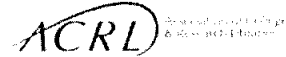




ASSOCIATION OF  
RESEARCH LIBRARIES



## ISSUE BRIEF

### Streaming of Films for Educational Purposes<sup>1</sup>

Last September, ALA and ARL posted a discussion on the permissibility under copyright law of streaming a film from a central server to a physical classroom. The posting explained that section 110(1) of the Copyright Act permits “the performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction....” Recent reports of the disagreement between University of California, Los Angeles (UCLA) and an association of distributors of educational films concerning the streaming of films from course websites raise a different, but related, issue: the permissibility of the streaming of an entire film to a remote non-classroom location. This paper considers three provisions of the Copyright Act that could permit streaming of this sort: Sections 107, 110(2), and 110(1). While all three provisions may apply, Section 107 fair use is perhaps the strongest justification.

#### I. FAIR USE

Section 107 of the Copyright Act allows copying, performance and display of copyrighted works without the permission of rightsholders where users satisfy certain broad, flexible criteria. Courts are likely to treat as fair use many

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<sup>1</sup> Prepared for the Library Copyright Alliance (LCA) by Jonathan Band, Brandon Butler, Kenneth Crews, and Peter Jaszi. Jonathan Band is legal counsel for LCA. Brandon Butler is the Law and Policy Fellow at the Association of Research Libraries. Kenneth Crews is Director of the Copyright Advisory Office at Columbia University. Peter Jaszi is Faculty Director of the Glushko-Samuelson Intellectual Property Clinic at the Washington College of Law at American University.

instances of streaming video to students logged in to class sites. Schools and libraries are in a particularly strong position to assert fair use because the law favors non-profit educational uses.<sup>2</sup> Determining whether a particular transmission constitutes fair use will involve balancing other factors, including the nature of the work, the amount used, and the effect of the use on the market for the work.

As indicated in other discussions we have posted<sup>3</sup>, recent judicial decisions have affirmed the importance of fair use, and clarified its application in cases involving digital technologies. In four appellate decisions<sup>4</sup>, courts found fair use notwithstanding the commercial context in which the use occurred. The defendants in three of the cases used entire works. In two of the cases, the defendants changed the works only by compressing them, and in the most recent case, the defendants made no changes whatsoever. The courts nonetheless found these uses fair because the defendants repurposed and recontextualized the works.

The principles articulated in these opinions could reasonably support a more confident application of the fair use doctrine to certain uses in the educational environment. Courts likely would treat educational uses of entertainment products, such as uploading a feature film to a course website so that students could stream it for purposes of analysis, as repurposing. These

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<sup>2</sup> Section 107 cites “teaching (including multiple copies for classroom use), scholarship, or research” as examples of activities that fair use is meant to protect.

<sup>3</sup> *Educational Fair Use Today*, available at <http://www.arl.org/bm~doc/educationalfairusetoday.pdf>.

<sup>4</sup> *Bill Graham Archives v. Dorling Kindersley*, 448 F.3d 605 (2d Cir. 2006) (book reproducing concert posters as historical artifacts in rock band biography was fair use); *Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2006) (artist’s use of a fashion photograph in a collage was fair use); *Perfect 10 v. Amazon.com*, 487 F.3d 701 (9th Cir. 2007) (search engine’s copying and display of entire images was fair use); *A.V. v. iParadigm*, 562 F.3d 630 (4<sup>th</sup> Cir. 2009)(technology company’s copying of student papers into a database for purposes of detecting plagiarism was a fair use).

cases further suggest that educators could buttress their fair use claim by recontextualizing works on course websites through selection and arrangement and the addition of background readings, study questions, commentary, criticism, annotation, and student reactions.

Fair use analysis is not affected by the commercial availability of the works used or the fact that a commercial tool is used to stream or copy the original work for that purpose. In the vast majority of cases where courts have found fair use, the works used were commercially available. In almost every conceivable case of fair use, a commercially available tool – whether it be a piece of software, a Xerox machine or a ballpoint pen – is necessary to make the copies at issue.

The specific exceptions in Section 110(1) and the TEACH Act, discussed in more detail below, strengthen the fair use argument in this context. Even interpreted conservatively, section 110(1) allows the screening of a full-length film in a physical classroom. An educational institution could purchase one copy of a film, and show it to literally thousands of students over decades. Given that Congress has provided specifically for such broad educational use of films, the streaming of the same film from a course website would have no meaningful effect “upon the potential market for or value of the copyrighted work,” the fourth fair use factor. Accordingly, conduct functionally equivalent to actions permitted under section 110(1) will present a stronger argument for fair use, not a weaker one.

