

Space and Time-Shifting:  
the state of fair use of a-v streaming in  
today's university

UCLA vs. AIME

Julia Kim

Digital Preservation 2010



# Copyright Law (as it applies to AIME-UCLA)

- Intent of copyright law:  
to Balance: authors and the good of society  
: commerce and non-profit  
(education, government)

Primarily “so that the world may not be deprived of improvements, nor the progress of the arts be retarded.” only secondarily, “reward/incentivize labor of authors.

# Copyright law: ambiguous, complex, torturous, incomplete, a...big mess

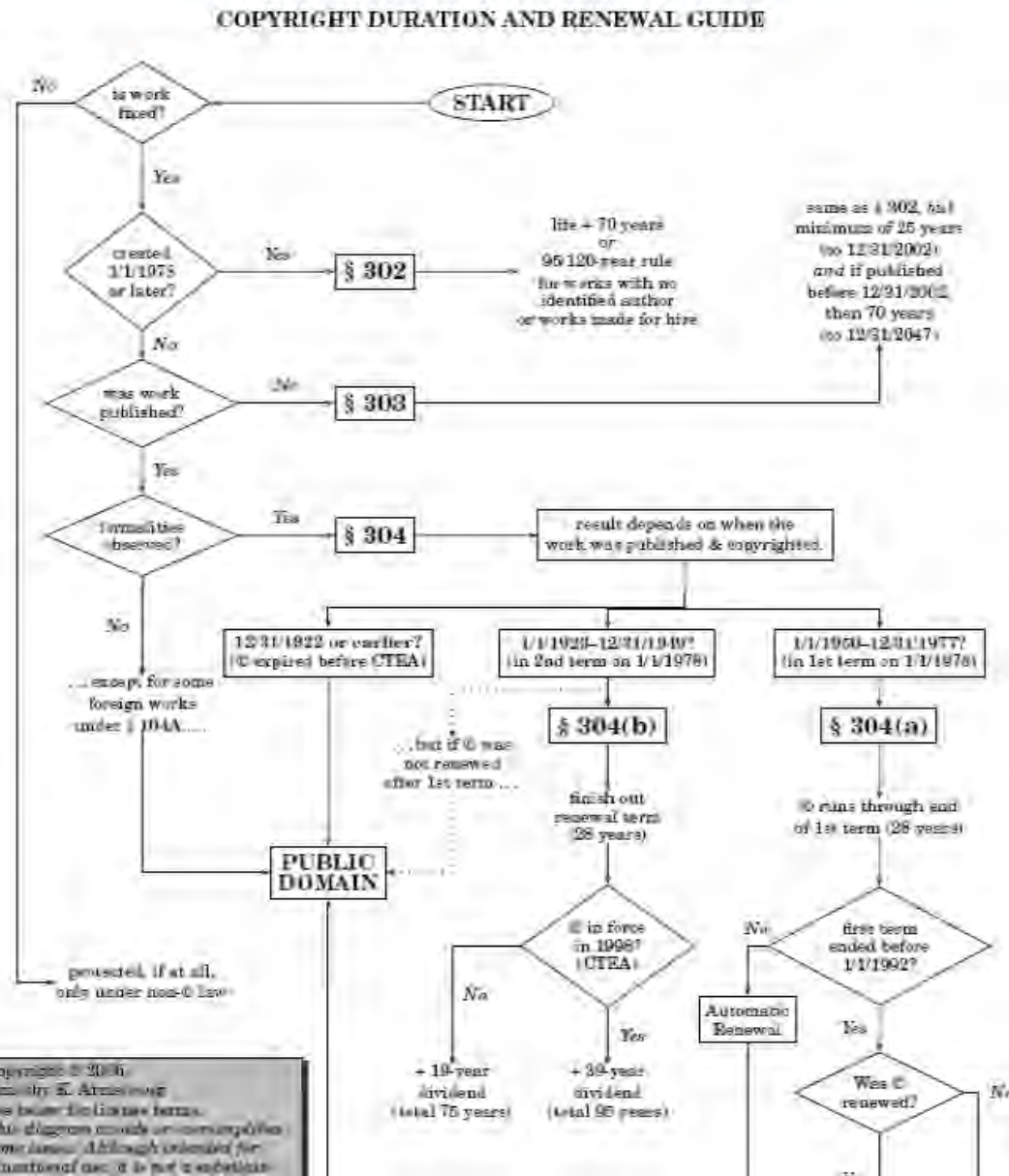
- Bypassing technological controls, (110) is a violation of copyright...regardless of whether the purpose falls under Fair Use



