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PowerPoint Handouts

The Copyright Case We've Been Waiting for: Key Lessons & Policy Changes

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Presented by:

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Linda Enghagen is an attorney and Professor in the Isenberg School of Management at the University of Massachusetts at Amherst. Her scholarly contributions related to intellectual property are directed to the needs of faculty members including two books, *Technology and Higher Education: Approaching the 21st Century* and *Fair Use Guidelines for Educators*.

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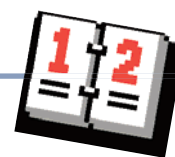
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Our presenter:

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What do you think?

A faculty member brings a ragged photocopy of a book chapter to the library to be scanned and loaded to the e-reserves for enrolled students.

Is this a fair use?

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Polling Question #1: Is this a fair use?

- A. Yes, it is only 1 chapter.
- B. No, it is a copy of a copy.
- C. It depends.



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**By the end of this
online seminar:**

**You'll be able to
develop institutional policies
consistent with the court's ruling**

1. Bigger picture

2. What's in a name?

3. Just the facts

4. Seven deadly sins

5. Lessons, implications &
unknowns

1. Bigger picture



U.S. Constitution


Congress shall have [the] power...
To 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...

Article I, Section 8, Clause 8


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It's about change

Ancient History



Modern Era



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Whose toner, paper, time & dime?

	Pre-Kinko's Era	Kinko's Era	Post-Kinko's Electronic Era
Toner	•University	•Copy Shop	•Student
Paper	•University	•Copy Shop	•Student
Time	•University •Faculty	•Copy Shop •Faculty •Student	•Faculty •Library •IT •Student
Dime	•University	•Student	•Student
Reproduction System	•Copy machine	•Copy machine	•Computers + software

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2. What's in a name? 

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Plenty!

Plaintiffs: Cambridge University Press, Oxford University Press, Inc., Sage Publications

Recruited & Underwritten by: Copyright Clearance Center, Assoc. of American Publishers

Defendants: Carl V. Patton, i/h/c/a President; Ron Henry, i/h/c/a Provost; Charlene Hurt, i/h/c/a Dean of Libraries; J.L. Albert, i/h/c/a Provost for Info. Sys. & Tech.; Members of Board i/t/c/a Trustees

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So what – who cares?

Sovereign Immunity

- GR = can't sue states in federal court
- Exception = sue official "in his/her capacity as" + ask for injunction (not \$)

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So what – who cares?

Can Sue State Employee/Official Personally Committed Illegal Act

- *Marketing Information Masters, Inc. v. The Board of Trustees of the California State University System, a public entity; and Robert A. Rauch, an individual*
- Board of Trustees = case dismissed
- Robert A. Rauch = allowed to proceed

What do you think?

With the assistance of an instructional designer, a faculty member scans and posts an entire book (still in print) to a course learning management system for students to use instead of requiring them to purchase it.

Who will likely be sued in the resulting copyright infringement lawsuit?

Polling question #2: Who will likely be sued?

- A. The instructional designer, personally.
- B. The faculty member, personally.
- C. Institutional officials, in their official capacities.
- D. All of the above.



3. Just the facts 

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According to the publishers

“... systematic, widespread, and unauthorized copying and distribution of a vast amount of copyrighted works...through a variety of online systems and outlets utilized...for the digital distribution of course reading material...without the requisite authorization and appropriate compensation to the copyright owners of such materials.”

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According to the publishers

- ~600 courses as of 02/29/08
- >6,700 works posted electronically, most without permission
- e-reserves system not password protected

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By the time it got to trial ...

