solution in situations where video content is available in physical formats. As will be demonstrated, CDL of video resources is not an option for libraries if the requested content has only been distributed in a streaming format. Therefore, CDL for video resources should be viewed as just one component in a larger strategy for a library to deliver video content.

Streaming Video: A Preference or a Necessity?

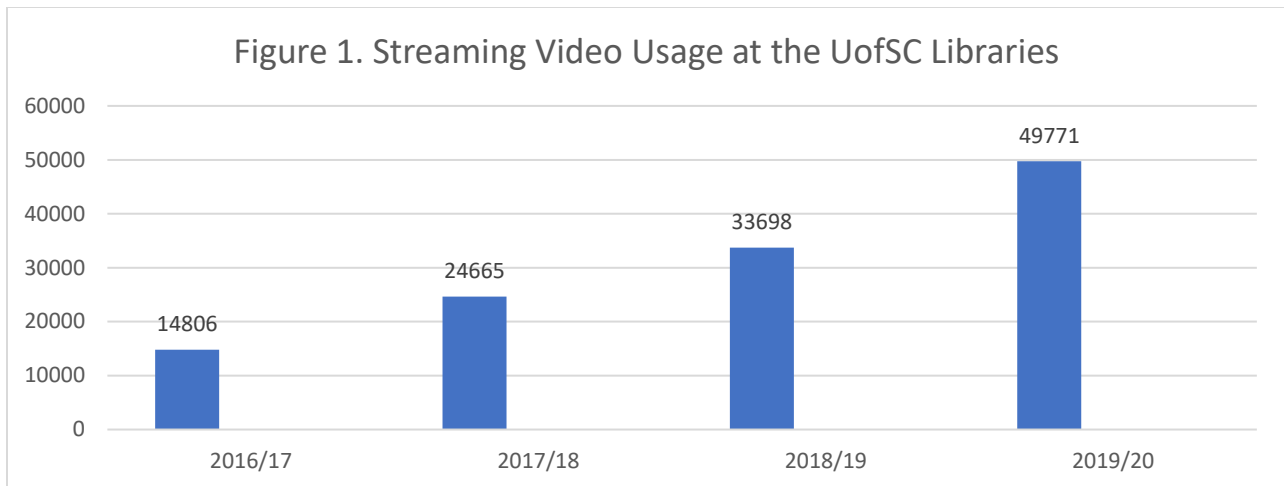
In the past, streaming access to videos for academic purposes was purely a luxury and not something required in order to access video content. Over the past decade, however, there have been multiple signs that point to a shift in how video content is accessed. Streaming access to video resources including television series, documentaries, and feature films to support teaching is no longer an added convenience that instructors want to utilize. Instead, streaming access for many institutions, including the University of South Carolina–Columbia (UofSC), has evolved into a necessity for any instructors incorporating films or television series into their instruction.

Even before the COVID-19 pandemic, streaming access to videos was becoming much more of a necessity rather than a preference. This assertion is supported by usage statistics comparing streaming and physical formats from the UofSC–Columbia campus over time. From fiscal year (FY) 2016/2017 to FY 2019/2020, usage of streaming video resources rose 236% overall across the six streaming video databases that the UofSC Libraries have continuously subscribed to.¹ This growth, as shown in Figure 1, has not only been exponential but also been steadily increasing during the four years under examination here, eliminating the possibility that COVID-19 alone is responsible for the tremendous growth.²