# Copyright Law:

- 1870
- 1909
- 1976: photocopier wreak havoc  
basically codified the fair use criteria  
(developed...1800s by Justice Story in  
Folsom v. Marsh)

# It's actually really annoying...



## Fair Use (1976) :

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

\*\*\*\*\*Guidelines to be balanced. Do not all need to be fulfilled. ("factors to be considered shall include..." (memphis review" ...however courts

"No real definition of the concept emerged" (Raffetto)

Can contradict.

Congress states that one of its major goals' with Fair use was "greater certainty and protection for teachers."

# So...Actually

- No real consistency.
- Fair-use is a toss-up.
  - Decided on a case-by-case basis
  - Ambiguous guidelines negotiated in stakeholder meetings...
  - Fair use sometimes is referred to as an “equitable rule of reason.” Since fair use was first recognized in 1841, courts have deferred to custom and practice within use communities where there was clear evidence of it. Various information industries (trade publishing and broadcasting, for example) have noted this fact and created their own internal “standards and practices” for fair use (<http://www.centerforsocialmedia.org/ocw>)
  - Ambiguous updates to copyright do not clarify  
What constitutes fair use with technological shifts

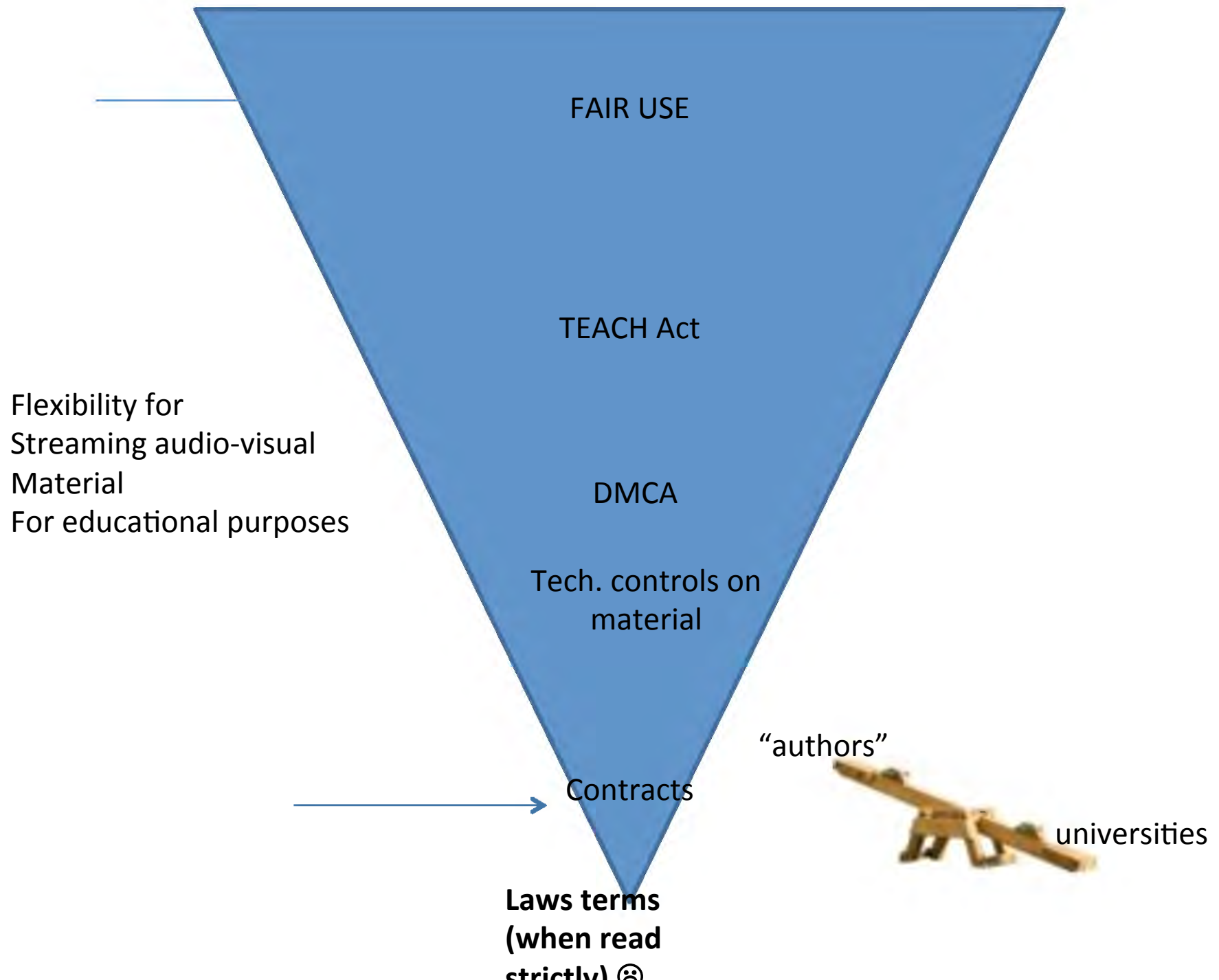


# Other Legal defenses to streaming for school:

- Copyright Section 110(1):  
exceptions for classroom uses (“face-to-face”)
- In 1998”
  - Digital Millennium Copyright Act (**DMCA**)
- Additional classroom exemption...
- In 2002, 110 updated:
  - Technology, Education, and Copyright harmonization Act (**TEACH act**).
    - 22 prerequisites** (ex: only for accredited nonprofit educational institutions)
  - Anti-circumvention clause (also prohibits 3<sup>rd</sup> parties “authors” from aiding in circumvention –ex: creating software to)
    - Given prevalence of DRM controls-
      - » No balance



universitie



- Practices:

- vary from university to university
- across different subject disciplines
- according to ...each faculty member, even

Guidelines, or “treaty,” created by publishers and academic communities, recognized by judges even though not part of Copyright law

