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Tina M. Adams

Claudia C. Holland

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Tina M. Adams[1]
tmadams@email.wcu.edu
Electronic Resources Librarian
Western Carolina University Library

Claudia C. Holland[2]
cholland@library.msstate.edu
Scholarly Communication Coordinator
Mississippi State University Libraries

Abstract

As VCRs and DVD players are decommissioned on academic campuses, online course offerings increase, and flipped pedagogy becomes ubiquitous, academic librarians are frequently confronted with requests from instructors for streaming media. The authors describe their experience at George Mason University, where they developed and implemented a policy and best practices to manage streaming media requests for a large public university library system. This policy is largely guided by the principles set forth in the U.S. Copyright Act's fair use doctrine (17 U.S.C. §107) and Association of Research Libraries (ARL)'s *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012), with additional reliance on the Technology, Education and Copyright Harmonization (TEACH) Act (17 U.S.C. §110(2)). The policy also includes a workflow for delivering streaming, Americans with Disabilities Act (ADA)-compliant video content that cannot be licensed via conventional library means. Moreover, the comparative costs of purchasing subscription video collections versus licensing individual streaming videos at George Mason University are provided for the fiscal years 2013 through 2016.

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1. Tina Adams was formerly the Distance Education Librarian at George Mason University.
2. Claudia Holland was formerly Head of the Scholarly Communications and Copyright Office at George Mason University.

The Academic Need for Streaming Media

In recent years, advances in technology have enabled video to become pervasive in both entertainment and educational settings. In higher education, instructors who adopt multimodal models of teaching rely heavily on streaming media content (Sorensen, 2016, p.782).[3] Because streaming content requires greater investment by academic libraries in resources beyond journals and books, librarians have allocated an increased proportion of collections funds to acquire digital media content. As a result, large vendor-hosted streaming collections are now more prevalent than ever and account for a larger share of library collection budgets.

In 2010, Vallier posited that physical media collections would eventually be replaced by "batteries of subscriptions" (p. 378), with more students opting to pay for on-demand subscription video in lieu of using their library's media collections. In addition to changing student practices, academic libraries have increasingly replaced physical media with subscription-based digital content.

In the early 2000s, vendors began offering libraries a plethora of digital video packages and individual titles to purchase or lease. Their platforms incorporated convenient features like transcripts, playlists, clipping tools, and online integration with course management systems. Academic libraries were enticed by these course-friendly features, and those that could afford to began accumulating digital media subscriptions. Cross (2016) refers to this shift away from purchased physical items toward licensed content as the first major crack "in the foundation of copyright law that protects libraries' ability to serve society" (p. 5). He further posits that, given a lack of a physical item in hand, fair use and other legal exceptions in copyright law are "diluted or complete[ly] washed away" (Cross 2016, p. 6).

A survey of media acquisition practices in academic libraries conducted by Farrelly and Hutchison in 2014 illustrates this shift. They reported that seventy percent of the 336 libraries surveyed were buying streaming video collections for their campuses, as were 92 percent of the ARL surveyed (p. 73). The institutions surveyed spent an average of $21,381 on

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3.   "Streaming media refers to all multimedia streaming content on the Internet… delivered by the host… that is continuously downloaded by, and immediately shown to the user. An application plays the data that is presented by the host before the file is entirely downloaded. Streaming media may refer not only to the most common examples, such as video and audio, but also to other live media, such as stock exchange data, closed captioning, and Twitter feeds…" (Bannier, 2014, p.1211). For the purposes of this article, only streamed video files are addressed.

subscription streaming video purchases and about $4,980 on individual streaming titles (p. 74).

The growth of streaming video adoption by academic libraries corresponded with the publication of professional media staff recommendations in the Association of College and Research Libraries (ACRL)'s "Guidelines for Media Resources in Academic Libraries". "A comprehensive understanding of copyright law, fair-use, the TEACH Act, and recent developments regarding copyright and circumvention technology (17 U.S.C. §1201) is essential for providing library patrons with guidance in the use of media resources" (ACRL Guidelines for Media Resources in Academic Libraries Task Force, 2012, p. 617). In practice, however, an academic library may not have a media librarian or staff member with experience interpreting copyright and fair use for media. Consequently, vendor-hosted media packages were and are attractive to institutions because locating, licensing, purchasing, and delivering streaming media are rolled into a single service. The burden of copyright compliance and staff time required to select, acquire, and deliver media is shifted to the vendor.

Newer models, such as patron-driven acquisition (PDA) offered by vendors like Kanopy, mimic ebook purchasing options to which many academic librarians have become accustomed. These models help academic librarians make better budget choices and spend money on titles that *are* used instead of packages of titles that *might be* used.

Commercially Unavailable Streaming Media

The ACRL's "Guidelines for Media Resources in Academic Libraries" states, "[L]ibraries must plan for format adoption and service adaptions to meet new instructional and informational needs" (ACRL, 2012, p. 614). New fields of study require access to video titles that may be unavailable to purchase or license in streaming format. Current literature lacks examples of active academic library policies or best practices to follow when searching for and acquiring "obscure feature films that have become standard throughout academia . . . that are *de rigueur* in film and media studies classes" but "tricky for libraries to reliably obtain" (King, 2014, p. 302).

Locating popular titles may be problematic because most vendors offering academic streaming titles focus on classic feature films and independent films, not major studio films (McGeary, 2015, p. 313). "While some may balk at the necessity of adding popular films and television series to academic collections, the reality is that these popular culture texts are increasingly the focus of academic study" (McGeary, 2015, p. 314). That is, there is an industry lag between print-based studies and the availability

of media (whether DVD or streaming) to support textual sources instructors are using in their courses. Further evidence of the difficulty in finding content is provided by Duncan and Peterson (2014) who report, ". . . a serious hurdle to a library's efforts to move toward a streaming collection is that major studios are not in the business of licensing streaming rights for their titles to academic markets" (p. 3).

With the exception of expensive leasing services like Swank Motion Pictures, Inc.˚, academic libraries have few options for providing feature films to their communities. Some drawbacks of a service like Swank's are the per-title cost for access and short lease periods. Librarians must weigh the benefit of purchasing a license to a single streaming title against the staff time required to incorporate a record for that title into the library catalog and subsequently remove it when the license expires.

Hesitance to reformat legally acquired physical video collections that cannot be purchased or licensed to stream by academic libraries usually stems from misinterpretation of the U.S. Copyright Act. Cross (2016) underscores concerns about litigation with this observation.