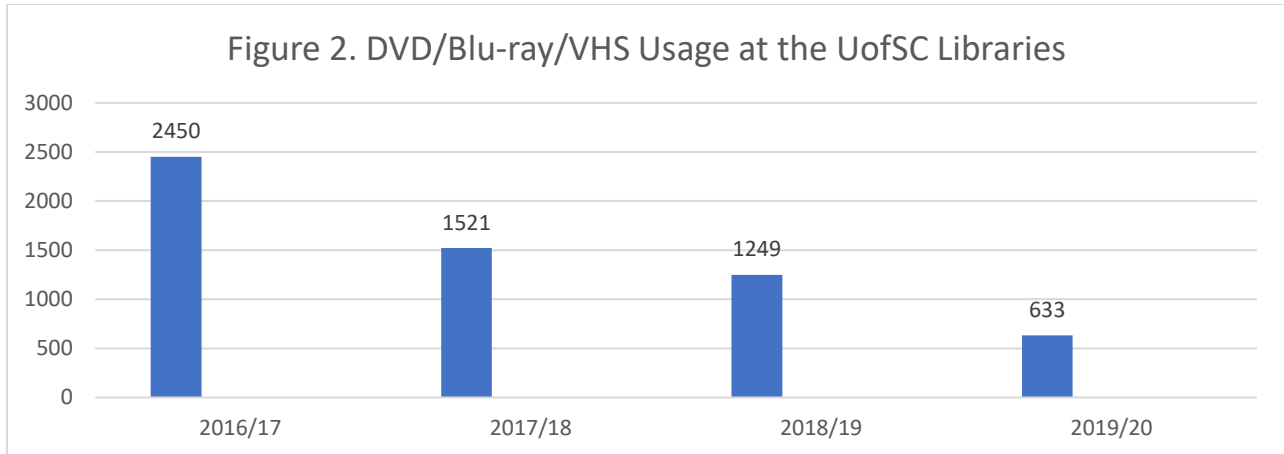
¹ The six streaming video databases that the UofSC Libraries subscribe to are the following: Alexander Street Press, Ambrose Digital, Docuseek2, Films on Demand (Infobase Learning), Kanopy, and Swank.

² One complicating factor involved in examining usage of streaming video resources is the fact that there is not a set standard employed by all vendors for defining what “usage” means. Some vendors define a “play” of a video as a user’s continuous viewing of the resource for 30 seconds, while others define a “play” as anytime the play button on a video is clicked by a user. For physical formats, usage is defined by a patron borrowing the resource.





The drastic rise in streaming video usage was, unsurprisingly, accompanied by a dramatic decline in the use of DVD and Blu-ray discs, as shown in Figure 2. From FY 2016/2017 to FY 2018/2019, patron use of these formats fell by 49%. FY 2019/2020 was excluded from this calculation because there were no physical loans of these materials during the last quarter of the fiscal year due to COVID-19 and the UofSC Libraries being closed as a result.



This trend is predictably present outside of academic campuses as well, where DVD sales have declined and streaming use, as indicated by revenue, has increased even more markedly than on campuses. Farrelly (2016) noted this trend by stating that “the growth of academic streaming video occurred simultaneously with the growth of commercial streaming services” to the point where at least “65% of people worldwide now watch streaming video or video on demand” (p. 4). From 2005 to 2018, DVD sales to the general public in the U.S. dropped from \$16.3 billion

to \$2.2 billion, a decline of 86.5% (Whitten, 2019). On the other hand, from 2011 to 2019, revenue from streaming video sales and rentals to the general public rose by 1,231% (Whitten, 2019). Of course, the example of the home video-viewing market could simply be interpreted as a reflection of user preference and not of actual necessity of the consumers, but this is certainly not the case on college and university campuses. In fact, many classrooms on campuses no longer provide DVD or Blu-ray players at all, partially as a result of the common misconception that streaming media resources are becoming more open and freely available (King, 2014, p. 289). Additionally, the presence of disc drives on personal computers has become far less common in recent years, contributing to the diminishing accessibility of physical formats. Although this lack of availability of media players does not meet the copyright statute's definition of "obsolescence," when coupled with the very large class sizes of many colleges and universities, it does render DVD and Blu-ray discs practically obsolete.³ The growing inaccessibility of physical formats due to the lack of these media players makes it less feasible to ask roughly 200 students to share access to one or two DVD's provided by the library, even without the presence of a global pandemic that limits physical loans. This is due to the lack of availability of physical media players as well as the fact that more instructors are recognizing the pedagogical value of video resources, which is demonstrated by the significant rise in streaming video usage.

Since COVID-19 the numbers for streaming versus physical formats have strongly confirmed the necessity for streaming access for instructors at many academic institutions such as UofSC-Columbia. This is because of the fast transition to online learning that took place in spring 2020. During the first three months that the UofSC-Columbia campus was closed (March 2020-May 2020), there were a total of 94 requests from instructors for streaming access to films and television series. During that three-month period in 2019, by comparison, there were a total of only 22 requests for both streaming and physical formats. Of course, many of the 94 requests during the pandemic came from professors who would have used a library-owned DVD had the campus not closed, but institutional streaming access to videos used in classes would have prevented the large quantity of emergency requests. Some might assert that many of these instructors will revert to DVD or Blu-ray discs after the pandemic, but this seems unlikely due to an increasing awareness and use of libraries' streaming services. That knowledge, when coupled with the many

³ To wit: 17 U.S.C. § 108(c)(2) states that "a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace."



benefits of streaming access (e.g., a reduced need to borrow physical items and more seamless access for students), will likely encourage instructors to continue using and expecting streaming video.

