Good afternoon, everyone. Thank you for joining us. My name is Ana Cackley and on behalf of Atla, I’d love to welcome you to the second in our series of four webinars on copyright, all about fair use. Before we get started, I just like to point out a few features of the webinars interface by default, you'll be listening in using your computer's speaker system. But if you would like to join us by phone, that's also an option. At the bottom of your screen, you should see a control panel it contains a chat box where you can type in your questions for the speaker and contact us about any difficulties. In terms of tech, you may send in your questions at any time, and we will collect these and address them during the q&a session at the end. We now have live transcription for our Atla Webinars, you can find the live Transcript by going to the red button in the top left corner of your screen labeled live on custom live streaming service, you click carrot and then click View live streaming service. It’ll open up the transcript in a new browser window. And we will make this transcript available on our on demand learning web page. Today’s presentation is being recorded and that recording will also be available on the on demand learning webpage. everyone who registered for today's webinar will receive an email notification when that's available. And now I'd like to introduce our presenter today, we have our very own Christine Fruin, who is the Scholarly Communication and Digital Projects Manager here at Atla. And with that, I will hand it over to her. Thank you for your patience, folks while we change presenters.
Alrighty. There we go. All right, well, good to join you all on this Tuesday of fair use week 2021, which is appropriate since we’re going to be talking all about fair use today. As Ana so graciously introduced I am Christine Fruin and I was kind of scanning through the attendees list. And most of you I’m happy to say I have met if not virtually, in person at a conference or at a member visit or at our scholarly communications roadshow are a variety of events. So it’s, it’s so good to see, to see names I recognize and to be able to think fondly of faces and and, and exchanges that we’ve had. So we’re going to be walking through fair use today. And we’re really going to be getting into kind of the constitutional roots of fair use. I’m going to touch just briefly on I don’t know if you had an opportunity to attend the copyright basics webinar that we did, which was the first of this four part series, which was in January, if you did not attend, the recording of that is available online through our on demand learning page, which Ana did reference at the beginning of the of the presentation today. So you might want to go check that out, it really kind of laid the foundation for what we’re going to be talking about today. And so we’re going to talk with just touch really briefly on kind of the constitutional roots of fair use, and then talk about the statute and digging into the four factors, we’re going to be talking about some really important judicial interpretations of fair use and what that has meant, in particular for libraries, and talk a little bit about some best practices for applying fair use in various scenarios that you may encounter in the work that you do. I know we’re going to hopefully have some time for questions at the end. So do make sure that you pop those into the the q&a box. As we go through today. There’s also going to have some resources listed at the end. And in case in case that I do forget, if questions do come up for you that you are not able to get answered today or maybe come up as we go along. For those of you that are in attendance and as I said looking through the panelists list, I can see that a lot of you are our staff at a institutional member library of Atla. We are our I am that we I am doing copyright office hours every other Wednesday and your whoever is your member rep would have gotten an email probably two emails by this point about that about because it is a it’s a it’s a zoom. It’s a Zoom Room where you’re just Welcome to pop in every other Wednesday. I believe it’s two to three central time. And they will be tomorrow where you can come in. I’m just hanging out in there. You can come in ask questions. A couple folks have taken advantage of it so far. We just started this, I just started this last month. So if there are questions, either tomorrow or in two weeks, I think I had them scheduled through April. And if it is popular enough, I will I will continue it and resume it perhaps in the fall, you’re welcome to take advantage of that. And that is kind of an institutional member benefit is kind of getting that one on one time to ask questions. So let’s get started. So the purpose of copyright law, so again, if you attended that January session, you’ve already kind of heard this little bit, but some folks do not realize that copyright law actually has its genesis in the Constitution itself, where in Article One, section eight, clause eight, Congress is specifically given the authority to develop
laws that promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. And it is from this, that copyright laws have been written by by Congress and enacted into law, of course, there have been various amendments over time, to to shape what the just really to craft out exceptions to these exclusive rights that creators have. And we talked about that a little bit, also last month about what some of these exceptions are, or these limits are on those exclusive rights that a copyright holder is, is given, like I said, Actually granted in the Constitution itself to creators, authors, inventors and such. So there are actually several statutory limits on on this bundle, as it's often called, have exclusive rights that a copyright holder has. And just real quickly, you know, those exclusive rights include the right to make copies, the rights to distribute, to perform to display and so forth. But there are certain situations that are defined statutorily where others who are not the copyright holder can also make copies, distributed work, perform a work, and do so without express permission, as normally would be the case. And therefore, if so, if your use then falls within one of these statutory limitations, as I said, permission does not need to be obtained. And only if your use exceeds these limits, must permission be obtained. So we dug into this a little bit deeper last month. So if you want to hear more about that, I encourage you to go back and watch that January recording. So the Fair Use statute is certainly one of those really big statutory exceptions that apply