



# MAGNA ONLINE SEMINARS

## Transcript

### How Recent Copyright Court Cases Affect Distance Education

A Magna Online Seminar presented on April 30, 2013 by **Linda Enghagen**, attorney and professor in the Isenberg School of Management at the University of Massachusetts at Amherst.

*How Recent Copyright Court Cases Affect Distance Education* teaches participants:

- Develop a working understanding of the transformative use doctrine
- Learn practical strategies for employing the transformative use doctrine in course design and delivery
- Develop a working knowledge of best practices in fair use

#### Editor's note:

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*Chris Hill:* Hello, and welcome to Magna's Online Seminar How Recent Copyright Court Cases Affect Distance Education: What You Need to Know about Transformative Use and Best Practices in Fair Use cosponsored by Magna Publications and *Distance Education Report*. I'm Chris Hill, Editor of the *Distance Education Report*, and I'll be the moderator today. I'm pleased you could join us.

We recommend that you print the 20-page supplemental materials for this seminar. Go to the file share box on the left of your screen, and then click on supplemental materials, then click on save to my computer to download, open, and print it.

And now I'm pleased to introduce today's presenter. Linda Enghagen is an attorney and professor in the Isenberg School of Management at the University of Massachusetts at Amherst. She is an expert on copyright law and distance education. Welcome, Linda.

*Linda Enghagen:* Thank you very much, Chris. For any of you who've perhaps heard me speak before, you know that I always like to begin with the requisite disclaimer. And now, I have to get my computer to advance the slide. Chris, can you jump in and help me out there?

*Chris Hill:* Sure.

*Linda Enghagen:* For some reason, the buttons aren't working for me today.

*Chris Hill:* All right. We have it up here. All right. I'll read the disclaimer. The information contained herein along with . . .

*Linda Enghagen:* Chris, hold on one second. I apologize to do that. But mine is frozen. It's not advancing.

*Chris Hill:* All right. Well, while you're doing that, I'll read the disclaimer, and then we will get this, so that you can advance to the next slide. The information contained herein, along with any questions and answers, are for educational purposes only. Neither is a substitute for legal advice, and neither is to be construed as the rendering of a legal opinion.

*Linda Enghagen:* Thank you, Chris, and now my buttons seem to be happy and working. My apologies to everyone. I always like to begin these sessions with a question. I apologize. It's froze again. I promise everyone that we did a test run on this.

*Chris Hill:* All right. Let's take a look.

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*Linda Enghagen:* All right. Okay. So now we're going to begin with the first polling question. And, Chris, I'm going to rely on you to advance the slides for me, so we have this go smoothly, and I'll cue you as we go along.

*Chris Hill:* All right.

*Linda Enghagen:* So let's assume for polling question one that your library's film collection includes a DVD of that classic that many of us have seen and used in our educational enterprises, *The Stanford Prison Experiment*. You digitize and stream it to students in an online class and ask them to discuss its implication in relation to the existence or nonexistence of free will. Is this legal? So let's show them the answer choices.

*Chris Hill:* Choices are A, yes, this is educational fair use, B, no you don't have public performance rights, C, it depends.

*Linda Enghagen:* So let us know what you think. Just like my students, many people like to choose the it depends. It's always a safe answer in response to a legal question. Right? So let's go on and see what we can find out about the answer to this.

So the question is, is it legal? Our three choices. And now what does that bring us to? Well, one of the cases we're going to talk about in a little bit of detail today is *AIME v. Ambrose*. And *AIME v. Ambrose* says that, you know, if you bought the public performance rights when you brought the video or the documentary, then, yes, you can go ahead and use it and stream it in that way.

Well, what about fair use? How does that work? Well, so far, we don't have a court ruling on that specifically, but something else we're going to talk about a little later in today's presentation, is best practices and fair use, and how they apply to the use of a wide range of materials.

And the best practices in fair use suggests that the answer to the question is, yes, you actually can do this under fair use as long as the portion you use is appropriately tailored, and you're using it transformatively. You've transformed it in some way.

So that brings us then to taking a look at some of the specific court rulings. You know, what do we really know so far? Because, you know, one of the things that we've all been kind of suffering along with here in education is that while there's lots of copyright infringement lawsuits out there, and there's lots of court cases on copyright infringement suits out there, there are very few that have looked specifically at the question of how fair use applies in educational environments.

That's not where the cases have been. For the most part, the cases have been far more on the commercial side. So that brings us to the kinds of resources that you can find in the supplementary materials. So, Chris, can we see the next slide?

*Chris Hill:* Mm-hmm. Slide ten, see supplemental materials.

*Linda Enghagen:* Yes. When you see the supplementary materials, what you will find is that there are five cases where I have given you what are called the key rulings at a glance.

You're going to see information about the Cambridge University Press Case against Georgia State University. The Author's Guild Case against the HathiTrust in a number of universities, *AIME and Ambrose v. UCLA*, and then a couple of cases that are not in educational contexts directly, but do, at least by my way of looking at it, and as far as many other people are concerned, have implications for educational settings. So that brings us to the three lawsuits that are specifically against the seven universities.

*Chris Hill:* Okay. Here we are on slide 11 with the 3 lawsuits.

*Linda Enghagen:* Now my screen, Chris, is locked back on the court rulings slide, so I'm going to go ahead here. But if somebody can help me out there, that would be lovely.

What you'll see with the three lawsuits against seven universities is that all of these court decisions have been rendered in 2012. There was a lawsuit against UCLA involving streaming video to the LMS. There was the 2012 lawsuit decision involving Georgia State University that involves the posting book excerpts to eReserves in the LMS. And then there's also the digital repositories case that involves the Author's Guild and the University of Michigan, the University of California System, the University of Wisconsin System, Indiana University, and Cornell.

So we could actually get this to far more than simply seven universities if we wanted to start counting up everything that's in the University of California System as well as the University of Wisconsin System. So let's begin to look at the cases on a case-by-case basis. So let's move on to *AIME and Ambrose v. UCLA* and the slide that shows us what's really going on in that particular lawsuit.

*Chris Hill:* Okay. We've got it here.

*Linda Enghagen:* Okay. So the undisputed facts in *AIME and Ambrose v. UCLA* boiled down to this. UCLA, just by way of brief background, had purchased a set

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of videos of Shakespearian plays. And in addition to having faculty members who used in them in their on-campus classes, so in a face-to-face classroom, and, clearly, we all know that's allowed. Go to the library, get the videos from the collection, and then we go ahead and we show them in our classrooms. That's clearly okay.

Now what was happening at UCLA is that when faculty members were teaching courses online, fully online, in which they wanted to use these same films, they were having them digitized and streamed to the students in the, through the LMS in the online classroom.

UCLA had purchased the public performance rights when they acquired the videos. They had bought the public performance rights, because that's the way they were being sold in the catalogue. It's the terms and conditions under which they were offered for sale.

So they digitized and streamed them to enrolled students, and then lo, and behold, Ambrose, the production company, and AIME, a trade association that represents educational video producers, turned around and sued UCLA saying, yeah, you can't do it that way, because you didn't buy the right set of rights in order to be able to stream them to online students in a purely online environment.

