

Rapid shifts in technology have outpaced the cultural norms and legal standards ordinarily guiding behavior. The ease of digitization with its implications for duplication and transmission of content without clear legal frameworks has seen the rise and fall of facilitating software companies (Napster, Pirate-Bay) without necessarily clarifying what theft and ownership mean in a materialistically abstract society. This means that while technology now offers the long-wished hope for transcendence over time and space, universities are unable to take full advantage for fear of legal ramifications. In recent years, professors have had to engage in legally ambiguous territory to stream videos for classroom viewing. Just recently, UCLA and AIME began conflicting over this very issue. In the course of this paper, using AIME vs. UCLA, I will discuss/show how copyright has failed to adequately address technological changes in education (and elsewhere), and that, in fact, because of increasingly restrictive law, the original intent of copyright to balance authors and society, has shifted dramatically in favor to privilege commerce over the general utility of society as a whole.

Copyright

According to the House of Representatives summary statements (1988):

Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the author's labors.

By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and ...when the limited term...expires and the creation is added to the public domain

(Lewis, 54)

Copyright Law is an attempt to strike a balance between authors and society, ultimately for the benefit of society so that “the world may not be deprived of improvements, nor the progress of the arts be retarded.” Aside from its initial creation in 1870, copyright law has only had several major revisions and amendments in 1909 and 1976. It’s an ever shifting balancing act, see-sawing with cultural and technological changes between individual interests and societal interests and between protection and access (Rafetto 79). It mediates, or it is suppose to mediate, between opposing forces, checking the monopoly to a product with limitations (time, forms), while also providing exemptions for valued spheres such as government and education. This should be consistent regardless of medium, whether a book or an audio-video clip.

Copyright law is a vast and complex, but in regard to streaming audio-visual materials for educational purposes, there are 3 emendations/aspects that are frequently analyzed and contended, especially by the respective representatives of UCLA and AIME: Fair Use, the TEACH act, and the DMCA act:

Fair Use: a right or last-ditch defense?

Section 107 of the Copyright Act (major amendments in 1976), often referred to as “Fair Use,” essentially codified a 19th century rule of thumb created to determine what constituted fair usage of copyrighted material. Lists of fair usage reasons included, but were not limited to, teaching, scholarship, research, news reporting, comment, and criticism. Directly inspired by the 1841 decision written by Justice Joseph Story in the case of *Folsom v. Marsh*, the four-factor rubric is both simple and elastic, allowing for its application in many situations.

Fair Use factors:

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

In making Fair Use determinations, however, concomitant to its very elasticity is its ambiguity; there is no clear recipe or formula to determine Fair Use. Courts are granted full discretion to use parts of the list or consider any other relevant factors to a case. That is, the four factors are meant simply as guidelines to be considered, both as a whole as well as individually by degrees, to determine Fair Use. Essentially, as this statement clarifies, “Congress noted that no real definition of the concept emerged “ (Raffetto 77). In practice then, applicability is decided on a case-by-case basis; there’s no clear legal illumination until after a judge rules and each judge may come up with his or her own evaluation of a case. While many court cases rely on the concept of precedent to determine or build on a related case, because of Fair Use inconsistencies, this is not necessarily the case for Fair Use. While trends have been noted....A successful Fair Use case can have negative answers for the factors and, in fact, it has been invoked successfully for use for commercial applications (rather than a non-profit application), for full-length use of works (rather than an excerpted work), and for cases in which usage causes potential market harm (Band, 2). Not surprisingly, Fair Use can, and in the case of UCLA and AIME, does, have polar meanings and interpretations.

An 85 second snippet of an opera for public TV broadcasting, a 41 second excerpt of a boxing match for a biography, the creation of home videotaping equipment (Betamax)-which qualify as Fair Use? While the first example was rejected as a conflict with revenue, the 4th factor, the second and third uses were determined to be Fair Use. As much as one would like for some clear logic and consistency in determination, a search for such certainty is sure to remain frustrating.

The effects of Fair Use uncertainty, then, is conservatism. These cases fall towards the margins of the “safe-harbor” policies adopted by most universities in order to avoid litigation. This is despite Congress’s intent that Fair Use provide “greater certainty and protection for teachers.” (Fischer, 2). A brief perfunctory survey of educational websites, regarding Fair Use policies and guidelines for audio-visual materials, reveals the conservatism that is a product of ambiguity, in which, essentially, universities reify each of the guidelines as well as the guidelines that accompany the technological statutes to copyright, added in 1998 and 2002.

