

STREAMING WHILE TEACHING: THE LEGALITY OF USING PERSONAL STREAMING VIDEO ACCOUNTS FOR THE CLASSROOM

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ABSTRACT

Educators are constantly seeking new sources of relevant material to illustrate doctrinal and practice topics. With the growing understanding of students' different learning styles (including visual and auditory learners), as well as the expansion of high-speed network connections and large displays in the classroom, streaming video has begun gaining popularity as an educational tool. Films, television programs, and real-time and archived legislative and court sessions may provide examples (both positive and negative) to enhance pedagogy.

One increasingly common source for streaming content is a commercial video provider such as Netflix, Amazon, and Hulu. Even where such providers do not offer educational or institutional services, educators may have personal accounts with the service to which they can connect from the classroom in order to show movies and television shows to students. The benefits are clear: little or no cost to either the school or the students, an ever-growing catalog of titles, and avoiding the delay of ordering and obtaining desired titles on DVD or VHS.

The ease and low cost of streaming services, however, do not necessarily translate into permissibility; faculty use of personal Netflix or similar streaming accounts in the classroom may not be legal. While certain provisions within U.S. copyright law (notably 17 U.S.C. § 110(1)) permit display of otherwise protected

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works in a not-for-profit classroom setting, the statutory exceptions, and the contracts underlying the service membership, may operate to prohibit this use of personal streaming accounts. Beyond the purely legal discussion, there are also ethical and institutional policy issues at stake.

Copyright and academia have long had a complicated relationship. Academics produce a great many works of all varieties that are or can be protected by copyright law.¹ In some instances, of course, this is not simply a coincidence; the phrase “publish or perish” comes to mind.² Moreover, the ideal educator inculcates in his or her students the creativity, insight, and analysis that form the basis of some of the best artistic and literary works, whether they be fiction, film, or computer programming.

That said, the relationship is not always a smooth one. Teachers seek out whatever materials they can in order to best convey that which they are teaching. This may begin with a textbook, but rarely will end there.³ Educators of any field, from mathematics to mechanics to law, may find useful information within images, movies, articles, sound recordings, or a variety of other works. Unfortunately, neither educators nor their students have unlimited budgets of time or money, and obtaining materials themselves, or the rights to use them, can be time consuming as well as expensive.⁴ While some institutions offer assistance in purchasing or clearing copyrighted works for use in the classroom, those resources too are limited.⁵ More critically,

¹ See 17 U.S.C.A. § 106 (West, Westlaw current through P.L. 112-207 approved 12/7/12) (listing works that can be protected under copyright law).

² See Stephen Lofthouse, *Thoughts on “Publish or Perish”*, 3 HIGHER EDUC. 59, 59 (Feb. 1974) (using the term “publish or perish” to refer to academic pressure to publish works to further one’s career, often at the expense of the work’s quality).

³ See, e.g., *Why Use Video in the Classroom?*, National Teacher Training Institute, <http://www.thirteen.org/edonline/ntti/resources/video1.html> (last visited Feb. 4, 2013) (discussing the benefits of using video in addition to written materials in the classroom).

⁴ See Melissa Kelly, *How Budget Cuts Affect Teachers* (last visited Feb. 4, 2013), *available at* http://712educators.about.com/od/issuesineducation/tp/teaching_budget_cuts.htm (noting the impact of school budget cuts on the availability of supplies and that teachers or students often have to provide materials themselves).

⁵ See *Copyright and Fair Use: A Guide for the Harvard Community*, Harvard

though, neither educators nor their administrations may know which materials are permissible, or prohibited, for use in teaching under copyright law.⁶

U.S. copyright law, in conformity to its counterparts in other countries and the United States' treaty obligations,⁷ grants broad and exclusive rights to the party holding the copyright in an artistic or literary work:

Subject to sections 107 through 122 [which provide certain exceptions, defenses and limitations], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁸

University – Office of General Counsel (last updated Nov. 3, 2009), *available at* http://www.ogc.harvard.edu/copyright_docs/copyright_and_fair_use.pdf (providing information to school community regarding how to clear copyrighted works for use in the classroom).