to all groups of people. But are is particularly important for libraries. And I have kind of quoted the Fair Use statute, which can be found in Section 107 of the Copyright Act, quoted it above as the fair use of a copyrighted work is what it is, for such purposes as criticism, commentary, news reporting, teaching, scholarship research, in those cases is not infringing of copyright. However, in determining whether a use kind of rises to this, there are four factors, of course, it has to be considered, which you probably all have heard before, but we're gonna walk through them all again today. So those four factors are the purpose and character of the use. So that includes looking at, you know, if it's a commercial use or for nonprofit, nonprofit purposes, the nature of the work that is being used, that's looking kind of at the content or the form of the copyrighted work that is that is being used, how much of the work is being used in relation to to the whole, so we're going to talk a look quite a bit about this, and numerical guidelines and all that. And then finally, the effect of the use upon the potential market for the copyrighted work. So looking at whether any harm is occurring to the commercial market or the resale market for that copyrighted work. The fact that our work is unpublished does not bar a finding a fair use, we're going to talk about that. So long as because this is a question that often comes up is whether it's the published status, so long as all all the other factors are at play there. Actually, I don't know why that bullet point there got to cut through me for a second. Like I think I meant to put that somewhere else. So sorry about that, like, Well, why do I have that there? Um, so fair use is very much a balancing test. And you may have heard this before, and when I used to teach this a work, you know, I used to teach workshops on fair use, in in person and
physical person, sometimes I would actually bring with me kind of an old timey balance, and you know, something like those little weights, you know, You all used to see in your high school science labs, I don't know if they still use them or not, we had them. And it really is about as you go through each for the factors dropping weights on one side or the other, and determining if in on one side having the the person that's not the copyright holder who's making use of the work, and on the other side, the copyright holder and going through each four factors, and where does that balance tip? And then once you get through all four, are is the balance of the four factors, weighing more in favor of the person or entity seeking to use the work in which case, you could comfortably say that it was a fair use? Or is it tipping more in favor of the copyright holder, in which case, you're either going to seek permission or make some alterations or, you know, revisit what you're using or how much you're using or how you're using to swing that balance back and favor. This balancing notion has led to what we often see our fair use checklists where you're going through and checking off boxes and totaling them up at the, at the bottom. This is a this is a method that a lot of libraries, a lot of institutions have adopted. But it really is intended to be this fact based, you know, you know, the certain circumstance of your use test, you know, is a very much a fact based test. No single factor controls, no factor weighs more than another. And although as we walk through some of the court opinions, today, you're going to see that there are there is a factor to where the courts seem to have been putting a lot of emphasis and which might lead you to believe that perhaps that factor does weigh a little bit more than the other three are way more even more than other two. But in theory, the way it is to be applied is that no one factor is like controlling is not dispositive of any Fair Use analysis. Also, what are the things that we saw kind of come up in terms of like this factual analysis that came up in particular within the last year was this, you know, emergency case for fair use that we saw when there was this rapid shift of cases moving online, or, excuse me, classes moving online. And that's kind of a misnomer, there is just like, there is no educational Fair Use meaning, because there are still our thing, a lot of faculty out there who think educational purpose equals fair use and think the other three factors kind of go out the window, go out the window, you have to look at look at those other effects. While there is no emergency case for fair use, you're still you're still having, you know, it's It is a fact, it is a circumstance to weigh in to your fair use analysis. But emergent situations, do not just make it Oh, we have an emergency boom, it’s fair use without considering all of the other with all the other facts. And many would say, and I’ve actually written a column for Atla about this, if you don't check it out every month, the scoop column, talked about the same thing as me in August, that this emergency is largely considered passed now as well. But again, it’s supposed to be you know, very much a case by case analysis. So we’re gonna walk now through each of the four factors. And since I can’t present to you an actual physical scale, I’m going to have kind of a graphical representation of this and and what kinds of things would tip these factors more in favor of a finding of fair use, as opposed to a finding for the rights holder,
which would then as I said, necessitate finding, you know, or getting permission, or somehow changing the what you’re using to bring it back into fair use. So purpose and character of the work is, or purpose and character of the use is the is the first is the first factor that we’re going to look at. So things that would tip more in favor of fair use are this is a biggie as transformative, and we’re going to talk a little bit more about that in a moment. transformative. This has been a really big buzzword, especially in cases within the last 10 to 15 years that have interpreted the face Fair Use statute. And I said, we’re going to talk a little bit actually have a slide specifically about this. I'm gonna talk a little bit more about that. So kind of just hold that in your back pocket for a second. Nonprofit uses it for a nonprofit purpose. Is it for an educational purpose. So here is where Yes, I am at a school I’m using this work but again, educational use is not just slam dunk, Okay, I'm done. I don't have to look at the other three factors. You still have to walk through those are three factors. Educational uses a very simple Wrong, you know slam dunk finding for justice one factor