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Video Streaming Licenses: Using a Decision Tree and Workflow Chart

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Abstract

This paper documents the results of a three-year process at a university library to develop a workflow for acquiring streaming video for use in face-to-face, hybrid, and online courses. The authors of this paper created two tools that guide their library in acquiring streaming video: the Streaming Resources Decision Tree (SRDT) and the Streaming Video Workflow Chart (SVWC). This paper describes the SRDT in depth, and the SVWC in brief. This paper describes the legal rationale behind the SRDT, which explores the limits of the right to fair use in U.S. copyright law.

Keywords: Streaming, academic libraries, copyright, fair use, video.

Video Streaming Licenses: Using a Decision Tree and Workflow Chart

This paper describes the results of a three-year process at Texas State University (hereafter Texas State) to develop tools that assist in the decision-making and workflow for acquiring and providing access to streaming video. Multiple departments and units contributed to creating the workflow: Acquisitions and its subunit, Collection Development; units within Collections and Digital Services, which facilitates digitizing and hosting media; and the Copyright Office, a unit within Research and Learning Services. Additionally, University Libraries (UL) solicited help from its sister department within the Division of Information Technology (DoIT), Information Technology Services (ITS).

The authors of this paper created two tools that guide UL in acquiring streaming resources for face-to-face, hybrid, and online courses: the Streaming Resources Decision Tree (SRDT) and the Streaming Video Workflow Chart (SVWC). This paper describes the SRDT in detail and the SVWC in brief. The authors explain the legal rationale behind the SRDT, which explores the limits of the right to fair use in U.S. copyright law.

The question whether a university is free to upload entire films without permission or license for use in instruction is central to this paper. The authors believe that there is not a blanket answer for all video and all uses, but that the SRDT (Figure 2) can help a university decide at a film's point of acquisition whether the content can be uploaded and what restrictions are applicable. As we describe the SRDT, we will address the potential legal concerns and the exceptions that may apply. At play is the right to fair use, under Section 107, Section 108 (libraries making copies for preservation), and Section 110(1) (performance in face-to-face classrooms) of the Copyright Act of 1976; Section 110(2) (provisions on hybrid and online courses) of the Technology, Education, and Copyright Harmonization (TEACH) Act of 2002; and Section 1201 (provision against breaking encryption) of the Digital Millennium Copyright Act (DCMA) of 1998, as well as the exemptions to Section 1201 (17 U.S.C. §§ 107, 108, 110, and 1201 [2018] and 37 C.F.R. § 201.40 [2015]).

For all requests from 2015–2017, the SRDT recommended that UL purchase streaming licenses rather than rely on fair use. Almost all streaming content that instructors have requested has been available for purchase or licensing, making the need for reliance on fair use extremely rare. Because UL has found acquiring content at reasonable costs relatively easy, the Copyright Officer, relying on the

SRDT, has not recommended relying on fair use for any request until this year, 2018. In terms of the SRDT, the 2018 request made it all the way through the four steps of the SRDT (Figure 2). In the 2018 request, the material was not available for purchase in streaming format (Figure 2), the copyright owners did not respond to requests for permission or licensing (Figure 2, Step 3), and the material was needed for an online-only course (Figure 2, Step 4).

Additionally, between 2015 and 2017, only two requests made it through the third step on the SRDT (Figure 2). The videos were not initially available for purchase or license (Figure 2). University Libraries converted the two videos from DVD and VHS to streaming and uploaded them to Mediaflo, Texas State's streaming platform. In one of the two requests, the Copyright Officer obtained permission from the copyright holder to convert the content to a streaming format, host the content locally, and stream the content on campus without any additional fees or licensing. For the other request, the Copyright Officer was able to negotiate a streaming license where streaming was previously unavailable.

Literature Review

Instructors need and continue to demand access to video resources for classroom teaching and learning (Spicer, 2018, pp. 236–239; Hobbs, 2009, p. 34). Academic libraries continue to strive to support instruction by collecting films and video materials (Spicer & Horbal, 2017, p. 706). However, depending on the university, the library may or may not support classroom technologies—another unit, separate from the library, may provide and support playback software and equipment (Spicer & Horbal, 2017, p. 706). As video technologies evolve, old technologies become obsolete and must be retired and replaced (Spicer & Horbal, 2017, p. 711).

Streaming can be delivered in a face-to-face classroom through performance from an in-class computer and large monitor or projector and screen. Streaming can also be delivered to hybrid and online courses by linking to content on the university's learning management system (LMS) for performance outside of class from students' computers and mobile devices (Spicer, 2018, pp. 237–238). In both delivery methods, the video content is stored either on third-party vendor platforms or on a secured local video storage platform.

Acquiring streaming resources remains challenging for libraries and institutions of learning due to the complexities of U.S. copyright law (Adams & Holland, 2017, p. 5; Krause, 2016, p. 4; King, 2014, p. 290; Cross, 2016, p. 12). Responding to the legal difficulties, some commenters have offered practical solutions or recommendations for future practice (Adams & Holland, 2017, p. 4; Cross 2016, pp. 11–14;

Spicer & Horbel, 2017, p.p. 12-16; Lazar & Myers, 2012, p.p. 161-164). Only one group has created a tool for acquiring streaming resources, but that group worked solely with audio files (Lazar & Myers, 2012).

Background

The availability of streaming licensing has increased since 2015, when UL began seeking streaming options outside the scope of subscription platforms. Since 2015, instructors have increasingly requested streaming content for use in face-to-face, hybrid, and online-only courses. The availability of online content, as well as the growing percentage of digital natives—those students brought up in the age of digital technology—have driven demand for streaming videos and other electronic content. Texas State has seen a steady increase in enrollment, including rapid growth in the numbers of students in both distance and hybrid courses. From 2006 to 2017, Texas State experienced an average increase of 25% per year in student enrollment for distance and hybrid courses (Office of Institutional Research, 2018). More recently, from 2014 to 2017 alone, student credit hours in distance and hybrid courses at the university increased from 36,709 to 75,663 and non-duplicated student headcounts increased from 12,526 to 26,915 (Office of Institutional Research, 2018). University Libraries expects the growth and demand for online content to continue. Texas State offers several online-only programs and plans to add more, as existing in-class programs add online-only options.