Now what the court came back and said in this case is, well, you know, there's this 11<sup>th</sup> Amendment sovereign immunity problem for public institutions, so UCLA has sovereign immunity. But the court went on to say a couple of things that I think are critically important.

One, that the public performance rights are sufficient for streaming. That we don't need to purchase rights that go above and beyond the public performance rights in order to know that we can stream to a secure LMS. Now that's important, because Ambrose was selling them that way. They also believed that if you wanted to do more, you needed to buy a more expensive license. But the judge said, no, actually, it doesn't work that way.

Furthermore, and perhaps even more critically, the judge said that the Copyright Act, the federal law, preempts any state law claims, because in addition to arguing copyright infringement, AIME and Ambrose were trying to argue that this was a breach of contract. And the judge said no. You know, again, it doesn't work that way.

It's, the judge said that this is one of those places where, when there's a conflict between what the federal law says, the Copyright Act, and what the state law says, which would be contract law and the potential breach of contract claim, that the breach of contract claim goes away.

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That the only law that controls the outcome of what is and is not permitted is federal law, and that, in this case, is Copyright Law, and that, in this case, this is allowed by Copyright Law. So public performance rights will do the trick.

Now there is always the win the battle lose the war potential with certain types of lawsuits, and this is one of them. Because what we could end up seeing is that the video producers stop selling them with public performance rights. They could simply increase the price on everything.

So whether going forward, you know, we do end up in that winning and losing situation between the battle and the war, nevertheless, what we know at this point in time is that public performance rights is sufficient. And that leaves open, still, of course, the question of whether we even need that much, or whether, you know, proceeding alone on fair use is sufficient to do the trick.

So now that brings us to our next case. So if you'll advance, Chris, to the *Author's Guild v. the HathiTrust*. So when we're dealing with the Author's Guild and their lawsuit involving the HathiTrust, I mispronounced it the first time, so forgive me, we have to be aware of the fact that there were really two different projects that were going on here.

There was the Orphan Works Project and the Mass Digitation Project, and the legal status of this single lawsuit differs for those two projects. And I'll start with the Orphan Works Project.

The purpose of the Orphan Works Project was to combine the collections of orphan works that were held by the institutional libraries of the participating universities, have them digitized. Google was hired to do the digitization and create the database of these works. And then these orphan works were going to be made available to the library patrons from the participating institutions, you know, in cooperation with the Trust.

The Guild, the Author's Guild, on behalf of its members, challenged the Orphan Works Project, because they challenged the, both the criteria by which institutions were determining what qualified as an orphan work as well as whether, even if they got that part right, you know, was this something that was permitted?

In the end, it really didn't get very far in the process, because the Author's Guild was able to provide documentation to the HathiTrust and participating universities that demonstrated pretty clearly that the process by which they were identifying orphan works was pretty flawed.

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They even had some works in there where authors were still alive, which is, that should've been readily identifiable. And they were not very successful at correctly identifying works that belonged in that category, so they voluntarily suspended that project.

You know, whether that gets revised down the road, I think remains to be seen. I haven't read anything clearly indicating whether they plan to do it. But I do think that one of the things we clearly know here is that properly identifying orphan works is a difficult process, if for no other reason, than that's, it is extremely labor intensive.

And you do need people involved in it who have a fairly high degree of expertise, because they're the ones who are going to have the knowledge base to know which path you need to go down with a particular work, or a particular author's set of works, to determine their copyright status and their ownership status and all of those kinds of things, which was the major problem. Now that brings us to the next slide which deals with the Mass Digitization Project. So, Chris, are we on the next slide right now?

*Chris Hill:* Yes, we are.

*Linda Enghagen:* We are. Thank you very much. So the Mass Digitization Project is somewhat different. Again, the Trust and the participating universities contracted with Google to digitize their book collections.

Here what they were doing was they wanted to develop the capacity for scholars, for example, this is one application, to do full text searches. The kind of thing that a computer is very proficient at that human beings are less proficient at, or at least the amount of time that it would take to do it becomes so labor intensive that it becomes prohibitive. So they wanted works to be digitized to facilitate new types of scholarly work by facilitating full text searches.

In addition, there were some works in their collections that they simply wanted to be able to preserve. You know, books that are no longer for sale, for example. They are out of print, and the copies that the institutions had, you know, may be deteriorating simply due to age, so you digitize them for the purposes of preserving them.

And then, finally, they wanted to digitize their collections for the purposes of making them more available to patrons who had various kinds of disabilities, where digitizing the collection would facilitate making them available in a way that the patrons who had certain types of disabilities could more readily access them.

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What did the court have to say about that? Well, in their ruling, they said that, you know, there's really not a whole lot more transformative than taking something like a print book, digitizing it, and then making new types of scholarship possible by virtue of the works having been digitized. So the court said, full text searches, that is transformative. And we're going to talk in a little bit about whenever a court finds that a particular use is transformative, it almost always also finds that that use is a fair use.

As far as the preserving deteriorating works, where the physical copy is deteriorating, and, you know, purchasing a new version of it is not possible, because that new version is not available on market, the court said that's just a classic fair use example. We don't even need to talk about transformative uses, because that's just straight fair use.

Access for patrons with disabilities, the court said a couple of things about that. They, the court concluded it was transformative by making these works available to that population of clientele, number one. And number two, they added to that, that, you know, if we're going to be realistic here, we have to acknowledge that the market, the potential, commercial market that might motivate a publisher to develop these materials so that they are available for sale to patrons with various kinds of disabilities is simply tiny. It's just not very big.

And that, also, adds to the conclusion that this is a permissible, transformative use that does not have any kind of a negative impact on the market for the works. And so that, in a nutshell, is where the two dimensions of the Author's Guild lawsuit against the HathiTrust, and the participating universities, where that stands.

Now that brings us, really, to the third case, which is the one that's probably gotten the most air time and the most press, particularly for those of you who regularly follow things like *The Chronicle of Higher Education*. The Georgia University Press Case, along with the other institutions, against the officials at Georgia State University is the case that has gotten us the most air time.

So the first thing I want to talk about there, so, Chris, if you can get us to the slide that talks about semester-to-semester uses and the *1976 Guidelines for Classroom Copying of Books and Periodicals*.

One of the long, you know, time-honored questions that faculty members have been looking for an answer to when it comes to questions of fair use and using materials in classroom settings is whether copyright and fair use law permits a faculty member to reuse the same materials from one semester to the next.

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Now the reason this has been a question is because the fair use guidelines have long suggested that while fair use might permit you to use something once, if you're going to take that same thing and use it repeatedly, then, after the first time, you have to start thinking about getting permission and paying royalties if that's required.

Well, at least in the trial level ruling that we have in this case, the judge definitively said that semester-to-semester use and reuse of the same materials does not violate fair use. So everybody can, you know, have a sigh of relief on that one.

Not only did the judge say that specifically about the semester-to-semester reuse of the same materials, but she also said that the *1976 Guidelines for Classroom Copying of Books and Periodicals* is not a legally binding standard for determining fair use.

Now she didn't say it was irrelevant. She simply said it was not a legally binding standard. So it's very important that we now know going forward that we don't have to look at that and limit ourselves to the structure of what it says the do's and don'ts are. So that brings us, and, Chris, if you'll move us on to Factor #1, the purpose and character of the use.