but does not obviate the need for looking at the other factors. Also here looking at, you know, how what what is the distribution? How in terms of how we are, you know, the purpose of these? How are we distributing it. So things that are going to tip more in favor of the rights holder are, is it is distribution, uncontrolled, are we just posting it on an open website where anybody can find it as opposed to a more limited distribution would be as just on an on a course site. And it's only available to students enrolled in that course, uncontrolled distribution is I'm sharing it through a listserv to which 1000 people subscribed. So this is why we discourage sharing things and making requests for things through listservs, such as Atlantis. Other things want to look at is, is my is my use commercial, or is my purpose commercial. But again, the thing I always caution here is, if your use is commercial, doesn't mean it can't be fair use, in fact, a lot of the law, the fair use cases have involved or have considered commercial uses. And therefore, it has still been found to be fair use, because again, you have to look at the totality of all the factors, it's a situation where the other three factors have tipped in favor of fair use. And so it didn't matter that this use was commercial, the overwhelming weight of the remaining three factors was, you know, led to a finding of fair use mirror image copying, so that is kind of the converse of transformative, you’re just making copies without any without any added value to it without changing, you know, who it would be, who the intended audience is, etc. So that’s just, I'm just making copies and putting them out there to the world without any without any kind of added value. So as I said, transformative use, what this question is looking at this is this has been a really important factor. You know, this is kind of a judicially coined term, when courts have interpreted factor one, and this is looking at does the use of the original work, create a new work or use the work in some new transformative way. So this is, is it for some new audience than what was intended by the creative for some new purpose is there are other things that have been added to it such you know, annotations or other assignments or, you know, commentary, and comparison and things as such, we would think would normally be done in in a course, for
example, that it really is a transformative use rather than this mirror image copying. Some things that are red flags, that you really can't make an argument for a transformative use are things that it's just supplemental material, it is a substitute, it's being offered as a substitute. And I like this one that I've seen this term, I seem to use it as decorative or otherwise, it's just for convenient, it's more convenient to just throw a copy up there than to perhaps do the remainder of the Fair Use analysis, find free or openly licensed alternatives, and so forth. So you have to watch out for doing things just for convenience. So let's look at now the nature of the work the suspect or two. So things that are going to tip in favor of a finding of fair use are nonfiction works are typically going to be more found Fair Use than works that are highly creative, or fictional works or poetry, again, doesn't mean uses of those kinds of words are never going to be fair use. But it is again, looking at all four factors. Remember, non consumable. So this is like things like workbooks, or things that you know, once they're used cannot be used again, and workbooks are the best example of this. So we see this a lot in particular with like K through 12. And teachers wanting to just photocopy pages of workbooks that are intended to be like tear out pages used by one student is where this example comes up most often in an educational context. And again, this is unpublished works, things that are going to tip more in favor of the rights holder as like, again, I said highly creative works consumer work, but also non published works as well. But if the other three factors weigh heavily in favor of fair use, then using a highly creative work or non published work could certainly be fair use. Factor three looks at how much of the work or how substantial of the work is being used. And when I talk about substantial, it's looking at really looking at the content of the portion that is selected. So walking through kind of the factors here is, you know, decidedly small portions only using as much as as needed to In the context of education needed for the pedagogical objective of that particular class session or unit or the course overall, it has to be narrowly tailored to whatever again, that pedagogical objective is, you know, what, how what is it being used to illustrate for this particular class? Or how is it being compared? How is it being used? Or is it just the supplemental reading that's just being thrown up there. And it has to be an amount reasonable in relation to market alternatives. So this is where you're starting to even dip a little bit into the factor for what what other art alternatives are out there. This is where substantiality comes into play is looking at things for the right holder and kind of starting at the bottom, is it central to the work or the heart of the work, or sometimes what I call the spoiler, this is when even a small portion of a work is can be potentially infringing if that little piece of the work is the whole reason why someone would buy that work. Or if it's just that piece of Yeah, this is the only part that you know, you would ever use in a class the rest. So maybe it's like the problem set. An example that I frequently use, as well as like a coffee table, coffee table art book, where I met, you may have a five or 600 page book, all you're wanting to do is copy the 20 or 30, image color kind of color plates in the middle. That's all you're copying. Why do we buy those books for those beautiful colorful pages in the middle. So that would
