

# Fair Use in the Digital Age

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## Copyright Law and the Permission Culture

The U.S Copyright Law protects creative works such as novels, poetry, paintings, sheet music, recorded music performances, movies, video games, software code, sculptures, photographs, choreography and architectural designs. The creator of a work or the employer of the creator have the exclusive rights of:

- Reproduction & Distribution
- Creating adoptions
- Performing/displaying a work in public
- Mass Digitization



With the Permission Culture, one must obtain license before using any copyrighted work. However, the process can be time-consuming, and the license is always expensive. If it is an orphan work (i.e. the creator cannot be located) people tend to avoid using it due to the risk of infringement.

## What is “Fair Use” ?

“Fair Use” is to use copyrighted material without permission from the owner for a limited and “transformative” purpose, such as comment upon, criticize, or parody.

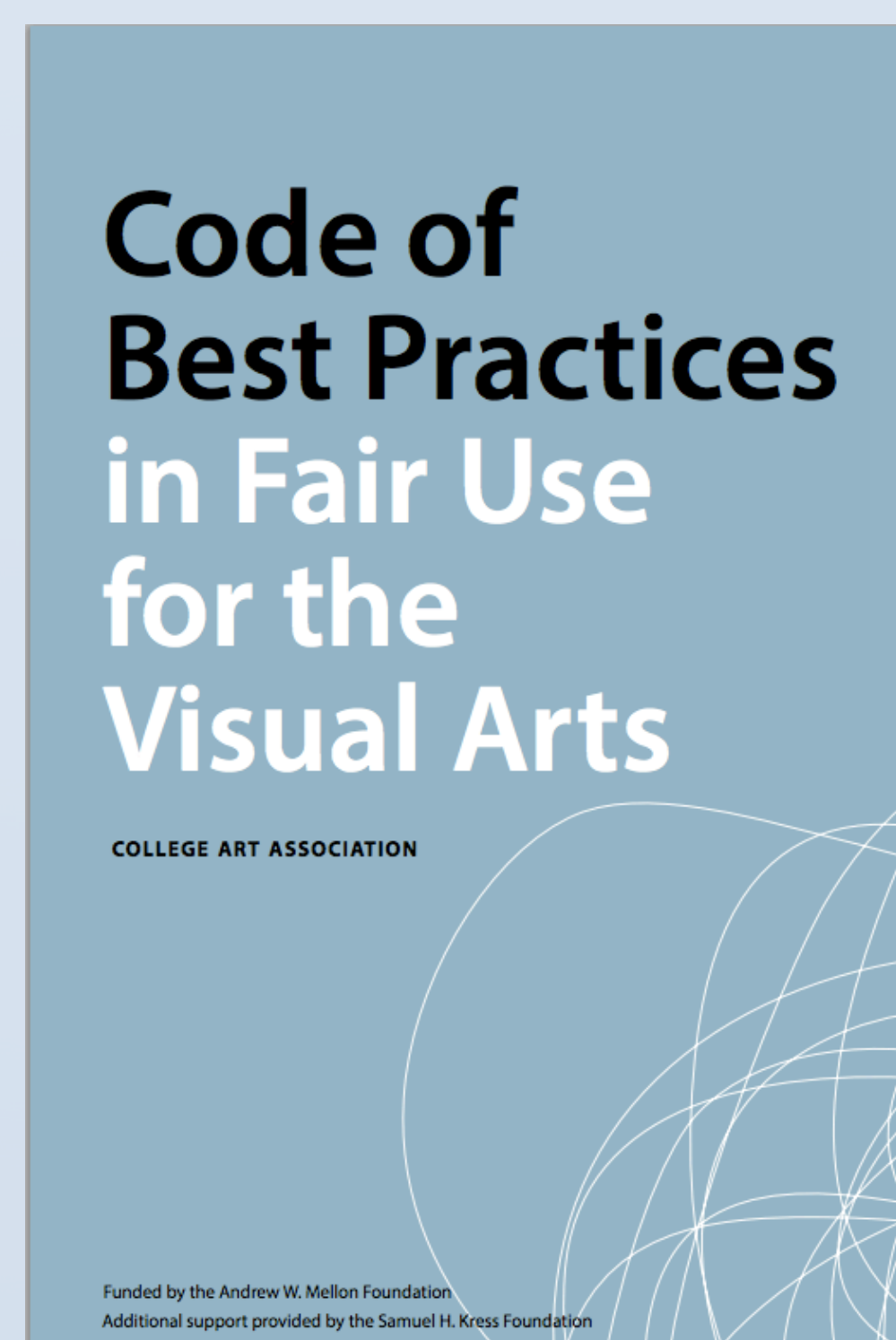
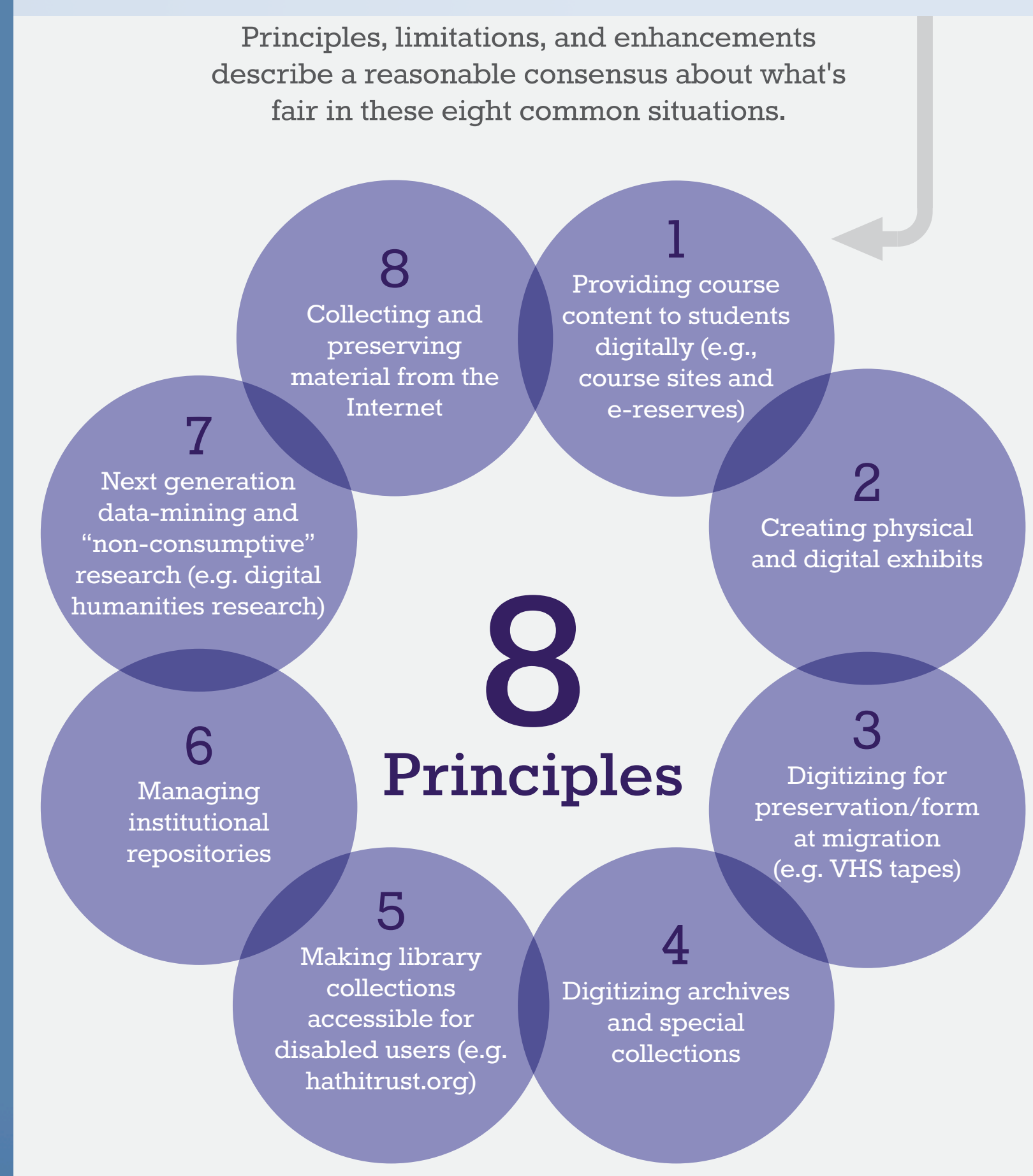
### Four Factors of Fair Use

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for, or value of, the copyrighted work

## Code of Best Practice in Fair Use

For cultural institutions

- educational/non profit purpose
- with limited amount, for time and access



## You Be The Judge! Is This Fair Use?

### SCENARIO

A search engine’s practice of creating small reproductions (“thumbnails”) of images and placing them on its own website (known as “inlining”) did not undermine the potential market for the sale or licensing of those images.