In 2015, Texas State transitioned from locally hosted password-protected servers for video streaming to a locally hosted third-party streaming delivery platform. Information Technology Services purchased and adopted third-party software, Ensemble, a platform that allows media uploads into the learning management system and local hosting of content. The department branded the Ensemble platform internally as Mediaflo. University Libraries acquired a Mediaflo account, and the Head Collection Development Assistant, UL's designated Mediaflo expert, began uploading video content purchased by UL.

Mediaflo implementation encouraged a flurry of new interest from instructors. Instructors and staff may upload content themselves through departmental Mediaflo accounts, without help from ITS or UL. Before training began on Mediaflo, Information Technology Services asked the Copyright Officer to prepare a slide with audio narration that briefly questions implicating copyright to the Copyright

Officer. In addition to this collaboration, two ITS staff members represent the department in serving on the Copyright Advisory Committee, a DoIT committee that is chaired by the Copyright Officer and that includes representatives from divisions across campus. University copyright policy charges the Copyright Advisory Committee with settling disputes about copyright ownership and use and with increasing copyright education opportunities for faculty, staff, and students.

Because Mediaflo facilitates the instructor use of copyrighted content on campus, ITS included an overview of copyright into the Mediaflo training for staff and faculty.¹ In the wake of implementation and training, the Copyright Officer fielded an increased number of questions about whether copyrighted content could be uploaded and stored on Mediaflo. University Libraries has its own Mediaflo departmental account through which it makes UL purchased content available to authenticated users. The Copyright Officer developed the SRDT to assist UL in responding to instructor requests for streaming content.

It must be noted that neither UL nor the Copyright Officer can mandate the use of the SRDT outside of UL. Instructors and departmental staff may upload content to Mediaflo on their own, independent of UL and UL policies. The authors of this paper believe that if UL mediated all campus Mediaflo uploads, UL could mandate use of the SRDT and Texas State could better mitigate its risk. However, UL-mediated uploads of all campus content would likely require additional UL staff and funding.

Limitations of the SRDT

The authors believe that, within current UL acquisitions workflows, the SRDT and the SVWC expedite decision-making and speed the acquisition of streaming resources. The SRDT and the SVWC ensure that UL staff follow a standard procedure, and errors are prevented by providing staff a visual checklist of steps. Rather than the Copyright Officer analyzing every streaming request for fair use, the SRDT allows her to review only those requests that will have the strongest fair use argument. Given these benefits, the authors do acknowledge the SRDT has limitations (Towery & Cowen, 2018).

First, the SRDT could cause UL to over-rely on licensing when the use was fair. Such an overreliance on licensing could cause UL to overpay for streaming content. As Fromer and Gibson acknowledge, there is a danger in this tactic:

1. Students must request a Mediaflo account to upload videos.

Copyright users. . . seek licenses even when they have a good fair use claim—i.e., even when proceeding unlicensed would probably result in no liability. This practice of unneeded licensing feeds back into doctrine because of one final uncontroversial premise: the fair use defense looks to the existence *vel non* of a licensing market when defining the reach of the copyright entitlement. The result is a steady, incremental, and unintended expansion of copyright, caused by nothing more than ambiguous doctrine and prudent behavior on the part of copyright users (Gibson, 2007, p. 887, quoted by Fromer, 2015, pp. 616–617, n. 8).

Because this limitation is inherent in Section 107 and affects all universities facing this issue, the authors believe that adjustments to the SRDT are unlikely to help. The authors suggest an update to the *Code of Best Practices in Fair Use for Academic and Research Libraries* and recommend a review of the first practice, *Supporting Teaching and Learning with Access to Library Materials via Digital Technologies* (Academic and Research Libraries [ARL], 2012, pp. 13–14). Academic and research libraries as a group should develop arguments, such as transformative use, that can be shared and established as best practices.

Another limitation is that the SRDT does not adequately account for transformative uses. The authors encourage future adjustments to the SRDT to identify transformative uses of entire films. One possible adjustment might be to encourage instructors to describe the instructional context of their use in the special instructions field when submitting a request via the UL order request system (ORS). This information could then be used to make a more informed decision on fair use versus licensing for the film. Jaszi (2013, p. 8) encourages instructors to tell stories about the transformative nature of their activities. This suggestion also comports with the best practices prescribed by ARL and matches the enhancement recommended when using digital technologies:

The case for fair use is enhanced when libraries prompt instructors, who are most likely to understand the educational purpose and transformative nature of the use, to indicate briefly in writing why particular material is requested, and why the amount requested is appropriate to that pedagogical purpose. An instructor's justification can be expressed via standardized forms that provide a balanced menu of common or recurring fair use rationales (ARL, 2012, p. 15).

The authors believe that instructors would volunteer the information if asked.

One additional limitation is that the SRDT does not adequately distinguish dramatic from non-dramatic video content. The authors acknowledge that the SRDT may cause UL to purchase licensing for non-dramatic video that might be used under the TEACH Act. To avoid this limitation the authors might amend the SRDT to add two questions to the beginning of Step 2 (Figure 2): “Is the video non-dramatic?” and “Is this video for a distance education course?” If the answer to both questions is yes, UL might proceed to copy and stream the video under the TEACH Act. Otherwise, UL would proceed to the next question in the SRDT.

Streaming Video Workflow Chart (SVWC)

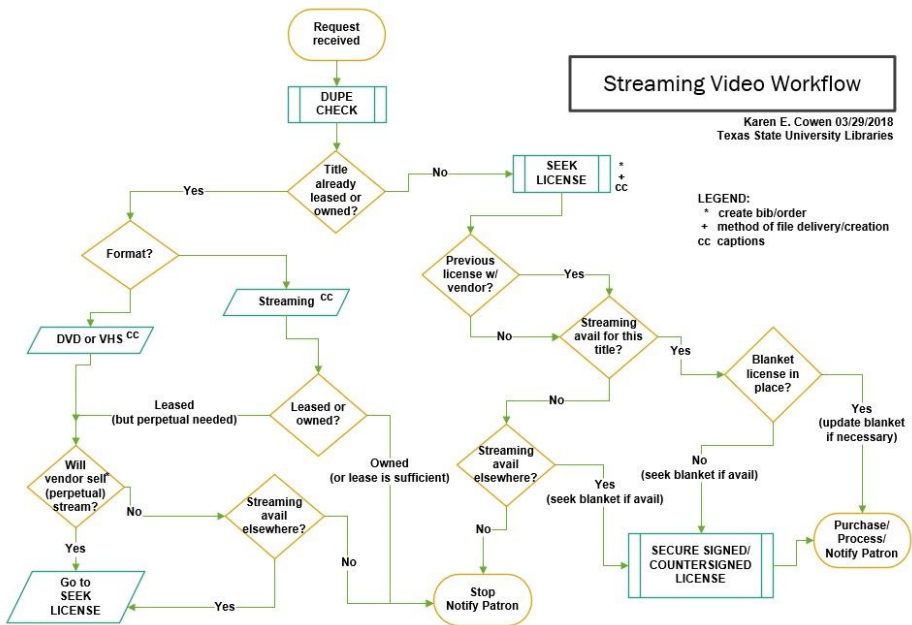


Figure 1. Streaming Video Workflow Chart (SVWC).