Before I start talking about how the judge broke down and analyzed the four fair use factors in the Cambridge case against Georgia State University, let me first just briefly refresh everybody's memory on what the facts of that case were.

Georgia University Press and other publishing companies, joined in this lawsuit against Georgia State University. And all of the alleged infringements that are evaluated as part of the judge's ruling in this case, and it's important to keep it in this context, were chapters out of books. So this does not involve journal articles or poems or anything like that. They're all chapters out of books, and they are all chapters out of nonfiction books.

So, you know, law is very fact specific. It's one of the things that's intriguing about it. If you like the law, it's one of the things that can be very frustrating about it for people who are not so fond of kind of like the mental gymnastics that you can end up going through when you try to then take the various court rulings and actually do something with them.

So the context is nonfiction books, chapters that were pulled out of these nonfiction books, scanned, and then either posted into the eReserve System at Georgia State or the LMS that they used for delivering online course materials and online courses to students.

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So, you know, we get past the, you know, of course, you can use these materials for educational purposes, because Georgia State is an educational institution. But I'm sure that many of you are familiar with the idea that just because the use is for educational purposes, that gets you past the first step in the process, but it doesn't get you to the end of it.

You now have to examine whether that educational use satisfies the fair use factors. So let's take a look at the four fair use factors, and what the judge had to say about them in the Georgia State case, again, keeping in mind that we're talking about chapters out of nonfiction books.

So Factor #1, the purpose and character of the use. The judge is very clear that teaching by nonprofit, educational institutions favors fair use. Therefore, in her analysis of all of the cases or instances, rather, of alleged copyright infringement in this case, Factor #1 weighed in favor of Georgia State.

Now that leaves open the question of how would that work if we were dealing with a for-profit institution? And I know some of you in today's audience are interested in that, and you'll find some materials in the supplementary materials, including a nonprofit, for profit comparison under the copyright statute, that lays out not only the basic differences between the two, but also provides you with some practical suggestions for how do you navigate the terrain in light of the differences.

But let me say this about how I see the for-profit side of this working. There are people out there who write about copyright and fair use law. I've read a number of sources that make the argument that if you're a for-profit institution, then you're just out of luck, that you've got to like get permission and pay for everything.

I believe that that is false. How false is it? You know, what are the parameters of it? Well, I don't know the answer to that any more than anybody else does, but I do know this. That when we're dealing with for-profit educational institutions, on the one hand, we have a for-profit entity, whatever the corporate model is, of the institution or organization. But on the other hand, what we have is providing an education.

This is about education. This isn't for-profit corporate training. That's different. You know, so I think that it really is a mixed bag on Factor #1 for for profits. I think it's still, at a minimum, has an element of fair use to it, and that it really is mixed. It's not weighed as much in favor of fair use, but it certainly is not tilted completely in the opposite direction.

So more care is in order, but fair use does not disappear simply because we are in a for-profit environment. And a little later, I'm going to show

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you a couple of lawsuits that do not involve educational institutions, but they are the reason I'm saying that as strongly as I am. So that brings us to Factor #2.

Factor #2 is the nature of the work used. So now we're not looking at what you're using it for, we're looking at what are you using. Here, the court said, you know, again, we're back to chapters in nonfiction books. Well, the nature of the works used, they were nonfiction works, and they were educational materials, so the court said that this favors fair use again in all of the instances in this particular lawsuit.

What questions does that leave open? Well, it doesn't give us answers for works of fiction, creative works, journal articles, video, anything else. It just tells us nonfiction and educational materials, so they're more factually based, that is going to weigh in favor of fair use, definitely when you are in a nonprofit, educational setting.

Then there's Factor #3, and Factor#3 is where the judge started getting formulaic in a way, that by some measure, I frankly found surprising. But it's also refreshing to have something that gives us a little more specificity than we've ever had before, again, at this stage of the game.

Trial court opinion. You know, all of these cases are in an appellate process, and where they end up after the appeals courts, get done with them all, you know, that is anybody's guess at this stage of the game. So Factor #3 looks at the portion used and the amount in substantiality that relates to the portion used.

So how much of it, how central is it? Well, the judge told us a few things here. You have to look at these situations on a case-by-case basis, so, again, individualized determinations. She said, no matter what you're using, if it is the heart of the work, you need permission.

Now that, of course, begs the question of what's the heart of the work? And, essentially, she says, look, if it's a book, and you want to take the final chapter, and the final chapter summarizes the entire book, then that's the heart of the work, and you can't do that. You need permission. Because if you're taking the heart of the work, what you're really getting in the neighborhood of is what's called a market substitution. You're trying to avoid making people to have to pay to get the product that's on the market. And that, she said, no, you can't do that.

Well, what do you do if it's not the heart of the work? Well, if it's a book, nonfiction book, nine or fewer chapters in the book, then fair use permits you to use up to 10% of the total pages, so nine or fewer chapters. If you

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have, you know, 150-page book, you can use up to 15 pages out of the total.

If the book has ten or more chapters, then we're not going to use this 10% rule, per se. We are going to say you can use one chapter or its equivalent. So think about a situation where you use excerpts of two different chapters, neither one in its totality. You take a piece of each of two different chapters. If the total pagination of those two different chapter excerpts combined is equivalent to one chapter, i.e., the average length of a chapter, then you are free to go on, and you are free to do that.

That brings us to Factor #4, which is the impact on the market. Now, again, the judge tells us here we have to go to that case-by-case analysis. We have to look at the impact on the market for the entire book, the entire work, and we have to look at the impact on the market for permission. And that means, among other things, that we have to take a look at whether there is some kind of a permissions system out there, whether it's something like a Copyright Clearance Center, whether the publishing house itself offers something.

You know, she says we have to ask the question, is there something that is readily available in a convenient format? She differentiated between permissions that are available only for print permissions as opposed to electronic permissions. And is it at a reasonable price? So if you want to use it electronically, and it's only available under permissions in print format, then that's going to weigh in favor of you using it in an electronic format.

So I know that we've talked about a lot already in our first 35 minutes or so, so let's take a break for a moment here. And, Chris, can you give me an idea of what kind of questions we have out there at this point, so we can stop and pick up a couple of those.

*Chris Hill:*

Sure. We have a question from Zayed University, who wants to know if because of the cost of production of course materials, if the institution sells them but does not make a profit, what is the, how does that, how is that affected by fair use?

*Linda Enghagen:*

That's a great question. And, you know, we don't have a court case that gives us an answer to that, so I can only give you my best professional judgment in response to that. And I believe that the answer to that would be if you are selling the materials, even if you are selling them, quote, unquote, at cost that is tricky terrain. I would not recommend to an institution that they do that.

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Now if it's wrapped somehow into a curriculum fee, that's different. But if it's on a per-unit basis, even though all you're doing is cost recovery, you know, you're more in the direction of the Kinko's kind of situation that a court said was unlawful.

But, again, wrap them into something like a curriculum fee where, you know, everybody pays a flat fee whether it's on a per-semester basis or something like that, and that, I think, is a far safer thing to do. What about one more question at this point before we go on and talk about transformative uses? What else, Chris?