**Basic TEACH Checklist: For Institutional Users**  
**Faculty, Staff, and Students**

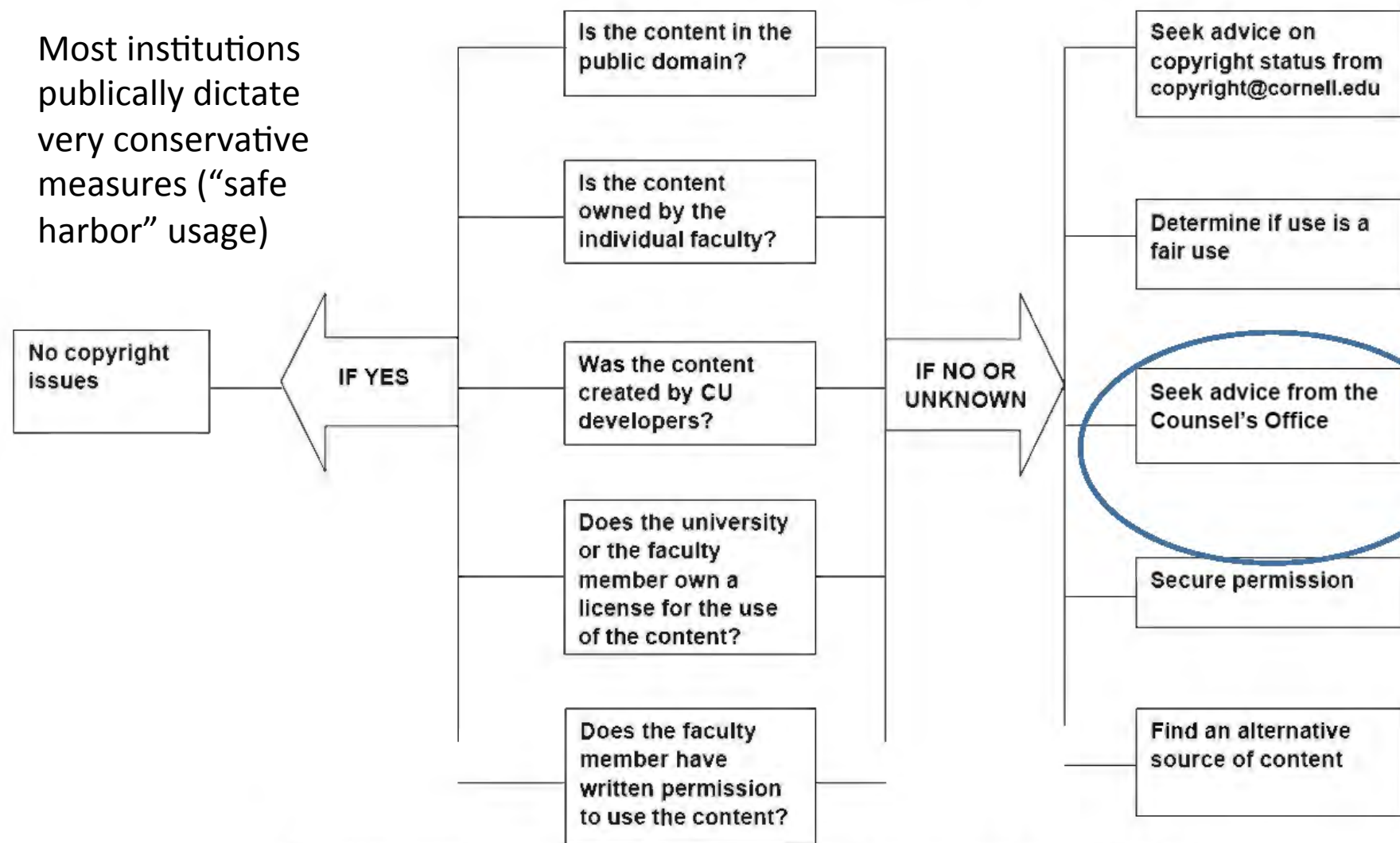
<i>Requirement</i>	<i>Complies</i>
1. <u>Accredited</u> nonprofit educational institution	<input type="checkbox"/>
2. Institutional <u>copyright use policy</u>	<input type="checkbox"/>
3. <u>Educational materials</u> on copyright available	<input type="checkbox"/>
4. Work is not a <u>digital educational work</u>	<input type="checkbox"/>
5. Work is <u>lawfully</u> made and acquired	<input type="checkbox"/>
6. Work is integral to <u>class session</u>	<input type="checkbox"/>
7. Work is part of <u>systematic mediated instructional activities</u>	<input type="checkbox"/>
8. Work is directly related/material assistance to teaching	<input type="checkbox"/>
9. Work is (check one):	
<u>Nondramatic literary work</u> (may use all)	<input type="checkbox"/>
<u>Nondramatic musical work</u> (may use all)	<input type="checkbox"/>
<u>Reasonable and limited portion</u> of any other work (for a performance) <i>or</i>	<input type="checkbox"/>
<u>Display</u> of any work in amount analogous to live classroom setting	<input type="checkbox"/>
10. Reception limited to students enrolled in course	<input type="checkbox"/>
11. Reasonable downstream controls instituted	
No retention of work longer than class session	<input type="checkbox"/>
No dissemination beyond recipient	<input type="checkbox"/>
12. For conversions of analog to digital	
No digital version available to institution	<input type="checkbox"/>
Digital version available is technologically protected	<input type="checkbox"/>
13. <u>Warning notice</u> to students present on work	<input type="checkbox"/>

Guidelines vary from Universities.

-Most rely on 4 factors...

-Most are stricter or very ambiguous

## Cornell Copyright Decision Tree



While copyright investigation, clearance, and support services are available, final judgment rests with each individual.