> Since librarians cannot rely on a license that anticipates library usage or engage in arms-length negotiation, they must rely on institutional experimentation and risk-assessment, but 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)

Respondents to Farrelly and Hutchison's academic library survey revealed that 58 percent would not digitize their physical media collections for the purpose of delivering streaming media (2014, p. 74). Forty percent said they would digitize, but only after securing permission from the licensed distributor. Only 33 percent chose to proceed with digitization after conducting a fair use (17 U.S.C. §107) evaluation with favorable results. Moreover, they found that libraries digitizing upon request are more likely to have a written streaming media policy, with 39 percent reporting a policy as opposed to 10 percent with none.

Despite Farrelly and Hutchison's report that 39 percent of libraries digitizing content on demand had written policy statements (2014, p. 74), when the authors of this paper took steps to develop their library's guidelines in 2012, these policies were not readily available. In fact, the authors were able to acquire only a limited amount of information, gleaned through queries on relevant email listservs and in consultation with colleagues at nearby universities who were willing to discuss digitizing under fair use "off the record."

The implication is that many academic libraries having a written policy describing their digitization practices are unwilling to make it public. This dearth of policies suggests a pervasive reluctance to make the physical media that institutions have spent thousands of dollars acquiring available to their communities in a streaming format, despite the availability of fair use as a fundamental legal exemption in the Copyright Act.

Fair use offers a means of minimizing institutional and personal risk. Institutional fear of lawsuits and perhaps a lack of understanding of the full range of copyright exceptions, especially fair use, often result in a library's lock down of content. Additionally, as Cross (2016) warns, decisions to license digital content rather than purchase physical items creates a murky legal environment for libraries who are traditionally predisposed to sharing, copying, and preserving these materials for educational and scholarly pursuits.

The ARL *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012) offered this clarification to librarians about fair use:

> The fair use doctrine draws no blanket distinctions among different media or among different formats . . . [A]ll kinds of content (e.g., text, image, audiovisual, music) should be subject to the same principles . . . So, except as otherwise indicated, a digital copy should be considered on the same footing as an analog one for purposes of fair use." (p. 12)

With the publication of ARL's code, librarians were further empowered to invoke the fair use exception for the purpose of creating streaming media; however, actual decision-making since the code's release is difficult to assess.

Digital transmission of copyright-protected content for educational purposes is under the purview of the TEACH Act (17 U.S.C. §110(2)). This act enables accredited, non-profit academic institutions to use "reasonable and limited portions" of legally acquired, audiovisual copyrighted material without permission of the copyright holder or license to that content. Further, the display of copyrighted images and similar works without permission is limited to "an amount comparable to that which is typically displayed in the course of a live classroom setting" (17 U.S.C. §110(2)). In

the case of transmission of this material for distance education[4] purposes, several caveats must be met in order for the proposed use not to be considered a copyright infringement[5]:

- The performance or display is at the direction or under the supervision of an instructor;

- the material is an integral part of the course, meaning it is directly related to pedagogy;

- technological measures are implemented to restrict access to the materials to students enrolled in the course;

- reasonable efforts are made to restrict retention and further distribution of the material; and

- policies and notices regarding copyright compliance are in place.

Although academic libraries rely on the TEACH Act for legal guidance in providing, in this case, streaming content, Mason librarians have experienced a greater need from instructors for fair use assistance. This desire for help may stem from the fact that library collections and technical expertise are involved, and librarians often have a greater familiarity with fair use criteria.

Material that exceeds the restrictions imposed by the TEACH Act may meet the criteria set forth in the fair use doctrine (17 U.S.C. §107). The TEACH act does not supersede a fair use (Crews 2002, p.12). Because the TEACH act incorporates a "reasonable and limited portions" clause, streaming large excerpts from or entire videos requires greater discretion when making a fair use decision.

Streaming video, like other electronic content, is a format that facilitates access to and enhances teaching, learning, and research for everyone in a community. Media that are unavailable in streaming format require academic librarians to devise workflows and a plan for fulfillment. In 2013, the authors of this paper had reached the tipping point with their academic

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4.   "Distance education" is not specifically defined in the TEACH Act; however, a clear distinction is made between face-to-face instruction and "a classroom or similar place devoted to instruction." Either scenario may involve digital transmission of content. The authors of this paper believe that a place devoted to instruction encompasses face-to-face, hybrid, or fully online courses. The only distinction of note is in the mode of content delivery.

5.   Some libraries have created TEACH Act checklists for instructors (for example, http://guides.lib.utexas.edu/copyright/teachactchecklist). These checklists are particularly helpful when the library is not involved as a mediator of content delivery.

community's need for access to streaming video in the classroom. This situation provided the impetus for the proposed streaming media policy and best practices proposed in this article.

Institutional Background

George Mason University (Mason) is a large public university that was founded in 1957 as a satellite campus of the University of Virginia and became an independent institution in 1972. The University currently offers 210 degree programs and has an enrollment of over 34,000 students, excluding its Korean campus. Unlike many universities, the majority of degrees offered at Mason are graduate programs. Of its degree programs, 88 are masters-level, 39 doctoral, and one professional (Law), for a total of 127 graduate programs (Office of Institutional Research and Reporting [OIRR], 2016–2017 Facts and Figures).

The University Libraries ("Library") encompasses five locations: the Fenwick and Gateway libraries on the Fairfax campus; the Arlington and Law Libraries on the Arlington campus; and the Science and Technology Library on the Manassas campus. Collections consist of more than 1.4 million volumes, 850 databases, 1.5 million e-books, 119,000 e-journals, and 39 streaming video collections. (OIRR, Facts & Figures 2016-2017, University Libraries: 2014–2015). The Library's research materials budget ranged from about $19,000,000 in fiscal year (FY) 2012 to over $21,500,000 in FY2016. This budgetary growth enabled the expansion of the physical media collection from 50,404[6] to 57,474[7] items, respectively (George Mason University Factbook, 2011–2012; George Mason University Factbook 2012–2013; George Mason University Factbook 2013–2014; OIRR 2015-2016 Facts & Figures, University Libraries: Facts & Figures Fiscal Year 2016).

In early 2012, Mason's Division of Instructional Technology (DoIT) began offering mini-grants to faculty to design individual online courses, as well as larger grants for entire programs. These grants motivated faculty to volunteer to create new online courses, which resulted in an increased need for media. The library became the go-to intermediary for finding or purchasing and delivering this content.