be an example of even a decidedly small portion could potentially be too much. So you're wanting to avoid, and you want to instruct your faculty to avoid using more than is needed for that purpose. And faculty need to be prepared to make that argument and need to make that case, it's not the library's responsibility to do this analysis. And to make that determination, it is your responsibility to educate faculty on how to how to apply these factors and how to make those decisions. This is where I give my oft repeated caution that numerical guidelines are not the law. I can't tell you how many times I see librarians ask this question of me of the of each other of others, as long as I use just 10%. As long as I use just one chapter or two chapters, as long as I know, there is no safe haven and the number of chapters or in percentages of a work. There are instances where if you limit somebody to 10%, or one chapter, you may be unfairly restricting their fair use writes, there are cases where there may be cases where copying half a book or a whole book could potentially in relation when looking at the other three factors could be fair use, there may be instances where you're using your faculty wanting to post that one chapter might be infringing might be too much, you have to look at what is comprised of that one chapter, you have to look at the other three factors. So I know that you know they're there, these numerical guidelines come from a 1976 report that is not was never law was just a report that was kind of written by a variety of, of kind of stakeholders in the in this space. But that was never law. I know that numerical guidelines are held on to for convenience. And for ease of use. And in particular, in like, either large institutions, or in libraries, where you have one staff member wearing a lot of hats is much, much easier to process those reserve requests if you're just looking at it numerically, Okay, this one doesn't mean this thresholding can go on this one. And I'm telling you, there's no, there's no legal safety net for you. By doing that you're doing you're potentially doing your faculty a disservice doing yourself a disservice. And that's why it's important to educate faculty. And to provide to them the resources on how to apply these four factors and how to walk through this analysis. So that guidelines become unnecessary, that you can feel comfortable that you are operating within Fair Use without counting pages, or looking at chapters because you are applying Fair Use the way that it was intended to be applied. So the finals I'll step down off my soapbox now about numerical guidelines. And look now walk through the fourth factor which is looking at the effect of your use on the market for the original work. And so things that are going to tip this factor in favor of a finding of fair use are you know, conveniently and efficiently accessible version is simply not available. There's not an electronic version there is not an open access version. Or, you know, like the case of like journal articles, let's say there's not an author accepted manuscript version available in an institutional repository somewhere. It's just, it's just not it's, there's no, there's really no good use book marketplace out there for students to buy copies for themselves. So convenient and efficient accessibility is just, it's just not they're also looking at Digital availability, and whether there is a reasonably priced digital license available now, what is reasonable? Is it is kind of an objective term, it's not necessarily subject, you know, it's not
just me, you know, you it’s, or maybe you really have to pipe out is it reasonably priced for your library or for libraries generally. And that has not been judicially answered Georgia State kind of danced around this did not answer it to, I think the the satisfaction that we would hope. But reasonably the the Congress, when they write legislation, they love using these words, like reasonable, and then we’re left to try to determine what that means. So a reasonably priced digital license is not available. And the work is just not available commercially at all, it is completely out of print, there is no use your There’s no use market for it’s just not available. And therefore if it’s not available, you there’s no market to harm, things that are going to get more in favor of the rights holder when analysis analyzing the specter are again, you know, reasonably priced digital licenses are available. And Georgia State kind of sort of suggested if any licensing market is available, you probably are going to lose on this but you would lose on this factor. And a convenient and accessible version is available in any in any format. So our things are going to tip the finding, finding in favor of the rights holder for this factor. So again, once you walk through all these four factors, you’re going to be telling up these blocks, and you’re going to be seeing where you are, are you in favor of fair use? Are you in favor of the rights holder? Are you kind of here in the middle toggling a little bit that probably happens more often than not. And when you’re there, then it comes down to what is the risk climate of your institution? What kind of risk is your institution as your general counsel is your Provost, Dean, whatever willing to absorb to take that risk, some institutions are very risk averse, some are like let’s push the boundaries, and then some. So in those kind of instances, you need to really be aware of what the risk climate is of your institution. And that means having conversations with your general counsel, with your admins, and cover yourselves working in the library to know what kind of backing you have, and making these kinds of decisions and also to inform your education or your educate when you educate faculty, also, you know, informing them with this kind of risk framework in mind. So now that we’ve walked through the four factors of fair use, let’s now look at some recent. And by recent, you know, some of these are really recent, as in within the last year, some are a little bit older, but all have really important impact for fair use applications in the library. So we’re going to walk through Now, a couple of those court decisions. So this one goes way back, starting almost 16 years ago, which is Authors Guild versus Google. I don’t know how many of you remember that. But this was back when Google started scanning books. And in fact, they were collecting books from very large universities, such as University of Michigan, University of Illinois, and scanning them. And that’s how we have kind of the Google Books. Corporate corpus that we have today, where if you searched Google, and you can see book snippets, this was all a product of this Google Books of this product, the Google Books project that started back in the early 2000s. They were scanning both public domain books and in copyright books offer the purpose of facilitating Full Text searching so folks could identify works that were relevant to their search with the idea being that then they would go and buy those books. Regardless, the fact that full text of the books were not being made
available to the world Authors Guild, which is an organization that represents authors filed
suit in 2005 against Google and these participating universities for copyright infringement.
