

What Makes Us Do It? The Legalities and Demand That Necessitate a Library Video Streaming Service

Corinne Forstot-Burke
University of Kansas, cforstotburke@ku.edu

Lea Currie
University of Kansas

Follow this and additional works at: <https://docs.lib.purdue.edu/charleston>

An indexed, print copy of the Proceedings is also available for purchase at:

<http://www.thepress.purdue.edu/series/charleston>.

You may also be interested in the new series, Charleston Insights in Library, Archival, and Information Sciences. Find out more at: <http://www.thepress.purdue.edu/series/charleston-insights-library-archival-and-information-sciences>.

Corinne Forstot-Burke and Lea Currie, "What Makes Us Do It? The Legalities and Demand That Necessitate a Library Video Streaming Service" (2018). *Proceedings of the Charleston Library Conference*. <http://dx.doi.org/https://doi.org/10.5703/1288284317040>

What Makes Us Do It? The Legalities and Demand That Necessitate a Library Video Streaming Service

Corinne Forstot-Burke, University of Kansas, cforstotburke@ku.edu

Lea Currie, University of Kansas, lcurrie@ku.edu

Abstract

There are many differing interpretations of copyright law when it comes to digitizing and providing streaming video as a library service. Librarians at the University of Kansas (KU) have long been interested in providing a streaming video service for pedagogical purposes, but KU general counsel always took a conservative stance on this practice and would not allow it. When KU Libraries hired a new dean, who was also a copyright attorney, general counsel became amenable to the fair use arguments the dean provided, and after working through workflow and technical issues, a new streaming service was introduced to KU faculty and students.

Growing demand for streaming content along with the diminishing availability of playback equipment in the classroom for VHS and DVDs were primary motivators in the establishment of this service. Preference for streaming content for classroom use mirrors the greater trend for streaming content and the downward trend for physical media in the marketplace, as well as the increased usage of video for classroom instruction and research. This service not only serves to meet faculty and student expectations for access, it allows for greater accommodation of online and distance education. In this article, KU librarians provide a survey of the policies at selected academic libraries for providing access to streaming video and discuss the various interpretations of copyright law and fair use, including the interpretation of fair use that allows the KU Libraries to provide a streaming service, and an examination of the rationale and the technological environment that necessitate such a service.

Introduction

There are many differing interpretations of copyright law when it comes to digitizing and providing streaming video as a library service. Librarians at the University of Kansas (KU) have long been interested in providing a streaming video service for pedagogical purposes, but KU general counsel always took a conservative stance on this practice and would not allow it. When KU Libraries hired a new dean, who was also a copyright attorney, general counsel became amenable to the fair use arguments the dean provided, and after working through workflow and technical issues, a new streaming service in partnership with the ERMAL Garinger Academic Resource Center (EGARC) was introduced to KU faculty and students.

Growing demand for streaming content along with the diminishing availability of playback equipment in the classroom for VHS and DVDs were primary motivators in the establishment of this service. Librarians at KU had been receiving requests to digitize video from the Center for Online and Distance Learning for years, but the instructional benefits of this service extend beyond online classes and distance learning. The service also benefits Film & Media Studies

classes that don't have a traditional lab time for viewing film, language classes, and classes with less face time in general. It helps the library to serve nontraditional students who may not be able to sit in the library and watch a video on physical reserves. Further, many instructors cite the need for students to view a film outside class so that they can employ flipped instruction methods, whereby the students view the film before the scheduled class so that face-to-face class time can be reserved for discussion.

Not only does this new service meet faculty and student instructional needs, but it also addresses faculty and student expectations for access. Preference for streaming content for classroom use mirrors the greater trend for streaming content and downward trend for physical media in the marketplace, as well as the increased usage of video for classroom instruction and research. According to the 2018 Digital Entertainment Group Market report, in 2017 use of subscription video streaming services (including Netflix, Hulu, Amazon, HBO Go, and CBS All Access) increased by more than 20%, disc sales were down 14% (following a 10% decline in 2016), and video rentals from brick-and-mortar stores and kiosks fell a combined 17% (Digital Entertainment Group, 2018).