*Chris Hill:*

We have a couple of questions that have to do with the visual character of a book. One asks if the rule applies to full images in the book, within the book chapters. In other words, I assume that this person is asking if the part of the book that you reproduce contains illustrations, are they, do they come in under fair use? And then a second person, if I can sort of combine these two questions, wants to know if transformation is easier with video than with still images?

*Linda Enghagen:*

Well, the answer to the first question is a simple yes. That if there are images, illustrations, that kind of thing, that would fall within the parameters established by the judge in the Georgia State case, then they are going to be permitted.

As far as the images, is it easier to do something in a transformative way with video than it is with images? You know, I actually think the answer to that is six of one, half dozen of the other. And some of it comes down to somebody's individual and personal, technological capabilities, because if you have the software and the ability to alter an image, then it's possible that you might easily transform that. For many of the rest of us, we don't have the ability to do that, so it would not be so easy to mechanically carry it out. But if you, you know, if you do it, then that can become transformative.

As far as video, the thing that makes it maybe on some, by some measure easier to transform video and film, is that you can transform it simply by taking excerpts. And it's harder to take excerpts out of an image, so that is how I would parse the difference between those two things.

But those all raise good questions about the nature of a transformative use. So why don't we move on and begin to talk more specifically about transformative uses and fair use?

*Chris Hill:*

If I can just say one thing here, Linda, we are getting a lot of questions, and I want to let people know that at the end of the formal presentation, we will be taking some extra time to answer questions and, also, we will

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answer, whatever questions remain at the end of that, we will try to get an electronic answer to you via e-mail.

*Linda Enghagen:*

Thanks, Chris. So let's move on and talk about transformative uses and fair use. Now I always qualify what I say about transformative uses by starting with the proposition that whenever a court concludes that a use is transformative, they almost always conclude that that is a fair use.

Now I put the word almost in front of always, despite the fact that I can't give you a single example of a court concluding that a use was transformative and not fair. But the rules leave open the possibility that that could occur, and, therefore, I don't want to give you an absolute statement when an absolute statement could end up being misleading.

So courts almost always conclude a use is a fair use if the work is, in some way, meets the legal standard of being transformative. What makes something transformative? Well, you're repurposing the original. You're not trying to do, and think of repurposing as being the opposite of a market substitute.

You're modifying or revising the original. You're not merely creating a derivative work. A derivative work is something that would be, comparatively speaking, a less significant or a minor change to the original. You are, in order to transform something, making a change that modifies or revises the original to a greater degree. So you're repurposing it. It's not a market substitute, and you are revising or modifying it in some way, shape, or form.

Now that brings us to our second polling question, which is what about for-profit educational institutions, can they rely on fair use and the transformative use rules too? And this time, our answer choices are, yes, the rules of fair use and transformative use do not apply only to not for profits, or, no, the rules apply only to not for profits. I have no clue, or choosing not to vote. So let's see where people land on this.

I've alluded to the answer to some of this earlier. So it looks like most people are landing on that, yes, the rules of fair use and transformative uses do not apply only to not for profits. It's possible that they can apply in a for-profit environment too.

So let's take a look at a couple of cases that, the ones I alluded to earlier, that will help us begin to sort that out and understand why I made the statements I did earlier about for profits being able to rely on fair use, not with quite the same degree of weight that not for profits can, but, nevertheless, they can.

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All right. First case. The first case is best known as the Turnitin Plagiarism Detection Case. iParadigms is the name of the company that owns Turnitin. I'm sure that many of you either use it at your institutions, or you've heard of it. You can require students to run their papers through the database that Turnitin maintains, and then you get reports back that give you an idea of whether there might be any kind of plagiarism issues involved in any of it.

So, Turnitin, when a paper is submitted to it, retains an exact copy of that paper in its database for future comparisons. So if I write a paper for one of your classes, and you require me to run it through Turnitin, my paper now is in the Turnitin database.

There were a couple of high school students who took exception to this and tried to argue that that was copyright infringement, that they did not give Turnitin permission to keep copies of their paper, that Turnitin was keeping complete copies and then using them for their business purpose, and, therefore, that was copyright infringement.

And the court came back and said, you know what, you're wrong. It's true that Turnitin is keeping a complete and exact copy of the paper as it was submitted, but this is transformative both in function and purpose. Turnitin is not selling or distributing your paper. What Turnitin is doing is they're using it to do two things. One is to detect plagiarism, and by virtue of having a system that detects plagiarism, they are also discouraging plagiarism. So the court said they are allowed to do that.

Now the other case that I want to point to, which is even more of a departure, this has nothing educational about it at all, it's *Perfect 10 v. Amazon and Google*, and Perfect 10 sold images of nude women. They sold nude photos, and they sold them to people who wanted to use them as their background screens on their computers, Smart Phones, that kind of thing.

Well, what happened was because of the way that both Amazon and Google were working with their search functionality, you could actually end up landing on thumbnail of these photos by doing the search on Amazon or Google. The search engines were capturing the thumbnails, and as the result of that, Perfect 10 said, you know, they can't do that, because they're making copies, and that is interfering with our copyrights.

And the courts came back, even on that, now these are all for-profit businesses. Perfect 10 is selling photos to earn money. Amazon and Google are in business to make money. There's no educational component to this at all. Nevertheless, the court came back, and the court said this is

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highly transformative. They didn't say it was transformative, they said it was highly transformative.

And it was highly transformative because permitting the search engines to capture the thumbnails, it doesn't really matter that they're thumbnails of nude photos, it could be plants from a site that talked about different types of plants. Doesn't matter what the images are, it improves access to online information.

Now I've got to ask you, if Perfect 10 and Amazon and Google end up with, in a fight like this, and Perfect 10 loses, then it strikes me that you couple that with the Turnitin Case, and for-profit educational institutions have a very strong argument that what they are doing when they are using materials, yes, in their for-profit organization, but they're using it for educational purposes, is going to be at a minimum, a very strong fair use argument if not, indeed, a transformative use argument.

Now that brings us to codes of best practices, which is the next thing I want to spend a little bit of time talking about. And the main purpose of me talking about codes of best practices is not to teach you the detail of them, but I want you to understand what they are, and what their purpose is, and how they operate. So let's take a look first at what they are.

So codes of best practices in fair use are, I analogize them to replacements for the old fair use guidelines. They're like the guidelines in that they're not laws, but they're really kind of like industry standards for communities of practice. They're developed by individuals from various communities of practice who were interested in helping people make better fair use decisions.

And the codes of best practices have a tendency to focus on how might we use materials in a transformative way, because the people who were involved in this realized early on that that was critically important. So it provides an answer for judges when they ask, and, you know, remember, judges can remit damages for an honest error, at least if you're working in a non-profit environment.

These best practices also help minimize mystery and anxiety. And they help us do what I call flexing fair use, because, you know, we don't want to let the commercial industry define the standards only. We need to have a place at that table as well.

So where do you find the codes of best practices? You'll see on the next slide that where you can find them is the Center for Social Media. Now the Center for Social Media is not responsible for creating them all, but they have provided space on their website to aggregate all of them.