⁶ *See id.* (providing faculty, administration, and students with information regarding fair use that those individuals might not have otherwise known); *See, e.g.*, Technology, Education, and Copyright Harmonization Act (T.E.A.C.H. Act), S. 487, 107th Cong. 92001), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-107s487es/pdf/BILLS-107s487es.pdf> (providing guidance regarding the impact of copyright laws on online and distance learning, implying Congress' concern about academics knowledge on these issues).

⁷ *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, H.R. 4262, 100th Cong. (1988), 1161 U.N.T.S. 3, *available at*

http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf; World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997),

36 I.L.M. 65, *available at* http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf.

⁸ 17 U.S.C.A § 106 (West, Westlaw current through P.L. 112-207 approved

Many educators on all levels, up to and including law schools, operate under a dangerous misunderstanding about copyright; namely, that all uses within education are “fair use” and require neither payment nor permission.⁹ This is, sadly, not the case. Fair use is a specific statutory defense contained within federal copyright law and while the statute provides some guidance as to the types of uses that might be considered “fair,” it does not provide a bright-line test.¹⁰ As it states in relevant part:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹¹

In evaluating these factors, courts may give varying weight to them depending on the balance between the benefits achieved through the use and the harm suffered by the copyright holder.¹² The U.S. Supreme Court, in *Harper & Row Publishers, Inc. v.*

12/7/12).

⁹ *Copyright Basics: Fair Use*, Copyright Clearance Center, <http://www.copyright.com/Services/copyrightoncampus/basics/fairuse.html> (last visited Feb. 6, 2013) (having to make it clear that “not all uses in an academic context are automatically considered fair use.”).

¹⁰ See 17 U.S.C.A. § 107 (West, Westlaw current through P.L. 112-207 approved 12/7/12) (defining “fair use” but not providing a test to determine what uses fall within that definition).

¹¹ 17 U.S.C.A. § 107 (West, Westlaw current through P.L. 112-207 approved 12/7/12).

¹² See *Norse v. Henry Holt & Co.*, 847 F. Supp. 2d 142, 145–47 (N.D. Cal. 1994) (discussing the need to balance factors when making a determination regarding fair use); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736–38 (discussing the benefit of using a work and the fair use doctrine).

Nation Enterprises,¹³ demonstrates this balancing process between the grant of rights in § 106 and the fair use defense of § 107 in the context of a dispute over Time Magazine's unauthorized quotations from President Ford's as-yet-unpublished memoirs:

Though the right of first publication, like *the other rights enumerated in § 106*, is expressly made subject *to the fair use provision of § 107*, fair use analysis must always be tailored to the individual case. The nature of the interest at stake is highly relevant to whether a given use is fair. From the beginning, those entrusted with the task of revision recognized the “overbalancing reasons to preserve the common law protection of undissemminated works until the author or his successor chooses to disclose them.” The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is *inherently different from other § 106 rights* in that only one person can be the first publisher; as the contract with Time illustrates, the commercial value of the right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced “sharing” of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.¹⁴

Essentially, the only way that one can be certain that a particular use of copyrighted materials would fall under the fair use defense is either to obtain a decision from a relevant court, or to follow an existing precedent that describes exactly the use, under exactly the circumstances, as the intended one. Otherwise, the best that one can do is make an educated guess and accept the potentially serious consequences of being wrong or, in the alternative, obtain clearances for all works to be utilized in the classroom.¹⁵

The fair use defense, though, is not the only exception to copyright available to educators. As the Copyright Act has evolved, Congress has recognized the need for certain exceptions to the otherwise broad based protections afforded to creators, and

¹³ Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

¹⁴ *Id.* at 552–53 (citations omitted).

¹⁵ Beyond negotiating with each copyright owner to obtain permission, educators and their institutions may utilize services of clearinghouses such as the Copyright Clearance Center that operate as agents for multiple rights holders to grant single and blanket licenses. COPY RIGHT CLEARING CENTER, <http://www.copyright.com/content/cc3/en/toolbar/aboutUs.html> (last visited Feb. 4, 2013).

enacted those exceptions into the law.¹⁶ One such exception is contained with § 110(1), which states in relevant part:

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) 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, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made¹⁷

This exception is quite broad, at least with regard to not-for-profit educational institutions and their in-classroom use of copyrighted works; the exception thereby excludes distribution of materials for homework or even classroom use by for-profit teaching programs.¹⁸

Congress has also recognized the growth of mediated distance education, by enabling remote instructors to utilize, and in doing so transmit, copyrighted materials in their coursework under certain circumstances, although the provision is drafted to ensure that materials *marketed* for such use may not be utilized without appropriate permissions and payments:

(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed

¹⁶ S. Rep. No. 94-473 (1975).