Likewise Section 110(2), as amended by the TEACH Act, provides specific safe harbors for streaming of copyrighted works, but does not limit the availability of fair use to protect other, similar uses. In general, the existence of a

specific exception to copyright protection in no way constrains a court's ability to apply the fair use doctrine to similar conduct. Fair use is an equitable, common law doctrine that predates the Copyright Act (though it is codified at Section 107), and Congress legislates with the assumption that the doctrine of fair use will be available to cover cases it does not specifically anticipate and protect.<sup>5</sup> A congressional determination that certain conduct must always be allowed does not limit a court's power to exercise its judgment to permit similar conduct under the particular facts of the case.<sup>6</sup>

## II. The TEACH Act

The Technology, Education, and Copyright Harmonization (TEACH) Act amended section 110(2) to specifically authorize transmissions for educational purposes under certain circumstances. The provisions of the TEACH Act are complex and ambiguous, but could apply to some transmissions of entire films to students outside the classroom.

The TEACH Act includes the following requirements:

- i) the transmission must be of a lawfully made and acquired copy;
- ii) the performance must be of "reasonable and limited portions" of works such as films;

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<sup>5</sup> Indeed, the Copyright Office in its report on the TEACH Act stated: "Fair use could apply as well to instructional transmissions not covered by the changes to section 110(2) recommended above. Thus, for example, the performance of more than a limited portion of a dramatic work in a distance education program might qualify as fair use in appropriate circumstances." The Conference Report that accompanied the enactment of the TEACH Act cites this portion of the Copyright Office analysis and reiterates that the "continued availability of the fair use doctrine" was critical to the Office's recommendation that Congress pass the Act. 21st Century Department of Justice Appropriations Authorization Act, Sec. 13301 No. 107-685, at 234 (2002).

<sup>6</sup> Schools and libraries that rely on a good faith belief that their activities are indeed fair use receive some legal protection even if it turns out they are mistaken. The Copyright Act allows rights holders to request steep statutory damages for infringement – up to \$150,000 per infringed work in cases of willful infringement. However, the Act also protects non-profit educational institutions and their employees by directing the court to 'remit' (i.e., cancel) statutory damages when there was a reasonable, good faith belief that the infringing activity was a fair use. The plaintiff would then only receive "actual damages" based on the rightsholder's lost profits.

- iii) the performance is made by, at the direction of, or under the actual supervision of an instructor as an “integral part of a class session....”
- iv) The transmitting institution applies technological measures that reasonably prevent retention of the work by recipients for longer than the class session and unauthorized dissemination by recipients to others.

Streaming technologies used in conjunction with course websites have the ability to prevent retention of the work by the recipients and to prevent unauthorized dissemination by the recipients to others. Moreover, educational institutions are likely to use only lawfully made and acquired copies.<sup>7</sup> Thus, the first and fourth requirements are easily met.

A strict reading of the second requirement, that the performance be of “reasonable and *limited* portions” of a work, suggests that the streaming of an entire film would not fall within section 110(2). However, a court could very well assess the second requirement in light of the overarching purpose of the TEACH Act, which is to allow the use of all copyrighted materials in distance education in ways that are analogous to their use in a physical classroom.<sup>8</sup> The TEACH Act provides specifically for “*display* of a work in an amount comparable to that which is typically displayed in the course of a live classroom session.” While § 110(2) addresses “display” (the showing of static works such as charts,

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<sup>7</sup> The TEACH Act also added a new § 112(f), which allows governmental and non-profit educational institutions to make copies of digital works to be used for transmissions under § 110(2). For purposes of this discussion, we assume that the streaming does not require the unauthorized circumvention of technological protection measures.