Fair Use for protected spheres, such as education, optimally, should be a right; it should be understood as rooted in First Amendment rights (without which copyright law would be unconstitutional), but it is, in effect, it is a defensive posture in which users of intellectually protected materials are urged to “check every box” to ensure that their usage will escape possible litigation.¹ This has led to a rise of many myths that, effectively, diminish the power of Fair Use, such as “if it’s entertaining, it’s not Fair Use,” or even “my license (for example, a public performance license to show a film) was denied, it’s not Fair Use,” In summary, although Fair Use was created because there are uses of copyrighted works that are of greater value to society than harm to the copyright holder, it’s very flexibility, in our increasingly litigious society, has

¹ Eldred v. Ashcroft, 537 U.S. 186, 2003

also resulted in an emphasis on its legal ambiguities. Unfortunately, straying from its originally intentions and positive rights, Fair Use has become something of an “argument of last resort, argued only in otherwise losing cases” (Baker 773). More unfortunate, compared to relatively recent additions to copyright exemptions, Fair Use is still the strongest argument for use.

The D.M.C.A. statute: Piracy Paranoia, or “the tuna-dolphin problem”²

It’s 1998: the music industry is suffering and undergoing dramatic restructuring. Industry is fearful; lobbyists work overtime. Piracy is no longer associated primarily with seafaring buccaneers. Enter the Digital Millennium Copyright Acts of 1998 (DMCA Act) (Section 110 (1)). As the U.S.’s version of the international copyright treaty of 1996, the extensive reforms added additional prohibitions with far-reaching consequences. We are just beginning to grapple with some of these consequences, especially in the conflict between UCLA and AIME. Hated by many stakeholders for its blunt approach to piracy, the DMCA is the most controversial copyright addition in our law books today (Jaszi, “Public Knowledge”).

DMCA is not wholly negative. It provides much needed protection for internet service providers (You Tube, Flickr, Facebook), but in its preoccupation with stopping piracy, it’s had mixed (at best) results. In the example of these internet service providers, what has resulted is an with which take down notices are assiduously conceded to, regardless of fair use. However, that’s a very small issue. What is the problem is that the DMCA carves directly into Fair Usage:

² this analogy has been attributed to Fred von Lohmann by Peter Jaszi in http://www.youtube.com/watch?v=a_OWZ0_oDI

No person shall circumvent a technological measure that effectively controls access to a work protected under this title... No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part that is primarily designed or produced for the purpose of circumventing technology.(Sharp 9)

The DMCA made any circumvention of CSS encryption technologies illegal, whether or not that usage was fair or not. Suddenly, modifying the content you fairly bought for your own private usage became a criminal act. On the far end of the spectrum, this meant modifying digital material/books/software to make it accessible to the blind is illegal. Even creating software that would circumvent encryption, by extension, became a criminal activity. As Peter Jaszi says, the DMCA is “not an extension or addition to copyright law, but literally, a parallel regime”(“Public Knowledge”). Instead of protecting technology from hackers and unfair use, the DMCA locks up content intended for lawful use.

As almost all commercial audio-visual products have controls on them, if total compliance with the DMCA is absolutely necessary, it effectively strangles the Fair Use. The inclusion of the copyright protections on nearly all audio-visual media has decisively tipped the scales between “authors” of works and legitimate fair usage of material by educational institutions. In a Berkman Center white paper analyzing Fair Use in the new realm of digital learning, their opinion is that “ (even) the most favorable possible interpretation (of the DMCA) would require that educators who circumvent DRM protections in order to make use of digital content must restore that DRM in its entirety prior to any dissemination of the content. As we

see it... (it is) likely infeasible for all but the most wealthy or technologically sophisticated institutions (McGeeveran 19).”

The T.E.A.C.H. Act:

Section 110(2), otherwise known as the Technology, Education and Copyright Harmonization Act of 2002 (TEACH) is an additional statute to existing copyright laws and guidelines. Like the DMCA, TEACH seems to have largely failed in its attempt to address technological shifts in education and distance learning. It’s shortsightedness is something that will need further clarification before universities in America can confidently embrace technology in education.

The TEACH act attempts to address and update the “face to face” aspect of former copyright law with the idea of bringing that into the future. The future, to legislatures back then, was “closed circuit transmission.” The teach act addresses the “new classroom” to an extent, but it also restricts a lot of the former freedoms of 110(1). The language is vague enough that it isn’t difficult to see if it’s particularly useful to either UCLA or AIME in making their case.

