

# Struggles and Solutions for Streaming Video in the Online Classroom

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**Abstract:** The upcoming round of exemptions to the Digital Millennium Copyright Act of 1998 anticircumvention provision and the questions raised by the copyright infringement lawsuit filed against the against University of California, Los Angeles (UCLA) for its streaming video practices illustrate the problematic state of the law concerning the digitization and streaming of video content by educators. This article reviews the current status of legislation and litigation and offers possible solutions for streaming video while librarians and educators await official instruction.

When Congress enacted the United States Copyright Act in 1976 (17 U.S.C. § 101 et seq. 2010), CDs, DVDs, MP3s and the Internet were not part of the education marketplace. The rise of and demand for digital formats and distance learning has forced courts and the legislature to attempt to interpret, amend, and apply the law in contexts that were not originally considered by the Act's drafters. As a result, many questions have emerged for

faculty and for the librarians assisting them on the use of copyrighted materials, particularly film, in the distance learning classroom.

One of the legislative attempts to amend the Copyright Act to reflect content created and published using new technologies was the enactment of the Digital Millennium Copyright Act (DMCA) (Pub. L. No. 105-304, 112 Stat. 2860 Oct. 28, 1998). The Copyright Office recently issued a Notice of Inquiry (76 Fed. Reg. 60398 Sept. 29, 2011) seeking comments relevant to its upcoming rulemaking proceeding on the DMCA provision prohibiting circumvention of technological protection measures (TPM), such as Content Scrambling System (CSS) found on most DVDs (Copyright Act of 1976, § 1201). The Copyright Office, pursuant to the DMCA's language, promulgates exemptions to the anti-circumvention provision every three years (Copyright Act of 1976, §1201(a)(1)(C)).<sup>1</sup> During the 2006 rulemaking proceeding, the Copyright Office granted an exemption for the creation of film clips by film and media studies professors (37 C.F.R. C.F.R. § 201.40(b)(1)).<sup>2</sup> In 2010, this exemption was expanded to all college and university instructors and to film and media studies students (United States Library of Congress, Copyright Office 2010). This exemption is of particular importance to faculty teaching online as well as to faculty teaching in on-ground or blended courses (Band 2011).<sup>3</sup> This exemption, along with application of the Technology, Education and Copyright Harmonization (TEACH) Act or Fair Use provisions of the Copyright Act, allows online educators to utilize film as a pedagogical tool in their digital classrooms. However, the statutory disparity between what is permitted in the face-to-face teaching environment under the Copyright Act's public performance provision (Copyright Act of 1976, § 110(1)) and what is permitted in the online classroom under the TEACH Act (Copyright Act of 1976, § 110(2)) still pervades,

leaving faculty who can screen an entire documentary film or other motion picture in the physical classroom but not in the distance classroom in a frustrating position. Similarly, librarians assisting distance education faculty in not only understanding the Copyright Act's bias against them but also in locating and affording suitable alternatives are often placed in a similar spot of frustration—and potentially in a spot of legal liability if too much content is digitized and streamed to online classrooms.

## **OVERVIEW OF THE STATUTORY SITUATION**

Although copyright law grants authors and creators certain exclusive rights with respect to how they may reuse their creative works, there are certain exceptions expressed in the Copyright Act that permit educators and others to reuse a copyrighted work without first seeking the author's permission. An exception expressly made available to educators is the codified right to perform or display a copyrighted work, such as a film or a still image, in a physical or face-to-face teaching environment (Copyright Act of 1976, § 110(1)). The TEACH Act amended the existing distance education provision, expanding the range of works that could be used, but with several cumbersome and burdensome prerequisites, for the performance and display of copyrighted works to distance learners. To invoke this exemption, the institution, the information technology office, and the instructor must each comply with several statutory requirements (Copyright Act of 1976, § 110(2)).

An institution may invoke the TEACH Act if it is an accredited, nonprofit educational institution and if it has complied with the TEACH Act's requirements of having a visible copyright policy and providing informational materials to its faculty, students, and staff

about copyright law (Copyright Act of 1976, § 110(2)(D)). The institution's information technology office or other appropriate service unit must install and maintain a system that controls access to copyrighted materials by enrolled students and that prevents unauthorized access to digital materials stored on the institution's servers (Copyright Act of 1976, § 110(2)(D)(ii)). Instructors in an online course also have a set of responsibilities under the TEACH Act. In addition to being familiar with the type and quantity of work allowed by the TEACH Act, instructors also have the duty to solely make the decision to use the transmitted materials and to ensure that the materials selected are lawfully made, serve educational purposes and are not for entertainment or any other purpose. Further, the materials that are selected for transmission to the students in an online course should be essential to achieving the pedagogical goals of the course. Materials chosen should not be supplementary but should be an important part of the course's curriculum (Copyright Act of 1976, § 110(2)(A), (B)).