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So if you go to their website and look under their fair use link, you're going to find the codes of best practices in the various fields. And, in a minute, we are going to see what the range of topics are that are included. And they also have related materials that help you sort out fair use, and they also have some educational videos that can help you.

So this brings us to another juncture where we can stop and maybe take one quick question before we move on and talk in more detail about best practices in fair use. So, Chris, why don't you give me an idea of what would be a good question to field at this point in time?

*Chris Hill:* Well, a couple people are wondering about journal articles, and whether or not you can, in a class, if you can post a journal article on the LMS?

*Linda Enghagen:* The short answer to that is, yes, you can post a journal article on an LMS as long as you're beginning with a copy of the article that was, that you lawfully acquired or accessed. So whether you have a personal subscription to the journal, whether it is in your library's database, yes, taking a single article out of a journal, you know, this is an answer that I'm giving not because it is a court case that has tested it, it is experts agree that that's kind of a classic example of fair use.

So being mindful of the clock as we move forward, and I'm, again, as Chris said, you know, I'm going to stay around a little bit when we're done here, and I'm happy to field questions for those of you who are interested and have time, but I also want to be respectful of those of you who need to be done at our scheduled time of 3:00.

So best practices in fair use, let's take a look at the topics that we have best practices about to date, and there are actually 12 of them. So there's a code of best practices for academic and research libraries. That's something that I think many people will find useful, the codes of best practices in relation to poetry, in relation to open courseware.

If you move on from there, we have media literacy education, online video, a filmmaker's statement of best practices in fair use. From there, we go on to journalism. The use of images, a few of you asked about that earlier. You can go and look and see what the statement of fair use for images, of images for teaching research and study.

The Society for Cinema and Media Studies has a statement in relation to media studies publishing. And the last three relate to film and media teachers, scholarly research, specifically in communication, and then best practices in fair use of dance-related material.

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Now this brings us to our third and final polling question, which is true or false, the codes of best practices for fair use are useful only for teaching related activities?

So here we've given you the choices, true, their purpose is to assist in designing and delivering online course materials, false, their purpose is to assist users in properly flexing fair use, or, I don't know. You know, I don't know would certainly be a fair answer. Well, most of you are landing on the most accurate answer, which is, in fact, B, their purpose is to assist users in properly flexing fair use.

You know, I've already had occasion, after talking to audiences about the codes of best practices in fair use, to have people come back to me and say that they've even used them when they were negotiating with publishers under book publishing contracts in order to persuade the publishers that a particular use that they wanted to make of someone else's copyright-protected work was, in fact, permitted under fair use, so even the publishing industry is beginning to pay attention to all of that.

So in the time that we have remaining, let's take a quick look at the structure of codes of best practices. And I want to use the code of best practices in relation to academic and research libraries just as one example, because this one, I think, has the broadest application to what many of us do regardless of our particular role and regardless of the type of institution that we're in.

The best practices tend to be laid out with first principles, then limitations. So they kind of like try to warn people about, you know, not going too far. And then, enhancements, things that you can do to make the argument or the case even stronger. Part of what they're trying to do is get the word out, so you will find, when you actually go to look at the best practices, a statement on them. On this particular one, it's on page 29. It says feel free to reproduce this work in its entirety for excerpts and quotations depend upon fair use. So they really are trying to get the word out on this.

Now let's take a look at the principles that are used. And I'm going to tick through these pretty quickly. Principle #1. It's fair use to make appropriately tailored course-related content available to digital enrolled students via digital network.

Principle #2. It's fair use for a library to use appropriate selections from collection materials to increase public awareness and engagement with these collections and to promote new scholarship drawing on them.

Principle #3. It's fair use to make digital copies of collection items that are likely to deteriorate or that exist only in difficult-to-access formats for

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purposes of preservation and to make those copies available as surrogates for fragile or otherwise inaccessible materials.

Principle #4. It's fair use to create digital versions of a library's special collections and archives and make these versions electronically successful in appropriate context.

Principle #5. When fully accessible copies are not readily available from commercial sources, it is fair use for a library to reproduce materials in the collection for the disabled upon request, and retain those for subsequent requests from qualified patrons in the future.

Principle #6. It's fair use for a library to receive material for its institutional repository and make deposited works publicly available in an un-redacted form, including items that contain copyrighted material that's included on the basis of fair use.

Principle #7. It's fair use for libraries to develop and facilitate the development of digital database of collection items to enable non-consumptive analysis, think the kind of database search that we were talking about earlier, across the collection for both scholarly and reference purposes.

Now I understand that all of this can end up being a little bit overwhelming, you know, like too much information, and eyes can start rolling. So one of the other things I did as part of compiling materials for this particular presentation, and you'll find these in your supplementary materials.

You'll see a section of a document entitled Pragmatics and Practicalities, and what I've done in the Pragmatics and Practicalities is tried to boil it down to what are we really talking about and dealing with here? I mean, when it comes down to it, at the end of the day, what are the choices you have when you're looking at the materials that you are using?

Well, you can do it yourself. You can use open access resources. You can go to commercially available books and other educational materials. You could use public domain works. You can use library resources, and you can use personal copies. I mean, that is, those are, rather, the most common categories of materials that any of us are going to use.

Some of them, you know, you're going to find a lot more of them in some fields than others. You know, I use a lot of public domain works, but I work in law. Many of the rest of you are going to end up working in areas where there aren't so many works that are in the public domain or aren't so many works that have been developed by those involved in the open

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access movement. But nevertheless, it all kind of boils down to those basic choices.

So at this point, what I want to do is thank all of you for joining us, and my clock says that it's 3:00 on the nose. So, again, I want to make sure that those of you who need to move on have an opportunity to do that. And at this point, I am going to ask Chris to jump back in so we can field some questions for people for those of you who are interested in staying around and have the time to do so. Chris?

*Chris Hill:* Well, one question here that strikes me as being kind of posing an interesting question is, is it fair use to e-mail an article to a friend, a friend who's not on your campus? Does the size of the people who are going to be viewing the material make a difference?

*Linda Enghagen:* Let me deal with those two questions separately, because they really are two different questions. If on, an occasional basis, you happen to run across something that you think is of interest, of personal interest, so this has no professional, you know, this isn't somebody you're working on a research project with or any kind of collaboration, this is just something that you think a personal friend of yours might find interesting. That kind of sharing on an occasional basis is generally believed to be permitted under fair use.

You know, you're not, in any way, shape, or form, impairing the market for the work by occasionally doing something like that. However, the second part of the question, does it matter how large a population, is critical. And the answer to that is, yes, because the larger the number of people that you circulate something to that is protected, then the weaker the fair use argument becomes.

You know, think about the basic restriction that we always talk about, which is secured systems, secured eReserves, enrolled students only. You know, the more limited the population is, and limited both in number, particularly when you're talking about unsecured environments, and limited by the security of only to enrolled eligible members of the community on the other end of the continuum, the better off you are for making a strong fair use argument.

So occasionally sending something to a friend, I don't see a problem with that. But the larger the number of people, and the less secure the environment, then the faster that becomes problematic. So what's next?

*Chris Hill:* Okay. The City University of New York asks us about music. What about music obtained from iTunes to put into a presentation?

