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Breakout Session: Case Studies from the Field: Making Fair Use Determinations in an Educational Setting.

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Breakout Session: Case Studies from the Field: Making Fair Use Determinations in an Educational Setting

In this interactive session, Ben Harnke and Meghan Damour[1] enabled the audience to provide some fair use scenarios and to discuss selected scenarios in small groups and then in the larger group—with the goal of making a collective decision about whether or not the scenarios were fair use.

Initially, the leaders discussed how they began using a fair use checklist, indicating that no one else on their campus appeared to be actively engaged in using fair use. They believe that this responsibility falls within a librarian's purview of information access and making choices about using information. They also provided a brief overview of copyright and fair use

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1.   John Jones was a contributing author for this presentation but had a conflict and could not attend the conference.

to ensure that everyone had the same understanding, briefly discussing the following questions:

- What is copyright?

- What is fair use?

- How does fair use relate to copyright?

- How can we make our own fair use evaluations?

In discussing the fair use statute (17 United States Code, § 107[2]), they emphasized that it was intentionally vague and difficult for novices to use, even though the four factors are outlined in the section. They further stressed that case law underlies fair use, and the elements listed on the fair use checklist are—for the most part—tied to *legal arguments*, mitigating the influence of personal opinion.

Additionally, they noted that the checklist helps determine whether a scenario tips toward or away from fair use and that one cannot really incorporate "weight" (one factor being more important than another) or "arithmetic" (three "yeses" and one "no" equals "fair use"). Finally, a fair use checklist documents a good faith effort that limits liability for library personnel as referenced in Section 504(c)[3] of the law (Title 17, United States Code).

The leaders asked the audience to use Padlet (https://padlet.com/meghandamour/kcc2017) to describe fair use scenarios that they had encountered for the audience to work through. The leaders also provided three scenarios for consideration. The leaders then asked the audience to vote on the scenarios to identify those with the most interest, which were:

- "I've got a variety of full-text PDF journal articles that are required reading for my course. Is it fair use for me to upload these for the students to access?"

- "Can an instructor embed a chapter of a book as a PDF into their LMS [Learning Management System] for discussion, as a learning tool?"

- "I want to include a YouTube clip in my PowerPoint slides. Can I do that?"

The leaders distributed the Fair Use Checklist they use at the Health Sciences Library at the University of Colorado Anschutz Medical Campus,

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2.   https://www.law.cornell.edu/uscode/text/17/107
3.   https://www.law.cornell.edu/uscode/text/17/504

which is based on Kenneth Crews' checklist (http://copyright.cornell.edu/policies/docs/Fair_Use_Checklist.pdf) to attendees to use in analyzing the scenarios.

Scenario #1 Analysis. PDFs in a Course Management System

Factor 1: Purpose. Everyone agreed that the purpose was nonprofit, educational, and fit with making "multiple copies for classroom use." Some discussion revolved around providing links to the articles instead of uploading the PDFs, thereby avoiding the copyright issue altogether and capturing usage from library-acquired resources. An additional discussion emerged around whether distributing the PDFs via the course management system was equivalent to distributing them in a classroom. The leaders identified best practices from the Center for Media and Social Impact, Code of Best Practices in Fair Use for Media Literacy Education (http://cmsimpact.org/code/code-best-practices-fair-use-media-literacy-education/) and the Set of Principles in Fair Use for Journalism (http://cmsimpact.org/code/set-principles-fair-use-journalism/), which included this statement: "A digital copy is the same as a hard copy in terms of fair use." This statement, combined with the PDFs availability only to the students enrolled in the course, seemed to fit within the concept of "multiple copies for classroom use." The audience also considered additional context by discussing the following question: What if some of the articles are in print, perhaps obtained from a colleague or from interlibrary loan and not part of library-subscribed content? In particular, the audience members found it more challenging to reach consensus regarding the usage of interlibrary loan articles.

