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**EDUCATIONAL VIDEO STREAMING:  
A SHORT PRIMER**

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As many of you are aware, AIME learned last year that the UCLA's Media Lab was streaming copies of DVDs that it had purchased. Streaming allows for Internet access to entire copies of motion pictures, both educational videos and feature motion pictures, subject to whatever constraints the streaming source places on access. In the case of UCLA, the streamed films are accessible by students and faculty, in class or online, subject to password controls. To facilitate the streaming, UCLA utilized a device called Video Furnace, a hardware and software product sold by a company called Hai Vision. AIME's discovery led to a discussion and then a stalemate last fall, when UCLA's University counsel insisted that its practice was exempt and a fair use of DVDs that UCLA had purchased.



**SPECIAL POINTS OF INTEREST:**

- Overview of the Rights and Limitations in Copyright Law
- The Streaming Issues

This response led to a heightened legal analysis in which I was asked to evaluate the practice and respond to UCLA on behalf of AIME. When I learned more about exactly what UCLA was doing, it was clear that the practice fell outside the standard exceptions written into copyright law. In fact, the use was a violation of copyright that raised a very serious threat to the educational video publishing community. Despite the fact that UCLA temporarily halted the practice to give negotiations a chance, many in the educational community reacted as if a core educational privilege was being unjustly curtailed. An online educational journal, Inside Higher Ed, published a story about the dispute, which led to dozens of comments. The Library Copyright Alliance prepared an "issue brief," in which it sought to justify the practice as fair use. [http://www.librarycopyrightalliance.org/bm~doc/ibstreamingfilms\\_021810.pdf](http://www.librarycopyrightalliance.org/bm~doc/ibstreamingfilms_021810.pdf). Unfortunately, the LCA Brief confused, rather than illuminated, the issue. To help clarify the dispute, here's a short primer on video streaming by educational institutions.

## I. Overview of the Rights and Limitations in Copyright Law

**A. Educational Exemptions – Section 110(1) and (2).** In very general terms, copyright law consists of a) a grant of certain exclusive rights to an author or owner of a copyrightable work (i.e. an original work of expression fixed in a tangible medium, like an educational video), and b) a set of statutorily defined exceptions or limitations on those rights. Among the exemptions important to education are specific limitations on an owner's ability to control certain performances or displays of a work in a classroom or online. Specifically, Section 110(1) provides that in the course of "face to face instruction," a copy of a video that was lawfully made can be shown by the instructor to the students. This allows a teacher to set up a DVD player in class and show the film.

"Face to face," which is easily understood as a live classroom, has real limits in an education world dominated by interactive networks and the Internet. So in 2002, following months of negotiations between educators, librarians and copyright owners, the educational exception was expanded. Section 110(2), an exemption that had allowed for closed circuit video transmissions via cable or satellite hookups, now covered the digital networks. The changes, called The TEACH Act, have a complex set of requirements and restrictions, primarily designed to limit the access of these works to enrolled students, and to preserve the market of those authors and publishers, who serve the educational market with digital works for in-class instruction.

Among the requirements for the exemption to apply to streaming are these:

- Works "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks" are expressly outside the scope of The TEACH Act.
  - "Mediated instructional activities" is defined in the law as referring to activities that use a work "as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting." The term does not refer to activities that use works "such as "textbooks, course packs, or other material in any media" which are "typically purchased or acquired by the students in higher education for their independent use and retention."
- The copy used must be "lawfully made and acquired."
- The use must be by or at the direction of an instructor and the use must be an integral part of the class session.



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- With respect to motion pictures, only “reasonable and limited portions” can be exploited.
- The educational institution must have technological controls to control access, downstream uses, or retention and use longer than the class session.
- The educational institution cannot interfere with the owner’s technological measures controlling access and copying, codified in the Digital Millennium Copyright Act (DMCA).



**B. Fair Use – Section 107.** When Congress reformed the copyright law in 1976, one of the key actions was to codify the rules developed by judges and known as “fair use.” Fair use, which is not an exemption, but rather is a “defense to a claim of infringement,” is a set of criteria that are evaluated on a case-by-case basis to determine whether public policy in favor of educational goals, such as teaching, research and scholarship, should override the rights of authors. A fair use analysis is driven by the facts of a specific use of a specific work. As a result, there is no preordained determination of what is fair use or what is not fair use. 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.

## II. The Streaming Issues

In response to AIME, UCLA explained that its practices were allowed as exempt practices under Section 110(1), Section 110(2) (The TEACH Act) and Fair Use.

**A. Is streaming a video from the UCLA Media Lab or Library an exempt practice under Section 110(1)? The direct answer is no.**

As noted, if a school has a lawfully made copy of a video, it can be shown in class for teaching purposes. In other words, a professor can take a video out of a school library and show it in class. If multiple classes want access to the same video at the same time, the school should have acquired extra copies to make them simultaneously available. However, UCLA approaches “face to face” with a different attitude. As explained in a letter to AIME, UCLA argues that in this “modern day,” the classroom “has extended to courseware through which students and faculty engage in a continuation of the classroom.” To succeed in its analysis, UCLA must presume that when Section 110(1) of the Copyright Act sets the condition that the instruction be “face to face” in the classroom, the students and teachers can actually be anywhere, linked by software and a computer. Of course, there is nothing in the law to suggest this interpretation, and usually, laws are given their plain meaning. Further, such an interpretation would render The

**Fair Use is not an exemption, but rather a “defense to a claim of infringement.”**

TEACH Act, not to mention the prior “closed circuit” exemption in Section 110(2), largely unnecessary. Therefore, if an educational institution wishes to engage in online communications, they must defend the practice by reference to The TEACH Act or Fair Use.