Some of the restrictions include:

- materials must be lawfully obtained
- the performance must be of a ‘reasonable and limited portion’ of the work.
- at a non-profit, accredited educational institution
- material must be central to course
- reasonable limitations to transmission: limits to enrolled students, content protected downstream

-The materials to be used should not include those primarily marketed for the purposes of distance education (e.g. an electronic textbook or a multimedia tutorial).

Given the many restrictions, many arguments would be best made by relying on the relative expansiveness of the Fair Use doctrine.

UCLA vs. AIME:facts

“We’re well aware the outcome of this dispute could affect other educational institutions, and it’s important that UCLA take a leadership role and demonstrate just how critical the appropriate use of technology is to our educational mission,” (Jim Davis, UCLA vice provost for information technology and chief academic technology officer.” (Hampton)

As we have briefly outlined, the law, in regard to digital streaming of audio-visual material in educational settings, is complex and filled with difficulty; but educational communities, at least until recently, seemed relatively safe from litigation. UCLA was not remarkable in its practices and they seem to fall into the tacitly “accepted practice within the education communities (Band 8).” Exemptions from copyright’s monopolies, after all, have always historically provided significant room for the education, research, and scholarship communities. Additionally, universities have not been secretive about streaming; providing virtual audio-visual library reserves is a common practice. Universities market this proudly to prospective and incoming students to illustrate their contemporaneousness. As digital media has revolutionized everyday life, the education sphere is only trying to keep pace. Higher education

institutions like UCLA, Northwestern, and Columbia all have streaming as an integral component to their education. UCLA, in fact, began converting titles for streaming in 2005 and budgets about \$45,000 for new media purchases for instructional uses (Hampton).

However, as markets expanded to service the emerging (side) market for educational audio-visual content, a trade group took interest in the potential new licensing markets. Last fall, the Association for Information and Media Equipment (AIME), a group representing 16 independent and educational film distributors/creators (including a distributor of PBS and a distributor of BBC) contacted UCLA with allegations of copyright infringement and licensing and contract violations. What follows is a brief summarization of events, as cobbled together from local news articles, public statements, and the December 7th court filing.

According to the *UCLA Newsroom*, A.I.M.E. became aware of the digital streaming of some of its members materials in May of 2009. AIME contends that UCLA was offered the option for licensing of digitized material for streaming. UCLA, in court documents, denies this and says that these options were unavailable at the time. In any case, UCLA, using VideoFurnace software, had already been streaming the same material. The particular content contended as copyright violation include a BBC series and productions of Shakespeare plays that, over the course of a five years, were accessed and streamed more than 130 times. UCLA used software to password protect access to enrolled students in the course, providing all standard downstream protections (such as time limitations and restrictions from downloading the material). As a “good-faith” gesture during the protracted negotiation period, UCLA also shut-down its video streaming software in January. UCLA and AIME engaged in face to face meetings, but discussions failed to reach settlement agreeable to both parties. By March 2009, UCLA publicly defended its actions and resumed its streaming of audio-visual material. UCLA’s

Information Technology Planning Board (I.T.P.B.) drafted the University principles regarding streaming of audio-visual material with little change with the exception of an additional clause providing for increased oversight by the faculty member teaching the course (give pedagogical reasons for the necessity of viewing the material) (Borgman et al). However, in striking contrast to other university policies, the I.T.P.B. streaming statement guidelines took a very clear stance and stated intent to “...maximally assert its (UCLA’s) rights to use intellectual property within the bounds of existing copyright laws,” and its plans to work...in concert with other UC campuses and other universities to protect rights for educational materials”(Borgman et al.).

AIME released a counter-statement, addressing the I.T.P.B. guideline with a point-by-point rebuttal in its spring 2010 *AIME NEWS*. Arnold Lutzker, the chief lawyer representing AIME, essentially stated that TEACH restricts Ambrose materials from virtual classrooms (not face-to-face classrooms), especially given the full-length nature of the streaming, Ambrose’s multi-tiered licensing scheme encompassing school streaming, and, on top of his copyright disagreement, Lutzker pointed out Ambrose’s prohibitory licensing for all of its products that denied any streaming, regardless of Fair Use or not. Additionally, AIME representatives released statements regarding its plans to investigate further the questionable practices of several other universities

Given the ramifications to short-term ramifications to universities and the long-term implications that leading scholars and activists Lawrence Lessig and Peter Jaszi portended, many associations and intellectuals took note and took sides. The Library Copyright Alliance (which included the American Library Association, the Association of Research Libraries, and the Association of College and Research Libraries) released statements in defense of UCLA’s

streaming of films from a course website, offering much of the same legal reasoning that UCLA used.