There are many similarities between the SRDT and the SVWC. Although the SRDT has the flexibility for adjustments to different environments (i.e. adopted by another library and adjusted to fit that environment’s workflows), the SVWC is more detailed and descriptive of the local process at Texas State. There are crucial elements within the SVWC that are dependent upon the decisions made in the SRDT. The authors and their colleagues have found it useful to have a graphical representation of these processes and their dependencies.

Streaming Resources Decision Tree (SRDT)

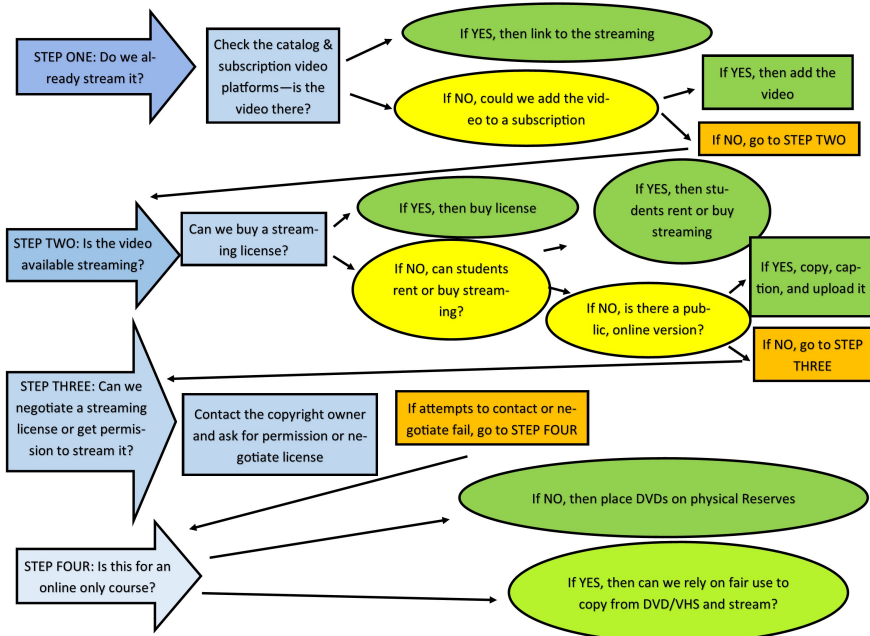


Figure 2. Streaming Resources Decision Tree (SRDT).

Purpose

The SRDT helps answer the question: “How can instructors give students access to an entire film?” Questions about access to portions of films or film clips, or about showing an entire film to a public audience outside the context of a course, are outside the scope of this paper. The Copyright Officer created the SRDT to address the problem of instructors gaining access for students to watch entire films in two contexts: for in-course use that allows students to view content for a class outside of class time, and for distance or hybrid courses where students can view the films within the learning management system.

The SRDT should be read as four steps, with multiple questions answered consecutively. If the access to streaming is not satisfied by the first step, then UL proceeds to the second step, and so on. If UL answers the question at the fourth step in the SRDT in the affirmative, then the SRDT suggests the possibility of relying on the right to fair use. The SRDT always directs the UL to rely on purchasing or licensing streaming if it is available. The SRDT only directs UL to consider a fair use analysis if access to streaming is not available either through markets available to UL or the student *and if*

there is no face-to-face component of the course (Figure 2).

Step 1: Do we already stream this video? The first step in the SRDT is avoiding duplicate purchases by checking the library catalog for the title (Figure 1, DUPE [duplicate] CHECK Figure 2). While policies regarding duplicate formats or various platforms and purchasing models may vary from institution to institution, UL's policy dictates that only those streaming titles that are purchased or are non-aggregate leased titles, be entered in the online catalog. Streaming titles available through subscription aggregate vendor platforms are not listed immediately in the catalog. If the title is not in the UL catalog, then the SRDT recommends checking UL Research Databases, which are accessible from the UL main webpage. By selecting Streaming from the Research Databases page, a user can find forty-six streaming databases for audio and video content, such as the video streaming platforms provided by Kanopy, Films on Demand, SWANK, and Alexander Street.

When faculty or staff request a video (DVD or streaming) through ORS, the Head Collection Development Assistant receives notification of the order. She searches for duplicates in the catalog and subscription services. If the video is not available either through the catalog or through a vendor platform, she investigates adding the title to one of these platforms. University Libraries can lease individual titles through platforms such as Kanopy and SWANK, which the vendor will add to their platform. Subject librarians can search these platforms and identify whether the requested title is available on that platform, and then place an order request in ORS. The Head Collection Development Assistant or the Monographic Acquisitions Librarian adds titles to streaming subscriptions services that lease individual titles.

Step 2: Is the video available in streaming? If UL does not already provide the video in streaming format, the SRDT asks: "Is this title available (for purchase) in streaming?" Videos not found either through the online catalog or through a subscription require further investigation, typically by the Head Collection Development Assistant (Figure 1). She imports a bibliographic record into the library management system and creates an order with a pending status. With the pending order created, she searches for commercially available content.

Starting with established vendors, the Head Collection Development Assistant searches for a streaming version to purchase (Figure 1). If the streaming version is available for purchase, she contacts the vendor to begin license and purchase negotiation. If

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the video is not available through vendors with which UL has an established relationship, the Head Collection Development Assistant widens the scope of the search to an alternate distributor or the film production company, establishes contact, and moves towards purchasing and licensing negotiation.