Revised October 2003, (originally developed by Academic Technology Center)

**Copyright Checklist: Compliance with the TEACH Act**

Copyright Advisory Office  
Columbia University Libraries  
Kenneth D. Crews, Director  
<http://copyright.columbia.edu>

*Please complete and retain a copy of this form in connection with each copyrighted work considered for your distance education course.*

Name: _____
Institution: _____
Project: _____
Date: _____
Prepared by: _____

The "Technology, Education, and Copyright Harmonization Act," better known as the "TEACH Act," is designed to provide educators more opportunity for the use of copyrighted works in distance education programs while still offering adequate copyright protection to those works. In order to qualify for these further possibilities, educators must meet several requirements. As the responsibilities of the TEACH Act will most likely fall upon different entities within any one educational institution, this checklist should be used as an aid to organize and ensure compliance with the TEACH Act for each copyrighted work. Remember, all requirements must be satisfied in order not to violate the law. For a more detailed explanation of any one requirement, click the "Explanatory Note" following each item. The principal text of the TEACH Act is enacted as Section 110(2) of the U.S. Copyright Act (available at: <http://www.copyright.gov/title17/>).

Keep in mind that if your project does not fit within the conditions of the TEACH Act, you have choices. Your use may be within "fair use" or another copyright exception, or you may secure permission from the copyright owner.

## Streaming

If you wish to make video and audio excerpts available within your course LMS, you may want to make the clips available for streaming. A media file that is streamed from a server is not downloaded; only streaming data is sent to the user. Media clips are not retained by the user. Streaming video and audio excerpts within your course LMS is usually considered fair use. As a general matter, streaming copyright restricted media can be posted for class use for only one semester. Please see [the Digital Studio132](http://library.nyu.edu/help/faq.html?category=COPYRIGHT) for information on creating streaming media and requesting an appointment.

<http://library.nyu.edu/help/faq.html?category=COPYRIGHT>

- The NYU Office of Legal Counsel  
The NYU Office of Legal Counsel is the place to turn if you have complicated questions regarding fair use, are a faculty member or administrator seeking permission to use a copyrighted work or if a copyright holder has challenged your use of their material. **The Office of Legal Counsel is located at 70 Washington Square South, Room 1148. Phone 212.998.2240.**

(Right now the only copyright policy NYU has in place was adopted in 1983 so ... we have some catching up to do.)





# AIME vs. UCLA

- Fall 2009, UCLA contacts
- Winter 2010: press releases. Negotiations
  - UCLA, in “good-faith” suspends streaming of videos (Jan-March)
  - March 2010: resumes streaming.
  - Releases argument for Fair Use

- **UCLA faculty principles on the use of streaming videos**
- University instruction has long ceased to be bounded by the four walls of a physical classroom. Students and instructors interact with each other, and with learning resources, on a 24/7 basis. **The virtual classroom is the UCLA classroom of today for UCLA.**
- UCLA is a leader, but is by no means alone in embracing the virtual classroom. The pedagogical opportunities made possible by Internet technologies, distributed access, and new forms of course content are now **critical components of higher education.**
- **Streaming video is an essential type of content for instruction.** It must be available in the virtual classroom, along with other types of educational content that are appropriate to the pedagogy of the course.
- UCLA use of streaming technologies, whether for video, audio, or other types of media, serves the purpose of time-shifting for students and faculty alike. Time-shifting has significant educational benefits. Students can study and interact with their educational course materials at times that best suit their learning styles.
- If it would be lawful for a teacher to show a particular piece of multimedia to students enrolled in a class that meets in a physical classroom, it should be fair use to permit the viewing or hearing of that multimedia, through time-shifting technologies, in a **virtual classroom that restricts access to those same enrolled students.**
- UCLA ***must maximally assert its rights to use intellectual property within the bounds of existing copyright laws.***
- Pedagogical concerns should determine what content, and what portion of any given work, should be required viewing, listening, or reading by students. **Faculty may be asked to specify the pedagogical reasons for requiring students to use (watch, listen, read) any given work.**
- We will work in concert with other UC campuses and other universities to protect rights for the educational use of materials.
- The temporary prohibition on use of the OID streaming video service has caused substantial hardship to our educational mission:

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**“one of the most effective teaching resources on the UCLA campus.”**

### Higher Education

Video Furnace provides a long list of higher-education customers with scalable, integrated IP video delivery for learning and entertainment. The company's extensive experience in this market includes:

- Live, pre-scheduled and video on demand programming delivered to the computer over wired and wireless networks
- Commercial video distribution to the computer (replacing traditional cable TV)
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- Video on demand libraries
- Cross-platform curricular instruction support
- High-quality distance learning