The first Distance Education (DE) librarian was hired at George Mason University in 2012 to devise a plan and implement services to meet the expanding needs of online students and faculty. In 2012, Mason offered 16 online degree programs and certificates, with a full time equivalent

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6. This figure includes media held in the Law Library.
7. This figure includes all media, except those held in the Law Library.

(FTE) of 6,273 students enrolled in online courses. Though only 19 percent of Mason's total student population, these students represented the vanguard of what was to become a quickly expanding arena of new programs and courses (Institutional Research & Reporting, 2012).

Media Acquisition and Equipment Sunset: 2012

One of the DE librarian's first actions involved a review of the existing library and university policies affecting her work, such as the internal *Collection Development Subject Area Policy Statement—Media* (Oberle and Jenneman, 2009). This document defined criteria to be considered before the library purchased any media. At that time, the Library bought streaming media with a preference, as per the policy, for aggregated licensed collections sold by vendors.

Like many educational institutions, Mason began decommissioning VHS and DVD players in classrooms through a gradual phase-out program beginning around 2012. Thereafter, DVD purchases tapered off, and streaming format materials began to predominate as the more flexible option for both on- and off-campus class use. Nevertheless, the Library continued to collect feature films in DVD format for playback in the classroom and community use.

In 2012 streaming media was challenging to locate. Finding and delivering media content became increasingly complex as requests became more difficult to accommodate. The DE librarian juggled greater demand from faculty for streaming media in DE courses, legal concerns around reformatting existing DVD media, and efficient delivery of content via the Blackboard Learn™ course management system.

To meet these responsibilities, the media librarian, copyright librarian, acquisitions staff, and collection development personnel adopted a team approach. In some cases, an instructor's Instructional Design Technologist was involved, when available. Given library staff's increasing reliance on the fair use exemption and the involvement of multiple people in the process, the development of guidelines, documentation, and a workflow was critical to smooth management and efficient delivery of the needed content.

Emerging Media Classroom Provision Guidelines: 2012–2014

Higher education administrators are typically risk averse and reluctant to commit to a written policy addressing copyright and expanded use of licensed proprietary content, and the University Libraries' administration was no exception. Nevertheless, as early as 2012, the authors felt

compelled to provide at least internal library guidance because use of digital media in online courses was being stymied by the lack of defined best practices.

The resulting *Media Guidelines for Distance Education Courses: Selecting Content and Requesting Video Clips* (Holland and Adams, 2012) was an internal, abbreviated document that outlined steps for library faculty and staff to take when determining whether the library owned, held license to, or needed to request purchase of desired media. Moreover, the guidelines explained what to do should an instructor need part or all of a film that was either unavailable in digital or streaming format, or cost prohibitive.

Use of subscription content was logically the most expeditious way to meet an instructor's pedagogical needs. From 2013 through 2014, streaming media at Mason could only be delivered in Blackboard through the purchase or lease of licensed content that was vendor-hosted. Because the Library did not own or have access to a media server, requests for streaming media that were not vendor-hosted through standard collections (e.g., Alexander Street Press or Films on Demand) or could not be leased from Swank, were not fulfilled. With that caveat, faculty were encouraged to explore public domain and Creative Commons licensed videos and simply link to content they needed that was either clearly proprietary or had questionable copyright status.

Mason purchased the Kaltura Video Building Block for Blackboard in late 2014 to remedy the Library's technological limitation, allow greater flexibility in purchasing options, and promote instructor-created video content. Subsequently, the Library and DoIT developed a shared workflow that permitted clips and non-vendor-hosted streaming films to be delivered more easily to students registered in a course. This workflow created new possibilities for the Library to provide non-vendor hosted video content reliably, easily, and seamlessly in Blackboard. Legal copyright considerations and the fair use exception still applied, but technical limitations were no longer an obstacle.

Consequently, an instructor who wanted a select title from the library's physical collection in streaming format was directed by the *Media Guidelines* to complete an electronic form, which triggered often time-consuming research by library staff to attempt to locate a license for that title. If no license was found, the instructor conducted a fair use evaluation of the title. Fair use copyright principles and an evaluation tool were incorporated into the guidelines to assist (not advise) faculty as they made a fair use deci-

sion.[8] Consultation with the copyright librarian was offered and encouraged when guidance with making fair use decisions was needed.

If over twenty percent or more of a film was desired, faculty were *required* to meet with the copyright librarian. When the evaluation weighed in favor of a fair use, library staff subsequently ripped and uploaded the digital files into the Kaltura media gallery in Blackboard. Subsequently, library staff notified the instructor that the file(s) were available. Kaltura technology permits only the students registered for the course to view the video(s), and it restricts the files from being downloaded and further distributed.

From 2012 to 2014, the Office of Distance Education, rather than the Library, paid for streaming video that was esoteric, prohibitively expensive, and likely to benefit only a course or two; these titles were made available via a temporary streaming content license for course-only use. The distinction between who pays is important because materials purchased by the Library (in the past and today) must be available to the entire academic community. Media purchased using library funds requires stricter vetting and purchasing processes. Nevertheless, on occasion, it is more cost-effective to lease content for a single course or set of courses for a specific period of time than to license a streaming video for the community.

Ultimately, the purpose of the *Media Guidelines* was to provide timely assistance to frontline staff and subject librarians who were fielding media access questions, but its unintended emphasis was on the provision of streaming clips from videos and rarely entire films. Additionally, the guidelines were not intended to be a fully-developed policy, but rather were a stopgap measure. The document presented a foundation upon which a mature policy toward managing this cumbersome, time-consuming, and legally-fraught process could be developed.

Tracking the Costs of Streaming Media: 2013–2016

Although the cost of providing streaming content to the Mason community was not the primary impetus for developing a policy, cost must be considered from the standpoint of annual impact on collections budgets. Researching, requesting, and purchasing streaming rights are not collectively an expeditious process. Staff time expended to find the distributor

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8. Reformatting an entire film from analog to digital under the exception incorporated in U.S. Copyright Law (17 U.S. Code §108) that addresses format obsolescence and material condition is a circumstance beyond the scope of the guidelines described here. Section 108 is not covered in this paper.

or copyright holder of a title can be protracted and should be considered an indirect cost.

The support provided to faculty teaching online typically involved these steps:

- Identifying appropriate streaming media for specific courses in Mason collections;

- fielding questions about how to integrate media into Blackboard;

- troubleshooting the delivery of digitized media in online courses; and

- coordinating with acquisitions staff to locate, purchase, and rush process individual media titles.