Again, you may or may not remember for several years thereafter, there was talk of talks
of the Google Book settlement and back and forth and back and forth, it went and some
in terms never could never were agreed upon. And finally, the trial court ruled eight years
after the lawsuit was filed. filed in favor of Google in the universities. And that decision was
then affirmed a couple years later by an appellate court. So some of the one of the really
important holdings from actually from the appellate court decision on judge Laval and
this, this is where, you know, it’s really, I highlight this really important, really important
ruling for interpreting fair use. And I’m just going to read this to you, Google’s
unauthorized, so he they do acknowledge it was unauthorized, without permission,
digitizing of copyright protected works. creation of a search functionality and display of
snippets from those works are non infringing fair uses. The purpose of copying is highly
transformative there we have that word, the public display of text is limited. And the
revelations do not provide a significant market substitute for the protected aspects of the
original. So in that little brief sentence, or a couple sentences, he kind of goes through
every single factor right there. While authors are undoubtedly important, intended
beneficiaries of copyright, so kind of taking us back to that constitutional, you know, grant
of power to Congress, the ultimate primary intended beneficiary of copyright law, is the
public whose access to knowledge copyrights seeks to advance by providing rewards for
authorship. So this brief quote out of out of the appellate court’s opinion, sums up the the
analysis of copyright law, the purpose, or the analysis of fair use the purpose of
copyright law, just so beautifully, which is why I wanted to share that with you. The next
case, another Author’s Guild, kind of reared their head again, this time against hottie trust,
how do you trust being a project of University of Michigan along with several partner
universities, who again, were digitizing books, to include in the corpus of hottie trusts, for a
variety of purposes, or to make preservation copies to again, facilitate search and data
mining, and also to very importantly, to provide access to persons with print disabilities.
And then another project that was hinted at and then was never actually followed up on.
They were going, they had initially proposed doing this whole orphan works project, which
I’ll just say the orphan WIC works piece of this was dismissed out because it was just a
project that was talked about and was never done. And so the courts like this is moot, you
can’t sue about something that’s just being discussed and hasn’t actually happened. And
consequently, because of this threat of lawsuit, it never did start up again. So the trial
court granted summary judgment in favor of hottie trust in the universities and the
appellate court appealed. And again, really important, ruling out of this wet so they’re just
looking at this point at the preservation making preservation copies the search and data
mining and the excess by persons with print disabilities, you know, the orphan works
project at this point had been taken out of the have been taken out of the equation. The
trial court wrote, I cannot imagine a definition of fair use, that would not encompass
again, the transformative uses made by the defendant. So making preservation copies
digitizing works for the purpose of searching, data mining, and definitely providing access
to persons with print disabilities were considered to be very transformative uses. Another
important ruling out of this was that the court ruled as well, that under Section 121, which is
the Chafee Amendment, which permits the the making of print, you know, accessible
copies for persons with print disabilities, at that point in time, the champion man just says
off, you know, just defines these authorized entities. And it had never been decided
whether libraries could avail themselves of Section 121 to make these kinds of make these
types of materials accessible. And so the court held here that under 121, academic libraries,
were an authorized entity who could provide access to copyrighted materials for persons
with disabilities. So that was a really kind of important piece of, of this of this, these court
rulings as well. And then, of course, the one of the most important cases for for libraries, of
course, is the long running Georgia State University case which finally concluded last fall. I
did a really big write up about this, I think in November of 2020, and so you can find that
again on the Atla blog, scoop column, maybe Ana can even throw up the link for us, but
looking through all of these I mean, there were several opinions, this thing kept bouncing
back and forth during trial court appellate court back to the trial court back the public just
ping pong back and forth for 12 years, and always kept coming back in favor of Georgia
State. And so really quickly the impact of Georgia State on fair use, and I recommend that
you look at that column that I wrote in November, because it goes into this a little bit more
deeply, is factor one. So, you know, we talked about transformative use being so
important to factor one, transformative use was not a factor at all. In Georgia State. This
was just copying books and putting those book chapter copies up, in Course Management
sites. And all these court opinions concluded that the lack of transformative use was not
dispositive. Because it was it was enough for factor one that this was a nonprofit
educational institution and the works were only being used for the purpose of teaching
students in class, you know, who were enrolled in classes that said, institution, factor two,
here, the court really did spend a lot of time looking at what these what these handbooks
were, it's really what they were just these and said that, you know, they did say, you know,
may weigh against fair use if the work principally comprises evaluative analytical or
subjectively descriptive material at surpasses bare facts. So they really spent a lot of time
looking at the content of these much of the material. So just said, you know, you know,
these more and, you know, informative works, that kind of go beyond just providing
information, but have a lot of author analysis and musings in it may tip again, just in
factor two, you may just lose on factor two. So remember, you still the other three factors.