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*Linda Enghagen:* Well, if you are taking, if you are taking that music and putting it into an educational presentation that, again, is limited in scope, meaning you are not having the students post those presentations online in an unsecured way, then that is going to qualify as fair use, as, you know, long as you're not, as long as you're not taking too extensive a portion of a single collection.

The thing I find increasingly is that more and more faculty members are experimenting with having students not only work in unsecured environments but post their work to unsecured environments. And that's problematic.

It really is, the focus of this really has to be on keeping things in secured environments, keeping things in the classroom and not just posting them out on the Internet somewhere where anybody with an Internet connection has the possibility of tripping across the materials and accessing them.

I understand that there's educational value to that. I don't, I hope nobody is hearing me suggest that there's no educational merit in that. That's not my point at all. My point is that from the standpoint of copyright and fair use law, when you make materials available through a forum where anybody can access them, then that really kind of destroys your fair use argument.

So it's about the law, not about the pedagogy of the potential benefit for creating materials that are for broader distribution. If you're going to do it that way, then you have to make sure that the students are using materials that they're properly authorized to use in that way. Another question?

*Chris Hill:* Yeah. Here's an interesting question. What if the book that you want to take material from specifically states that the content, no portion of the content can be used? And this person says that an example of that is Pearson's books.

*Linda Enghagen:* Right. A lot of, well, let me start in a somewhat different place. Copyright owners are not required to correctly describe copyright law in their materials. So now I say that not to make some kind of obtuse legal point, I say that because sometimes people will respond by saying, well, can they put something in the book that's not legally correct, that's not a correct statement of the law? And the answer is, yeah, actually, they can.

So when they are making that kind of a statement, what they are trying to do is discourage people from using the materials without either buying them or buying permission from them to use them. However, to date, at least, what we know about copyright and fair use law is that no publisher can obliterate fair use by that kind of language. You can't deny somebody

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their statutory right to use fair use by saying you need permission no matter what. You just can't.

And, as a matter of fact, you know, when we were talking about some of the cases earlier, that is, in fact, what happened when the judge said, here we have copyright law, and here we have contract law, and only copyright law applies. That's exactly what the judge was saying was that the owners of a copyright cannot change the rules of copyright by putting specific other terms and conditions on the sale, that, you know, you can't contract away fair use rights, in other words.

So when a company puts that on there, they are trying to discourage people from exercising their fair use. But everything I know about copyright and fair use law says that we still get our fair use rights as users of lawfully acquired and accessed materials. So I would say fair use still applies, and I would still do it.

As a matter of fact, I personally have used materials out of books and other types of products that have those kinds of statements on them. You know, and I try to use them within fair use. I don't mean that I go willy-nilly with it, but, yeah, that does not prevent you from exercising your fair use rights.

*Chris Hill:* And another question has to do with stock photos, such as you may purchase rights from iStock or Corbis from, can those be used in LMS or in a PowerPoint presentation or a format like that?

*Linda Enghagen:* Yeah. The general answer to that is yes, but you have to look at how they're being sold. You know, I have purchased, in some instances, I've purchased the rights to use images from those types of companies. And they often sell them with different levels of rights, which they are permitted to do, again, as long as they're not trying to prevent you from using them under fair use once you lawfully acquire them, but you have to look at the rights that you're buying, which is the same kind of idea as using library resources.

You know, there's different terms and conditions of licensing agreements, even when those terms and conditions are all perfectly legal. So you have to know more detail, and, you know, that's what you would have to be consistent with with that. You can't necessarily go in and buy the cheapest rights and then use it however you want. You have to pay attention to the terms under which you acquired it. Is there another question out there?

*Chris Hill:* Oh, yes. There's quite a few. And, actually, one of our people out there, and probably more than one is wondering about this, asks to, wants to make sure that we'll send responses to all the questions to all the

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participants. And you will see these all. This will be included on the CD that is sent out, so the answer to that is yes.

But as far as questions, more questions go, we have people who are curious, and this is continuing kind of on the subject of journal articles, what about use over multiple semesters of journal articles?

*Linda Enghagen:*

Well, I believe that even though the Georgia State case involved chapters of nonfiction books, that the thing we talked, one of the things we talked about that came out of that case was that semester-to-semester reuse of those same chapters in books is permitted. I cannot imagine that the ruling would be any different on journal articles.

If your use of the journal article is genuinely a fair use the first time you use it, then using it subsequent semesters when you teach, doesn't matter the same class or a different class, is going to be permitted as well. You know, until an appeals court says differently, and I don't believe they will say differently, I think we now safely know that reusing the same materials from one semester to the next is permitted.

And I will say even more so, I have always believed that. And I've always believed that because while it is true that you're using the same materials from one semester to the next, they are different students. You know, we're not like, it's not like a do-over that we teach the same class to the same students semester after semester after semester.

We teach the same classes to different groups of students, with the limited exception of the few instances where a student needs to repeat a class for one reason or the other. So that prohibition on, the idea that there was a prohibition on semester-to-semester reuse never made any sense to me at all. It didn't make any sense to me as a practical matter, and it didn't make any sense to me as a matter of law. So what else do we have?

*Chris Hill:*

Well, what about if your course features a guest speaker on some occasion, and you record or tape that speaker and then make that a part of your course, or if you share the portion that you've taped with other members of your institution?

*Linda Enghagen:*

That's not an uncommon practice. As a matter of fact, when I do live speaking engagements at various institutions and conferences, that's a question that often arises, and the simple solution is you get the permission of the speaker. You get the permission of the speaker to do the taping and then to provide it to whatever the appropriate audience is. And as long as you have the speaker's permission, you're fine.

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And I would add that that is not only a copyright issue, there are private, potential privacy issues with that as well. So, you know, just make sure you get permission. And I often, you know, give permission, which is an e-mail from me. It's not, sometimes it's a formal signed contract, but a lot of times it's just an e-mail that gets sent to me where they say is it okay with you if we tape it and then post it on our intranet? And I typically respond by saying, yes, that's fine. What else do we have out there?

*Chris Hill:* Well, and then our participants want to complicate this, the last question a little bit, by asking what if they recorded or taped speaker shows a clip from a film, they mention *Star Wars*, for example?

*Linda Enghagen:* Okay. Well, now you potentially, actually have a problem, because it is possible to have a copyright-protected work embedded in another copyright-protected work. You know, it's no different than using a long excerpt from a book that you then need permission when you're going to write about it and put it in your book.

So if your speaker is using someone else's copyright protected materials, and this is actually a problem with MOOCs, I mean, it's the same kind of idea as what happens with MOOCs, is that you may actually need to scrub that out, if the, if presenting it above and beyond the initial presentation is going to require permission and paying royalties.

So that is possible, and that's a great question. Because that's the kind of detail that you need to pay attention to, and, in many cases, the solution is you just scrub it out.

*Chris Hill:* Well, we're close to the end here. Maybe we can take one more. Do you want to do one more, Linda?

*Linda Enghagen:* Sure, one more is fine.

*Chris Hill:* All right. Another question that has to do with video or film, they want to know if an instructor might be able to use their Netflix account to access a video, or, I suppose, a portion of the video to show in class?

*Linda Enghagen:* You know, that is a question that I have been asked on multiple occasions, and I always caution people to proceed with care on that one. You know, think about the difference between buying a personal subscription to anything and a subscription of the same thing, but that is designed for multiple users.