When possible, the Head Collection Development Assistant negotiates a perpetual license for the streaming content. Increasingly, however, vendors have moved away from perpetual ownership models in favor of leases. University Libraries policy is to select the maximum lease option for most titles unless otherwise specified. In recent years, it has become increasingly common for vendors to limit the license to three years. To make sure UL does not exceed the length of the license, the Head Collections Development Assistant developed a method utilizing functions within the integrated library system to remind staff when the licenses end for those titles leased on vendor platforms. She adds a “tickler note” to the order record, which generates an email to the Electronic Resources Librarian and Monographic Acquisitions Librarian on the day the lease expires. The Monographic Acquisitions Librarian suppresses the bibliographic record so that it will not appear in the online catalog, gathers usage statistics, and determines whether to renew the lease based on usage or contact Subject Librarians for input. For those titles hosted internally, the Head Collections Development Assistant uploads the video to Mediaflo, and schedules publishing (i.e. campus accessibility) to cease on the expiration date.

For those titles in physical format such as DVD that must be hosted on Mediaflo, the Head Collection Development Assistant negotiates streaming licenses with distributors and production companies, usually film by film or order by order (Figure 1). She reviews standard licenses and terms of use from distributors and production companies. When possible, she requests a blanket agreement to cover all future streaming license orders, saving time and streamlining the process for any future orders. For those licenses that are problematic or include questionable language, the Copyright Officer, Monographic Acquisitions Librarian, and Head Collection Development Assistant will consult as a team, analyze the agreement, and negotiate any necessary changes to the language.

University Libraries collection policy dictates acquiring the greatest rights that are commercially available. Thus, when a streaming video is requested, the Head Collection Development Assistant will acquire both the DVD and streaming file, or in the absence of the file, the rights to copy and stream. If available, she will acquire a Digital Site License and Public Performance Rights (PPR).

Although PPR are not required for face-to-face classroom showings (Jenemann & Butler, 2014) because face-to-face performances of video without license is covered by Section 110(1) of the Copyright Act (Spicer, 2018, p. 241), PPR is often sought for extra protection for the university and to cover possible community showings.

Where the Head Collection Development Assistant cannot license or purchase streaming for UL, she contacts the Copyright Officer with information about the request. The Copyright Officer searches for streaming versions that are free, or available for purchase or lease to individuals only. If one such version is located, often through Amazon, Hulu, Netflix, Roku, or other similar providers, the Copyright Officer notifies the instructor and explains that UL is unable to purchase or license a streaming version of the film but that students can rent or buy streaming themselves. Where streaming is already available for rent or purchase by students through providers who market content for personal use, the authors have found that it is unlikely that the copyright holder will sell an academic streaming license. As a result, UL no longer attempts to negotiate academic licenses where streaming licenses are available to individuals only. If the course is hybrid or face-to-face, the Copyright Officer also suggests that faculty might place the DV D on physical reserve for check out by students.

Private citizens often upload copyrighted videos without license or permission. Linking to these public, online versions of videos, though often available on YouTube or Vimeo without cost, is not an option, as those versions rarely contain compliant captions (Figure 2). To make uncaptioned or poorly captioned video compliant with accessibility standards, the instructor can copy the video, obtain captioning, and then upload the video and caption file to Mediaflo. Instructors can copy, store, and stream those videos, even if they were posted without permission, exception or license, by relying on Section 121 (Reproduction for blind or other people with disabilities) or Section 107 (fair use) (*Authors Guild, Inc. v. HathiTrust*, 2012). The Head Collection Development Assistant recommends ordering captions at points in the SVWC that are marked "CC" (Figure 1).

Step 3: Can we negotiate a streaming license or get permission to stream the film? If streaming is not available for either UL or students to purchase, the SRDT asks: "Can we negotiate a streaming license or get permission to stream it?" It may be possible to get permission to locally host and stream the video. For example, the Copyright Officer secured permission for a film with a single copyright owner that was no longer being sold or distributed. In that case, the request took very little time to make, and UL did not have to wait long for a reply. The Copyright Officer has not been successful in obtaining permission to stream any other content that was not already available for streaming licensing.

It may also be possible to negotiate a streaming license with a production company that has not previously considered selling streaming

rights. The Copyright Officer, after several months of negotiation, obtained a streaming license under these circumstances. The authors recommend libraries weigh the benefits of providing access to a title to the relative time and effort expended when pursuing permissions for a problematic title. Permission requests are rarely time-consuming except where the production company is no longer in business and the successor copyright owner is unknown. In those cases, the authors suggest treating the videos like orphan works and proceeding to step four on the SRDT. An orphan work is “an original work of authorship for which a good faith, prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission for the copyright owner(s) is necessary as a matter of law” (Pallante, 2012). Orphan works can be used without license or permission “under certain circumstances, such as Section 107 (Fair use)” (Orphan Works and Mass Digitization, 2012).

Step 4: Is this video for an online-only course? If the video is not for an online-only course—if it is for a face-to-face or hybrid course—then the SRDT suggests placing a DVD of the film on physical reserve in the library. The Access Services unit oversees reserves for physical materials, such as DVDs, books, and articles. Students can check out the DVD for a limited time and view the film in one of the Media Viewing Rooms within the library. Instructors often prefer using reserves as opposed to showing a film during class time. Instructors may prefer placing the DVD on Reserves rather than asking students to rent or purchase the streaming version of the film. Instructors may be hesitant to amend the syllabus after the start of the semester especially if it requires students to incur additional costs. While Rumore (2016, p. 5) recommends that syllabi be specific enough to allow students to complete their work with understanding of the instructor’s expectations, the authors are not aware of any legal prohibition against making syllabus changes during the semester. Texas State requires that instructors provide students with a copy of the syllabus at the beginning of the semester but does not prohibit mid-semester syllabus changes (Office of Academic Affairs/Provost, 2018).

In those instances where students will not have access unless UL relies on the right to fair use to copy and host the content, UL will assess whether the use is fair. By the time the steps to the SRDT are completed, the Copyright Officer is assured that the use is educational, restricted to a limited audience, and that the use has no market effect. In those cases where the SRDT suggests fair use, the Copyright Officer will analyze the use. If the Copyright Officer believes that the use is fair, she will complete and send a Fair Use Checklist with a note explaining her analysis to the

requesting instructor. The Copyright Officer gathers the correspondence and any other internal documents as evidence of due diligence and compliance with SRDT. The Copyright Officer stores this information on the UL SharePoint site. The Head Collection Development Assistant will obtain a DVD version of the video to copy and proceed through the workflow as if UL had purchased a streaming license for the film.