This was super important. So I'm stepping back up on my soapbox again, factor three, the
courts trial court specifically said and the appeals court agreed, they would repeatedly
rejected numerical guidelines and said numerical guidelines. This is a quote, numerical
guidelines are not the law, numerical guidelines will not win you or lose you on factor
three, analysis has to has to vary based on both a look looking at the purpose, and the
end looking at market. So factor three really has to be informed by the purpose of the use, and the impact upon the market that you have. You can't you cannot weigh factor three in a vacuum, you have to almost look at FACTOR one and four to determine whether your amount is infringing or not. You can't you just can't say Oh, it's under 10%, or it's less than two chapters. And then they spent an enormous amount of time and did so much mind numbing market analysis on each of the 9294 instances of infringing copies, and you mark and they defined the market for any particular work as not only including the market for sales of the print version, but also the market for licensing of those of those works for placement on the reserves. But there was differing conclusions on different works. Depending on whether or not the works were available for sale or for licensing, so not the clarity that we would have hoped for. But some insight and perhaps also instructive if a case like this ever comes up again, which I wholly suspect will happen again, specific, especially with a lot of classes remaining online, I think that's going to become even more predominant. So let's talk a little bit now about Okay, we have the four factors. We have, you know, this kind of constitutional basis, we have what the statute says we have what the Court has said, How do we as libraries employ all this and put it into practice. If you have not looked at this resource before I highly, highly recommend you do it is almost 10 years old now. But it's still very sound on the code of best practices and fair use for academic and research libraries, which was put out in collaboration by the Center for Social Media at American University and the Association of Research Libraries. It's the product of numerous numerous interviews with librarians with publishers with copyright lawyers participated in focus groups and roundtable and one on one discussions to help you know, you define kind of some boundaries and some behaviors to ensure to help help ensure that when you're engaging in one of these eight activities, or as the code refers to them as common practices, how to kind of ensure that You are performing these actions in a way that generally is going to be considered fair use. So these eight common practices are digital access to library materials. So this is going to largely going to be like your E Reserve's digital exhibits digital preservation, digital collections on from Archives and Special Collections. reproduction of material for persons with disabilities, institutional repositories, creation of databases for non consumptive research, those scanning things to do text and data mining, and harvesting online content, for access and preservation. So, I highly recommend that you read those, there are hoops I went forward to quickly, there are what they call enhancements and limitations. So things you want to do and things you want to refrain from doing. So it's really important I, you know, to read through, in particular, the digital access to library materials, on course reserves, really, really instructive couple pages in there, that I think will help you a lot in determining how to how to apply fair use to that to these kinds of materials. There are other codes of best practices out there that may also be of use for you. So you can find the whole library of codes of best practices at this link here. So okay, final words of advice for you, based on all the things that we've kind of talked about. So I talked a little bit about this even? No, it
wasn’t, this wasn’t the last webinar, it was the webinar I did, immediately after it when I talked to the acrl group, be mindful of contracts and license agreements, these terms are going to control over fair use. So a lot of times what we are sharing, whether it be through course reserves, or if one of our friends at another library, is asking us if somebody has an article that they don’t have access to and can’t get through IE lol or maybe they haven’t tried through al I’ll sorry, if you’re one of those folks that do this on Atlantis, but I have to pick on you. You got to be aware that if you’re pulling this out of your database, or if you’re pulling this out of an E book, fair use doesn’t matter because you have licensed that content. And that is a contract between you and the database provider or you and the publisher. And those are the terms that control how you share that where you post it, who you provide a copy to. So even if you’re like this is fair use for me to post this article up, of course reserves it for me to download this article and send it to my friend at such and such library. If you have a license agreement that says no, you can’t do that doesn’t matter that fair use says you can, you have to be mindful of and abide by those contract and license agreements and only share works and post works in a way that complies with those and nine times out of 10 license agreements are going to tell you do not download and post this in a course management system, you need to use the stable or persistent link. So get in the habit if you haven’t already to posting links, not the PDFs that you download from those databases unless you have that odd license agreement that says you can do that. As far as downloading and sharing without sharing it with others. license agreements frequently speak to that as well. Some license agreements will have things like a scholarly sharing clause, or something of the like, which says yes, you could share it with someone at another institution. Usually it’s in the context of, of you’re working on a project together, sometimes license agreements get really specific in defining what they mean by scholarly sharing. So if you haven’t read your license agreements recently, I highly recommend you do so sometimes there will be some Fair Use provision in there. Sometimes there will be language that will say nothing in this License Agreement is intended to, you know, lessen or restrict fair use of these materials. That’s good. We want to have that kind of language in licensed agreements. We don’t want license agreement or contract language that restricts fair use. But if it isn’t explicitly in there, you got to be you need to be really cautious about how you are using your licensed content. I’ve already said this many times but educate your faculty and students about Fair Use get faculty in the habit of doing their fair use analysis before they bring content to you to post they need to be thinking through this not you it’s their responsibility, not yours. I know what you’re saying. My faculty is not going to do that. There’s no way they’re going to make time to do that. Well. I’ve I’ve met those faculty, plenty of them. I know where you’re coming from, but really, you need to do your due diligence and educate them and put the responsibility where it lies. be thorough and don’t be afraid when making Fair Use determinations do not find this scary. I know folks are always more scared than they are more bold in their application of fair use. Unless you I mean, and chances are, what you’re