Furthermore, actual usage of existing and newly added streaming films and series increased disproportionately, unsurprisingly as a result of the pandemic. One of the campus's most popular streaming databases, Kanopy, saw a 128.75% increase in the amount of video plays by users at UofSC–Columbia from the period of March 2019–May 2019 compared to the period of March 2020–May 2020. During that time in 2019, there were 4,591 total plays (defined as a single viewing of a video that lasted at least 30 seconds) of videos on Kanopy, compared to 10,502 total plays during that period in 2020. Usage for Swank, another popular streaming database that provides feature films for educational purposes, increased by 30.85% during the same time periods, with 1,478 plays (defined as a single viewing of a video that lasts for any length of time) in March 2019–May 2019 and 1,934 plays in March 2020–May 2020. Just as it is not likely that instructors will revert to the use of physical formats, it also seems unlikely that that students will begin using DVDs and Blu-ray discs after the pandemic, especially given the lack of availability of physical media players discussed above.

Given the aforementioned trends in consumption of video resources, it seems probable that a preference for streaming formats is quickly becoming a dependence on streaming formats. If the academic library is not able to provide streaming access to films and television series after the pandemic, users will be increasingly frustrated by this failure. While the practical need for streaming access to video resources is not a legal justification for the practice of CDL, it does demonstrate that media librarians must find creative ways to provide streaming access. As will be shown, licensing streaming content is not a sustainable method for the provision of these resources.

Licensing of Streaming Content as a Problem, Not a Solution

If one accepts the fact that streaming is now a necessity as opposed to a luxury, then the next inquiries must aim at understanding how libraries currently provide streaming access to video content and if the current methods of provision are effective and sustainable. It appears that an overwhelming majority of academic libraries that provide any kind of streaming access do so by licensing the content through vendors (Lowe et al., 2020, p. 119). Numerous surveys and reports in recent years “reinforce the popularity of these [streaming] services with library

users,” but an alarming number of metrics also point to the lack of sustainability of relying on licensed content from vendors (Lowe et al., 2020, p. 119).

One aspect of streaming video licenses that demonstrates the lack of reliability and sustainability is the frequency with which academic libraries are not able to provide streaming access to video content. From March to May of 2020, the period in which 94 requests were submitted, the UofSC Libraries were unable to gain access to a total of 34 videos that were being used in courses, meaning that 36.1% of requests were unsuccessful. The success rate for episodes from television shows was even worse. Of 14 requests that were submitted for episodes from television series, the library was only successful in fulfilling three, which is a success rate of only 21.4%. The lack of success in fulfilling requests for streaming content was primarily because vendors did not have streaming rights in order to provide a license, or the distributor of the video did not provide institutional streaming licenses. And, of course, requests from streaming services such as Netflix and Hulu had a 0.0% success rate. This is because the original content of these companies cannot be licensed to an institution. When only 63.9% of total requests are successful, and there are no reasonable alternatives, the feasibility of licensing streaming content should be questioned because instructors are not receiving the resources that they need.

For the situations where streaming access can be licensed, it is important to examine the costs of obtaining content in order to determine the long-term sustainability. As King (2014) demonstrated, “a subscription to a single database can cost an academic institution tens of thousands of dollars a year” and many vendors that offer feature films, which are frequently used in a transformative manner within academia, “do not provide librarians with opportunities to build comprehensive collections that could replace academic libraries’ DVD collections of feature films” (p. 300). It is important to note here that the use of many of these feature films could be characterized as a transformative use in a fair use analysis because this characterization could expand the possibilities for digitization and distribution of this content. If a proposed academic use does not match with the creator’s original intent in making the video, then the digitization and distribution could potentially be characterized as transformative and may be permissible under fair use. However, due to current restrictions placed on librarians dealing with the acquisition and distribution of video content, in order to build a comprehensive streaming collection, libraries must subscribe to multiple products, each of which would likely cost an excessive and unsustainable amount. Some vendors do allow for the licensing of individual titles on a per-title basis. This may seem like a more