The TEACH Act stands as an important development in online education (Crews 2010); however, it also poses a substantial burden upon an online instructor in return for its limited benefits. The statutory requirement that the performance or display occur as part of "systematic mediated instructional activities" (Copyright Act of 1976, § 110(2)(A)) fails to take into account the asynchronous learning that frequently occurs in distance education. This requirement is targeted toward preventing distribution of distance learning materials that are either specifically marketed for student use outside the classroom or that are traditionally reproduced for this purpose. It also informs educators that the display or performance must not be supplemental or additional material. That is, online educators must ask themselves is the work displayed in the online classroom the

same work that would be shown (although in lesser quantity) and discussed in a face to face teaching environment, or is the convenience of digital transmission being taken advantage of? The general consensus is that online instructors relying upon the TEACH Act should only display digital copies of materials that are consistent with what would be presented in the physical classroom (Allner 2005; Dames 2005; Lipinski 2003). Materials digitally transmitted should not be supplementary or otherwise extraneous to what is needed to achieve the goals of the particular class session. Additional advice that has grown from the discussion over mediated instructional activity relates to the time during which the digital material is available and accessible by students. Instructors are advised to make materials available for only that period of time necessary to achieve the learning objectives for the class session for which materials are assigned. For librarians and information technologists, the struggle becomes determining and coordinating how long to allow a digital film clip to be available and whose responsibility is it to disconnect or remove access once that time has passed (Schroeder and Williamsen 2011).

The greatest burden lies in the definition of how much of an audiovisual work may be transmitted digitally. The quantity of the work that may be digitally copied or streamed is greatly reduced under the TEACH Act as compared to what is permitted in the physical classroom. Under the TEACH Act only a reasonable or limited portion of any audiovisual work may be performed or displayed in a distance learning situation. Therefore, while an instructor may be able to show an entire film in the physical classroom, he or she may only be able to digitize a single scene for an online class. This limitation has forced librarians and other academic service units to adopt arbitrary guidelines, much as has occurred in the areas of interlibrary loans and electronic reserves, often limiting instructors to a

predetermined percentage or number of minutes of a film that may be digitized and streamed (Carter 2008).

Given the burdens imposed by the TEACH Act, online educators may wish to avail themselves of another exception—fair use. Fair use applies to the limited use and reproduction, without permission, of all copyrighted works. In order to invoke fair use, the use or reproduction must be for the purpose of criticism, comment, news reporting, scholarship, research, or education (Copyright Act of 1976, § 107). To qualify for the fair use exception, four statutory factors must be balanced and result must weigh in favor of such use. The four factors of fair use can be best summarized as follows: first, what is the purpose and character of the use; second, what is the nature of the copyrighted work; third, how much of the work is used and does this portion represent the “heart of the work”; and fourth, what effect does the use of the copyrighted work have on the market and value of the work. Consideration of all of the fair use factors is required; however, all four factors do not have to weigh equally in favor of the proposed use. A fair use analysis is fact driven, and each unique set of facts regarding a proposed use leads to its own reasoned conclusion. Reasonable individuals may come to different conclusions concerning the same set of facts, but the operative word is "reasonable" (Pressman 2008).

When analyzing each factor, there are several inquiries one can make. When examining the purpose and character of the use, consider whether the use is for educational or commercial purposes. Recently, courts have indicated that if the use is significantly transformative, that is, the use of the work is a completely new, unexpected, or unintended way, and not merely a substitution or superseding use, this factor may weigh in favor of a finding of fair use (see, inter alia, *Campbell v. Acuff-Rose Music*, 510 U.S. 569 1994;

*Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 9th Cir. 1997; *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 2nd Cir. 2006; *A.V. v. iParadigms, LLC*, 562 F.3d 630 4th Cir. 2009). An example of this in the online learning context may be the screening of a Hollywood blockbuster film to depict how an individual struggles with his sense of morality, as opposed to showing the film for its original purpose of entertainment or technical display of special effects. Thus, if a work is reproduced only in a quantity necessary for the stated purpose and where that purpose is not the one originally intended by its author, then that reproduction and use will be considered transformative for the purpose of fair use analysis (Heymann 2008). When considering the nature of the work, analyze whether the content is technical or fact based, or is it more artistic and creative? Facts or common technical knowledge are ordinarily not subject to copyright protection while more artistic or creative expressions are generally afforded greater copyright protection. When looking at the quantity of a copyrighted work used, a smaller amount ordinarily will weigh more in favor of fair use than using the whole work. However, even a smaller portion can be infringing if it qualifies as the “heart of the work” (*Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 1985). Finally, in conducting a fair use analysis, one must consider the effect of the use upon the market for the copyrighted work. This factor has garnered increased attention in recent cases interpreting the Copyright Act, with courts giving scrutiny to noncommercial and nontransformative uses that have the potential for substantial harm, as may be the case where the use or reproduction is solely for the purpose of cost savings for student or for institution by not paying the customary price (*Campbell v. Acuff-Rose Music*, 510 U.S. 569, 591; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 557. See also *Religious Tech. Ctr. v. Netcom On-Line Communications*