These tasks reflect the disparate activities and coordination required to provide this library service.

	2013-2014	2014-2015	2015-2016	Total all years
Single title physical media expenditure	$68,011.00	$68,378.00	$51,267.00	$187,656.00
Electronic media/ one-time purchase expenditure	$32,332.00	$25,052.00	$10,589.00	$67,973.00
Electronic media/ subscription expenditure	$36,855.00	$88,858.00	$112,031.00	$237,744.00
Total media expenditure	$137,198.00	$182,288.00	$173,887.00	$493,373.00
Total collections budget	$10,121,105.00	$10,341,105.00	$10,221,105.00	$30,683,315.00

Table 1. Media collection expenditures and total collections budgets, FY2014-FY2016, George Mason University Libraries.

Table 1 reflects single-title physical media expenditures as compared to electronic media subscription/one-time purchases at Mason for FY2014 through FY2016. Total media expenditures and total collections budget figures for these years are also provided. During FY2014, the Library expended $68,011 to purchase 1,369 single titles, whereas the following year, 511 titles cost

$68,378. In FY2016, $51,267 was spent to acquire 1,119 titles.[9] Collectively, 2,999 single media titles cost $187,656 (an average of $62.50/title) over this three-year period.[10]

In summary, the percentage of funds dedicated to purchase all media grew 27% over these three years, representing approximately 1.6% of the total collections budget from 2013 to 2016.

Funds allocated for purchase of media during these years illustrates a shift from acquisition of physical titles to that of licensed electronic media (Figure 1).
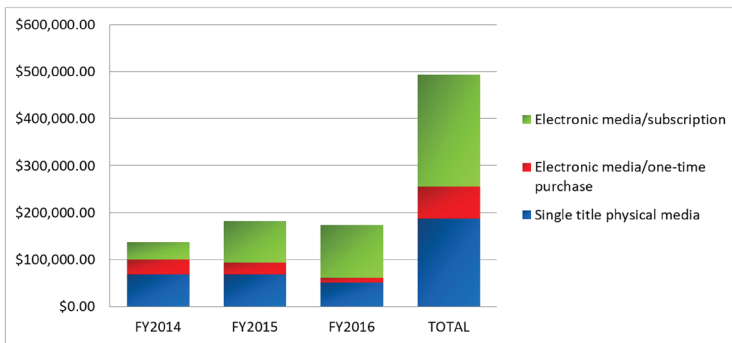

Figure 1. Summary of streaming rights purchased for DVDs & duration of access, FY2014-2016, George Mason University Libraries.

Interestingly, there was a substantial decrease in one-time purchases of electronic media. This drop may be related to the availability of packages, cost of packages, and/or subject librarian collection decisions.

From 2013 to 2016, almost $25,000 was spent on making only 57 DVD titles (~.1% of total physical media) available via streaming format (Table 2).

	# of Titles	Cost	License Duration
	34	$17,681.20	Perpetual rights (incl. 2 unknown)
	1	$190.00	Two-year
	15	$4,448.95	Three-year
	6	$2,213.80	Five-year
	1	Unknown	Unknown
Total	**57**	**$24,713.95**	

Table 2. Summary of streaming rights purchased for DVDs & duration of access, FY2014-2016, George Mason University Libraries.

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9.   These expenditures are only for licensing rights to stream or digitize individual physical media titles. They do not cover titles hosted or licensed by Kanopy, Swank, Media Education Foundation, and other vendors.

10. Electronic media include streaming audio and visual content; annual access fees are not covered in the expenditure figures.

The average cost per title was $520 for a perpetual license, $369 for a five-year license, and $297 for a three-year license. Consider the fact that an individual DVD title cost an average of $62.50, whereas the license for a title's streaming rights can cost over $500 depending on the duration of the license.

Based on these figures, to acquire available perpetual streaming rights to even as little as five percent (2,874) of the Library's physical media could require as much as $1,494,000! One could argue that purchasing packages of streaming media is a more fiscally responsible decision; however, librarians must address other equally important criteria prior to choosing the latter option, such as owning vs. leasing, repeated licensing of popular titles, inclusion of needed titles in subscription packages, etc. Faculty requests continue to be a massive driver of single-title selections. Regardless, the costs to acquire individual streaming media licenses are neither justifiable nor sustainable.

Given the funds expended and pedagogical need for media (or, for that matter, any content a library purchases or holds license to), librarians typically educate faculty about resources to which the library subscribes as an ongoing institutional goal. As such, the DE librarian teamed up with the media librarian to develop media education workshops describing how to find and integrate licensed media into online courses. These workshops were well attended and well received, but faculty continued to assert that the content they needed for their courses simply was not available through educationally-licensed subscription models. The Library struggled to provide them with the course support they needed.

Online Education and Accessibility

In early 2013, library staff became aware that the University administration planned a substantial increase in the scale of online programs offered at Mason. In fact, a major initiative presented in the University's then-new strategic plan was the expansion of online degree programs, producing 100,000 career-ready graduates in the STEM-H (science, technology, engineering, mathematics, and health) programs by 2024 (George Mason University [GMU], 2014).

At this time, Mason's distance education programs were transitioning to or being created wholly online at a rapid rate. From July to December 2014, the DE librarian and her assistant worked with faculty who were developing 47 unique courses, several of which had multiple sections. For example, an English class required for all Mason students was offered online with an average of ten sections per semester. Spring 2014 was the busi-

est term recorded, with 60 newly-created courses supported. The growth in online offerings spurred the copyright librarian, DE librarian, and her assistant to begin lobbying Library administration in earnest for a streaming media policy. They had determined it was no longer feasible or logical to continue to work without a policy.

Concurrently, Mason's Assistive Technology Initiative (ATI) began a systematic attempt across campus to comply more fully with Section 508 of the Rehabilitation Act of 1973, which, amended in 1998 under the Workforce Investment Act, was enacted to eliminate barriers in information technology and open new opportunities for people with disabilities (29 U.S.C. §794d, 1998). As a public institution receiving federal and state funds, the University and its libraries are legally obligated to provide accommodations. Furthermore, Mason's Electronic and Information Technology Accessibility University Policy 1308 (2014) specifies that multimedia and digital content must meet the accessibility guidelines set forth under Section 508 and Web Content Accessibility Guidelines 2.0 best practices (W3C, 2008). Specifically, the guidelines stipulate that transcripts or captions are required to be provided as part of digitally-delivered audio and video media (GMU, 2017; W3C, 2008; 29 U.S.C. §701; 36 CFR §1194; 29 U.S.C. §794d; ITRM, GOV 103-00; 28 CFR §35). Mason Online incorporated this accessibility policy into their course creation and assessment procedures. (Mason Online-Course Design, 2016)

Consequently, when acquiring or subscribing to new media, the Library committed to making every effort to obtain vendor-provided accessibility features, but might not be able to negotiate these features at a cost that fits with collection development goals and budgetary constraints. The Library planned to work with the ATI and vendors to obtain captions, transcripts, or descriptions for items already in Library collections, on an as-needed basis. Any costs to add these accessibility features to media would be the responsibility of the unit originating the request (for details see below, Developing & Implementing a Policy: 2014–2015, item 4).