GSU



CLAIMS

- E-reserves secured
- Revised copyright & fair use policy
- > 6,700 → 99
- 75 litigated
 - 74 analyzed
 - 1 repeated use

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4. Seven deadly sins



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Seven ways to violate fair use

1. Posting to unsecure sites
2. Posting without permission and payment
3. Posting semester-to-semester
4. Posting pursuant to overly generous policies

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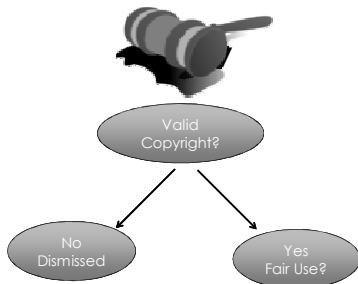
Seven ways to violate fair use

5. Failing to enforce overly generous policies
6. Creating free course packs instead of purchasing collections & anthologies
7. Encouraging & facilitating infringements

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Fair use framework



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Fair use factors



1. Purpose & character of use

- A. Teaching & scholarship by nonprofit educational institution
- B. Favors fair use & GSU in all instances

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Fair use factors



2. Nature of copyrighted work

- A. Nonfiction & educational
- B. Favors fair use & GSU in all instances

Fair use factors

3. Portion used--amount & substantiality

- A. 9 or fewer chapters & not "heart of work"
 - i. 10% of total pages
 - ii. Pages = all pages (e.g. index, forward, title page, etc.)
- B. 10 or more chapters & not "heart of work"
 - i. 1 chapter or its equivalent
- C. TBD case-by-case

Fair use factors

4. Impact on market

- A. Market for entire book
- B. Permissions
 - i. Readily available, reasonable price, convenient format?
- C. TBD case-by-case



What do you think?

A faculty member wants to post 2 excerpts from a 15-chapter nonfiction book to e-reserves for enrolled students only. Neither is the "heart of the work." Each excerpt is part of a chapter.

One excerpt is 15 pages and the other is 11 pages. The book is 350 pages, and the average chapter is 33 pages.

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Poll #3: Does this violate fair use?

- A. Yes, because it takes excerpts from 2 chapters (not just 1).
- B. No, because the total pages posted ($15+11=26$) is less than the length of an average chapter (33 pages).
- C. I don't know.

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Results of case-by-case analysis

74 Alleged Infringements	
No valid copyright	16
De minimis (hits)	10
No digital permissions program	19
Excerpt w/i fair use	24
Fair use violation	5
Total	74

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How sinful was GSU?

1. Posting to unsecure sites
 - Fixed by GSU
2. Posting without permission & payment
 - 5 violations
3. Posting semester-to-semester
 - "impractical, unnecessary limitation"

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How sinful was GSU?

4. Overly generous policies
 - Rejected "Guidelines for Classroom Copying"
 - Yes – didn't limit to 10% & 1 chapter rules
5. Failure to enforce
 - More or less – though not directly

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How sinful was GSU?

6. Free course packs instead of buying them
 - Didn't directly address
 - Some instances: no required texts but excerpts within limits = fair use
7. Encouraging & facilitating infringements
 - GSU made good faith effort to comply

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What do you think?

Fair use is finally resolved! We now know that all we need to do is stay within the 1 chapter or 10% limit!

Poll #4: Do we have clear guidelines?

- A. Yes, we finally got a court ruling that is useful and easy to follow.
- B. No, this ruling applies only to nonfiction books (i.e. not to fiction, journals, film, etc.)
- C. I don't know, I'm still confused.



5. Lessons, implications & unknowns



As a matter of law

1. **Ruling limited to nonfiction books**
 - Limits likely even smaller for creative works
2. **Uses = substitutions**
 - Not transformational
 - If transformation = different result?

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As a matter of law

3. **Hits matter**
 - Few hits = de minimis = no violation
 - eReserves tracked hits—uLearn didn't
4. **More digital permissions programs**

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As a practical matter

5. **More attention to authors' copyright paperwork**
6. **Publishers not required to disclose what's popular and what's not**
 - Assume negative impact on market if permissions program available

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Institutional due diligence

7. More test cases to come?
8. Review and revise policies and checklists for compliance

Institutional due diligence

9. Disseminate to faculty members, librarians, instructional designers, etc.
 - Offer training opportunities
10. Provide guidance for checking on the availability of permissions

Supplemental materials

1. Key Rulings at a Glance
2. GSU's Updated Policy and Checklist
3. Institutional Due Diligence
4. Useful Web Sites

Thank you for joining us!

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<http://www.copyrightcompliance.net>



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We'd like to know what you think!

Our evaluation form is located here:
<https://www.surveymonkey.com/s/81312>



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