¹⁷ 17 U.S.C.A. § 110 (West, Westlaw current through P.L. 112-207 approved 12/7/12).

¹⁸ See *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) (levying fine for \$510,000 in statutory damages, plus more than \$1 million in attorneys' fees and costs, against duplication service provider for twelve instances of copyright infringement in course packets for university classes it duplicated and sold for twenty years); *Princeton Univ. Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (upholding lower court rejection of fair use defense against copy shop that duplicated and sold course packs containing plaintiff's copyrighted works without permission).

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in the course of a live classroom session, by or in the course of a transmission, if—

(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;

(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—

(i) students officially enrolled in the course for which the transmission is made; or

(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the transmitting body or institution—

(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

(ii) in the case of digital transmissions—

(I) applies technological measures that reasonably prevent—

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination¹⁹

The exceptions contained within § 110 permit specified educators to use, among other materials, extended excerpts of or even entire movies and television programs without obtaining specific permission or risking infringement liability, even if the copyright holder specifically limits the permissible uses of its work, provided that the copy used was itself made legally.²⁰ For

¹⁹ 17 U.S.C.A. § 110(2) (West, Westlaw current through P.L. 112-207 approved 12/7/12).

²⁰ *Id.*

example, consider a “screener,” the term used for a copy of a current or recent film not yet in public distribution, which is distributed to those who are eligible to vote for awards or as a review copy.²¹ Such copies are always provided subject to specific restrictions not only on resale but permitted viewers, restrictions enabled under the exclusive rights contained within the Copyright Act.²² Assuming, however, that an authentic copy of a screener is obtained by a high school film teacher (perhaps from a friend who is an Academy Award voter), the teacher is permitted under § 110 to show the screener (a legally made copy) to her students in the classroom regardless of the restrictions on other uses.²³ Section 110, though, would not permit the same teacher to utilize a “bootleg” copy of the same film to her class; because the copy itself was not legally made, the requirements of the exception would not be met, and its exemptions would not apply.²⁴

A recent innovation in technology, though, has posed a unique question as to the applicability and interpretation of § 110: the advent of personal streaming video accounts such as those offered by Netflix,²⁵ Amazon,²⁶ and Hulu,²⁷ together with traditional cable channels such as HBO²⁸ and Showtime.²⁹ While these accounts offer different types of content and may be standalone services or benefits of a cable subscription, they share a few relevant features. First, a substantial percentage of the content the services offer their users is owned by third parties and licensed to the services for streaming.³⁰ The services are thus

²¹ See *Types of Content Theft*, MOTION PICTURE ASSOCIATION OF AMERICA, <http://www.mpa.org/contentprotection/types-of-content-theft> (last visited Feb. 6, 2013) (defining screener while discussing the illegal use thereof).

²² See *id.* (discussing screener theft); Cory Doctorow, *Studios Winning the Battle to Stop Oscar Screeners from Leaking*, BOING BOING, (Feb. 1, 2012 10:25 A.M.), <http://boingboing.net/2012/02/01/studios-winning-the-battle-to.html>.

²³ 17 U.S.C.A. §§ 106, 110 (West, Westlaw current through P.L. 112-207 approved 12/7/12).

²⁴ 17 U.S.C.A. § 110(2).

²⁵ NETFLIX, <https://signup.netflix.com/HowItWorks> (last visited Feb. 6, 2013).

²⁶ AMAZON INSTANT VIDEO, <http://www.amazon.com/Instant-Video/b?ie=UTF8&node=2858778011> (last visited Feb. 6, 2013).

²⁷ HULU, <http://www.hulu.com/> (last visited Feb. 6, 2013).