Through a partnership with DoIT and ATI, the Library was prepared to incorporate ADA-compliant audiovisual material into online courses by invoking the fair use exception (17 U.S.C. §107). Conversations among these units, along with University Counsel, convinced the units involved that the University was more likely to be sued for failure to provide accommodations than for copyright violations associated with creating derivative works (such as unauthorized transcripts and captions) of in-copyright content. Consequently, as the newer 2015 streaming media policy was being developed, procedures were incorporated to ensure that library-provided resources would meet accessibility requirements. A much-needed

workflow (Appendix A) incorporating copyright and ADA compliance was devised to accommodate the anticipated exponential increase in DE course offerings and attendant media requests.

Specifically, the workflow indicates that when an instructor meets with DoIT and ATI staff during the DE course planning and creation phase—which is compulsory for mini-grant recipients—the instructor must document how library resources are to be used and determine whether course materials are already captioned or audio-described. Faculty using ebooks, articles, library databases, or streaming media in their online courses are provided assistance by ATI staff to meet accessibility requirements. Library staff help instructors obtain captions and minimize copyright infringement, insofar as possible.

Media requests were and are initiated by the instructor of record, ATI, or DoIT, by virtue of a form completed and submitted to the Library. The request follows this staff workflow (see Appendix A):

1. Has the faculty member identified the specific title they want or could a number of media items fit their pedagogical need?

2. Does the library own the title?

3. If the library doesn't own the title, can the library purchase it for a reasonable cost?

4. Is the video for a DE course? If so, does it need captions?[11]

   a. Is the caption file part of the media file? If not, send the media file to ATI for captioning.

   b. Audio description is provided by ATI on an as-needed basis.

5. If not used in a DE course, video captioning is optional; however, the preference is captioned.

6. If the library can't purchase the title and more than 20 percent[12] of the content is needed, the faculty member must meet with the copyright librarian and complete a fair use evaluation.

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11. The ATI Office does not require self-disclosure of students with disabilities who are taking online courses with Mason.
12. Copyright statute does not dictate the amount of a work permitted to be used per fair use. However, for our purposes, the arbitrary amount of 20% triggered a meeting between the instructor and the copyright librarian. This step was incorporated as a way to get instructors to think carefully about whether they, in fact, needed an entire work—which was often not the case upon reflection.

No administrative approval was given with regard to decisions on how long streaming media would remain "up" for a course, when streaming media would be revaluated, whether the Library would pay to re-license content that was previously leased for a course, and what was considered a reasonable cost. These were questions we hoped to address when developing an actual policy.

Developing & Implementing a Policy: 2014–2015

In early 2014, the DE library assistant and the authors of this paper wrote and submitted an early draft of a streaming media policy, drawing heavily from ARL's *Code of Best Practices in Fair Use* (2012). To continue providing streaming media in support of online courses, the Library needed legal guidance and decisions on questions specific to fair use. Clearly, any audiovisual material licensed individually or accessible via a vendor-hosted subscription or streaming service was and is not subject to this policy.

On occasion, instructors teaching face-to-face courses are also unable to locate specific physical and/or licensed streaming media needed for their courses. This is particularly true for courses in which popular media are used as cultural texts to study topics like gender, racism, etc. Furthermore, playback equipment was being decommissioned by the University and presented situations where physical media could not be used in classrooms even when available. With the arrival of vendors like Swank and its Digital Campus product in 2015, these challenges began to be addressed. Regardless, cost is often prohibitive and some face-to-face courses required content that is novel, even for Swank, such as avant-garde foreign films. The Library's streaming media policy would need to address both distance education and face-to-face needs.

As Cross notes, in recent years academic libraries have increasingly relied on fair use. Rights holders have legally challenged library claims of fair use; however, libraries have prevailed and a growing body of case law is emerging that privileges educational fair use. (2016, p. 5). Current contractual licenses (e.g., digital content wrapped in digital rights management software that cannot be legally circumvented for a fair use) have moved library practice out of copyright and into the realm of contracts. In essence, licenses and other contracts have gutted educational consumers' ability to exercise a fair use exception (Cross 2016, p. 10)

As described earlier, licensed streaming access is available for a limited proportion of the Library's physical media collection. When access is available, the cost will likely be prohibitive as demand for streaming

media increases. Equipment obsolescence negates the ability to play back DVDs. Consequently, the Library holds a large collection of legally-owned, inaccessible media content for which an immense amount of student and public monies were expended to acquire. The practice of purchasing licenses merely to view this content for educational and research purposes is unsustainable for most, if not all, academic libraries.

In short, a common scenario for streaming media requests at most libraries resembles this:

- A license to a selected video the library owns a legal physical copy of is unavailable or unaffordable (beyond a "reasonable" cost);

- an assessment of the four fair use factors (17 U.S.C. §107) is conducted for the title in question by the instructor, often resulting in a decision that the use is a "fair use"; and

- the streamed video becomes viewable in Blackboard (i.e., Kaltura), which limits access to registered students and prohibits download of the digital file, as defined in the TEACH Act (17 U.S.C. § 110(2)).

Based on this scenario, some questions and answers that helped shape our policy and best practices were:

1. **Should digitized media be made available to a class for an entire semester or is it less risky from a legal standpoint to limit access to a video to a portion of the semester?**

    Distance education faculty who request an entire or a substantial portion of a work are unable to schedule a media screening.[13] Furthermore, distance education students are unable to access items placed on physical reserve. To minimize the risk of a potential copyright violation, the Library will set an arbitrary period during which student access to digitized media will be limited to appropriate portions of the semester. As such, digitized media will be made available for no more than a two-week period designated by the instructor. Copyright statute does not stipulate a time limit; this is a practice set by the Library, largely in response to the TEACH Act, which states, "No such copy shall be maintained on the system or network in a manner ordinarily accessible to. . .recipients for a longer period than is reasonably necessary to facilitate

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13. In this case, a "media screening" refers to viewing an entire film in a classroom setting or in the library proper, outside of class.

the transmissions for which it was made" (17 U.S.C. § 110(2)).