proposing to do is going to be fair use. I mean, it's very rare, when I have consulted with folks that I find like flagrant violations. So be thorough, be thoughtful. do your due diligence, act in good faith, do not be afraid, we want to take fear out of this. Pay for permissions and licenses only when there's no other alternative. Look for ways to make the request to make the request work with your faculty to reduce the amount or find some kind of alternative so that you're not paying for permissions and licenses because they can get expensive real quick. Don't pay for them. If it's not necessary, find alternatives, or make sure that you are, make sure it's not fair use, or there's not some little tweak that could be made to make it fair use. Look for open access versions, there's a lot of tools out there now to help you find open access versions of content. These are browser extensions, these are really great things that you just download, it sits there right in your chrome or your edge or Firefox, whatever it is, you're using unpay wall and open access button are great and test it out, put it on there, go to some journal site that you don't subscribe to. And you're going to look for a little padlock off on the side that'll either be closed, or it'll be open and green in with it's open and you click on it, it will take you to the open access version of it might be in an article and might be the author's manuscript authors version that's sitting in our institutional repository somewhere that is okay. All it's gonna have is not the fancy formatting and the pagination. But usually the text is exactly the same. And that's what we're wanting to use, right? The content doesn't matter if the pagination is not there, or the fancy typesetting. And if if you can't find it yourself, using a browser extension, sometimes a really good trick is look at the article. And who is the author go to their institutions repository, maybe they have, maybe they have already deposited themselves. And also, when digitizing large collections, employ transformative, this is where transformative and this can be your friend, when digitizing Special Collections or archives. And we're actually doing I'm doing an April webinar, I have to like special topics and copyright. This is actually a presentation that I did at Atla Annual last summer. So if you attended that talk last June, you're going to get a repeat sorry, if you want to hear it again, please come back. So that's going to be the focus of April's webinar. So here are just some additional resources for you. As I said, the scoop column every month, frequently is on the topics of copyright and fair use. But also sometimes we talk about open access, we talk about digital humanities to talk about the last scholarly communication topics there. And as I said, I have a lengthy detailed analysis of the Georgia State case and what it means for libraries, I believe it was in the November of 2020. Again, here's the link to this copyright of best practices and fair use, I highly recommend that you go to that. Also, I did do if you were hoping like oh, we're gonna learn more about copyright and online teaching, already did that webinar not too long ago. But you can go back and watch the recording. It's available there. So we have a little less than 10 minutes for questions. I've seen the little q&a box pop up, occasionally flashing
so we'll take some questions now. Also, I do have a LibGuide there that you're also welcome to reference to use on your own libguides. And again, just want to repeat I am here for you as a resource. Copyright Office Hours for Atla institutional members tomorrow. If you know go if you are the member up check your inbox, you should have gotten a couple emails from this about it or go to whomever is your member rep for Atla. And or just drop me an email at cfruin@atla.com. And I can tell you what the zoom link is, as well. So let's take a look at questions. I'm going to stop my sharing and let's see what we've got. So Deborah asks Is it possible to have a copy of the copyright checklists that you mentioned? Deborah, they are everywhere. If you just do a search for copyright checklists, I mean, Georgia State has one. You I mean, I have one that I mocked up back when I was at the University of Florida and also at the University of Illinois, I could share with you, but if you just do honestly, if you just do a google shirt, Google search for fair use for fair use checklist, you're going to find all kinds of examples out there. Some examples are definitely better than others. I think the examples that have incorporated the Georgia State case, so ones that are going to if hopefully, if someone has put a version or a date on them, some that ones that incorporate those findings are going to be far better than ones that were written that are older than that. So look for that. Carmen says, You've emphasized education, but what if we find that faculty are not using resources properly? Are we to police their behavior in some way or just re educate? Libraries are not the police. We all we should not be like lording over faculty and policing them. Our role is to educate, provide them with the tools, provide them with the knowledge and hope they make good choices. Now, if you get a request that is clearly in flagrant copyright violation, of course, it is within your discretion and hopefully your authority to decline posting something, but we want to be we want this to be positive. We want to be proactive, we don't want to be the police at all. It's not Library's role. I hope that answers your question, Carmen. I'm going to look in the chat. Do not be afraid. Ellen, that cracks me up. Thank you. I'm hoping that is a, hoping that's a compliment. Hope hypothetical scenario is a lot that's a lot of reading. I applaud you for typing this all in a small institution has a few Oh, international students. Yes. enrolled in a special Yeah, with travel restrictions, student access, students need access to required. Okay. So the first thing I want to say I'm going to get to the probably more here but the trick that I have discovered in talking with my colleagues at other institutions. A trick about international students is sometimes the material is we shouldn't be sending material to them, because it may be banned or barred in their country. So we need to be really careful when we make content available to international students, particularly and thinking about where they are, what the culture is, where they are, what the perhaps the legalities the law legal system is where they are we don't want to be putting students in a situation where they could be in trouble for possessing certain materials and I am speaking from very recent experience where a colleague of mine at a small institution provided content to a student that they were not legally allowed you know nonsensically but legally we're not allowed to have so we need to be very cautious.