There is a clear downward trend in overall circulation of physical media for video at KU. From 2010 to 2017, circulation of DVDs fell by about 78%, while circulation of VHS fell by roughly 92% (see Figure 1). Conversely, use of library subscription streaming databases for video at KU have not only been increasing over the same time period, but in

recent years use has been increasing dramatically (see Figure 2).

Dwindling circulation of physical media is not only a symptom of user preference for streaming video, but also an issue of access. Many students (perhaps most students) do not own a dedicated DVD or Blu-Ray

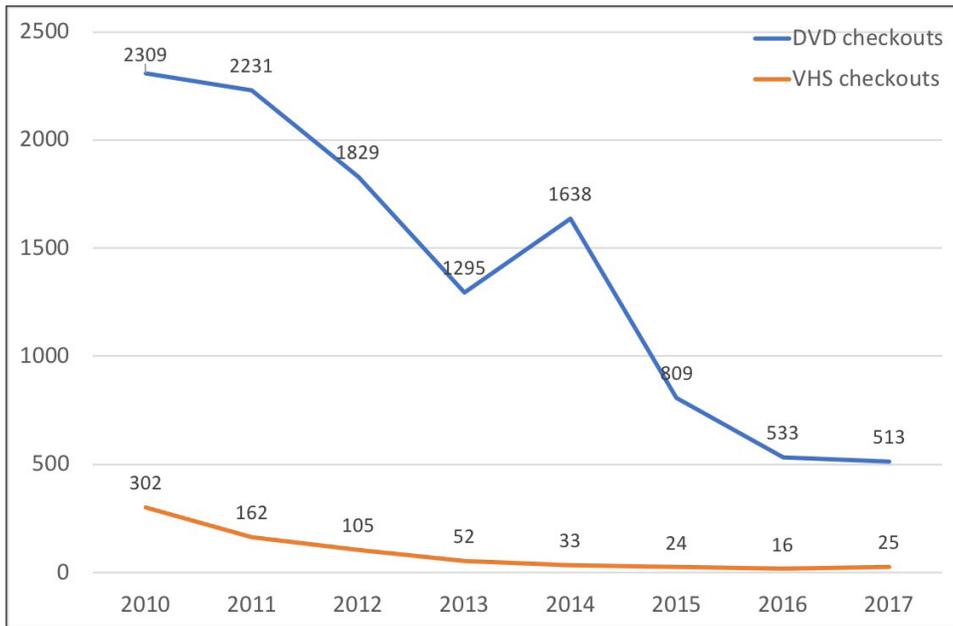


Figure 1. DVD and VHS—total checkouts.

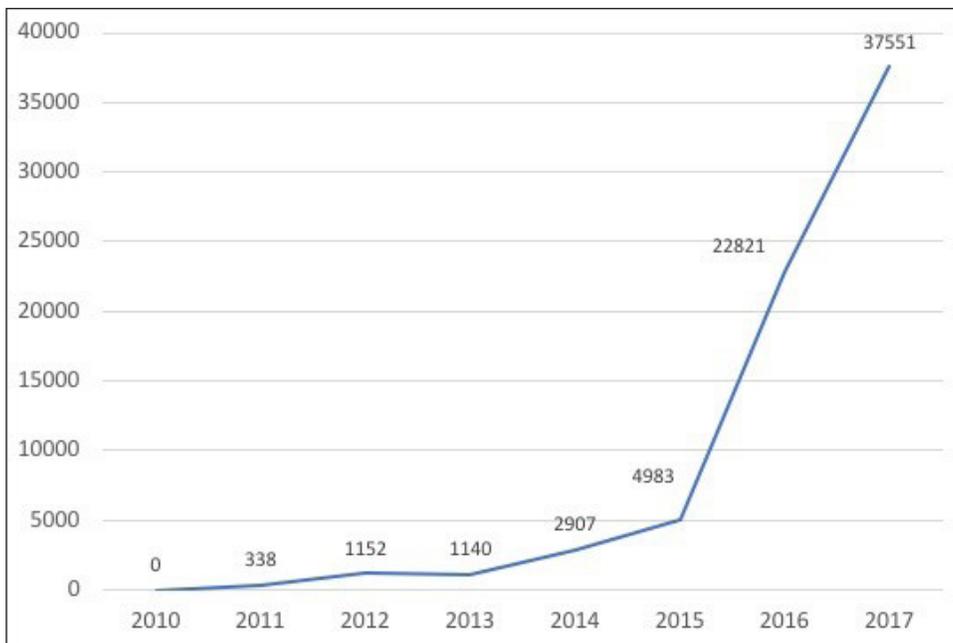


Figure 2. Streaming video—total streams.