Within Mediaflo, the Head Collection Development Assistant orders captioning on the content via Rev, a third-party captioning vendor (Figure 1). When the caption file is returned from Rev, she syncs the caption file to the video file and sends the files to the Head of Collections and Digital Services for placement on the UL archival server. She does not send leased streaming files to archive. The Head Collection Development Assistant creates a secure link that she places in the catalog entry in the library management system and sends a note to the cataloging department to accession the streaming video. At this point, the Head Collection Development Assistant also sends the Copyright Officer and the requesting instructor a link to the video content.

An Environment for a Conservative Approach to Fair Use

The authors believe that a conservative approach to relying on the right to fair use is appropriate due to the self-service nature of video storage and delivery at Texas State University. Texas State currently uses Sakai, an open-source product rebranded locally as Teaching Research and Collaboration Site (TRACS) as its learning management system (LMS). Students accessing TRACS must sign on with a user identification and password and will only have access to course sites for courses in which they are enrolled.

There is no requirement that instructors remove content from Mediaflo after a course has ended. While storing videos on Mediaflo is convenient to instructors because it allows repeated use in subsequent courses, it means that the university is storing copyrighted material indefinitely. While repeated or subsequent use is not a factor in a fair use analysis, the authors have found that materials initially unavailable for license or purchase often come on the market after a few years. If a video was unavailable for purchase in streaming in an earlier semester and so was converted from DVD and uploaded for use in an online course but became available in future semesters through a distributor, the instructor's subsequent use of the video might not be fair, as there is now a market for the video. The instructor's subsequent use of the upload would function as a market replacement for the purchased streaming. The authors believe their reading of the issue of

indefinite storage comports with the enhancement suggested by ARL's Best Practices: "In order to assure the continuing relevance of those materials to course content, libraries should require instructors of recurrently offered courses to review posted materials and make updates as appropriate" (2012, p. 15).

It is probable that instructors have successfully copied and uploaded entire films to their departmental Mediaflo libraries in reliance on fair use, without either ITS or UL knowing about it. Without audits of Mediaflo and TRACS, the university will not know how often faculty are relying on fair use. University copyright policy requires faculty to complete a Fair Use Checklist when relying on fair use, but the policy does not require notification of the Copyright Officer.

Legal Rationale for the SRDT

Why can't we rip streaming copies from these DVDs we have? Two of the exclusive rights of copyright are the right to copy and the right to perform. Unless the university can identify an exception that applies to the copying and performance (via streaming) of copyrighted video content, the university risks copyright infringement by streaming content ripped from DVDs.

There are several exceptions to infringement that apply to educational uses of copyrighted resources. Instructors showing videos via DVD in face-to-face courses can rely on Section 110(1), which exempts performance of copyrighted video from licensing and permission requirements. Section 110(1) allows instructors to show entire films in a face-to-face classroom under certain conditions: the video must have been obtained legally and the location must be a place normally devoted to instruction (Spicer, 2018, p. 241). There is no need to consider purchase for in-classroom use through the SRDT because in-classroom use is covered by the exception in Section 110(1). SRDT only comes into play if instructors either want students to watch entire films outside of face-to-face class time or if instructors want students to watch entire films as part of a hybrid or online-only course.

The TEACH Act

While the TEACH Act allows performance of portions of non-dramatic video content (with certain conditional requirements), the language of Section 110(2) does not permit performance of entire videos of dramatic content. The language of Section 110(2) regarding dramatic content states that instructors may only use "reasonable and limited portions." Instructors of online-only courses who require students watch video content of entire dramatic films should seek to

license the streaming content through UL or rely on the right to fair use to upload it to a course site.

Instructors of distance course who would like students to watch non-dramatic video can rely on Section 110(2) to upload entire films so long as the content is lawfully obtained. As mentioned previously, the SRDT does not account for the possible copying and streaming of non-dramatic video under the TEACH Act. The authors suggest that instructors might note in the ORS special instructions field that the course is a distance course. This solution places the burden on the Head Collection Development Assistant to assess whether the requested film is dramatic or non-dramatic based on marketing material for the film. The Head Collection Development Assistant might shift the burden to the Monographic Acquisitions Librarian or the Copyright Officer in difficult cases.

Some commentators have argued that courts might consider entire dramatic films to be “reasonable and limited portions” (Band et al., 2010, p. 6, citing Huber, et al., p. 7). This view would require courts to ignore the plain language of the TEACH Act and interpret “limited portions” to include entire films. Courts may interpret statutory language to affect Congressional intent, but where, as here, the language is unambiguous, the courts would have to jettison the plain language rule of statutory construction. As Farnsworth, Guzior, and Malani point out, this “principle is hoary” (2010, p. 259 n. 4).²

Band et al. cite language in a report by Huber, et al. that does argue for an expansive reading of “reasonable and limited portions:”

Although what constitutes a “reasonable and limited portion” of a work is not defined in the statute, the legislative history of the Act 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 (citing S. Rept. 107-31 at 7–8). For example, the exhibition of an entire film may possibly constitute a “reasonable and limited” demonstration if the film’s entire viewing is exceedingly relevant toward achieving an educational goal; however, the likelihood of an entire film

2. Citing *Fisher*, 6 U.S. (2 Cranch) at 399. “Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.”); *Ratzlaf*, 510 U.S. at 148. “We do not resort to legislative history to cloud a statutory text that is clear”); *Barnhill*, 503 U.S. 393; *Schwegmann Bros.*, 341 U.S. at 395 (Jackson, J. concurring) “Resort to legislative history is only justified where the face of the [statute] is inescapably ambiguous.”

portrayal being “reasonable and limited” may be rare (Band et al., 2010).³

While relying on the TEACH Act where we would otherwise pay for licenses might make our work easier and less costly, we do not believe courts will interpret the word “portions” to mean anything other than less than a whole work.

The legislative history of the TEACH Act supports our reading of the statute: “The performance of works other than non-dramatic literary or musical works is limited, however, to ‘reasonable and limited portions’ of *less than the entire work*” (S. Rep. No. 107-31, 2001, p. 7, emphasis added).

The “limited portion” formulation used in conjunction with the performance right exemption is not used in conjunction with the display right exemption, because, for certain works, display of the entire work could be appropriate and consistent with displays typically made in a live classroom setting (e.g., short poems or essays, or images of pictorial, graphic, or sculptural works, etc.) (S. Rep. No. 107-31, 2001, p. 8).