about providing copies to international students like providing them with direct copies and not just a way of accessing it. So um, so additionally students are unable to obtain print yeah to meet the needs library scan entire books and load the PDFs on Yeah, I will be so also you know, scanning entire books and making them available to them so long I think that is okay. It says sending them copies I think as long as the the you know, the if they truly cannot access it cannot get a commercially available copy cannot otherwise access it through licensing or scanning it and putting it somewhere I would not but I would not. Yeah, I think what you're what you're doing is probably okay, password controlled links, links expire. Yeah, I would even I don't know that I would even let them download it I almost would have them have to almost read it online and not be providing them copies and have it be available for a very limited period of time for these very specific students and not have this available to you are definitely hope you're definitely going in the right direction. If you and I can if you want to email me we can you and I can chat about that a little bit more but you're definitely you're definitely in your you're going in the right direction. I'll just I'll just leave it at that. Other questions? not seeing any else in the QA Any other questions in chat? We got a couple more minutes. If not, Ana, I don't know. If you have things you need to say to wrap up?

Ana Cackley  55:04
Yeah, just as a reminder, folks, we do have two more webinars in this series, as Christine mentioned. So please join us for those, you can find all the details on the Atla website. And we will also post the recording of this webinar within a few days. That will be up on the Atla website as well. And we'll email out a notification once it's available. Thank you all so much for joining us today.

Christine Fruin  55:30
There's there was like if we if we can, there's two more questions that just went into the q&a box while you're talking? Can I get real quick? Okay, that's fine. So Tim Grasso, as I heard you say author of all four Fair Use factors are theoretically considered equally, not theoretically legal, I mean, legally considered legally. Does that mean each factor gets weighed in a yes, no manner? Essentially, Tim? Yes, it really is. But Yep, this one's fair use? Nope, this one's not Yeah, it really does come down to, yes. Know, what happens when two factors are foreign to our guests. So that is that situation I described? Where you're kind of like, you don't you don't know. I guess I courts have been looking very closely at the market harm one. I mean, they haven't come out and said, this one weighs more. But I would say if your market one is in the know, you may want to rethink, you know if this is fair use or not. But also, it comes down to risk. What kind of risk is your university, your college, your institution, your seminary, whatever the case, I don't know where you're
where you're from? What kind of risk? Are they willing to assume? What kind of liability?
Are they willing to assume? And that's a conversation that you need to have, or your
supervisor needs to have with your general counsel with your Provost, Dean, whatever,
President, whoever, whoever has the ultimate authority at your institution? I know it
doesn't give you like a concrete answer. But that is really the response that I have for that.
Francine faculty member wanted to use a picture of a Japanese food menu as a cultural
item in her online class. Best way to do this. I don't make a copy of it and post it, share it I
don't think that's I don't without more information about where this is coming from. I don't.
To me, that doesn't sound like that would be I I question of whether a menu is even
copyrightable. And then you may not even be a copyrighted work. It's just a listing of food
and pictures. And so if you attend if you go back and watch my, the webinar from January
about what kinds of works are eligible for copyright protection, I don't know that a menu
would even be copyrightable. So this that you there may be no concern with that, for
instance, without without you sharing more with me, of where this menu came from, and
such, that may not be even an issue because I don't know that a menu would even be
copyrightable to be honest with you. So we are one minute over. So um, with that, we will
conclude Thank you so much.

Ana Cackley  58:08
Thank you, Christine. And thanks, everyone for joining us today.