### Government / Public Sector

Video Furnace provides government agencies and public sector entities with secure, standards-based interoperable IP video solutions. While many of the ways in which this sector uses Video Furnace are classified – especially with our military customers – here is a representative sample to spark your imagination:

- Commercial video distribution to the desktop
- Video news to the desktop
- Homeland security
- Testing support
- Mission support
- Remote training
- Video distribution via the Global Information



# A.I.M.E.

## Association For Information Media and Equipment

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### Welcome to AIME

The **Association for Informational Media and Equipment** is a non-profit membership organization offering copyright information and support to teachers, librarians, media center directors, producers and distributors of informational film, video, interactive technologies, computer software and equipment. AIME serves as your organization's copyright resource.



The mission of AIME (pronounced "aim") is to promote fair and appropriate use of the media and equipment delivering information in a rapidly changing world.

#### Institutional and Corporate Membership Benefits include:

- Subscription to our quarterly newsletter, AIME News;
- Answers to your copyright questions by legal counsel to AIME;
- The opportunity to network with members who produce, distribute and utilize media products in educational settings;
- Access to membership listing;
- Access to the Copyright Information Packet.

[AIME Membership Benefits...](#)[Join AIME Today...](#)

A.I.M.E.  
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Cedar Rapids, IA 52409-9844  
Ph: 319-654-0608  
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is available only to current members. If you have an active AIME membership and would like to view the entire member listing (including both Corporate and Institutional members) – please login to the [AIME member area](#) [1].

## Corporate Member Directory

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<b>Ambrose Video Publishing</b> 145 West 45th St. Suite 1115 New York, NY 10036	Ph: 212 768-7373 Fax: 212 768-9282 <a href="http://www.ambrosevideo.com">www.ambrosevideo.com</a> [1]
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<b>BioMEDIA ASSOCIATES</b> PO Box 1234 Beaufort, SC 29902	Ph: 843 470 0236 Fax: 843 470 0237 <a href="http://www.eBioMEDIA.com">www.eBioMEDIA.com</a> [15]
<b>Bullfrog Films, Inc.</b> 372 Dautrich Road Reading, PA 19606	Ph: 610 779-8226 Fax: 610 370-1978 <a href="http://www.bullfrogfilms.com">www.bullfrogfilms.com</a> [18]
<b>Direct Cinema Ltd., Inc.</b> PO Box 10003 Santa Monica, CA 90410	Ph: 310 636 8200 Fax: 310 636 8228 <a href="http://www.directcinemalimited.co">www.directcinemalimited.co</a>
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<b>INSIGHT MEDIA</b> 2162 Broadway, 2nd Floor New York, NY 10024	Ph: 212 721 6316x10 Fax: 212 799 5309 <a href="http://www.INSIGHT-MEDIA.com">www.INSIGHT-MEDIA.com</a> [1]
<b>Landmark Media, Inc.</b> 3450 Slade Run Dr. Falls Church, VA 22042	Ph: 703 241 2030 Fax: 703 536 9540 <a href="http://www.landmarkmedia.com">www.landmarkmedia.com</a> [2]
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<b>Lucerne Media</b> 37 Ground Pine Rd. Morris Plains, NJ 07950	Ph: 973 538 1401 Fax: 973 538 0855 <a href="http://www.lucernemedia.com">www.lucernemedia.com</a> [22]
<b>New Day Films</b> 12 Overcliff St. Yonkers, NY 10705	Ph: 914 377 1924 Fax: 914 377 1924 <a href="http://www.newday.com">www.newday.com</a> [23]

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**\*\*Disputed as to whether this Service was readily available when inquiries were initially made In Fall 2009.\*\***



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## UCLA Video Streaming Damned, Dammed

Created by Steven Worone (EDUCAUSE) on January 30, 2010

Updated Feb. 10

On Tuesday, January 26, Inside Higher Education reported that UCLA was "Hitting Pause on Class Videos". Under threat of a lawsuit from AIME, the Association for Information and Media Equipment, reporter Steve Kilowich said that UCLA would "stop



# MARCH 2010

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eo-after-legal-disp

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### Campus to restart streaming of instructional video content

By Phil Hampton | March 02, 2010

UCLA is taking steps to restore the streaming of previously purchased behind password-protected course websites, a practice the campus has followed for various provisions in the federal Copyright Act.