2. **Does the answer to the previous question change if instructors expect students to revisit digitized media after the week(s) during which it is first introduced, for instance so that they may write final papers or study for final examinations?**

The Library determined that a second period of access, consisting of no more than one week, may be allowed, should the instructor desire students to review said digitized media in support of a cumulative written assessment, exam, or test.

3. **If sections of a course are offered every semester or every year, how many semesters may the Library provide the digitized media under fair use before it is deleted and instructors are notified that they need to find an alternative means of meeting their learning objectives?**

The same digitized media items may be re-used in subsequent iterations of a course. Instructors will be expected to periodically revisit their fair use evaluation of each digitized media item requested. Library staff will periodically conduct an up-to-date determination that use continues to accord with these policies, for instance by checking for changed commercial licensing options.

4. **The Library and the ATI partner to provide accessible media to students in face-to-face (self-disclosure required) and online (self-disclosure not required) courses. How will the library assist in the provision of accessible media?**

To facilitate compliance with relevant accessibility laws, standards, and University policy (29 U.S.C. 794d §§ 504 and 508; 42 U.S.C. §§ 12101–12213; Virginia Information Technology Accessibility Standard, 2005, Scherrens, 2014, Mason University Policy 1308), the Library provides a streaming version of any media item requested by the University's ATI for face-to-face instruction. In many cases, the physical media (DVD, VHS) include captions. The Library loans the physical item to ATI who digitizes the item for face-to-face accommodation. When captions are not available, the Library initiates a request

for assistance from ATI to provide captions for online courses. The Library provides both captioned and non-captioned versions to online instructors.

5. **Previous attempts by the Library to provide clips have resulted in little to no demand for clips. Whereas the TEACH Act specifically limits the amount of an item to be used to "reasonable and limited portions," fair use imposes no such limitation. Instructors may need to use an entire work in order to support their course learning objectives. Is it within fair use to use/digitize the full length of films and videos?**

    Language in the TEACH Act (17 U.S.C. § 110(2)) and fair use doctrine (17 U.S.C. § 107) is at odds. The TEACH Act states that a work may be displayed "in an amount comparable to that which is typically displayed in the course of a live classroom session."[14] Brief media clips presumably meet the definition of "reasonable and limited portions," as per the TEACH Act. Additionally, instructors' use of brief clips (however defined by a library) should encourage transformative use, be in keeping with the "amount and substantiality" factor, and reduce the potential impact on the value of the item, as per fair use. On the other hand, fair use restricts neither the length of time displayed nor the amount of a work used. Consequently, instructors often turn to fair use to expand their legal options beyond TEACH for using larger portions of a work. To that end, instructors must conduct a fair use evaluation.

The answers to these key questions shaped the resulting policy (Appendix B). Under this policy, instructors who request the digitization of physical media for use in their classes are required to complete and submit an electronic *Fair Use Evaluation* (http:/librarycopyright.net/resources/fairuse) form for each item to be digitized, in consultation with the copyright librarian. By answering questions related to their use of the copyrighted content, instructors are guided through an assessment of each of the four fair use factors defined in 17 U.S.C. §107.

Assuming the evaluation favors a fair use, this form documents the instructor's assertion that the selected media are to be used for the purpose of meeting pedagogical goals and achieving student outcomes within a

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14. This language infers a bright line in terms of the duration a work may be displayed. Face-to-face class sessions now range from as little as 55 minutes to as much as a full day.

course. The form also documents and acknowledges the instructor's role in the fair use evaluation. Consultation with the copyright librarian ensures that the instructor has exhibited diligence and caution when determining which portions of the media item are required to meet student learning objectives. The Library archives submitted electronic forms for three years.

Legal Review of the Streaming Media Policy: 2013–2014

As required for any document affecting frontline staff practices, university risk, and the possibility of lawsuits, this draft policy had to be vetted by Mason's Office of University Counsel, preferably by an attorney well versed in copyright law and with a higher education perspective. To that end, University Counsel referred the library to one of the leading attorneys in intellectual property law in the state of Virginia—Madelyn Wessel, at that time University Counsel at Virginia Commonwealth University.

Wessel provided a thoughtful overview of the draft document with substantive oral comments about language that was unclear or areas that were not addressed. She suggested options to address situations where no library licensing mechanism was reasonably available that would also strengthen fair use arguments in targeted situations. Specifically, where the Library was unable to purchase streaming rights to entire works, as initially incorporated in the *Media Guidelines* (Holland and Adams, 2012), instructors could require their students to have an active account with an online media service, like Netflix or Hulu, that offers titles needed to meet learning objectives.

Access to feature films, in particular, often costs little when leased via a subscription service. Student cost to sign up for a media account or stream one-off titles may be interpreted as equivalent to purchasing a "textbook" required by an instructor for a course. In this case, expecting students to subscribe to a streaming service may be the most reasonable option in the current market. Though the Library would like to be able to provide all the streaming media resources students and instructors need, often libraries cannot purchase these rights for feature films. For works unavailable through any of these mechanisms, the fair use case for the library to stream legally-acquired works to students enrolled in classes was deemed to be strong.

The final draft policy was submitted to Library administration for approval in November 2015. The authors received acknowledgement of the policy's acceptance in October 2016, after which it was posted in the Library's intranet.

Conclusion

In the fall 2016 semester, Mason had a total FTE of 10,780 students enrolled in online courses (Institutional Research & Reporting, 2016)—an expansion of 72 percent since the DE librarian was hired in 2012. Continued growth in online programs, coupled with an increased desire to use streaming media in face-to-face and hybrid courses, virtually guarantees that the need for streaming media will only intensify. Faculty have not rushed to request clips or entire films as a result of the policy being adopted; however, with the anticipated growth in DE programs the library is poised to respond in a legally-responsible manner, exercising fair use to the fullest extent possible.