player, to say nothing of a VCR. Library public computers do have an optical drive allowing patrons to view DVDs; however, laptops that are loaned out at the Circulation Desk do not come equipped with an optical drive. In fact, most laptops no longer come standard with an optical disc drive. In a recent study of ARL libraries, over 90% of respondents indicated that there is already a plan in place to phase out playback equipment in the classroom, or there is a plan in place to develop a phase-out plan (Spicer & Horbal, 2017). There is a plan currently in place to phase out VHS in KU classrooms—as the equipment fails, it will not be replaced. Blu-Ray players will still be included in new classroom setups, but PCs may or may not have optical drives since this feature no longer comes standard. In summary, while DVDs are certainly not obsolete, it is simply unreasonable at this point to assume that library patrons have a way to view a DVD or VHS when they are not in the library.

Legal Basics and Statements on Fair Use

A basic understanding of copyright and fair use is important before providing video digitization services in academic libraries. The KU Libraries follow these basic principles:

- Fair use is any copying of copyrighted materials done for a purpose, such as commenting, criticizing, news reporting, teaching, or parodying a copyrighted work. Such uses can be done without permission from the copyright owner.
- Fair use is a factor test that examines what you are using the work for, if you charge to view the work, and how much of the work you use.
 - Commercial vs. nonprofit educational purposes—Is the video being used for educational purposes in a nonprofit institution?
 - The nature of the copyrighted work.
 - The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
 - Derivative vs. transformative—Derivative works are substantially similar, or based on an original idea. Transformative means you have changed, added, deleted, or altered enough of the original work that it is transformed into something new.

The Digital Millennium Copyright Act that was passed by Congress in 1998 extends copyright to Internet resources, but limits the liability of Internet providers. It does not allow most individuals to circumvent copyright, but there are special exemptions for instructors and students. The TEACH Act, which became law in 2002, expands the scope of educators' rights to perform and display works and to make copies integral to such performances and displays for digital distance education. The TEACH Act was intended to make the rights of online instructors closer to those for face-to-face teaching, but it significantly limits the amount of a work that can be used. In most cases, fair use adequately protects instructors who want to legally provide digital copies to students.

KU Libraries also use the Statement of Best Practices for Fair Use in Teaching set forth by the Society for Cinema and Media Studies to help with navigating fair use in providing digitized copies of videos. The Center for Media and Social Impact also has a Code of Best Practices in Fair Use for Online Video. Academic libraries will find these principles useful when providing their own online video services. The American Library Association Code of Best Practices in Fair Use is another good resource for academic libraries.

Streaming Video Policies

Librarians at KU found it useful to scan the environment to find out what the policies were for providing video access at other academic libraries. More than 60 websites were reviewed from universities in the United States and Canada. There is a wide variety of policies and interpretations for fair use. The most common policies encourage the use of videos already owned by the library, including checking out DVDs to view in class or individually. Many libraries suggest using free online resources like YouTube or Vimeo. They also provide links to licensed collections such as Kanopy, Alexander Street Press, and Films on Demand. The use of low-cost commercial streaming services (Netflix, Amazon, iTunes, and Google Play), where the student pays, is also encouraged. Many students already subscribe to one or more of these services. In fact, in 2016, we surveyed 207 students who were studying in the library and 88% of them said they subscribed to one or more (usually two) of these services. When asked if they pay to stream it or check out a library copy if a digital rental was available for less than three dollars, more than three-quarters of the students surveyed said they would pay for the online rental. Some academic libraries

suggest the use of streaming services through the local public library and one school actually suggested that faculty host the content themselves, after evaluating fair use, and embedding it in the course management system.