sustainable licensing practice than subscribing to large databases, but that is unfortunately not the case in the long-term. These titles are generally licensed for a period of one to three years, at which point the license may need to be renewed. Over time, a library could end up paying thousands of dollars for streaming access to just one title. This is far less sustainable than the one-time purchase of a DVD that the library then owns. While libraries are certainly not averse to paying large sums for important content, the overwhelming costs and limited access as opposed to ownership of content have made this model unsustainable, as library budgets before and during the pandemic could not absorb the prices. In addition, because of the short leasing periods (usually just one or three years), “librarians must weigh the benefit of purchasing a license to a single streaming title against the staff time required to incorporate a record for that title into the library catalog and subsequently remove it when the license expires” (Adams & Holland, 2018, p. 4).

Adding to the issue of the prohibitive costs of streaming access to video content, issues regarding preservation of streaming materials present a problem. Preservation is a central tenet of librarianship, and as the American Library Association (ALA) has noted, “promoting preservation of our cultural heritage and ensuring access to information in a usable and trustworthy form” is a primary policy goal (ALA, 2017). Preservation of video content was simpler with physical formats, but this has changed because of the shift to streaming media. According to Lamphere (2020), “as technology continues to develop, preservation methods become ever-more complex, streaming licenses become more expensive, and platforms emerge to make money and pull in the most users” (p. 34). Furthermore, preservation of these video resources is frequently not an option for libraries, as institutions do not own the resource and, therefore, are prohibited from making any copies for the purpose of preservation.

Literature Review on Current Streaming Video Solutions

Given the frequent failure to obtain streaming video, the cost of streaming access to this content, and the difficulties involved in preservation, it seems reasonable to suggest that licensing is not a viable long-term option for academic libraries. Since streaming access is now a requirement for many instructors, media librarians must find a solution that allows access to streaming content. One potential solution would be the application of the concept of CDL. CDL refers to the practice of making digital copies of physical library resources and loaning those digital copies to users in a controlled electronic format. The term “controlled” means that only the number of physical copies that a library owns will be electronically

accessible at a given time, while the physical copies would be made unavailable to users. For example, if the library owns only one physical copy of an item, then the implementation of CDL would mean that only one user could access the digital content at one time, while the physical item would not be available to users. Though there has not been much written about the applicability of CDL to streaming video, the problems facing media librarians regarding streaming video and proposed solutions to those problems have been covered extensively. The applicability of CDL will be covered in later sections, but this literature review focuses primarily on how media librarians have attempted to deliver video content in a streaming format in academic libraries up to this point. Most of these methods have relied heavily on the licensing of streaming content and have operated under the conception that US copyright law prevents digitization and controlled delivery of the content. Others, however, have looked to the exceptions within U.S. copyright law to support the digitization of physical video resources and the controlled delivery in a streaming format.

Over the past decade, it has been widely acknowledged that “increasing user expectations and demand for remote, 24/7 access to library resources” have led to considerable changes in the collection development practices of libraries (Handman, 2010, p. 326). While this has been the case for many types of library resources (e.g., books, journals, newspapers, etc.), it has been particularly true for video resources (Handman, 2010, p. 326). Handman (2010) noted that “the transition from the ownership of collections of physical media to a service-based model of access to licensed resources . . . [entails] major rethinking by libraries of the . . . traditional roles of the library or media center” as well as collections practices (p. 326). There are numerous licensing options that are, in theory, available to libraries, such as in-perpetuity licensing, term licensing, and standing-order models. However, it is important to note that “none of these options will . . . duplicate the . . . DVD model” because these license agreements only provide access to resources and not ownership of resources (Handman, 2010, p. 333).

Examining the same topic, farrelly [sic] (2016) also observed that “as libraries moved into digital rather than physical assets, acquisitions moved from purchasing to licensing” (p. 6). He noted that “licensing of streaming video falls into two broad categories: in-perpetuity . . . licensing and term licensing,” but despite this broad simplicity there are significant obstacles to overcome to gain access to video content (6). The primary obstacle is the excessive cost. The problem stems from the unfortunate fact that “most distributors charge significantly more for their titles in streaming format than they charge for DVDs” (7). Due to this reality, farrelly [sic]



acknowledged the shortcomings of the current institutional streaming market and demonstrated that licensing practices are not sustainable because of the costs that cannot be absorbed by constricted library budgets.