Campus officials temporarily suspended the practice in January as a while UCLA attempted to resolve a copyright claim with a trade association reviewing options and implications, UCLA has notified the Association for Information and Media Equipment (AIME) that it intends to restore the service.

"Course instruction long ago ceased to be bound by the walls of the classroom and is obligated to provide students with appropriate instructional content in order to foster an effective learning environment," said Jim Davis, UCLA vice

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### UCLA Will Resume Streaming Video After Legal Dispute

March 3, 2010, 4:30 pm

By Jill Laster [43]

The University of California at Los Angeles has restored its streaming video service about two months after temporarily suspending the service amid complaints from an educational-media trade group.

The Association for Information and Media Equipment told UCLA in the fall [44] that the university had violated copyright laws by letting instructors use the videos, some of which were full-length productions. UCLA decided that beginning this semester it would suspend the password-protected video-streaming service, available only to students in specific classes.

UCLA announced Wednesday [45] that it will restart streaming of instructional content. The university hopes material will be back up by the spring quarter, which begins May 24. J. Ann Plum, senior campus counsel for UCLA, says the university wants to tell

“NO COMMENT”

DECEMBER 7, 2010

Betty Garsegner Ehinger, Executive Director  
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**PRESS RELEASE:** Educational Video Publishers Sue UCLA for Copyright Infringement

Dateline: Los Angeles, CA December 7, 2010

A national trade association of educational video publishers, A.I.M.E., and one of its leading members, Ambrose Video Publishing, today filed a copyright infringement and breach of contract case against The Regents of the University of California and the Chancellor of UCLA.

The educational publishers charge that UCLA has illegally streamed Ambrose's copy-protected DVDs hundreds of times to students and faculty, both on and off campus, using a technology system called Video Furnace. UCLA, which openly acknowledges the practice, defends online streaming of Ambrose DVDs and thousands of other film titles, as "exempt" from copyright liability and a "fair use" of copyrighted works.

Despite those assertions, the copyright law clearly limits the way in which universities like UCLA can exploit copyrighted content. "When UCLA's media library licenses Ambrose videos or secures educational videos from other A.I.M.E. members, the school obtains the right to loan those copies to teachers for in-class performances, or show them within the library itself. However, it does not secure the right to stream our programs from a library server to any class and any student whenever it chooses," explained A.I.M.E. President and Ambrose VP Allen Dohra. Ambrose already offers schools a low-priced streaming option for hundreds of educational programs (called AMBROSIE 2.0) and fears that UCLA's behavior spells catastrophe for the entire educational video market, which increasingly will turn to streaming video options.

- In order to incorporate this material, OCW makers must decide whether to rely on a license (whether open or restricted) or to employ fair use if relevant licensing terms do not prevent it. If these options are not available, they may decide to replace, delete, or obscure the material.
- Until now, it has been difficult for OCW makers and their institutions to be confident in employing fair use, because there is no direct legal precedent clarifying the applicability of fair use to the practice. This has resulted in expending time and resources licensing material that does not need to be licensed, or alternatively, in weakening the educational quality of OCW by the precautionary removal of third-party copyrighted material.
- <http://www.centerforsocialmedia.org/ocw>

Posted  
December  
11<sup>th</sup>!

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ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASSOCIATION FOR INFORMATION  
MEDIA AND EQUIPMENT, an Illinois  
nonprofit membership organization; and  
AMBROSE VIDEO PUBLISHING, INC., a  
New York corporation,

Plaintiffs,  
New York corporation,

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, a California corporation;  
DR. GENE BLOCK, CHANCELLOR OF  
THE UNIVERSITY OF CALIFORNIA,  
LOS ANGELES, an individual,

Case No.: CV10-09378 CBM (MANx)

COMPLAINT FOR:

- (1) Breach of Written Contract;
- (2) Copyright Infringement;
- (3) Violation of 17 U.S.C. § 1201;
- (1) Breach of Written Contract;
- (2) Copyright Infringement;
- (3) Violation of 17 U.S.C. § 1201;
- (4) Breach of Covenants of Good  
Faith and Fair Dealing;
- (5) Unjust Enrichment; and
- (6) Torts Interference with  
Business Relationships

DEMAND FOR JURY TRIAL

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- transmissions” fall under different rules than doing something like posting an article or link. To make matters a bit more complicated, there are two categories of “transmissions:” those that are done under the TEACH Act (i.e. by institutions that are TEACH Act compliant) and those that are done without the benefit of the TEACH Act (and therefore must rely on other rules of law such as fair use). UCLA is relying on fair use.