*Servs., Inc.*, 923 F. Supp. 1231, 1244 N.D. Cal. 1995). The market effect inquiry should also look at whether there is a ready market for the original work that would be impeded by the use (*Perfect 10 v. Amazon.com*, 508 F.3d 1146 9th Cir. 2007. See also *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 918 2d Cir. 1995).

## **LEGAL LIABILITY FOR STREAMING?**

Invocation of the TEACH Act or fair use may not permit an online instructor to show a film in an online class the same as he or she would in the physical classroom without the possibility of incurring individual or institutional liability. In December 2010, the Association for Information and Media Equipment (AIME) filed a copyright infringement lawsuit against the University of California system and the chancellor of the University of California Los Angeles campus (UCLA).<sup>4</sup> The complaint contends that UCLA infringed upon the copyrights of Ambrose Video, one of the institutional members of AIME, by allegedly copying, digitizing, and streaming full-length Ambrose Video DVD content via a password-protected on-demand technology delivery system. Specifically, the complaint alleged that UCLA digitized a DVD series of BBC Shakespearean productions and streamed them more than 130 times to students and faculty. Ambrose Video, like many film distribution companies, provides by license, which is assented to upon purchase of its DVD products, that digitization and streaming of DVD content is prohibited.<sup>5</sup> Under the terms of use, a separate license for streaming must be purchased. Ambrose Video and most other film distribution companies offer, as part of their services, streaming video on-demand from their own servers or by license from an institution's own servers. AIME contended in its



complaint that the actions of UCLA not only violated the license (hence, a breach of contract) but also, by digitizing and streaming Ambrose's DVDs, it unfairly preempted this emerging market for streaming video services and, as a result, great harm will be sustained by the educational video business.

UCLA's stance was that its actions fell within the exemptions of the Copyright Act, 17 U.S.C. § 101 et seq. First, UCLA claimed that the streaming of full-length DVD content constituted a public display under § 110(1). Second, the university claimed that the TEACH Act exemption at § 110(2) applied. Finally, UCLA resorted, as a fallback position, to the fair use exemption at § 107. In its complaint, AIME addressed each of these assertions of exemption. AIME contended that the streaming of content was not a public display because the attendant requirement of "face to face" teaching was not present. Rather, students and faculty could access the streamed content on-demand, at any time and at any place, and not necessarily simultaneously. The TEACH Act exemption did not apply, according to AIME, because the Ambrose Video DVDs are separately marketed as available for mediated instructional activities through its on-demand streaming service. The TEACH Act expressly excludes from its exemptions those works explicitly produced and sold for distance learning. The TEACH Act also limits its application to performances of "reasonable and limited" portions of works that are neither nondramatic literary nor musical works (Copyright Act of 1976, § 110(2)). The phrase "limited and reasonable" is a difficult objective standard to apply, and there is little guidance in the legislative history for interpreting what quantity of a fictional or dramatic work would qualify as "limited and reasonable." The legislative history suggests that determining what amount is permissible should take into account the nature of the market for that type of work and the

instructional purposes of the performance (S.Rept. 107-31, 107th Cong., 1st Sess. 7-8 (2001)). Rarely would the performance of an entire film constitute a “reasonable and limited” demonstration unless it could be demonstrated that the film’s entire viewing was exceedingly relevant toward achieving an educational goal (Nimmer and Nimmer 2006). In this case, entire DVDs were streamed. Finally, the result of a balancing of the four factors of fair use likely would not extend protection to the actions of UCLA, argued AIME, because the quantity of the films streamed and the purported harm to the market for streamed educational videos weighed against fair use (*Compl., Association for Information Media and Equipment et al v. Regents of the University of California et al.* at 20).