Adams and Holland (2018) also showed that “the high costs of streaming media . . . indicate that licensing streaming content whenever possible is both an unsustainable and an undesirable practice for most academic libraries” (p. 21). At the same time, they demonstrated the conundrum for librarians by pointing out that “with the exception of expensive leasing services . . . academic libraries have few options for providing feature films to their communities,” which has led to a discussion within media librarianship regarding digitization and hosting of library-owned DVDs (Adams & Holland, 2018, p. 4). As of 2014, however, the majority of librarians surveyed indicated that they “would not digitize their physical collections for the purpose of delivering streaming media,” primarily due to copyright implications (Adams & Holland, 2018, p. 4). This indicates that the majority of these media librarians are relying on licensed content.

Despite reluctance from many librarians, there have been some optimistic signs in recent years of the possibility for libraries to digitize content from DVDs and have that content hosted for patrons to stream. Towery, Price, and Cowen (2019) developed a very useful and detailed guide to librarians for making decisions regarding the provision of streaming access to video content. By going through the steps outlined in their streaming resources decision tree (SRDT), a librarian can determine if copying and streaming content from a DVD would be permissible under the fair use doctrine. However, these steps would only justify copying and streaming in a very narrow manner. For example, if students need to access video content for a class, but the library cannot provide streaming access, then the media librarian must first check to see if the required video can be purchased or rented from a for-profit streaming service. If so, then the best practice recommended by the SRDT is to have students gain access through that service instead of the library. However, those costs can add up quickly for students who are in classes that rely on a high quantity of videos for instruction. In addition, the authors note that a strict adherence to their SRDT workflow “could cause [librarians] to over-rely on licensing” when copying and streaming could be justified under the fair use doctrine, which will be discussed below (Towery, Price, & Cowen, 2019, p. 5).

There have also been other librarians who work with video resources that have shown greater willingness to digitize and stream content, generally due to a greater tolerance for risk on the part of the institution in which the librarian works. As early as 2010, the University of Washington had “been floating a pilot project to

<https://doi.org/10.17161/jcel.v5i1.14807>

stream video course reserve material” (Vallier, 2010, p. 387). In addition, King (2014) noted that, due to the unreasonable costs of licensing video content, “UCLA [librarians] decided that the only way to ensure short-term and long-term access to the videos in their collection was to convert DVDs to streaming video” by making a copy of the DVD content (p. 300). While specifics on the digitization processes were not provided in these articles, Vallier (2010) and King (2014) both demonstrated two important realities regarding streaming video content. First, the complexities and unreasonably high prices of institutional streaming licenses are forcing librarians and the institutions in which they work to wade into legally ambiguous territory. Unfortunately, as Cross (2016) has shown, “uncertainty about the law and fear of litigation leave many librarians feeling compelled to work *sub rosa*, keeping their heads down in hopes that they won’t be discovered” copying and distributing video content (p. 2). In addition, these authors all show that digitization of DVD content is not a new or radical proposal. This is significant because the CDL of video content would require making digital copies of DVDs. However, Cross (2016) also noted that “digital content wrapped in DRM . . . cannot be circumvented even for lawful purposes,” which means that digital copies must be made in a manner that does not circumvent the encryption on the DVDs (p. 6).

Controlled Digital Lending and the Application to Video Content

Given the demonstrated necessity of streaming access to video content as well as the impossibility of licensing all the video content needed for the purpose of instruction, media librarians should use rights granted under U.S. copyright law to continue to provide access to users. One potential approach that librarians should exercise is CDL of video content, particularly for videos required for class assignments. While the application of this practice to video lending would present additional challenges that would not exist with other types of resources held by libraries (i.e., books, journals, etc.), CDL holds exciting potential for film and media resources. This section will provide an overview of CDL and then focus on how this concept could be applied to video resources. It will then consider additional challenges and opportunities to overcome those challenges involved in the application of CDL to video content.