While we might argue that entire dramatic films are also often performed in a live classroom setting, the legislative history supports the notion that Congress considered that possibility and rejected it. Our reading of the statutory language is also supported by the Register of Copyrights. Here the Register of Copyrights connects the amount used with the market effect:

For entertainment products like motion pictures, transmission could well substitute for students paying to view them elsewhere, and if digital copies can be made or disseminated, could affect the broader public market. . . . If audiovisual and other works are added, it should be done in a limited way, with greater restrictions than Section 110(2) currently imposes. Thus, Section 110(2) could be amended to allow performances of categories in addition to nondramatic literary and musical works, *but not of entire works*. An expanded exemption should cover only the performance of reasonable and limited portions of these additional works. . . . This requirement, *combined with the limitation on the amount of the work that could be used, should further serve to limit any impact on primary or secondary markets* (Register of Copyrights, 1999, pp. xx–xxi, emphasis added).

Despite our doubts about whether the TEACH Act allows streaming an entire dramatic video, we may still rely on fair use. The literature

3. Citing Nimmer & Nimmer (2006), Nimmer on Copyright, 2(§ 8.15[C][2][a]).

supports that where the TEACH Act is too restrictive, in a digital environment a university may rely on fair use to copy an entire dramatic video. (S. Rep. No. 107-31, 2001, p. 15, citing Register of Copyrights, 1999, pp. 161–162; Spicer, 2018, p. 243, citing Russell, 2010, p. 354).

Section 108 (Reproduction by Libraries and Archives)

The authors have not found Section 108 to be helpful when considering the question of streaming copyrighted video. Section 108 allows libraries to make preservation copies of entire films if certain conditions are satisfied. One condition is that the library can only copy the material if the current copy of the content “is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete” (17 U.S.C. § 108(c)). Because those conditions do not usually apply with the conversion of content from DVDs to streaming, Section 108 does not help UL stream copyrighted videos.

Another condition of Section 108 is that “any such copy or phonorecord that is reproduced in digital format ... not [be] made available to the public in that format outside the premises of the library or archives in lawful possession of such copy” (17 U.S.C. § 108[c][2]). Because “premises of the library” is not defined, it is unclear whether content hosted on an LMS and accessed by students in a course would be “outside the premises of the library.” University Libraries has been reluctant to interpret “premises of the library” to include restricted access on the LMS, so UL has not relied on Section 108 to copy videos.

Where content is on VHS, libraries may rely on Section 108 to shift format to DVD because VHS is arguably an obsolete format. But, there is another condition of Section 108: the library can only copy material that is not otherwise available for sale at a reasonable price. Therefore, if the content from the VHS is available for sale on DVD, UL would not be able to make a copy from a VHS. Instead, UL would purchase the DVD. Because UL does not need a DVD copy—it needs a digital copy encoded for streaming—Section 108 does not help with this issue. Even if Section 108 does not apply, Section 107 (fair use) is still available (Crews, 2012, p. 46).

Fair Use

There has only been one legal opinion to arise from copyright infringement litigation against a university who copied, uploaded, and delivered copyrighted streaming content to students via a learning management system: *Association for Information Media and Equipment*

v. The Regents of the University of California (hereafter the UCLA case). The Court found that it was ambiguous whether performing (streaming) the videos was fair: “Notably, no Court has considered whether streaming videos only to students enrolled in a class constitutes fair use, which reinforces the ambiguity of the law in this area” (*AIME v. UCLA*, 2011, p. 11). The Court found in this case that copying from a DVD for the purposes of uploading to stream the content was “incidental copying” and therefore fair use. The Court found that copying the videos was fair but that it was ambiguous whether streaming the videos was fair.

In this case, UCLA had licensed the right to publicly perform the videos from the DVDs that it copied and streamed. It is unclear if a court would find that copying to stream is incidental and therefore fair, absent a public performance license. While some DVD materials are sold to academic libraries with public performance licenses, this is not typical (Spicer, 2018, p. 241). Generally, DVD material sold to individuals does not contain public performance licenses. Because universities are usually copying and streaming videos without a public performance license, the UCLA case’s impact may be limited.

Because fair use must be determined on a case-by-case basis, it is difficult and perhaps unwise to summarize a typical fair use argument for copying and streaming video. For the purposes of this paper, the authors will give a broad example of how fair use might be assessed. The four factors of fair use are: (1) the purpose and character of the use; (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 (17 U.S.C. § 107).

Factor one will usually weigh in favor of fair use because the nature of the use is education, and the use occurs at a not-for-profit institution. It is unlikely that courts will find uses in this context transformative. The Supreme Court described transformative use in *Campbell v. Acuff-Rose Music, Inc.*:

Under the first of the four 107 factors, “the purpose and character of the use ...,” the inquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is controversially ‘transformative,’ altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use (510 U.S. 569 [1994]).

Most instructors show films to illustrate teaching points or to initiate discussion of themes, which are not by themselves transformative uses.

Instructors should argue that the context in which they use the films gives the films “new expression, meaning, or message.” Band, Butler, Crews, and Jaszi have suggested that courts may find the use of entire films transformative where instructors recontextualized the video, where the secondary use audience (students) is different from the audience the creator intended, or where the quality of the film has been reduced by video compression (Spicer, 2018, pp. 242–243, citing Band et al., 2010, pp. 2–3).

An instructor’s use of film can be as transformative as the uses in other media. Band et al. cite *Bill Graham Archives*, 2006, p. 605, where the Court found that a book reproducing concert posters as historical artifacts in rock band biography was fair use; *Blanch*, 2006, p. 247, in which the Court found that an artist’s use of a fashion photograph in a collage was fair use; *Perfect 10*, 2007, p. 701, where the Court found that a search engine’s copying and display of entire images was fair use; and *iParadigm*, 2009, p. 630, where a technology company’s copying of student papers into a database for purposes of detecting plagiarism was a fair use (2010, p. 2). However, several years after Band et al. (2010), the 11th Circuit cites the same cases⁴ to find that digital copies of chapters uploaded to a university’s electronic reserves systems was not a transformative use:

Here, Defendants’ use of excerpts of Plaintiffs’ works is not transformative. The excerpts of Plaintiffs’ works posted on GSU’s electronic reserve system are verbatim copies of portions of the original books which have merely been converted into a digital format. Although a professor may arrange these excerpts into a particular order or combination for use in a college course, this does not imbue the excerpts themselves with any more than a *de minimis* amount of new meaning. . . . Rather, Defendants’ use of excerpts of Plaintiffs’ works “supersede[s] the objects of the original creation.” Were this element by itself dispositive, we would be compelled to find that the first factor weighs against a finding of fair use (*Cambridge University Press v. Patton*, 2014, pp. 1262–1263 [citations omitted]).

