Resource Sharing and Streaming Media
or….

What Happens When Netflix is Dead
How Licensing & Copyright Threaten the Future of Libraries and Our Cultural Heritage
Copyright Loves Libraries!

How do libraries legally do what we do?
“...the owner of a particular copy or phonorecord lawfully made under this title is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy"

17 U.S.C. 109

“it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section . . .”

17 U.S.C. 108
“the 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”

17 U.S.C. 107
A license is a contract, and agreement between two parties to specific terms.

They can modify, change, or alter rights.

Presently: the licensing of digital content exists in a legal realm that is separate from copyright law.

Licensed Materials Make the Library and Archive’s Mission(s) Impossible
Common License Example: Netflix Terms of Service

4.2. The Netflix service and any content viewed through our service are for your personal and non-commercial use only and may not be shared with individuals beyond your household. During your Netflix membership, we grant you a limited, non-exclusive, non-transferable right to access the Netflix service and view Netflix content through the service. Except for the foregoing, no right, title or interest shall be transferred to you. You agree not to use the service for public performances.

4.6. You agree to use the Netflix service...in accordance with all applicable laws, rules and regulations....Except as explicitly authorized in these Terms of Use, you agree not to archive, download, reproduce, distribute, modify, display, perform, publish, license, create derivative works from, offer for sale, or use content and information contained on or obtained from or through the Netflix service. ...
WHAT SHOULD WE DO?

Maybe Congress can help . . .?
Amendment to the Fair Use statute (1992)

“The fact that a work is **unpublished** shall not itself bar a finding of fair use if the use is made upon consideration of all the fair use factors...”
Is it Fair Use?

Fair Use
“Notwithstanding the provisions of sections 106 the fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright”

17 U.S.C. 107
**Solutions?**

**Fourth Factor Arguments: Market = License**

*“The effect of the use upon the potential market for or value of the copyrighted work.”*

1. Where permission has been sought to make a copy and denied (a “No”) you can still make a fair use ([Bill Graham case](#))
2. Where there is no market for permissions, weighs in favor of fair use ([e-Reserves case](#))
3. Making a preservation copy does not do any market harm ([Section 108](#) and [Fair use](#))

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**Other “Honorable Mention” Legal Solutions**

4. Insurance and Fair Use ([documentary filmmaker fair use example](#))
5. Empirical analysis ([Factors 1 & 4](#))
6. Controlled Digital Lending ([First Sale](#))
7. Other Legal Remedies? ([Potpourri](#))
Permission? No. Might be OK

Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605 (2d Cir. 2006)
License denied, but DK wins on fair use!

Court states you can still make a fair use of a copyrighted work, even if you are denied permission first!

Cambridge University Press et al. v. Patton et al.

“The Georgia State e-Reserves Case”
The case was a “test case litigation” that was “organized by the Copyright Clearance Center (‘CCC’) and the American Association of Publishers (‘AAP’) who recruited Cambridge University Press, Oxford University Press, and Sage to serve as plaintiffs.”

Their motivation was not to enforce valid copyright interests, but rather “to test whether publisher clearing houses could successfully argue that any educational use of a copyrighted work, no matter how small, is not a fair use and requires payment of a license fee.”
Infringement was found whenever CCC was offering a digital license for copying the chapter in question, and fair use was found whenever there was "no evidence in the record to show that digital excerpts from this book were available for licensing."

The absence of a ready market shifts the factor four analysis to favor fair use.

Application to our specific e-media/streaming problem?

Yes – there is no ready license, no market!
"It's worse than dog eat dog. Its dog doesn't return other dog's phone calls...."

In 72% of the cases "factors one and four either both favored or both disfavored fair use. In all but one of these opinions, the outcome of the fair use test followed the outcome of these two factors."

Insurance and Fair Use

“Documentary Filmmakers’ Statement of Best Practices in Fair Use”

In documentary world: insurance policies provide important protections against lawsuits (incl. copyright infringement)
• Includes coverage for fair use

Now some companies are using this “Best Practice” document as the foundation for legal coverage - “use this document, write off fair use risk”

Consumer Media Streaming
Users’ Statement of Best Practices in Fair Use in:

• Libraries
• Archives
• Museums
• Classrooms
Controlled Digital Lending
Controlled Digital Lending continues to be adopted....

- Now 30+ libraries have harnessed a CDL system to loan their digital copies
  - Boston Public Library
  - Allen County Public Library (genealogical collection)
  - Georgetown Law Library
  - MIT Libraries
  - MIT Press (selected back catalog)
  - Houghton Mifflin Harcourt (entire back catalog)
  - And more....

For CDL, Libraries Should

1. ensure that original works are acquired **lawfully**
2. apply CDL only to works that are **owned and not licensed**
3. limit the total number of copies in any format in circulation at any time to the number of physical copies the library lawfully owns (maintain an “**owned to loaned**” *ratio*)
4. lend each digital version only to a **single user** at a time just as a physical copy would be loaned
5. **limit the time** period for each lend to one that is analogous to physical lending
6. use digital rights management to **prevent wholesale copying and redistribution**
e-Media Implied Consent

- Medical care without consent is battery
  - cf. copying of copyrighted work w/out permission is infringement
- Unconscious person $\rightarrow$ emergency care
  - No explicit “yes” or “no”
  - “Implied consent” to receive care and “privilege” to render care
  - No liability
Limited, one-time licensing?

Not really the answer – temporary at best – highly dependent on outside factors
Language of a one-time exception

- Consequently, we will permit one-time educational screenings, "one-time screening" means that you can't hold screenings several times in one day or one week - but if, for example, you're an educator who wants to show the film once a semester over multiple semesters, that's okay, of any of the documentaries noted with this information, on the following terms:
  - The documentary may only be accessed via the Netflix service, by a Netflix account holder. We don’t sell DVDs, nor can we provide other ways for you to exhibit the film.
  - The screening must be non-profit and non-commercial.
  - Please don’t use Netflix’s logos in any promotion for the screening...
Main problem (recap)

• Licenses do not address preservation
• Licenses do not address access
• Licenses are all personal use
• Refuse to offer a site license, library license, campus license, etc.

RESULT: No §108 rights, no § 109 rights, no § 110 rights, etc.

Before it’s too late....
LOW RISK VS. NO RISK