In broad terms, CDL proponents explore how libraries can continue to fulfill their missions in the digital environment. The CDL theory argues that libraries can “digitize books that are not otherwise available in [an electronic] form, and share them in the same controlled way that they might share a physical book” (Wesolek & Ramsey, 2018). Further, “CDL enables a library to circulate a digitized title in place



of a physical one in a controlled manner” (Bailey et al., 2018). If a library has access to the technology that allows it to circulate electronic copies of digitized resources and limit that circulation to only a specific number of users, then CDL would be a promising avenue to explore for lending library materials. The idea is that the library can “only circulate the number of copies that it [physically] owned before digitization,” creating an “owned to loaned” ratio (Hansen & Courtney, 2018, p. 2). In this approach, the act of digitization would not create a new copyright but would simply be regarded as a shift in format.

The argument for CDL for library books is founded in two exceptions to the exclusive rights of creators codified in copyright law: 17 U.S.C. § 107 (fair use doctrine) and 17 U.S.C. § 109 (first sale doctrine). While in-depth consideration of these exceptions to creators’ exclusive rights cannot fully be explored here, it is necessary to give a brief overview of these concepts and how they relate to CDL. The fair use doctrine permits the “unlicensed use of copyright-protected works in certain circumstances” based on factors such as the following: 1) the purpose and character of the proposed use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the copyright-protected work that is being used; and 4) the impact that the proposed use would have on any potential market for the protected work (U.S. Copyright Office, 2020). Arguably, several of these factors favor CDL in a fair use analysis, including the first factor: “library use of CDL is non-commercial and designed to promote public benefits by facilitating research and learning” (Hansen & Courtney, 2018, p. 16). One could argue that by avoiding the cost of licensing streaming content, libraries are technically profiting and, therefore, the first factor would not be favorable for CDL. However, this is not the case. In fact, “given the costs of digitizing, building and maintaining the technical infrastructure necessary to lending digitally and controlling physical copies, and personnel time used to restrict” access, it should be clear that libraries “will not generate monetary profit” from this practice (Hansen & Courtney, 2018, p. 17). The fact that libraries are not seeking monetary profit in the digitization and controlled distribution of resources suggests that the first factor in a fair use analysis favors the library’s use. Another significant factor that favors a library’s use is the fourth factor, which considers the market effect of digitization and distribution. For scenarios in which a library decides to utilize CDL, “the market effect . . . is nearly identical to the market effect” of lending only a physical item due to the “owned to loaned” ratio mentioned above (Hansen & Courtney, 2018, p. 23).

The first sale doctrine not only enables libraries to engage in CDL but also provides the foundation for the existence of libraries. This doctrine gives the owner

of a copy of a protected work the “rights to sell, lend, or share their copies without having to obtain permission or pay fees” (ALA, 2019). Without this exception to a copyright owner’s exclusive rights, libraries in the U.S. would not be able to lend copyrighted works at all. In addition to this, the first sale doctrine provides support for the practice of CDL, even though some ambiguity does exist when applying this doctrine to CDL. The idea is that if the “owned to loaned” ratio is maintained, it can be argued that only the copy that was legally obtained by the library is being used, therefore justifying digital lending in a manner that limits the number of users who can access the resource at one time. However, the ambiguity comes from the fact that when the physical copy of a library resource is digitized, it is unclear whether that constitutes a separate copy, and “to date, courts and legal scholars have struggled to identify what is a ‘particular’ copy in the digital realm” (Hansen & Courtney, 2018). Still, the first sale doctrine in conjunction with fair use can be a powerful factor in supporting the practice of CDL in libraries.

As previously stated, CDL has generally been promoted as a method for loaning out traditional library resources such as books. However, it is not difficult to imagine the benefits of applying CDL to other library resources, especially video content. Utilizing CDL to loan videos that are being used for instruction and for which a library cannot otherwise gain streaming access in a reasonable and sustainable manner would be a logical step in providing access to needed resources for users, especially considering the growing obsolescence of physical formats such as DVD and Blu-ray discs. Streaming video content has been the strongly preferred method of access even several years before the COVID-19 pandemic. The effect that the pandemic has had in accelerating the shift from preference to necessity means that the practice of CDL must be considered to ensure that the delivery of streaming content is financially possible and to allow more opportunity for libraries to engage in preservation activities of their resources through the creation of alternate copies and the reduced usage of physical copies. Of course, barriers exist to applying this practice to the circulation of videos that do not present themselves with other formats such as books. These barriers are both technological and legal, but none of them should be seen as significant enough to prevent libraries from engaging in this practice.