# Fair Use

: "reasonable minds can disagree"

- Is it a right? According to educators-yes!
  - Related to First Amendment rights: an exercise of freedom of expression
- A defense of last defense?

<http://www.utsystem.edu/OGC/IntellectualProperty/copypol2.htm#test>

Most people think that the fair use test is difficult. Actually, it's not so much difficult as it is uncertain - susceptible to multiple interpretations. Two people can review the same facts about a proposed use and come to different conclusions about its fairness. That's because one must make many judgments in the course of weighing and balancing the facts.

- A protection for commercial innovators/  
distributors/copyright holders

- This factor asks, "If the use were widespread, would the copyright owner be losing money?" Well, actually, it asks, "If the use were widespread, ***and the use were not fair***, would the copyright owner be losing money?" After all, if the use were fair, the copyright owner would not be entitled to any money at all, so he couldn't "lose" what he never would have had to begin with.

<http://www.utsystem.edu/OGC/IntellectualProperty/copypol2.htm#test>



# Some fair use cases:

- **Not a fair use.** A nonprofit foundation presented a program called "Classic Arts Showcase," for broadcast principally to public television and cable channels. The foundation used an 85 second portion (of a five-minute performance) by an opera singer from a two-hour movie, "Carnegie Hall." **Important factors:** Although the court considered the use to be educational, noncommercial and to consist of an extremely small portion of the work, those factors were outweighed by the potential **loss of licensing revenue.** The copyright owners had previously licensed portions of the work for broadcast and the court determined that the foundation's use affected the potential market. (*Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Found.*, 2005 U.S. Dist. LEXIS 26302 (S.D. N.Y. 2005).)
- **Not a fair use.** A television news program copied one minute and 15 seconds from a 72-minute Charlie Chaplin film and used it in a news report about Chaplin's death. **Important factors:** The court felt that the portions taken were substantial and part of the "heart" of the film. (*Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095, 1100 (2d Cir. 1982).)
- **Fair use.** The makers of a movie biography of Muhammad Ali used 41 seconds from a boxing match film in their biography. **Important factors:** A small portion of film was taken and the purpose was informational. (*Monster Communications, Inc. v. Turner Broadcasting Sys. Inc.*, 935 F. Supp. 490 (S.D. N.Y. 1996).)
- **Fair use.** In a lawsuit commonly known as the Betamax case, the Supreme Court determined that the home videotaping of a television broadcast was a fair use. This was one of the few occasions when copying a complete work (for example, a complete episode of the "Kojak" television show) was accepted as a fair use. Evidence indicated that most viewers were "time-shifting" (taping in order to watch later) and not "library-building" (collecting the videos in order to build a video library). **Important factors:** The Supreme Court reasoned that the "delayed" system of viewing did not deprive the copyright owners of revenue. (*Universal City Studios v. Sony Corp.*, 464 U.S. 417 (1984).)
- [http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter9/9-c.html#2](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-c.html#2)

- 2) courts seem increasingly willing to let **the fourth factor of the fair use analysis trump all the other factors so that where there is a market** for permissions, "fair use is negated." This was the position articulated by the majority in the recent [MDS117](#) decision.
- Under this strictly economic analysis, in those circumstances where a ready market for permissions exists, such as permission for coursepacks, fair use shrinks - perhaps in time as well as in other dimensions. But the opposite is true, too. Where the permissions market is dysfunctional, fair use expands, both in the amount one may use and in time. For more information about this, see [Advanced Topics in Copyright Law118](#), the third section addressing issues in a College of Fine Arts.
- <http://www.utsystem.edu/OGC/IntellectualProperty/copypol2.htm#test>