**B. Is streaming a video from the UCLA Media Lab or Library an exempt practice under Section 110(2)? The direct answer is no.**

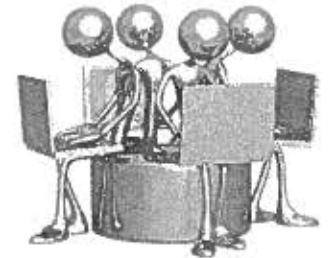
Although UCLA did not originally suggest it was relying on The TEACH Act, perhaps after reading the LCA Issue Brief, it decided to do so. It is true that Section 110(2) is designed to help qualified nonprofit educational institutions use certain copyrighted materials on their digital networks. However, before any school does that, it has to carefully review the law and decide if the use qualifies. In the case of UCLA’s dispute with AIME, the uses do not qualify for at least four reasons.

First, the law is very clear: Section 110(2) does *not* apply to works “produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks....” The specific educational videos that UCLA has been streaming include a number of those acquired from AIME member, Ambrose Video Publishing (AVP). AVP has a multi-tiered marketing system for its videos. Among its licensing arrangements, AVP offers schools a streaming option. By paying an annual, multiyear or perpetual license fee, UCLA could acquire the right it seeks – to stream the video to classrooms. However, since AVP has a streaming option for its catalogue, its videos fall outside The TEACH Act, because AVP works are “produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks.” The law is clear, and UCLA has no right to stream these videos. Strike one against UCLA.

Second, even if a streaming option was not available, the AVP works are made available to schools and libraries on a licensed basis. Many AIME members do the same with their videos. The thing to appreciate is that copyright law pays great respect to contracts or licenses. If a work is acquired under contract, the user must comply with those terms, even if the copyright law would allow for a more liberal exploitation in the absence of a license. The AVP license does not permit streaming. Strike two against UCLA.

Third, as noted, Section 110(2) is a carefully crafted compromise. One of the key limitations, which was a condition for its passage, is that with respect to motion pictures (i.e. videos) only “reasonable and limited portions” qualify for exempt use. To convert an entire video to exploited use, so students and faculty can access at will, is not allowed. Strike three against UCLA.

Fourth, while UCLA is already called out, there is another overarching problem with the video streaming. The stream originates from the UCLA network server. To place the video into a format that can be streamed to students and faculty, a useable copy of the original must be made and stored. A companion provision to Section 110(2) in the copyright law is Section 112(f), which allows the making of The TEACH



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Act copy. However, whether the making of the copy is permissible also involves consideration under Section 1201, the DMCA rule against circumventing technological measures designed to limit access and copying. The problem for UCLA is that most videos, including AVP's, have technological measures that control access and copying. This means that copying the video to the library's server not only violates the obligation in Section 110(2) to respect technological measures of the copyright owner, but also it crosses the DMCA's no circumvention line. Strike four (!) against UCLA.

### C. Is streaming fair use?

The final claim of UCLA is that, regardless of the status under Section 110, the streaming practices of the University are allowed under fair use. The problem with that simple assertion is the complexity of the fair use provision. To start, fair use is not a blanket exemption. It is a defense to a specific claim of infringement based on the facts respecting use of a specific work. To suggest that every educational video can be streamed merely because teachers will state an educational purpose avoids the hard analysis required to satisfy Section 107. What kind of work is used? How much of the work is used in relation to the whole? What impact will the use have on the market for or value of the original copyrighted work? These are the tough questions, which require specific factual answers and which must be considered on a case-by-case basis before the ultimate fair use determination can be made.

In the AVP example, where the publisher licenses the original work and offers a reasonably priced option for streaming, the likelihood of a favorable finding of fair use is very remote. Moreover, whether the entire work, as opposed to "reasonable and limited portions," needs be streamed, must be carefully analyzed and fully justified. Finally, how to reconcile fair use and Section 110(2) is a novel question. If the use of a work has been scrutinized under Section 110(2) and that exception does not apply, can the institution automatically fall back on fair use? Even though Section 107 may allow use of a work when Section 110(2) does not, the fact that a specific copyright exemption is inapplicable cannot be ignored in balancing of the fair use criteria. Why that statutory exemption does not apply can be relevant to the evaluation of particular fair use factors. In short, any fair use analysis requires a rigorous, fact-specific determination. This is not something that can be opined about from afar or through generalization, as the LCA Issue Brief attempts. Rather, it is an on-the-ground, work-by-work, specific assessment. Something no one - not even the legal department at UCLA - has yet done.

So there you have it, a short primer on educational video streaming. Since this dispute is actively in process, as always, we urge that you stay tuned.

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*A PDF of this article is available in the Copyright Information Packet, found in the Member Area of the website, [www.AIME.org](http://www.AIME.org)*



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