Challenges and Solutions: Implementing CDL for Video Resources

Copyright Barrier

Several exceptions to creators’ exclusive rights within U.S. copyright law support the practice of CDL with library-owned books. The fair use and first sale



doctrines would bolster the arguments for CDL for video content as well as print. Circulating a digital copy of a video that the library owns in a physical format (while ensuring that the physical copy is not loanable) would be justifiable under the same copyright considerations as a book. However, additional and substantial challenges arise when digitizing videos that require more thoughtful solutions. The primary challenge that will confront media librarians in making copies of DVD and Blu-ray discs is one statute within Title 17 of the US Code known as the Digital Millennium Copyright Act (DMCA). The challenges presented by this law as well as potential solutions to address those challenges are discussed below.

The barrier to CDL for video sharing within the DMCA is codified in 17 U.S.C. § 1201(a)(1). This statute prohibits the circumvention of technological protection measures (TPM) that encrypt and/or scramble the content contained on virtually all DVD's. The DMCA sits outside of the other exceptions within copyright law, essentially providing another right to copyright owners outside of 17 U.S.C. § 106 (where the exclusive rights of copyright owners are codified). These rights are not subject to the exceptions within the statute because they do not serve as a "protection of the work itself; [they are] protection of the digital fences wrapped around" the work (Boyle, 2008, p. 87). In other words, even if copying and distributing the content contained on a DVD were permitted under the fair use and first sale doctrines, breaking through the encryption to make a copy may not be permissible. This inflated level of protection for copyrighted works prevents "citizens from making 'fair uses' the copyright law allowed" for because it puts a digital barbed-wire fence around copyrighted works with TPMs in place (Boyle, 2008, p. 87). While exemptions to this anticircumvention provision do exist, they are too narrow to allow for any meaningful CDL policy. For example, it is "permitted to circumvent TPMs of 'lawfully made and acquired' motion pictures on DVD solely to incorporate 'short portions' into new works 'for the purpose of criticism or comment'" (Rockhurst University Library, 2020; US Copyright Office, 2021). To add to this limitation, exceptions to the DMCA are reviewed every three years in a very complex process by the Library of Congress, meaning that these exceptions may not even be permanent. Even if exceptions are rolled over into the next review period, media librarians are required to continue to track the status of those exceptions on a regular basis, leading to a further drain on library resources. This lack of stability regarding exceptions to the anticircumvention provision can cause confusion if certain actions are permissible at one point, only to be deemed as violations of the TPMs within three years. These kinds of exceptions do not benefit most instructors

at UofSC–Columbia, and likely instructors elsewhere as well, because these users tend to require a substantial amount of a video, if not the entire work.

Due to the rigid limitations imposed on users of copyright-protected video resources, media librarians are faced with a difficult challenge in implementing CDL for video content. However, there are short-term and long-term solutions that could assist media librarians in carrying out CDL practices. The short-term solution should be characterized as a temporary workaround. Instead of using a software that breaks the encryption on a DVD, librarians could consider using screen-capture software that also allows for audio recording to obtain a digital file of the video content. The most recent exceptions to the prohibition on circumvention of TPMs address the use of screen-capture technology by noting that the use of this software is permissible in situations where the technology is “offered to the public [for] the reproduction of [portions of] motion pictures after content has been lawfully acquired and decrypted,” and if the proposed use is for comment, criticism, or other educational purposes (U.S. Copyright Office, 2021). Of course, this practice has limitations that would prevent the large-scale implementation of CDL for video resources. The primary limitation would be the time that it takes to digitize video content in this manner. The librarian would be required to let an entire video play on a computer while the content is being recorded and then the file would have to be converted to a format that is supported on the platform being utilized for digital lending. An additional limitation would be the fact that the quality of the copy would not be satisfactory to justify widescale implementation of CDL for video content. This would mean that the practice of CDL would be severely limited until a more viable, long-term solution could be put in place.