As copyright holders and their agents move to license virtually all digital content, librarians may feel forced into situations in which fair use is not considered a risk worth taking to provide access to materials bought and paid for in other formats. The high costs of streaming media reported in this article indicate that licensing streaming content whenever possible is both an unsustainable and an undesirable practice for most academic libraries. But what good is a collection, if format precludes its use? While the streaming media policy shared in this article is only one approach, and admittedly a fairly conservative one, it offers a reasonable and measured means of exercising fair use and implementing the TEACH Act. The authors encourage others to build on and modify this policy to create model fair use and TEACH Act practices for providing streaming media to our academic communities.

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Statutes

17 U.S.C §107 Limitations on exclusive rights; Fair use

17 U.S.C. §110 (2) TEACH Act

28 CFR § 35 Nondiscrimination on the Basis of Disability in State & Local Gov Services
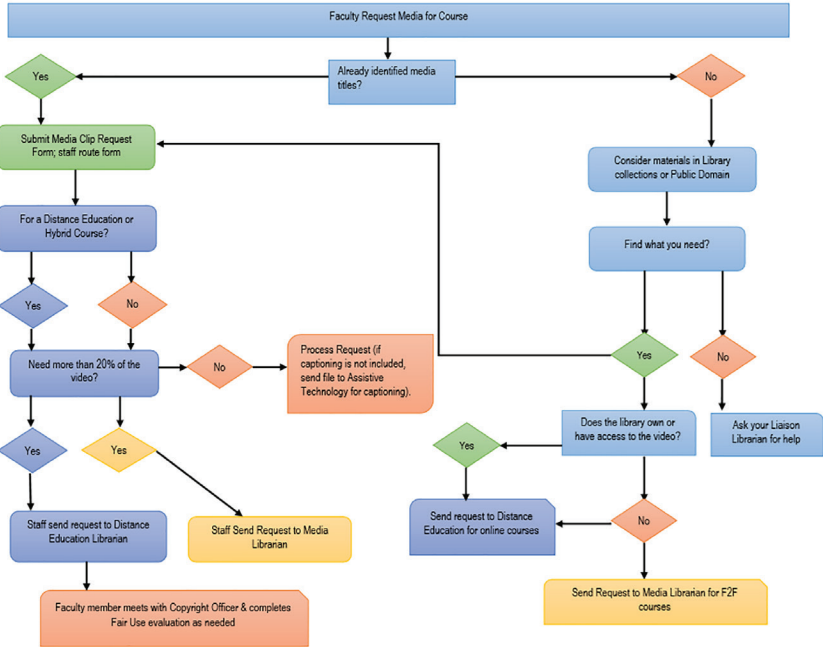
29 U.S.C. § 794 Nondiscrimination under Federal Grants Programs (Section 504 & 508)

36 CFR §1194 Electronic and Information Technology Accessibility Standards

42 U.S.C. §§ 12101-12213 Equal Opportunity for Individuals with Disabilities

Appendix A

Staff Workflow for Media Requests

Appendix B

George Mason University Libraries Streaming Media Policy

Section 1: General policies concerning digitized media

1. **Definition of digitized media.** For the purposes of this policy, digitized media are created (ripped) from lawfully acquired, physical visual, audio, and/or audiovisual items (i.e., DVD, VHS, CD, or LP) in the Library collections for online streaming delivery.

2. **Applicability of this policy to subscription streaming media content.** Whereas the University Libraries (hereafter, "Library") subscribes to media that are subject to the licensing provisions of individual streaming media services, no portion of the following policy shall be interpreted to supersede the provisions contained in these licenses.

3. **Access and acquisition of streaming media.** Media for which the Library holds streaming rights, or that are available via a subscription database, may be used in any course. Library selectors may decide to pursue purchase or licensing of streaming rights for individual titles, as this is a matter of collection development.

4. **Digitization of media.** Physical media will be digitized for one of several reasons:

   - Physical media will be digitized to fulfill accessibility requests from ATI (see Section 4).

   - Physical media may also be digitized when providing or storing a digitized item is the best way to meet preservation requirements, or at the discretion of the Media Librarian.

   - Under the conditions specified below (see Section 2), physical items owned by the Library may be digitized and provided to students taking and faculty teaching fully online or hybrid courses within the Learning Management System pursuant to legal provisions for Fair Use (17 U.S.C. §107).

   - Under the conditions specified below (see Section 3), physical items owned by the Library may be digitized and pro-

vided to students taking and faculty teaching fully online or hybrid courses within the Learning Management System pursuant to legal provisions for Fair Use (17 U.S.C. §107) and/or the TEACH Act (17 U.S.C. §110(2)) as appropriate.

5. **Archival copies of digitized media.** Archival copies of media may be stored on a remote server and/or a local storage device, with access to these copies made temporarily available to students registered in courses only at the explicit request of the responsible faculty member. This practice ensures that only one archival copy of an item (or a portion thereof) is made.

6. **Clipping and excerpting services.** When an instructor determines that clips or excerpts of video or audio media in the physical collections are necessary to meet their learning objectives, the Library will provide a reasonable number of digitized clips or excerpts to the instructor as specified in the policies below when the conditions for the provision of digitized media specified in these policies have been met.

7. **Fair use consultation and assessment documentation.** Faculty who request the digitization of physical media for use in their class under this policy must first complete an electronic Fair Use Evaluation form for each item to be digitized in consultation with the University Copyright Officer. By answering questions related to their use of the copyrighted content, instructors are guided through an assessment of each of the four fair use factors defined in 17 U.S.C. §107. The form documents the instructor's assertion that the selected media are to be used for the purpose of meeting pedagogical goals and achieving student outcomes within a course and acknowledges the instructor's role in the fair use evaluation. The consultation ensures that the instructor has exhibited diligence and caution when determining which portions of the media item are required to meet their students learning objectives. The Library will store submitted electronic forms, which will be archived for three (3) years.

8. **Re-use of digitized media.** The same digitized media items may be re-used in subsequent iterations of a course. Instructors will be expected to periodically revisit their fair use evaluation of the digitized media item. Library staff will periodically conduct an up-to-date determination that use continues to accord

with these policies, for instance by checking for changed options for commercial licensing.

9. **Exclusion of items produced for the explicit purposes of meeting the classroom goals to which instructors intend to put them.** Items produced for the explicit purposes of meeting the classroom goals to which they are put, for instance videos accompanying textbooks or certain video trainings, will not be provided under the provisions of this policy.

10. **Reasonable and good faith attempts to license streaming media for courses when requested.** When an instructor or instructor's designee requests that long clips or an entire digitized audiovisual item be digitized and delivered to his/her course, Library staff will attempt to locate and acquire legally licensed streaming access to the item as an addition to the Library's collection. Collection additions will be made when such access is available at a reasonable cost, using established payment structures, and within administrative limits, as determined by Library selectors.