²⁸ HBO GO, <http://www.hbogo.com/> (last visited Feb. 6, 2013).

²⁹ SHOWTIME ANYTIME, <http://www.showtimeanytime.com/> (last visited Feb. 6, 2013).

³⁰ There are some exceptions to this: cable channels like Showtime and HBO produce original series and movies which are offered together on their streaming services, and even the purely online services are producing and

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bound by the license terms they receive from the content owners, and may not sublicense or display the content to their subscribers other than as may be permitted by those licenses, including any geographic restrictions.³¹ They are meant for personal rather than public use, and their contractual terms provided to (and required to be agreed upon by) their users reflect this.³² Netflix, among the most popular of such services,³³ provides a useful demonstration of these restrictions, which are explicitly included within its terms of service:

Unless otherwise specified, the Netflix service, and any content viewed through our service, are for your personal and non-commercial use only and we grant you a limited, non exclusive [sic], non transferable [sic], license to access the Netflix service for that purpose. Except for the foregoing limited license, no right, title or interest shall be transferred to you. You may not download (other than through page caching necessary for personal use, or as otherwise expressly permitted by these Terms of Use), modify, copy, distribute, transmit, display, perform, reproduce, duplicate, publish, license, create derivative works from, or offer for sale any information contained on, or obtained from or through, the Netflix service, without our express written consent. Netflix does not promote, foster or condone the copying of movies & TV Shows, digitally delivered content, or any other infringing activity. You may not circumvent, remove, alter, deactivate, degrade or thwart any of the content protections in the Netflix service. You may not frame or utilize any framing techniques to enclose any trademark, logo, or other proprietary information (including images, text, page layout, or form) of Netflix without our express written consent. You may not purchase search terms or use any meta tags or any other "hidden text" utilizing the Netflix name or trademarks without our express written consent. Any unauthorized use of the Netflix

offering proprietary content. Ian Paul, *Amazon May Join Netflix and Hulu and Produce Original TV Content, Report Says*, PCWORLD, (March 7, 2012 08:35 A.M.), http://www.pcworld.com/article/251426/amazon_may_join_netflix_and_hulu_and_produce_original_tv_content_report_says.html.

³¹ NETFLIX CONTENT GURU LOOKING FOR MORE GLOBAL CONTENT LICENSES - THE HOLLYWOOD REPORTER, <http://www.hollywoodreporter.com/news/netflix-ted-sarandos-content-licenses-365382> (last visited Aug 24, 2012).

³² See *supra* note 34 and accompanying text (providing example of contractual terms of one of these services).

³³ Mike Snider & Roger Yu, *Flood of Video Streaming Options Could Confound TV Watchers*, USA Today (April 10, 2012 02:18PM), <http://usatoday30.usatoday.com/tech/news/story/2012-04-09/streaming-video-options/54136024/1>.

service or its contents will terminate the limited license granted by us and will result in the cancellation of your membership.³⁴

Netflix further presents its users with a software license agreement to which users must agree in order to utilize the embedded player software through which the service presents its streaming video within the Web browser (or via Netflix's own applications on smartphones and tablets).³⁵ That document is even more explicit about its limitations and restrictions on use:

Netflix grants you . . . a non-exclusive, limited, personal and nontransferable license, subject to and conditioned on your compliance with the restrictions set forth in this License Agreement, to install and use the Software, in object code form only, provided to you by or on behalf of Netflix in connection with your use of the Netflix service.

. . . The license grant above includes the right to use documentation accompanying the Software for the sole purpose of using the Netflix service and the right to make one (1) backup copy of the Software, provided that (i) the Software is installed on only the number of Netflix ready devices authorized by Netflix . . . (ii) the Software may NOT be modified; (iii) all copyright notices are maintained on the Software; and (iv) you agree to be bound by all the terms of this License Agreement.

. . . The Software is only for your own personal, non-commercial use and not for use in the operation of a business or service bureau, for profit or for the benefit or any other person or entity.