Butler (2015) suggests that “making entire, unaltered works available for . . . viewing may be found fair where the users’ . . . purpose differs sufficiently from the original purpose of the work, and the amount taken is justified by that novel purpose” (p. 18, citing *Swatch v. Bloomberg LP*, 2014, p. 9). The other three factors are more problematic and may weigh against fair use.

4. The 11th Circuit omits the Koons case.

Under factor two, use of a film is less likely to be fair because most films involve a great deal of creativity. Films are rarely completely factual and will contain analysis and opinion, which makes use of them less likely to be fair. In *Cambridge University Press v. Patton* (hereafter the Georgia State case), the 11th Circuit found that where the works contained evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author's experiences or opinions, the District Court should have held that the second factor was neutral, or even weighed against fair use in cases of excerpts that were dominated by such material. (*Cambridge University Press v. Patton*, 2014, p. 1270).

For this reason, factor two is most likely to weigh against fair use in the case of most films. Instructional or educational films are not usually qualified by the SRDT for a fair use analysis as they are more likely to have licenses available for purchase. These types of films have been created for the higher education market, a circumstance which by itself weighs against fair use under factor two and under factor four market effect (Register of Copyrights, 1999, p. 88 n. 210, citing *Triangle Pubs*, 1980, p. 1176 n. 14 and S. Rep. No. 94-473, 1975, p. 64). Other considerations that fall under both factor two and factor four are the film's commercial availability and whether the film is "unavailable for purchase through normal channels" (Register of Copyrights, 1999, p. 88, n. 211-212, citing H. Rep. No. 94-1476, 1976, p. 67 and S. Rep. No. 94-473, 1975, p. 64). These considerations indicate the applications of factor two since they concern the nature of the works themselves, and additionally, fall under factor four because they indicate the lack of a market effect on fair use.

Under factor three, use of an entire film could be considered fair if the other factors weigh heavily in favor of fair use. For example, if there is no market for the film (factor four) or if access is restricted (factor four), use of the entire film might be fair. An instructor might argue that her use of the entire film is transformative (factor one), in which case use of the entire film might also be fair. On its face, factor three weighs against fair use because the use is of the entire work, but factor three may weigh in favor of fair use where viewing the entire film is pedagogically necessary, and, therefore, the amount taken is justified. Butler (2015) reminds us that the "amount of the work used should be appropriate to the transformative purpose" (p. 33). "[A]s Judge Leval argues, courts may look to the amount taken as an additional indicator of whether the use truly is transformative; taking too much supports an inference that the use is in fact merely substitutional or otherwise illegitimate" (Butler, 2015, p. 33, n. 214, citing Leval, 1990, p. 1123).

Use of an entire film, under factor four, could be fair if there is no market for the film or if there is no way to license the use of the film. This is the factor that creates the steps in the SRDT: “Is there a market for the film?” (Figure 1) and “Is there a way to license the film?” (Figure 1). If the SRDT determines that factor four does not weigh against fair use, the SRDT suggests the Copyright Officer review the streaming request and make an argument for fair use. The SRDT only suggests using fair use where there is no market effect under factor four and where access to the video would otherwise be denied.

Market Replacement

“[W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly ‘supersedes the objects’ of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur.” (Fromer, 2015, p. 628, quoting *Campbell v. Acuff-Rose Music*.) Butler (2015) points out that, in the Georgia State case, the 11th Circuit found “that absent a transformative use argument, the availability of a license for the use could still be decisive against a fair use claim” and that, where the use is non-transformative, the Court is required to give the fourth factor “additional weight” because “the threat of market substitution [is] more serious” (p. 5 n. 26, quoting *Cambridge University Press v. Patton*, 2014, pp. 1278–1282).

Lemley traces the development of the concept of licensing as a market replacement: “Beginning in the 1990s, and most notably in *American Geophysical Union v. Texaco*, courts began to count as market harm not just actual lost sales of the copyrighted work or plausible derivative works, but also the loss of money they supposed users would pay to license the right to use the copyrighted work” (Lemley, 2007, p. 189). Lemley posits that courts have shrunk fair use by their “willingness . . . to find a use unfair, even though it did not cost the copyright owner a sale, because the copyright owner could have gotten a licensing payment from the accused infringer.” (2007, p. 186, citing *Texaco*, 1994, p. 913). Numerous commentators have remarked on the circular nature of the effect of licensing on the fourth factor:

Whether a use is fair depends on whether the copyright owner loses anything from the use, but under *Texaco*, whether the copyright owner loses anything from the use depends on whether the use is deemed fair; only if it is not a fair use would there be

licensing revenue to lose. (Lemley, 2007, p. 190).⁵

The structure of the SRDT acknowledges that courts weigh the existence of licensing against fair use. Butler (2015) suggests that “[t]he safe response may well be to forego fair use whenever there is a license available, and to tread very carefully indeed even when there is not” (p. 31).

The fact that access is restricted to a single course mitigates the potential market harm weighed in the fourth factor. Where libraries and universities stream video content under fair use where licenses are available, they are relying on restricted access to mitigate the potential harm of market replacement. The ability to restrict access to a single course helps to limit the potential market harm covered by the fourth factor, but it is unlikely restricted access may decrease potential harm so much that the fourth factor no longer weighs against fair use, especially where an entire work is used.

Format Shifting

While Ferullo (2018) suggests that “[more] often than not there is no market impact under the fourth fair-use factor, particularly if there is restricted access to the movie and the movie was legally purchased by the library or the university” (p. 83), not all commentators agree that copying and streaming from previously purchased formats (format shifting) is fair use. Loos (2007) argues that “[u]pload and distributing digital files made from copyrighted works is not legal, even if there is a transformation from the original work to the digital format” (p. 612, citing *UMG Recordings*, 2000, p. 353).

Recently, Madigan (2017) addressed whether format shifting could be considered fair use:

The Copyright Office recently refused to adopt an exemption that would have allowed broad, noncommercial format-shifting of motion pictures distributed on DVDs, Blu-ray discs, and downloaded files. The Office’s final rule found that proponents of the exemption “failed to establish a legal or factual record sufficient to establish that the space- or format-shifting of audiovisual works, e-books, and other copyrighted works constitutes a non-infringing use” (n.p.).