11. **Contingency of provision of long digitized clips and entire digitized audiovisual items when streaming access to students commercially unavailable.** Neither long digitized clips nor entire digitized audiovisual items will be provided to students when these titles are commercially available at cost to the students through a legal streaming video service, such as Netflix, Amazon Instant Video, Google Play Video, etc. Only reasonable and limited digitized clips may be provided when titles are *not* commercially available at cost to the students through a legal streaming video service.

12. **Copy and distribution prevention policy for the provision of digitized copies of physical media to courses.** All digitized media provided by the Library to courses under the terms of this policy will be delivered using a password-protected streaming media platform that prevents further distribution or reproduction by users. When digitized media owned or licensed by the Library are provided directly to a course, access will be limited to the instructors, students officially enrolled in the course, and instructional/administrative support staff of the university, in accordance with the legal provisions for Fair Use

(17 U.S.C. §107) and/or the TEACH Act (17 U.S.C. §110(2)), as appropriate.

Section 2: Provision of digitized media to face-to-face courses under Fair Use (17 U.S.C. §107) and the TEACH Act (17 U.S.C. §110(2))

13. **Provision of limited clips of digitized media to face-to-face courses.** When an instructor or instructor's designee requests excerpts from physical media to be digitized and delivered to his/her face-to-face course, librarians and/or Library staff will ensure that the item is not currently available in a streaming form in the Library collection. In cases when licensed streaming copies are unavailable in current Library collections, face-to-face instructors will be asked to conduct a Fair Use assessment. Decisions about the digitization of any portion of a physical media item from the Library collection will be made on a case-by-case basis in consultation between the instructor and the University Copyright Officer. Generally, brief media clips will be provided that presumably meet the definition of "reasonable and limited portions," as per the TEACH Act (17 U.S.C. §110 (2)). Additionally, instructors' use of brief clips should encourage transformative use, be in keeping with the "amount and substantiality" factor, and reduce the potential impact on the value of the item, as per fair use (17 U.S.C. §107).

14. **Provision of longer digitized clips and entire digitized media to face-to-face courses.** Face-to-face faculty requesting longer clips comprising a substantial portion of a whole title or requesting digitized access to entire digitized audiovisual works in the service of meeting their learning objectives may schedule a media screening which uses the original physical media housed in the Library collection. Additionally, faculty may place physical items on Reserve through the Library so students can watch items in the Library or on their own devices. However, very rarely, some classes (for instance, film and media studies classes using flipped classroom pedagogy, with limited meeting time, or without access to screening equipment) may have valid transformative uses for long digitized clips or entire digitized audiovisual works in the service of meeting learning objectives. In such rare cases when provision of a long digitized clips or entire digitized audiovisual work would be integral to meeting the learning objectives of the course, the Library

may provide long digitized clips or entire digitized audiovisual items. These rare exceptions will be determined on a case-by-case basis by the instructor and University Copyright Officer through the Fair Use Assessment process.

Section 3: Provision of digitized media to online under Fair Use (17 U.S.C. §107) **and the TEACH Act** (17 U.S.C. §110(2))

15. **Provision of limited clips of digitized media to online courses.** When an instructor or instructor's designee requests excerpts from physical media to be digitized and delivered to his/her course, librarians and/or Library staff will ensure that the items are not currently available in a streaming form in the Library collection. In cases when licensed streaming copies are unavailable in current Library collections, instructors will be asked to conduct a Fair Use assessment. Decisions about the digitization of any portion of a physical item media item from the Library collection will be made on a case-by-case basis in consultation between the instructor and the University Copyright Officer. Generally, brief media clips will be provided that presumably meet the definition of "reasonable and limited portions," as per the TEACH Act (17 U.S.C. §110(2)). Additionally, instructors' use of brief clips should encourage transformative use, be in keeping with the "amount and substantiality" factor, and reduce the potential impact on the value of the item, as per fair use (17 U.S.C. §107).

16. **Provision of longer digitized clips and entire digitized media to online courses.** Faculty who teach online classes and request access to longer clips comprising a substantial portion of a whole title or to entire works in the service of meeting their learning objectives are unable to schedule a "media screening," which uses the original physical media housed in the Library collection. Additionally, online students are unable to access physical items placed on Reserve. In these cases, fair use (17 U.S.C. §107) is a more flexible option than the TEACH Act (17 U.S.C. §110) for providing access to the needed content. Consequently, the instructor and University Copyright Officer will meet and conduct a fair use assessment to evaluate the applicability of a fair use decision.

Section 4: Accessible media policies

17. **Accessibility requests and Library provision of captioned digitized media.** To facilitate University compliance with relevant laws (29 U.S.C. 794d §§ 504 and 508; 42 U.S.C. §§ 12101–12213, and Virginia Information Technology Accessibility Standard) and University Policy 1308, the Library will endeavor to provide a streaming version of any media item requested by the University's Assistive Technology Initiative (ATI). When available from the media source, open- or closed-captions will be incorporated in the digitized copy the Library provides the ATI. The Library does not provide a captioning service that adds third-party captions to media owned or licensed by the Library.

18. **Assistive Technology Initiative responsibilities for media provided from the Library collections to meet accessibility needs.** The ATI will be responsible for managing course access to media provided by the Library in response to its requests. The ATI is responsible for determining whether requests for digitized media accord with relevant laws and University policies. The Library's role is to provide requested streaming media files to the ATI for the express purpose of assisting University compliance with relevant laws and policies.

19. **Library responsibilities for the acquisition of captions, transcripts, or descriptions.** When acquiring or subscribing to new media, the Library will make every effort to obtain vendor-provided accessibility features, but may not be able to negotiate these features at a cost that fits with collection development goals and budgetary constraints. The Library may also negotiate with vendors for explicit permission to use, create, or provide third-party accessibility features when acquiring or subscribing to new resources. Additionally, the Library will work with the ATI and vendors to obtain captions, transcripts, or descriptions for items already in the Library collections, on an as-needed basis. For any items already in the Library collections that vendors are unwilling or unable to provide captions, transcripts, and or descriptions for, the cost to add these accessibility features will be the responsibility of the unit originating the request.

20. **Library responsibilities for checking captions**. When requested to do so by the Assistive Technology Initiative or another

unit, the Library will check its holdings for the presence of captions. If existing Library catalog records do not accurately reflect the availability of captions, the Library will attempt to update these records.