Standard policies include:

- The library is required to own the requested video or it is owned by the requesting faculty member.
- Viewing is required for the course and is not supplemental.
- The required viewing is indicated in the class syllabus and the faculty member must provide a copy of the syllabus to the library, which is kept on file.
- The library can only provide clips, but some will provide the entire film if it is essential to the goals of the course.
- A copyright notification is included in the students' view, which tells them it is unlawful to share the copy of the film they are about to observe.
- In some cases, students must signify an understanding of copyright protections in order to access the videos.

When a video is requested:

- Library staff search their streaming video services first and provide a link to the video, if it is available, to embed in the course management system.
- Library staff try to license access to streaming rights or try to obtain permission to digitize the film if it is not available to stream.
- The instructor obtains written permission from the copyright holder to digitize the film.
- Some require the requesting instructor or department to be the copyright holder of the material or to get permission and sign a copyright release to duplicate materials.

Some libraries will only digitize "if":

- The title is only available in VHS format with no equivalent DVD copy commercially available.

- The title is owned by the library or by the requesting instructor.
- The streamed video is password protected.
- The digitized streamed media file resides on a server that is controlled and monitored by library staff.
- The streamed video is available for a limited time, usually a semester.

Some libraries use the threat of legal penalties if faculty fail to abide by copyright law restrictions. Libraries warn individuals that they are prohibited from downloading, sharing, installing, and operating unauthorized streaming media programs. Many library policy statements include the inability of libraries to digitize rented videos or video borrowed through interlibrary loan.

Policies

The dean of libraries, along with general counsel, have deemed the digitization service at KU to be within the purview of fair use. A pedagogical need for digitization and use is established with each request. Section 110(2) of the TEACH Act is applicable when there is a strong pedagogical case for using a digital copy, and Section 108 is applicable when digitizing VHS tapes. The prohibition about making a digital copy available to the public outside the premises of the library was determined not to apply in this scenario, because access for KU students and faculty is not "to the public." Finally, market availability is considered with each request.

A limited number of items will be digitized per course, per semester. Titles must be required viewing for the course; recommended or supplemental titles do not qualify for digitization. KU Libraries must own a physical copy of any title to be digitized. An attempt will be made to purchase films that are not owned, while films available in streaming video databases for which KU Libraries have a licensed subscription will not be digitized for streaming video reserves. If a film is available via a commercial streaming service (i.e., Netflix, Amazon, etc.), the film will not be digitized—instructors are asked to direct their students to these services, and if available, to place a DVS/VHS on reserve at the library. Videos originally marketed or created primarily for classroom use also will not be digitized, as this would be a direct violation of the TEACH Act.

Once digitized, a physical copy of the DVD or VHS is placed on reserve. This is done primarily to limit

the circulation of the physical copy while providing streaming access to the film. An embed code is sent to the instructor so they can place the video link on their course site in Blackboard, KU's course management system. Course sites in Blackboard are only accessible to students enrolled in the class—students must log in with their KU user name and password. The class is only available in Blackboard for the current semester that it is offered; as such, the video link is no longer available to students after the semester ends.

Policies with regard to copyright compliance are communicated through the request form for digitization. The request form includes a statement on copyright compliance, good faith, and portion control. In order to fill out the remainder of the form, an instructor must first acknowledge that the request is fair use.

Procedure and Workflow

The digitization request form used for this service is a SharePoint form. SharePoint is a Microsoft Web-based platform that integrates with all the Microsoft Office products and allows for document management and storage. KU Libraries use SharePoint for intranet documents and any internal/external forms such as the digitization request. A series of questions are included in the request form to gauge that the instructor's use is in accordance with fair use:

- Is this film required viewing for your course?
- Will this film be subject to class discussion?
- Will this film be part of a class assignment?
- Will streaming improve the pedagogy of this course?
- Please explain how streaming will improve the pedagogy of this course.
- Please indicate portion of film needed.

All questions must be answered in the affirmative in order to complete the remainder of the form, otherwise the request is automatically declined.

An automatic message with the completed form is sent to a representative from the library's Content Development department, at which point a follow-up message is sent for further clarification regarding declined requests. If a request is not automatically declined, the film is searched for streaming availability. If it is already available for streaming, either

from a library subscription streaming video database, or via Netflix, Amazon, and so on, the request is declined and the instructor is contacted with details. If the title is not already available for streaming, the request is marked as "Approved" or "EGARC Approved," depending on which unit owns the film.