When, because the rules on film and video under the copyright statute are more restrictive, I would caution people against using a personal Netflix account and logging into it in a classroom setting and then showing a film

from it. That, because of, you know, without going into detail, because the rules that relate to the use of film and video have some specific statutory differences associated with them, I would not advise doing that. Even though I cannot say it's against the law, because we don't have a court case that tells us that, but it makes me highly nervous.

*Chris Hill:*

All right. Well, thank you very much, Linda. And I want to tell our participants again that these additional questions will be, excuse me, will be on the recording that we are making of the seminar, and that will be available tomorrow, and it will also be sent to you in the form of a CD by mail.

I want to mention that your campus has received an e-mail evaluation form from us here at Magna. We would love it if you would fill it out and tell us what you think of today's program, what you thought of today's program, and maybe if you would indicate what programs you would be interested in seeing in the future.

Complete information about upcoming Magna seminars is available at [www.magnapubs.com](http://www.magnapubs.com). Thank you again for joining us today and have a great day.

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### Additional questions and answers.

#### Disclaimer

The information provided in response to questions posed at the seminar is provided for educational purposes only. The responses do not constitute legal advice and are not provided as legal opinions.

#### 1<sup>st</sup> Sale Doctrine

*Can a DVD have license limitations that negate first sale rights of a library to circulate the DVD?*

No. Sellers cannot negate or trump the 1<sup>st</sup> sale doctrine through limiting language in a licensing agreement.

#### Appeals of Current Cases

*Is it safe to use the current court interpretations of the cases you described? Or is it better to wait until the appeals have been decided?*

As a technical matter of law, each of the court decisions we talked about applies only to the jurisdictional (typically geographic) reach of the court that issued it. This is because they are trial court decisions, not appeals court decisions. For example, the case against Georgia State University was decided in a federal district court in Atlanta so it applies only in Georgia until ruled on by an appeals court. That is the technical answer. However, given the general lack of court cases involving educational institutions and practices, as a practical matter, these cases provide the best guidance currently available. For that reason, in my view, it is prudent to follow their rulings unless and until they are over turned on appeal.

*Is the UCLA decision(s) being reviewed by the 9th Circuit?*

Yes.

#### Best Practices

*Where can we find links to the 12 best practices in fair use categories?*

The Center for Social Media provides space on its web site that serves as a database of the codes of best practices in fair use. The Center for Social Media's site can be found at: <http://www.centerforsocialmedia.org>.

*Can you use book jacket images in relation to Principle #2?*

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As long as it is used in a manner consistent with the principle, yes. Remember that the principles are not hard and fast rules. They offer guidance on how to think about and make the case for using copyright protected materials under fair use.

### Continuing Education

*Is an online continuing education activity the same as a classroom activity?*

*Can you please elaborate on fair use in continuing education? These questions assume that copyright materials are involved and permission has not been sought or obtained.*

*Many faculty want to either present the same course presentations as continuing education or modify their presentations for continuing education. Are there different/additional restrictions on the use of copyrighted images, graphics, and other materials in continuing education offerings as opposed to curricular offerings? What are the copyright ramifications of repurposing their presentations for continuing education – whether presented with minimal cost recovery charges or for profit?*

All three of these questions ask more or less the same thing. What, if anything, is different in the context of continuing education? While continuing education systems differ from one institution to another, I am responding to these questions with the understanding that continuing education refers to offering courses or training that is not for academic credit. Instead, the courses may be offered for professional development or as part of a lifelong learning program, for example. Fair use does not disappear in these contexts. However, because the courses are not education in a traditional sense, it is not as simple as taking the same materials used in an academic course and relying on fair use in the same way. The claim of fair use is weaker in courses and training that is not for academic credit. It is closer to publishing a book. Consequently, relying on fair use requires greater care which translates into using fewer and shorter excerpts unless permission is obtained and required royalties paid.

### Copies Sold by Educational Institution

*What if the educational institution uses materials for commercial sale but does not make a profit (because of costs of production of the course/book/materials)?*

There are a couple of different dimensions to this question. First, copyright law explicitly forbids copying materials designed for student purchase. So, anything that falls into that category can't be reproduced. Second, to date, no court has ruled on whether an educational institution can reproduce materials under fair use and then "sell" them to students. In my view, given earlier court rulings such as in the *Kinko's* case, selling them at a profit is not advisable. If you look at the codes of best practices in fair use, they do suggest that providing copied materials to students on a cost recovery basis is consistent with fair use.

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## Copyright Act Pre-empt's Breach of Contract

*If a federal law preempts state law claims (breach of contract) (Ambrose vs. UCLA), and the Fair Access to Science and Technology Research law is passed by Congress, will FASTR pre-empt copyright agreements between authors of journal articles and the journal publishers? This is very important to health sciences libraries working with NIH policies.*

With very limited and rare exceptions, new laws do not apply retroactively. So, altering prior publishing contracts, for example is highly unlikely. However, Congress does have the authority to put terms and conditions on grants and contracts it funds. So, it can require the recipients of such federal funds to publish their research findings in outlets that meet certain requirements. Again, this would be prospective, not retroactive.

## Images/Stock Photos

*Would that rule apply to full images in the chapters of the book?*

*Can we grab images from books?*

These two questions ask essentially the same question. Fair use applies to images as well as text.

*If I use an image in my powerpoint presentation to illustrate an abstract concept, eg, a photo of a firehose to illustrate the stream of information on the internet, is that a transformative use?*

Yes, that sounds to me like a great example of the transformative use of a photo.

*What about the use of stock photos like istock.com, corbis.com in ppts or in the LMS?*

Assuming the images are lawfully acquired or accessed, using them in ppts or an LMS for educational purposes may qualify as a fair use. I suggest consulting the Visual Resources Association's statement of best practices in fair use which can be found at the Center for Social Media's web site: <http://www.centerforsocialmedia.org/fair-use/best-practices/statement-fair-use-images-teaching-research-and-study>.

## Journal Articles

*Will you be covering journals later?*

None of the court decisions we discussed specifically involves journal articles. However, all of the books involved in the publishers' case against Georgia State University were non-fiction. Further, many were edited collections with chapters authored by different writers. Given the similarities, the GSU case provides some insight into how journal articles might be used similarly.

*What are your thoughts on posting journal articles on a lms?*

As long as the articles are lawfully acquired or accessed, posting articles can be done within the parameters of fair use.

## Library vs LMS

*Is there a difference if the university's library posts content vs. posting it directly in the LMS?*

From a legal standpoint, posting to a library's e-reserves system and posting directly to the LMS are permitted as long as done in a manner consistent with fair use.

## Licensing Agreements

*Regarding licensing agreements that try to trump fair use, does the Harvard Business Review electronic disclaimer, which states that no article can be made available electronically within online courses, require licensing for the use of a single article? Or does using one article constitute fair use?*

The video streaming case against UCLA indicates that a licensing agreement cannot be used to trump rights under copyright law. This ruling suggests that Harvard Business Review's attempt to eliminate fair use by the terms and conditions of the sale would not be upheld in a court challenge.