After the initial flurry of publicity in March, however, there were no updates on negotiation developments until, on December 7th, 2010; AIME and its member Ambrose, issued a formal legal complaint against UCLA. Negotiations failed. AIME and one of its members, Ambrose Films, charged UCLA with:

- (1) Breach of Written Contract;
- (2) 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.

They also issued a press release regarding the breakdown of negotiations with UCLA. As of December 13th, 2010, UCLA had not released any official statement.

Stakeholder bias

The language behind intellectual property with the new era of digitization has yet to coalesce. Even outside the courtroom, there is a lack of clarity on very basic notions of theft and ownership and yet, parties from both UCLA and AIME can claim truth value.³ Each party has

³ Lutzker is going to teach a copyright course at the University of Maryland. See: <http://cipcommunity.org/s/1039/index.aspx?sid=1039&gid=1&pgid=252&cid=1596&ecid=1596&crd=0&calpgid=303&calcid=807>

their own intractable interpretations of appropriate policy that is antithetical to the other. There is a vast divide between the two positions. According to Allan Dohra, president of AIME, UCLA is doing nothing less than “stealing,” especially in its streaming of “ill-gotten goods” (Laster) ⁴ What is behind these very different meaning aside from, perhaps, well-paid lawyers? One of the many issues raised by digitization is the lack of a discrete and clear essence. Copies are exact replicas, not degraded, grainy toner-smearred photocopies.

Market Harm in Fair Use

Arnold Lutzker, in many statements on behalf of AIME, concern and high estimation of the market harm factor in fair use. In his belief, UCLA and universities like it area a “very serious threat to the educational video publishing company (Lutzker AIME News, Spring).” This has been brought up in Fair Use cases grappling with new technological innovations, time and again. Lutzker finds contention with many of the defenses raised by UCLA. His primary point, however is that_ “The goals and practices of the use, including whether it is for noncommercial use, the nature of the work and how much of the original is taken, are balanced against the impact of the use on the market for or value of the original “(Lutzker 3). Analyzing that quote, Lutzker seems to count economic harm as equal to all the other factors combined. The balancing act is between markets and everything else including societal impacts. His overemphasis of the fourth factor (market-potential and actual harm) is something that has been insufficiently remarked upon, it seems. Along with the “multi-tiered licensing” schemes for any

⁴ Dohra: “The customers want our product-enough of them prove that by stealing it-but they seem to have a problem with the companies recovering those expenditures. That is exactly the case in the UCLA matter “The Chronicle,”)

conceivable niche market, the general concern for the economic factor is part of a shift in Fair Use readings.

When copyright issues can take prohibitively high amounts of money and many years to resolve (Betamax was no longer a viable medium by the time it was cleared for home use), only stakeholders with a lot of financial resolve can influence precedent and even legislation. This is an unfortunate aspect of the flexibility of Fair Use. With the new developments in mind, however, I echo Lessig: “We should see a resistance to imposing the Brittany Spears model of copyright upon the scientist or the educator... Scholars have allowed the copyright conversation to be steered by lawyers and businesses who are not accountable to intellectual discovery” (27). The chance to bypass back room meetings and negotiations holds a lot of hope for parties trying to clarify equitable standards for Fair Use in the new classroom. There is a chance for new precedent to be set and correction to previously misguided and short-sighted statutes.

Interestingly enough, in the recent court filing, AIME primarily tries to bypass the Fair Use determinations with other claims of contractual breach and TEACH and DMCA issues.

TEACH: “The virtual classroom is the UCLA classroom of today for UCLA,” ITPB release.

What is the university today? It may be cliched to say, but given the controversy of the TEACH act in regards to the new filing between AIME and UCLA, it should be restated that higher education today is without walled classrooms. University learning now takes place anywhere and at anytime as an extension of the new 24-7 life available in large part do to the internet. UCLA argues, and AIME does not dispute this, that the virtual classroom and the instructional videos streamed are new norms. Streaming technology is but another form of time-

shifting and, with access and downstream controls, UCLA should be able to legally stream. The new classroom is space-shifting as well as time-shifting.