However, it is possible that courts could still find format-shifting fair despite the Copyright Office’s 2015 decision not to grant an anti-

5. Citing the dissent in *Texaco* and referring to numerous commentators who have noted the circularity of this theory; Fromer, 2015, p. 616, n. 3, citing Nimmer & Nimmer, 2014, pp. 13-199 to 13-206.4; Leval, 1997, p. 1465; Loren, 1997, pp. 38-39; Pasquale, 2005, pp. 781-84.

circumvention exemption. Recently, the Second Circuit, in an opinion by Judge Level, opened the door to a fair use argument for format shifting:

To the extent a reproduction was made solely for cloud storage of the user's music on ReDigi's server, and not to facilitate resale, the reproduction would likely be fair use just as the copying at issue in *Sony* was fair use (*ReDigi*, 2018, p. 30 n. 16).

Leval's footnote foresees extending fair use to copies made by a user (such as a university) for their own purposes. Band (2018, n.p.) recognizes that footnote 16 promises hope for fair use for "space-shifting,"⁶ but because *Sony* concerned "format-shifting," footnote 16 promises hope for fair use for format-shifting as well.

First Sale

In most requests for streaming for courses at Texas State, the content is usually available either for purchase in streaming format from the vendor, or UL can license streaming and extract the content from the physical format to a digital file and host the streaming file itself. There is no legal difference between purchase of a license and purchase of the streaming content. Whether the vendor or UL creates the streaming file, the copyright owner or their agent grants UL a non-exclusive license to stream the content (the rights granted are the right to copy and the right to perform). The format itself (digital rather than analog) necessitates that the university acquire streaming rights because the first sale doctrine does not apply to content in digital formats (*ReDiGi*, 2013, p. 640).⁷

Digital Millennium Copyright Act

There is the possibility that faculty have successfully copied and uploaded video content, perhaps entire films, to their

6. "For decades there has been a debate whether space-shifting is a fair use. In 1999, the Ninth Circuit in *RIAA v. Diamond* indicated that it was, but then last year, in *Disney v. VidAngel*, it suggested that it wasn't (Band, 2018, n.p.)." In *RIAA v. Diamond* (1999, p. 1079), the Ninth Circuit suggested that space-shifting was fair use: "The [portable digital audio device] merely makes copies in order to render portable, or 'space-shift', those files that already reside on a user's hard drive. Cf. *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 455 (1984) (holding that 'time-shifting' of copyrighted television shows with VCR's constitutes fair use under the Copyright Act, and thus is not an infringement)." As Band points out, the Ninth Circuit rejects this view in *Disney v. VidAngel*, (2017, p. 862), citing *Napster* (2001, p. 1019) *UMG Recordings* (2000) and *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* (2015, p. 65960).
7. Resale of digital content is infringing reproduction; first sale doctrine does not cover digital files.

departmental Mediaflo libraries in reliance on the TEACH Act or fair use. Without audits of Mediaflo and TRACS, Texas State will not have a complete picture of how often faculty are relying on TEACH Act or fair use of streaming content. Texas State's copyright policy requires faculty to complete a Fair Use Checklist when relying on fair use, but it does not require notification of the Copyright Officer. The copyright policy does not specifically warn against breaking DVD encryption. Without consulting the Copyright Officer, instructors may not realize the right to fair use does not apply to the statutory anti-circumvention measures. Section 110(2) (TEACH Act) does contain an exemption for breaking encryption for distance courses, so it would be possible for instructors to break encryption to copy non-dramatic films.

Statutory anti-circumvention measures are set out in 17 U.S.C § 1201 and came into being in 1998 when Congress passed the Digital Millennium Copyright Act. Section 1201 prohibits circumventing technological measures to decrypt an encrypted work. Even if an instructor has the right to fair use to use the content in the encrypted DVD, she does not have the right to break the encryption unless she also can find an exception to Section 1201. Fair use, Section 107, is not an exception to Section 1201 (Reimerdes, 2000, p. 322). There is an exemption to Section 1201 that applies to breaking encryption on DVDs for educational purposes, but that exemption only applies to encryption broken "where circumvention is undertaken solely in order to make use of short portions" of the video content (37 C.F.R. § 201.40 [2015]). The Register of Copyrights meets with stakeholders every three years to determine whether the exemptions need to change, so it is possible that in the future, the exemption might apply to entire films (17 U.S.C. § 1201[a][1][C][1998]).

University Libraries uses Handbrake, an open source video converter program, to extract copies of encrypted DVDs for which UL has purchased streaming licenses. The anti-circumvention statute allows breaking of encryption with permission of the copyright owner. But because UL only uses Handbrake to break encryption on DVDs with the permission of the copyright owner or their agent, UL has not had an issue with Section 1201. For those titles not licensed, UL does not break the encryption on any protected DVD. The DMCA prohibition on anti-circumvention of technological measures would prevent UL from breaking the encryption on a protected DVD that an instructor wanted to use without license or permission even if the instructor had a compelling fair use argument (Spicer, 2018, p. 245). In this way, Section 1201 limits UL reliance on fair use to streaming copyrighted videos.

Conclusion

This paper attempts to bring to light work that has been recreated by numerous librarians in similar situations all over the United States. As Will Cross (2015) recently wrote, “uncertainty about the law and fear of litigation leave many librarians feeling compelled to work *sub rosa*, keeping their heads down in hopes that they won’t be discovered” (p. 2). Out of the burden of great uncertainty, with few exceptions, librarians have not yet shared their practical experiences in this area via scholarly publication. This paper documents the development of a practice in acquiring streaming video for this team’s university. By presenting new tools and the legal rationale for the tools, the authors hope to further discussion in the field on the issues and workflows surrounding streaming video acquisitions, as well as generate dialogue that leads to further improvements. The authors acknowledge that it is possible for the SRDT to encourage overreliance on licenses, which can lead to overpayments on licensing, as well as an under-reliance on using fair use and the TEACH Act. The authors posit that the SRDT may be improved by asking instructors for information about the context of use that may support a fair use or TEACH Act argument. We also recommend all university libraries work with their university to set copyright policy campus-wide and mediate video uploads that are hosted on a local video hosting platform so that libraries can mandate the use of tools like the SRDT and the SVWC for all streaming videos. Ultimately, the answers to questions concerning streaming copyrighted videos lies in libraries and academia banding together to advocate for meaningful changes to a copyright regime that makes relying on fair use difficult for academic libraries.

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