## Linking

*What about linking to copyrighted material from an LMS?*

Linking is permitted. One advantage to linking is that it doesn't involve any copying, so students are simply accessing the materials themselves.

*If we have journal articles available through our library databases, should we post links to the databases or e-reserve links vs. a downloaded copy of the journal article?*

As indicated in response to the previous question, an advantage to linking is that it does not involve any copying. Because there is no copying, linking does not raise the same kinds of fair use questions. You are simply sending students to something they have a legal right to access. For that reason, some people prefer to simply link to materials. However, downloading and copying articles is also legal as long as it is done in a manner consistent with the requirements of fair use.

## Limiting Language

*What can we do when the book states that the content cannot be used in any portion? Example: Pearson's Books*

While I'm not familiar with the precise wording used by Pearson's Books, it is not uncommon for materials to be published with limiting language along the lines of: "All

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rights reserved” or “No portion of this may be reproduced without permission.” Based on court rulings to date, this language cannot be used by publishers to trump fair use.

## Music

*We have a digital music database service we pay for. Can I take an excerpt of the song say 30-60 seconds to digitize and use in an LMS for a test?*

That sounds like a transformative use. Depending on exactly how you use the excerpt in the test, it could be for illustrative purposes or critique which would make a strong case for the use qualifying as a lawful transformative use.

*What about music obtained from iTunes to be put into a presentation? Fair use?*

Fair use applies to music as well as other types of copyright protected works. So, as long as it is done in a manner consistent with the requirements of fair use – yes.

*With iTunes, what would the definition be of "extensive portion of single collection?"*

Typically, when music is purchased from iTunes, the purchase is of a single song. So, there is no “collection” of music.

## Online vs F2F

*Is there a limitation for use of content for online versus face-to-face courses?*

As a general proposition – no. If a use is permitted in a face-to-face course, it is permitted online. However, that isn’t always true when streaming content that may fall under, for example, the TEACH Act. So, when dealing with streaming content, make sure you follow your institution’s policies and protocols.

## Personal Subscription

*If a professor subscribes to a journal and wants to put a copy in an online course, is it fair use if the publisher actually sells journal articles?*

I’m not sure what you mean when you refer to the publisher selling journal articles. But, let me say this. If a professor has a personal subscription to a journal, fair use applies to that. So, the professor can rely on fair use in posting, for example, a single article (not an entire issue). In the Georgia State University decision, the judge made it clear that fair use permits some uses even when the publisher makes the materials available on permissions for a fee basis. Selling individual articles from an issue of a journal is similar to fee based permissions.

## Personal Use

*Is it FU to email an article to a friend not on your campus?*

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As long as it is done on a limited basis, it can be defended under fair use.

## Public Performance Rights

*Are public performance rights necessary to purchase to show a video in a classroom or to digitize and offer on LMS as streaming?*

Public performance rights are not necessary when showing a video in a face-to-face classroom. To date, there is no court ruling answering that question when streaming to an online class. However, many people in the field, along with the applicable codes of best practices in fair use believe it is possible to stream utilizing fair use.

## Semester-to-Semester

*When you say that we can post a journal article in an LMS as long as it was legally acquired, does that also apply to multiple semesters (semester to semester use)?*

*I would like to know about multiple semester use of journal articles as well.*

*We have rolling enrollments, so there is no "semester to semester." What does this mean for Fair use, when the use IS restricted to currently enrolled students?*

The judge in the Georgia State University case ruled that semester-to-semester reuse of the same materials is permitted under fair use. So, if the first use qualifies as a fair use, subsequent uses qualify as fair use. While the GSU case involved book chapters, there is no reason the rule would be different for other types of copyright protected materials. Similarly, while GSU operated on a semester system, the central question is really about repeated uses for students enrolled in specific courses. For that reason, a university that uses rolling admissions should be able to rely on this as a basis for the repeated use of materials.

## Taping Speakers

*What are the restrictions on taping a guest speaker and sharing the taped talk with members of the college?*

As long as you have the speaker's permission, taping a guest speaker for later viewing is fine. I am assuming that the speaker owns the copyright to any copyright protected materials used in the presentation.

*And what if the guest speaker shows a clip from a film like Star Wars?*

In this situation, you have two separate copyright issues. As I said in response to the previous question, as long as you have the speaker's permission, you can tape the presentation for later viewing and that includes any copyright protected materials used by the speaker to which he or she owns the copyright. Presumably, the speaker does not own the copyright to the film clip from Star Wars. The use of the clip needs to be evaluated under fair use.

*Is it fair use to record a classroom presentation that shows a video in class?*

Recording a classroom presentation that shows a video, in and of itself, is likely fair use as long as the use of the video is fair use. If, for example, the recording is done to archive the presentation for the instructor to later review it to grade it, a strong case of fair use can be made. Other uses may not offer as strong a fair use argument.

### **Textbook Supplementary & Ancillary Materials**

*What about using content from a previous edition of textbook? If we have purchased a newer edition and there are not enough ancillary materials or not the kinds we had access to before, can we use the previous edition information?*

*What are the limitations of using ancillary materials from previous editions of a textbook that we formerly used but have now moved to a new edition of the same text?*

These two questions are asking the same thing. Is it legal to use supplementary materials from an earlier edition of a text book when you have adopted a more recent edition? I believe a strong case can be made that this is allowed as long as we are not talking about materials designed for student purchase. In this situation, the publisher is not losing any revenue because the newer edition of the book continues to be the text chosen for the course.

*When a book comes with supplemental material (ie videos etc.) can faculty put these materials online if secure?"*

Generally, the answer to this question is yes – as long as we are not talking about materials designed for student purchase. Using the supplementary materials for their intended purpose is permitted.

### **Transformative Uses**

*Can you give us a definition of "transformative use"? And is it easier to transform video than to transform still images?*

A use is transformative when it gives new meaning or expression to the original by, for example, using it a new way or materially changing it. The classic example of a transformative use is parody – though that is of little use to most academics. Another way to think of a transformative use is in reference to what it is not. A use that merely creates a substitute for the original is not transformative. As far as whether it is easier to transform video than images, that really is a question of technological capacity – not legality.

## Video

*What about VHS tapes donated to our library before digitization was available. Can we now digitize and offer the videos to students through our LMS?*

If the old VHS tapes are now commercially available as DVDs, you need to buy the DVD. If they were not released in the updated format, you can digitize them and stream them in a manner consistent with applicable rules.

*The video is also no longer available for purchase in the US.*

Even though it is no longer available for purchase in the U.S., before digitizing it, I would recommend determining whether it is available through an online vendor.

*Can an instructor use their Netflix to access a video online and show that video in class? What about a DVD rented from Netflix, Blockbusters, etc.?*

While there are no court cases about this that I am aware of, I've read news accounts of Netflix sending "cease and desist" letters in situations in which individuals have used personal subscriptions to show films in classroom settings. I do not recommend using a personal subscription in this way. Generally, renting a DVD and showing it in a classroom setting is viewed by most experts in the field as permissible. But again, there are no court cases on this.

*Does the dmca prohibit us from encoding a dvd for streaming? The only way we would be able to put a video in an online class setting.*

As long as this is done in a manner consistent with the requirements of the TEACH Act – yes.