Libraries provided a search engine company (Google) with books to scan; the libraries later used the resulting digital scans for three purposes: preservation, a full-text search engine, and electronic access for disabled patrons who could not read the print versions.

A nonprofit organization posted a newspaper article about police discrimination on its website. The newspaper assigned its right in the article to a third party, Righthaven (a copyright enforcement company), who filed the lawsuit.

An attorney/author sued Google when the company’s cached search results provided end users with copies of copyrighted works. (A “cache” refers to the temporary storage of an archival copy—often a copy of an image of part or all of a website. With cached technology it is possible to search Web pages that the website owner has permanently removed from display.)

A woman was sued for copyright infringement for downloading 30 songs using peer-to-peer file sharing software. She argued that her activity was a fair use because she was downloading the songs to determine if she wanted to later buy them.

A Fox News production assistant posted Thomas Franklin’s iconic photograph to the Facebook page of “Judge Jeanie” on the 12th anniversary of the 9/11 attacks (2014). “The Facebook post included the hashtag #NeverForget and it was juxtaposed with Joe Rosenthal’s Pulitzer Prize-winning historic photograph, “Raising the Flag on Iwo Jima.”



### IMPORTANT FACTORS

**FAIR USE.** The thumbnails were much smaller and of much poorer quality than the original photos and served to help the public access the images by indexing them. (Kelly v. Arriba-Soft, 336 F.3d. 811 (9th Cir. 2003).)

**FAIR USE.** The three purposes for which the scans were used were transformative. The court also did not find any evidence of financial harm and labeled as circular logic, any claims of lost license revenue. The Author’s Guild v. Hathitrust, No. 1:11-cv-06351-HB (S.D.N.Y., October 10, 2012).

**FAIR USE.** The court’s reasoning was influenced by the fact that Righthaven had acquired the copyright and was not in the newspaper business (it appeared to be in the “litigation business”). For that reason, the court reasoned that the nonprofit’s use was transformative because its purpose was to educate the public about immigration issues. And also, because Righthaven was not in the news business, it could show no harm from the defendant’s dissemination of the article. Righthaven LL v. Jama, No 2:2010-cv-01322, 2011 WL 1541613 (D. Nev. April. 22, 2011).

**FAIR USE.** Google was considered passive in the activity—users chose whether to view the cached link. In addition, Google had an implied license to cache Web pages since owners of websites have the ability to turn on or turn off the caching of their sites using tags and code. In this case, the attorney/author knew of this ability and failed to turn off caching, making his claim against Google appear to be manufactured. (Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006).)

Downloading songs is **NOT FARI USE**. Since numerous sites, such as iTunes, permit listeners to sample and examine portions of songs without downloading, the court rejected this “sampling” defense. (BMG Music v. Gonzalez, 430 F.3d 888 (7th Cir. 2005).)

We don’t’ know yet. In February 2015, U.S. District Judge refused to rule that the posting was fair use. He left the issue open for a jury to decide. Fox asked for an immediate appeal to the Second Circuit last month. Ruling of this case could have “massive implications” for how the fair use doctrine is applied to social media.

Reference:

- Code of Best Practices in Fair Use for Academic and Research Libraries. <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>
- Code of Best Practices in Fair Use for the Visual Arts. <http://www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf>
- Fox News Settles Fair Use Case Over 9/11 Facebook Photo. <http://www.law360.com/articles/643460/fox-news-settles-fair-use-case-over-9-11-facebook-photo>
- Stanford University Libraries. *Copyright and Fair Use*. <http://fairuse.stanford.edu/>
- U.S. Copyright Office. *Fair Use*. <http://copyright.gov/fls/fl102.html>