In October 2011 the trial court granted UCLA’s motion to dismiss (*Or. on Mot. to Dismiss, Association for Information Media and Equipment et al. v. Regents of the University of California et al.*, C.D. Cal. Oct. 3, 2011).<sup>6</sup> The court held that AIME was not a holder of the copyrights at issue and thus lacked standing to bring the action. Additionally, the court determined that the UCLA Board of Regents and other university officials were immune, under the 11th Amendment, from suit in their official capacities. The remainder of the ruling on the motion to dismiss concerned more substantive issues; although by no means was there any legally determinative interpretation of fair use or other elements of copyright law. The trial court held, although without much discussion or justification in the existing body of law, that the copying of the DVD onto the UCLA server for streaming was that kind of “incidental copying” permitted by fair use. That is, in order to make use of its license to publicly perform the film, UCLA had to place the content onto its network. As stated previously, ordinarily the streaming of a film is treated as a separate license from the one to publicly perform a film. In fact, some public performance licenses (whether it be a

separate document included with the DVD purchase or a click through on the online shopping cart when purchasing a DVD) expressly exclude streaming for remote access or distance learning. Further, if the viewing of the streamed copy is done by a student in the privacy of his or her own residence or dorm room and not by a class in a group setting, is this really a “public” performance? Without clear direction from the trial court, faculty and librarians should be cautious in relying upon the trial court’s interpretation of public performance and instead turn to the language of the terms of use accompanying the DVD or any attendant license agreement.

AIME took advantage of the trial court’s grant of a limited opportunity to refile the lawsuit (*Sec. Amend. Compl., Association for Information Media and Equipment et al. v. Regents of the University of California et al.*, C.D. Cal. Oct. 24, 2011).<sup>7</sup> The second complaint, interestingly, did little to cure the associational standing and sovereign immunity issues in the first complaint and only asserted minor additional claims regarding violation of the license terms. Pending outcome of this action or any further instruction by way of DMCA rulemaking or other legislative amendment, online educators should be mindful of what is clearly allowed under the law and make use of alternative digital video solutions detailed below.

## **SUGGESTIONS AND SOLUTIONS FOR STREAMING VIDEO**

When deciding to incorporate streaming video into an online course, there are several factors an instructor should be advised to consider. Many educational publishers produce and market video content specifically for online education. The TEACH Act

expressly prohibits use of such specially marketed content in any manner without permission. Further, many film production and distribution companies now include terms of use or licenses with their DVDs. Oftentimes there is language contained therein specifically prohibiting the streaming of any quantity of the film to an online course. Thus, even if streaming of a film would be allowable under the TEACH Act or under fair use, by purchasing a DVD, the purchaser is agreeing to whatever terms of use or license accompany the DVD and those terms must be complied with.

According to Halpern et al. (2011)

“The results in Vernor, Blizzard, and UMG suggest that license restrictions on transfer and use of software are likely to be more prevalent and powerful. The decision also could affect conduct in the secondary markets for all copyrighted works, not just secondhand software. It’s not difficult to imagine software style licensing terms being attached to other kinds of works. Indeed, many copyright owners who distribute their works electronically already use technological measures to restrict transfer and use by anyone other than the original purchaser, and these measures may be backed by license agreements that also limit transfer and use, and explicitly state that the purchaser does not own the copy of the purchased work. Vernor may bolster such agreements and weaken markets for resale of secondhand copies of all types of copyrighted works, particularly those distributed electronically, whether software, music, movies, or books.” (10)

Another common issue that arises for online educators utilizing video content in their courses is the unavailability of a digital version of a work. Many important video

works are available solely in VHS or other analog format. Under the TEACH Act, it is permissible to digitize an analog work where no digital copy is available or where the only available digital copy is technologically protected, subject to the DMCA's prohibitions against circumvention (Copyright Act of 1976, § 112(f)). Under the Copyright Act's exemption for libraries, unavailability can be shown when no digital format has been produced or when the only digital copy is unreasonably difficult or expensive for the institution to acquire (Copyright Act of 1976, § 108(c)(1)). Presumably, unavailability may be similarly demonstrated under the TEACH Act.

Given the limitations expressly under the TEACH Act and potentially under fair use, when considering the quantity of a dramatic work that may be transmitted to an online course, instructors may want to consider one of many low-cost or free options for streamed video content. Several online retailers offer video streaming for rent or purchase at a very low cost. Librarians can assist faculty in locating what titles are available through which services so that faculty could advise students ahead of time that access to certain services is a course requirement. With a basic Netflix account, which most students likely have, thousands of films, including foreign and documentary works, can be viewed on a variety of electronic devices. The terms of the Netflix user agreement would not permit the sharing of an instructor's or a student's own Netflix user account details with other students or showing a streamed film in a physical classroom, and similarly, libraries are advised not to procure an account for use by faculty or students. Amazon and iTunes also offer inexpensive rental of streamed video content that students could avail themselves of in meeting the requirements of a course.