. . . As a condition of the limited license for the Software granted to you in this License Agreement, except as and only to the extent expressly permitted in this License Agreement or by applicable law which cannot be waived by this License Agreement, you may NOT:

a. publish, display, disclose, rent, lease, modify, loan, distribute or create derivative works based on the Software or any part thereof . . .³⁶

From the plain language of these two documents, a Netflix subscriber may not utilize the software or service for public display of the content Netflix makes available, nor for a commercial context or a third party's benefit.³⁷ This would preclude, for example, connecting a computer to a digital

³⁴ *Terms of Use*, NETFLIX, <https://account.netflix.com/TermsOfUse> (eff. Sept. 14, 2012).

³⁵ *End User License Agreement*, NETFLIX, <https://account.netflix.com/EULA> (July 12, 2011).

³⁶ *Id.*

³⁷ *Id.*; *Terms of Use*, *supra* note 34.

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projector and showing a Netflix movie in a theater or auditorium, whether or not the venue charged admission for the show.³⁸ It also appears to prohibit such showings in other public fora, including classrooms.

The question of in-class use of Netflix (at least in a not-for-profit educational institution), though, is more complicated, because of the exception in § 110(1) discussed above. While Netflix's licensing and other contractual terms are quite clear, they apply to Netflix's own proprietary software and service.³⁹ The copyright protection for the movie or television program being transmitted by Netflix, however, stands apart from those terms; Netflix at most is granting a sublicense to its subscribers under the license to stream the videos it receives from the production companies who own them. Section 110(1), though, applies to the copyrighted work itself, and may supersede any licensing restrictions, as it does in the screener example previously discussed.⁴⁰

The key question, then, appears to be whether an educator's (arguable) breach of Netflix's contractual terms by using her personal account to show videos in her classroom has any relevance to the availability of the exception to infringement for the work itself provided by § 110(1). While other portions of § 110, notably the exceptions for performance on specific types of home entertainment equipment and in venues below a certain size,⁴¹ have been analyzed by courts⁴² and scholars,⁴³ the educational exception of § 110(1) has not.

The technology for classroom (and other) viewing and display of copyrighted audiovisual works through on-demand streamed

³⁸ See *End User License Agreement*, *supra* note 35 (stating that the user cannot "publish, display, disclose, rent, lease, modify, loan, distribute . . . works based on the Software"); See *Terms of Service*, *supra* note 34 ("Unless otherwise specified, the Netflix service, and any content viewed through our service, are for your personal and non-commercial use only").

³⁹ See *End User License Agreement*, *supra* note 35 ("This License Agreement contains details on your limited right and license to use the Software . . .").

⁴⁰ *Supra* note 21–22 and accompanying text.

⁴¹ 17 U.S.C.A. § 110(5) (West, Westlaw current through P.L. 112-207 approved 12/7/12).

⁴² See, e.g., *Edison Bros. Stores, Inc. v. Broad. Music, Inc.*, 760 F. Supp. 767 (E.D. Mo. 1991), *aff'd*, 954 F.2d 1419 (8th Cir.), *cert. denied*, 504 U.S. 930 (1992).

⁴³ David E. Shipley, *Copyright Law and Your Neighborhood Bar and Grill: Recent Developments in Performance Rights and the Section 110(5) Exemption*, 29 ARIZ. L. REV. 475 (1987).

services such as Netflix was not part of Congress' consideration in drafting § 110(1)⁴⁴, hardly surprising given that the basic exception was part of the major Copyright Act revisions enacted in 1976, long before such technology was feasible.⁴⁵ Rather, the drafters of § 110(1) were focusing on the use by teachers of recordings on physical media such as film, audio records, and their equivalents, and the concept of "lawfully made copies" was intended to exclude bootlegs or other unauthorized duplicates.⁴⁶ As the initial Senate Committee on the Judiciary report provides in its discussion of the proposed § 110(1):

Clause (1) of section 110 is generally intended to set out the conditions under which performances or displays, in the course of instructional activities other than educational broadcasting, are to be exempted from copyright control. The clause covers all types of copyrighted works, and exempts their performance or display "by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution," where the activities take place "in a classroom or similar place devoted to instruction."

... nothing in this provision is intended to sanction the unauthorized reproduction [sic] of copies or phonorecords for the purpose of classroom performance or display, and the amended clause contains a special exception dealing with performances from unlawfully made copies of motion pictures and other audiovisual works, to be discussed below.