However, what is a gray area is whether or not UCLA is using material primarily meant for the educational market. Additionally, does it matter that a closed-circuit television scheme envisioned by lawmakers in 2002 is no longer a reality? That “face to face” has been replaced with various software programs like VideoFurnace or Blackboard in which content is accessed at any time in whatever setting a student happens to be in? Where do lawmaker intent and this failure of “closed circuit” meet? Additionally, if TEACH exceptions can be negated by creating licensing agreements for educational groups, isn't it possible that any video, even if originally intended for a larger market in its inception, with the blessing of another education license, no longer apply to education's traditional exemptions?

Contracts versus rights and loopholes

While it is not in the purview of this paper to address another tortured area of the law, it seems like the accusation of breach of contract and licensing agreements made by AIME can be addressed, albeit briefly, consonantly with the larger arguments being made in this paper.

As mentioned earlier, AIME's attempt to avoid question of Fair Use through looking at the very limited or even non-existent provisions for educational usage of digital copyrighted material also includes an attempt to sue for breach of contract and to sue for damages.

If Fair Use is thought of in its formally expanded and positive sense, as an exempt privilege for certain spheres, can Fair Use preempt a(n) unfairly restrictive contract? Can a contract infringe upon these rights? If Fair Use is to be considered an extension of First

Amendment rights, no, it certainly *seems* to be a constitutional violation, rendering the contract null. The First Amendment is another method by which information is allowed to flow freely. Essentially, this can mean that intellectual property protection, especially far-reaching copyright monopolies, are a form of censorship. This conflict between copyright and the first amendment has been argued in past court cases.⁵

General Trends

“For the last fifty years, whenever there has been a change to case law, it has been in expansion of intellectual property rights”(Lewis 236). Case law has, in the recent past, swung over to emphasize, more and more, the commercial and even possible (as of yet, not created market or license) commercial impact of an exemption to copyright. his overemphasis on threats to profit margins is not the only shift in fair use interpretation (Raffetto 169). Additionally, in the majority of court cases in which contracts collide with copyright law, contracts are stronger... (although there is a minority against) (Raffetto 473). Thinking about whether Fair Use can be contracted out is worth a moment. It seems like, however, Fair Use truly has become an option of last resort, the option of the desperate.

What is copyright law’s intention? Most neutral analysis makes it a balance between author and society with the overarching, utilitarian purpose for benefiting society as a whole. Technological changes coupled with the increased emphasis on economic concerns have decimated whatever small safe harbor there once was for educational institutions. The American Intellectual Property Law Association estimates that the average cost to defend a copyright case is just under one million. With the possibility addition of the statutory damages, may be

⁵ Eldred v. Ashcroft (2003), [Harper & Row v. Nation Enterprises \(1985\)](#)

extremely steep. On the one hand, are the voices from higher education who see this attempt to regulate and impose more licensing fees and copyright protections in this new area of transmission as yet another encroachment on rights and our collective good. In an age where portions of digitized could be licensed separately, or even licensed by words or phrases, the possibility for additional controls and costs seem endless. The ramifications for higher education as well as society as a whole cannot be overemphasized in this case between UCLA and AIME. That is, in my opinion, whether the balance between education and commerce, or more broadly, authors and the rights of society as a whole, will be restored in this new emerging area of digitization, or not (Baker 47):

. “Lawyers tend to look first to legal regimes when surveying the landscape of a public policy issue. At times, this is the wrong place to begin, because economic or social forces play a greater role in shaping practices... Copyright single-handedly creates the monopolies that underpin economic interests in this area, and it profoundly shapes norms and institutional practices concerning the use of content (McGevern section 3). If market forces were to continue to shape the interpretation of copyright law unabated, any balance would be lost and society would end up bearing increased economic and social costs. Given that both sides have, to some degree, valid claims, one hopes that some middle ground will be forged with the possibility of legal precedents developing for clarifying appropriate use that would benefit and balance individual rights of authors/creators/distributors with the rights of society. Fair Use was initially codified common law meant to plug the gaps in statutes. It’s meant to apply, without bias, to new mediums and technologies. With the case between UCLA and AIME, perhaps it can be used more robustly and reinsert itself as relevant in today’s digital age.

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Internet Sites:

AIME

<http://www.aime.org/>

The First Amendment Center

http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Eldred_v_Ashcroft

Public Knowledge

<http://www.publicknowledge.org/issues/dmca>

Center for Social Media

<http://centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>