<sup>8</sup> For example, § 110(2) allows the performance of an entire nondramatic literary or musical work. Instructors in physical classrooms frequently read a poem or perform a song; § 110(2) permits instructors to engage in the same conduct online.

paintings, movie stills and sculpture) and “performance” (acting out plays, screening films and the like) separately, a court could decide to read the two parts of the statute together in light of their common purpose. If a court compares streaming of films to students in remote locations to the performance of films in physical classroom settings, it could find that a “reasonable and limited portion” may well include an entire work in some contexts.<sup>9</sup> This integrated reading of the statute would allow both performances and displays that are limited to a reasonable extent, i.e., to an extent similar to limitations placed on performances and displays in a physical classroom setting.<sup>10</sup>

For example, often a college course will meet two or three times during the week for lecture and discussion, with an additional meeting scheduled weekly for screenings of full-length films. Students are required to attend these screenings, and they occur in a classroom or lecture hall. These screenings clearly fall within the section 110(1) face-to-face teaching exception. Since screenings of entire films frequently occur in such a manner in a wide variety of classes, a court applying the TEACH Act to a particular streamed performance could find that the entire film constitutes a “reasonable and limited portion.”<sup>11</sup>

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<sup>9</sup> Analysts for the Congressional Research Service reach a similar conclusion, i.e., that the scope of “reasonable and limited” should be determined by reference to the “instructional purpose of the performance” and that entire films may meet this criterion. See Jared Huber, Brian T. Yeh, and Robin Jeweler, *Copyright Exemptions for Distance Education: 17 U.S.C. § 110(2), the Technology, Education, and Copyright Harmonization Act of 2002*, CRS Report RL33516, at 7 (2006), available online at <http://opencrs.com/document/RL33516/>.

<sup>10</sup> In other words, the adjectives “reasonable” and “limited” in the phrase “reasonable and limited portions” are best understood not as independent modifiers of the word “portions,” but as a joint modifier. The phrase should be interpreted to mean portions limited as reasonable under the circumstances. A similar analysis is applied in fair use, where the portion of the work used is a factor, but in many circumstances courts have found the entire work may be copied as a fair use. See Part I above for more on fair use.

<sup>11</sup> In the K-12 context, full-length films are regularly shown within regular class sessions, thus satisfying this requirement as well.

The requirement that the performance be made “at the direction of” an instructor as part of “mediated instructional activities” that are “an integral part of a class session” should be similarly satisfied where the performance is “analogous to the type of performance or display that would take place in a live classroom setting.”<sup>12</sup> This requirement “is not intended to require either constant, real-time supervision by the instructor or pre-approval by the instructor for the performance or display.”<sup>13</sup> Rather, the purpose of these requirements is to distinguish materials typically used in a class session from textbooks and other materials typically purchased by students for use ancillary to class. Where it is common for instructors to require attendance at group screenings rather than require students to purchase films as ancillary materials, this requirement should be satisfied.

One limitation to the TEACH Act should be noted: it does not apply to “a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks....” Thus, works marketed primarily for the use in distance education would not fall within the exception.

### **III. SECTION 110(1)**

As noted above, section 110(1) permits “the performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction....” On its face, section 110(1) would not appear to apply to

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<sup>12</sup> Report of the Senate Committee on the Judiciary on the Technology, Education and Copyright Harmonization Act of 2001, S. Rep. No. 107-31 (2001).

<sup>13</sup> *Id.* The Report continues, “Asynchronous learning, at the pace of the student, is a significant and beneficial characteristic of digital distance education, and the concept of control and supervision is not intended to limit the qualification of such asynchronous activities for this exemption.”

streaming from a course website because the streaming literally is not occurring “in the course of face-to-face teaching activities ... in a classroom or similar place devoted to instruction....” Indeed, the September 2009 analysis of Section 110(1) suggests that the provision “would not reach the streaming of a film to students’ residences for homework.” However, films that are required viewing and will be subject to classroom discussion may be a different matter, depending on whether a court interprets the phrases “face-to-face teaching activities” and “similar place devoted to instruction” in a more flexible manner. The same is true where courseware is used to create a “virtual classroom” where a teacher can interact fully with students, and students can interact with each other.<sup>14</sup>

Interpreting the phrases “face-to-face teaching activities” and “similar places devoted to instruction” in this broader fashion would not necessarily obviate the TEACH Act; the TEACH Act could still apply to unidirectional educational activities, while section 110(1) would apply in interactive settings.

Copyright law is a carefully balanced system that protects users, authors, and rightsholders. Copyright’s limitations and exceptions for users (especially educators) are as important to a thriving culture as the set of exclusive rights it conveys to authors and publishers. The contours of those exceptions, especially fair use, are determined in part by the accepted practices in communities of users. Educational institutions should know and exercise their rights to use copyrighted works to extend and enrich the classroom experience.

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<sup>14</sup> In such a virtual classroom, where a student could “live blog” her impressions to the instructor and to other students, viewing the stream of a film would be more like viewing a film in a classroom setting than performing homework in solitude. *See Performance of or Showing Films in the Classroom*, September 10, 2009.