The request then goes to the KU Libraries Acquisitions and Resource Sharing department (ACQRS), where multiple reviews are conducted. If the library owns the DVS or VHS, ACQRS will perform a secondary search for streaming availability. If the film is not owned by the library, ACQRS will search for an available copy for purchase, and if so, whether or not it is cost prohibitive (a \$350 limit has been set for purchase). If purchase of the film is cost prohibitive, a representative from the Content Development department is notified and will contact the instructor—otherwise, purchase is initiated.

Approved and reviewed requests are forwarded to library or EGARC staff for digitization. KU Libraries use the online video platform Kaltura to store audio and video files. If the requested video is only owned on VHS, the video must be converted to DVD before proceeding. The Media Production Studio, an IT department at KU, will burn a DVD or an MPEG codec, which can be loaded directly into Kaltura. Open source transcoders used for digitization are Handbrake and MakeMKV. Handbrake is preferred by digitization staff, but this product can only be used if there is no file protection (DRM). If the file is protected, MakeMKV is used. Staff have recently become aware of a Handbrake plug-in to allow circumvention of file protection, but the product has not yet been used and tested onsite. MakeMKV is higher quality, which has many benefits, but the file size is a lot larger—typically around 8 gigabytes, while Kaltura has a limit of 2 gigabytes. The MKV files must be compressed to 2 gigs, resulting in a loss of quality.

With regard to circumvention of file protection, staff received the dean's permission that overriding DRM is appropriate for fair use. If the use is fair use, circumvention is permissible. The courts are somewhat divided on this issue. In some cases, courts have found that circumvention is not authorized even if the underlying use is legal or authorized by fair use. Kevin Smith, dean of KU Libraries, suggests that a "better interpretation is that circumvention is a problem only when there is an underlying copyright violation, so if the use is fair use, circumvention is permissible." This means that once the decision is made to take the risk of relying on fair use, the

associated risk of circumvention is not a separate problem. The analyses can be thought of together.

Once the film is uploaded to Kaltura, instructors are contacted with an embed code for the film and instructions for uploading the film to their Blackboard course. Some amount of assistance is needed for first-time users of the service at this point, particularly for those instructors who are unfamiliar with an embed code. If an instructor would like to use the digitized film again for a future course, they must resubmit the request form, since the form serves as their acknowledgment of copyright guidelines and fair use.

Conclusion

Some issues have been encountered along the way with establishing this service. Due to technical constraints, the process of digitization can take many hours. The time it takes to complete individual portions of the conversion process varies from one request to the next, from reformatting VHS to DVD as necessary, ripping, encoding, and uploading. Working with SharePoint has not been without challenges. Determining who should receive messages, in what order, what automatic messages should or shouldn't be sent, and whether requests should be

automatically declined have proven to be important issues to consider. To further complicate matters, the KU Libraries SharePoint specialist left to pursue other opportunities, impacting the librarians' ability to troubleshoot workflow solutions. Other issues include decisions regarding precedent with rush requests, faculty donating videos for the digitization service, and managing expectations for immediate availability.

KU Libraries have not openly promoted this streaming service, since there were so many workflow issues to work out, but it has steadily grown during its first year. The majority of the requests have been for foreign language titles available in EGARC that were formerly put on physical reserve for students to check out and watch in the EGARC lab. Librarians will continue to monitor the requests closely and document any workflow issues that arise. In the future, the service will be promoted to individual university departments, such as Film and Media Studies, Theater, Dance, and others. Librarians also anticipate needing to work on storage solutions as the service grows. Presently, success is measured by the number of videos that have been digitized and access provided in a timely manner, but it would be interesting to survey instructors using the service to find out if they were satisfied.

References

- Digital Entertainment Group. (2018). 2017 U.S. home entertainment year-end report. https://degonline.org/portfolio_page/deg-year-end-2017-home-entertainment-report/
- Spicer, S., & Horbal, A. (2017). The future of video playback capability in college and university classrooms. *College & Research Libraries*, 78(5), 706–722.