... The final provision of clause (1) deals with the special problem of performances from unlawfully made copies of motion pictures and other audiovisual works. The exemption is lost where the copy being used for a classroom performance was "not lawfully made under this title" and the person responsible for the performance knew or had reason to suspect as much. This special exception to the exemption would not apply to performances from lawfully made copies, even if the copies were acquired from someone who had stolen or converted them, or if the performances were in violation of an agreement. However, though the performances would be exempt under section 110(a) in such cases, the copyright owner might have a cause of action against the unauthorized distributor under section 106(3) or against the person responsible

⁴⁴ See S. Rep. No. 94-473 (1975) (providing no mention of Netflix or other streaming services).

⁴⁵ See, e.g., *Company Facts*, Netflix, <https://signup.netflix.com/MediaCenter/Facts> (last visited Feb. 10, 2013) (establishing that Netflix wasn't founded until 1997).

⁴⁶ S. Rep. No. 94-473 (1975).

for the performance for breach of contract. . .⁴⁷

Note that the Senate Report states that the exception applies even “if the performances were in violation of an agreement,” and that “[a]s long as there is no transmission beyond the place where the copy is located, both section 109(b) and section 110(1) would permit the classroom display of a work by means of any sort of projection device or process.”⁴⁸ These statements could strengthen the argument that Congress intended the exception to cover situations such as the unauthorized use of a Netflix account by a teacher, even if the particular technology was not envisioned by the statute’s drafters.

A Netflix or similar streaming account, though, has a specific distinction that may well place it outside the § 110(1) exception: whether and how the copy of the work being displayed is “lawfully made.” As a functional matter, when a user streams a video (or any file) over the Internet, a temporary (or “ephemeral”) copy of the content is sent to the user’s device and stored in its memory for local access and display;⁴⁹ that copy generally is automatically deleted from the device’s memory once the streaming is stopped.⁵⁰ This can be seen by disconnecting the network connection while watching Netflix streaming video on a computer; the video will continue to run for a limited time using the portion that has been temporarily stored, or “cached,” on the computer, and will stop only after that cached portion is exhausted.⁵¹ Although the copy may be ephemeral and exist for a very short time, creating it without the copyright holder’s permission is an infringement of the holder’s exclusive rights.⁵² This is indicated by the need for and enactment of specific exceptions regarding ephemeral copies in § 112 of the Copyright

⁴⁷ S. Rep. 94-473 (1975).

⁴⁸ *Id.*

⁴⁹ See Tracy V. Wilson, *How Streaming Video and Audio Work*, HOW STUFF WORKS, <http://computer.howstuffworks.com/internet/basics/streaming-video-and-audio4.htm> (last visited Feb. 10, 2013) (explaining the process of streaming files online)

⁵⁰ *Id.*

⁵¹ Netflix utilizes Microsoft’s Silverlight technology, which includes storage functionality, to stream its content to the desktop. *Application Storage*, MICROSOFT, <http://www.microsoft.com/getsilverlight/resources/documentation/AppStorage.aspx> (last visited Feb. 10, 2013).

⁵² 17 U.S.C.A. § 112 (West, Westlaw current through P.L. 112-207 approved 12/7/12).

Act, including for certain educational uses.⁵³

What is notable is that the right to make ephemeral copies under § 112 is granted to parties legally entitled to *transmit* copyrighted work, where the ephemeral copy may be necessary to enable the authorized transmission; for example, the educational exception in § 112(f) refers to § 110(b), covering distance education, rather than the § 110(a) classroom right:

Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if—

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).⁵⁴

Under what authority, then, does a Netflix subscriber, whether an educator or otherwise, make the temporary local copy of the copyrighted movie or television show being displayed in the application? The permission, granted as a pass through sublicense by Netflix from the copyright holders from which it obtains the content for streaming, is contained within the terms of use cited above, in which the user's right to download content is restricted to "page caching necessary for personal use, or as otherwise expressly permitted by the[] Terms of Use" there are no other express permissions within the Terms of Use.⁵⁵

What makes the Netflix streaming account different from other sources of video for the classroom, including Netflix's own DVD-by-mail service (now only available as an add-on to a streaming membership),⁵⁶ is when, and by whom, the copy used by the

⁵³ 17 U.S.C.A. § 112(b), (f) (West, Westlaw current through P.L. 112-207 approved 12/7/12).