The limitations inherent in utilizing screen-capture software require that a long-term solution be implemented as well. The solution proposed here is to advocate (to both the U.S. Copyright Office and Congress in general) to create permanent and meaningful exceptions to the anticircumvention provision of the DMCA, or to simply allow the rights granted under the DMCA to be beholden to the other exceptions within the copyright law, such as the fair use and first sale doctrines. The main goal would be to put in place an exception that would allow for an *entire* video (not just clips) to be copied for instructional purposes if, and only if, the proposed copying would be permissible under one of the exceptions to a copyright owner’s exclusive rights, such as the fair use doctrine. This could still impose limitations on the practice of CDL for video content because media librarians would not be allowed to circumvent TPM for videos that do not have an academic or pedagogical purpose. Essentially, a DVD in a library collection might only be



digitized and circulated in a controlled manner if that video were needed for teaching and/or research purposes. Videos in a collection that do not relate to pedagogy would still be protected from the circumvention of TPM. This would mean that a direct request from an instructor would be required in order for the librarian to make the determination that the video resource had a pedagogical purpose, which would be a requirement for the exception to the prohibition on circumvention of the TPM. In this case, self-directed research on the part of a library user would not be enough to make an exception to the prohibition on circumvention of a TPM. Library users with this need would have to rely on the library's acquisition of an additional physical copy of the video resource. The digital video content that is streamed could also be limited to only the students in the class for which it is being used (through password protection) in order to provide an additional layer of protection that only allows those users who require the content for a class. In addition, access to this streaming video content would have to be further restricted to only a certain number of users at one time in order to maintain the "owned to loaned" ratio. This would present a technological challenge because the hosting platform utilized by the library would need the capability to limit the number of users who can access one of these specific streaming resources to only the number of physical copies of that resource that the library owns and that are not available to be borrowed by library users.

Another factor to consider with the adoption of CDL for any library resources, including video resources, is the fact that CDL is not a universally accepted legal principle, nor has this concept been tested in courts. Many interested observers have significant reservations about the practice of CDL, whether those reservations are warranted or not. For example, as Ojala (2021) noted, the National Writers Union has made the claim that the "unlicensed copying and distribution of books" involved in CDL amounts to "digital piracy" (p. 27). Of course, this stance does not consider the fact that the "owned to loaned" ratio severely weakens the idea that CDL amounts to digital piracy, but this skepticism of CDL is sufficiently common to cause librarians to be somewhat hesitant to engage in CDL. This hesitation is further justified by the reality that CDL is an "interpretation of copyright law, not the law itself" (p. 25). Because of this, it is important for librarians to understand that the practice of CDL of any library resources can include certain legal risks.

Technological Challenges

Of course, the level of technological difficulty in implementing CDL for video lending would be highly dependent on the individual libraries and their resources

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and circumstances. The primary technological requirement for implementing this practice would be a video hosting platform from which users can access the content. Considering the features that would be required (capability for controlled lending, analytics data for the purpose of tracking usage of the digitized resources, sufficient storage, login protection to restrict access to individual titles, customer support, IP address restriction to limit off-campus access to the hosting platform, etc.), this would be an expensive endeavor. Some streaming film vendors do provide reasonably priced hosting services, but they frequently are included within a larger package of resources (i.e., the library must subscribe to an entire package, not just the hosting service) and they do not provide the capability for controlled lending. Deciding whether to rely on hosting services provided by a vendor or to maintain an institutional platform would depend on several variables. Factors to consider would be financial costs, technological capabilities, and needed features, among others. Decisions on all of these variables would be highly dependent on the needs and means of individual institutions, but any institution that does engage in CDL must employ the “use of digital rights management software and/or secure distribution platforms to ensure that borrowers don’t create additional copies of a work for distribution or retention” (Enis, 2018, p. 17).

Conclusion

Given the necessity of streaming access to video content as well as the lack of sustainability in current institutional licensing practices, it should not be disputed that media librarians must find new and creative ways of delivering streaming video. This article has explored CDL as an option to provide streaming access to video content. The literature has demonstrated that copying video content from DVD’s in order to create a digital file for the purpose of controlled distribution is not necessarily common, but it is not unheard of nor radical for that matter. The application of CDL to video resources would provide an effective though limited means of access to course content. Of course, there are legal and technological barriers to implementing CDL for video content, but these challenges should be confronted and not avoided. There are long-term and short-term solutions that can be utilized in order to work through the barriers, and doing so will allow media librarians to engage in the practices that make libraries valuable to the communities that they serve.



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