There are also many websites providing legal and no-cost quality streamed video content. For example, the television network PBS offers many of its programs, including *Independent Lens*, *FRONTLINE*, and *Nature*, for free viewing online. The other major television networks also regularly stream recent episodes of their programs on their websites. Additionally, there are several aggregator websites that link to free and legal streaming versions of documentary films. Folkstreams provides a growing collection of documentary films about folk culture in the United States. SnagFilms, a site dedicated to its self-coined term *filmanthropy*, offers a broad and growing collection of documentary films, including many that are both well known and award winning. The site's operators encourage sharing of and commenting on films as a means of promoting social and cultural discourse. A final site of note is hosted by the journal *Nature*. *Nature's* streaming video archive (<http://www.nature.com/nature/videoarchive/>) provides free access to well-made, informative, and educational videos that feature summaries of research as detailed by the scientists who conducted the work.

Libraries, if budgets permit, have the opportunity to subscribe to streaming video databases. Alexander Street Press offers numerous, subject-based collections featuring programs from well-known cable networks and programs, including the History Channel and A&E Biography, as well as selections from respected film distribution companies such as California Newsreel. The advantages of these databases are the ease of linking to content from within course-management sites, the ability to create custom clips, and the availability of closed-captioning and transcripts. Librarians should also check content in traditional article databases. For example, EBSCO, in its Business Source Complete

database, provides more than fifty videos of seminars hosted at the Harvard Business School (see <http://www.ebscohost.com/academic/business-source-complete>).

If the free streaming sites, commercial services, or library subscription databases fail to provide access to needed content, the final option is licensing. One of the challenges with licensing is determining who the licensor is. If the film in question is produced or distributed by a major Hollywood studio, Swank Films' Digital Campus Service (2011) is the primary resource for licensing and streaming. For other films, there are several major distributors of documentary film, including Films for the Humanities, New Day Films, California Newsreel, and Bullfrog Films. Smaller film distribution companies may also offer streaming licenses. The options available differ from one company to the next. Licensing is typically for a fixed period of time, such as a single semester or a period of years. Licensing fees may be dependent upon the size of the campus enrollment or the number of students enrolled in the course that will be viewing the streamed film. Access to the streamed film also differs. Some companies host the streamed content and provide the institution with an IP authenticated portal. Other companies require that the institution own the physical DVD and merely grant the institution the right to make a digital copy and stream it from its own server. The organization National Media Market hosts an annual conference for media distributors and librarians. National Media Market (2011) also maintains an excellent chart detailing for almost every film distributor the digital rights that are available, including availability of free previews, duration of license, and content delivery options.

## **CONCLUSION**

The confusion created by the application of the current Copyright Act and the DMCA and TEACH Act amendments to distance education as well as the uncertain legal liability for educational institutions digitizing and streaming films have stymied online educators and the librarians providing support. While the current legal framework offers grounds for showing small portions of films digitally, online educators are disadvantaged in not being able to make use of full-length films the same as their physical classroom counterparts. Until there is judicial or legislative clarification regarding the digitization and streaming of films, librarians should counsel faculty to instruct their students to avail themselves of the various free, low-cost, or subscription-based services or investigate the possibility of licensing streaming content.

## NOTES

<sup>1</sup> See also *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, December 1998 (<http://www.copyright.gov/legislation/dmca.pdf>) for an explanation of the Digital Millennium Copyright Act and its amendments to the Copyright Act.

<sup>2</sup> See also *Statement of the Librarian of Congress Relating to Section 1201 Rulemaking*, November 22, 2006 ([http://www.copyright.gov/1201/docs/2006\\_statement.html](http://www.copyright.gov/1201/docs/2006_statement.html)).

<sup>3</sup> In the response to the call for comment, Jonathan Band, counsel for the Library Copyright Alliance, compiled a number of excellent real-world examples from teaching faculty and academic librarians utilizing digital film clips.



<sup>4</sup> Compl., Association for Information Media and Equipment et al v. Regents of the University of California et al., <http://docs.justia.com/cases/federal/district-courts/california/cacdce/2:2010cv09378/489296/1/> (C.D. Cal Dec. 7, 2010).

<sup>5</sup> Id. at 4-5, 11.

<sup>6</sup> See <http://docs.justia.com/cases/federal/district-courts/california/cacdce/2:2010cv09378/489296/34/>

<sup>7</sup> See <http://docs.justia.com/cases/federal/district-courts/california/cacdce/2:2010cv09378/489296/38/>

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