⁵⁴ 17 U.S.C.A. § 112(a)(1) (West, Westlaw current through P.L. 112-207 approved 12/7/12).

⁵⁵ See *Terms of Use*, *supra* note 34.

⁵⁶ *How Netflix Works*, NETFLIX, <https://signup.netflix.com/MediaCenter/HowNetflixWorks> (last visited Feb. 10,

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educator is made. In the case of a streaming Netflix video, the copy is made in the classroom by the educator as the Netflix account holder in the context of public utilization of the streaming account for the benefit of students and the institution. Since any copy, even an ephemeral one, made other than for “personal use” is outside the grant of rights under the Terms of Use, the user may be violating both copyright and applicable contract law by creating the classroom copy, which would therefore not be “lawfully made.” As the classroom exception in § 110(a) requires the use of a lawfully made copy, the exception would be inapplicable, and absent another exception or defense (such as fair use, which as discussed above is a much more complicated and risky approach even in education), the instructor would be violating the Copyright Act by showing the Netflix-streamed video in class.⁵⁷

Even if educators themselves may not be concerned about the legality of using their personal accounts, their employers may take a different view. Not only should educational institutions, especially law schools, serve as examples for ethical (and legal) behavior, but there is a more pragmatic concern as well. Unlike unauthorized photocopying or pirating of copyrighted works on discs or tapes, which may go undetected until and unless someone reports the infringement to the works’ owners, all accesses of Netflix and similar online services are associated with the Internet Protocol (“IP”) numerical address of the computer or network from which the access request comes, and can be matched to the physical location of the network using publicly available tools or databases.⁵⁸ If Netflix, for example, analyzes its access logs and discovers that a large number of law-related movies are being streamed to an IP address belonging to a law school during typical school hours, it (and its studio licensors) may take action for infringement and license breach not only against the account holders but the institution for whose benefit they teach, just as universities were sued (along with Napster) by the heavy metal band Metallica for enabling infringement by students of the band’s music via the schools’ Internet

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⁵⁷ 17 U.S.C.A. § 110 (West, Westlaw current through P.L. 112-207 approved 12/7/12).

⁵⁸ IP-LOOKUP, <http://ip-lookup.net/> (last visited Feb. 10, 2013); WHOIS-RWS, <http://whois.arin.net/ui/advanced.jsp> (last visited Feb. 10, 2013).

connectivity.⁵⁹

If a teacher may not legally use a Netflix streaming account to show relevant content to students, what are the permissible alternatives? The obvious one is to utilize a legally copied DVD or videotape, although as schools move away from traditional audiovisual equipment to computers and interactive displays, it may be more difficult (and costly) to do so. This also assumes that the desired content is available on physical media, and that even if it is, the educator has the time (and budget) to obtain it from the source—often, librarians can be of great assistance via interlibrary loans and other methods.⁶⁰ Educators and schools may also wish to investigate streaming video services to see if any currently permit use in the classroom, either through personal accounts or personal or institutional education-use options, and to request that the services without education accounts establish them as choices.

Until education accounts are offered, though, teachers should be wary of using their own personal accounts, particularly those with restrictions such as those placed by Netflix on its users, to show movies and other video content (particularly extended excerpts or the complete work, for which the fair use defense, never a certainty, becomes much more unlikely to be usable). Beyond the potential legal risk to themselves and their schools, the educators also risk having their accounts permanently cancelled by the service (an explicit possibility in typical licenses) if the unauthorized use is detected. Cancellation would not only eliminate the teachers' use of the service in the classroom, but for their personal entertainment at home and while mobile, a truly devastating loss.

⁵⁹ John Borlad, *Napster, Universities Sued by Napster*, CNET News (Apr. 13, 2000 05:35 PM), <http://news.cnet.com/2100-1023-239263.html>.

⁶⁰ *See ILLiad*, OCLC, <http://www.oclc.org/illiad/> (last visited Feb. 10, 2013) (providing an example of an interlibrary loan service).