Factor 2: Nature. The audience believed that these articles were published and factual or nonfiction, which favors fair use. However, if they were literary works (short stories or poems), that could tip the balance against fair use, depending on the context. Also, if these PDFs represented consumable content, everyone believed that use would be clearly against fair use.

Factor 3: Amount/substantiality. Everyone agreed that the students needed to read the entire article, so providing the entire article would be appropriate for educational purposes; likewise, everyone agreed that for articles, the "heart of the work" did not seem applicable.

Factor 4: Market effect. Presumably, some of these articles were from library-subscribed resources, so a paid license would exist. If that license explicitly excluded using the content for courses or teaching, then additional licensing fees should be paid, which would work against fair use.

For any articles that were scanned, consideration should be given to paying a licensing fee to the publisher or Copyright Clearance Center.

Ultimately, the group believed this scenario leaned toward fair use. Linking was seen as a viable alternative, but linking was also seen as an extra step for the students. Another suggested alternative was to provide a citation, requiring the students to find the article, which would help educate the students on using library resources.

Scenario #2 Analysis. Embedding a Chapter of a Book as a PDF into Their LMS

This scenario was very similar to the first scenario, and many of the same issues applied. Consequently, the discussion focused on the main difference—the third factor, amount and substantiality. The questions raised included the following: Is it one chapter from a 20-chapter book or from a three-chapter book? Does the chapter contain what would be considered the "heart of the work"? If it does contain the "heart of the work," is conveying and discussing that information so closely tied to learning outcomes that it would have a chilling effect on the instruction if it was not used? Is it a chapter from a textbook? Is there ever a good case for providing chapters from a textbook, maybe because the textbook has not yet arrived in the bookstore, and classes have begun? In scanning content from a print book, is there a difference between a book published in 1964 from Italy versus one published more currently in the United States?

The group also discussed the guideline of using only 10% of or one chapter from a book. The leaders noted that this is only a guideline and is not codified in copyright law. Some in the audience referenced the Georgia State case[4] as justification for why their institutions now adhere more closely to this guideline. The leaders also recommended a 2001 article by Kenneth Crews, "The Law of Fair Use and the Illusion of Fair-use Guidelines," Ohio State Law Journal, 62(2), 599-702 (http://kb.osu.edu/dspace/handle/1811/70447).

Other concerns raised by the audience revolved around providing reserve readings to students at a distance, when a book is not available digitally. The audience also discussed the habits of students who do not want to come to the library to use a print book, and when they do, they scan the needed chapters. This discussion demonstrated the very real tension be-

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4.   https://scholarworks.gsu.edu/univ_lib_copyrightlawsuit/8/; also http://libguides.law.gsu.edu/gsucopyrightcase for additional information

tween librarians wanting to act ethically but also wanting to provide access to needed course content.

Scenario #3 Analysis. Include a YouTube Clip in My PowerPoint Slides

The last scenario, even more than the previous one, generated much discussion around the need for more context, as the audience attempted to answer the following questions: Where are the PowerPoint slides going to be used: in a face-to-face classroom; in an online classroom in a course management system; at a conference? If the slides are part of a conference presentation, is that venue considered an educational environment? Are there any stipulations on use associated with the video on YouTube that would enable or preclude its use? This last question generated another question about what rights one "signs away" by uploading videos to YouTube. What are the YouTube terms of service? One person indicated that students were very quick to put their creative works on YouTube, not thinking about others using their work or the potential monetary value of their work in the future.

Session Wrap-up. At the end of the session, the leaders emphasized the importance of using fair use and advocating fair use to others, noting that if they did not use fair use, they risked losing it. They suggested that one reason they cannot routinely defer to publishers and guidelines is that they do not want fair use to be weakened or scaled back, knowing that the courts consider established practice in their rulings. Finally, in addition to fair use being a balancing act among the four factors, it is also a risk tolerance-balancing act. Are practitioners (or their institutions) comfortable defending the use of the material?