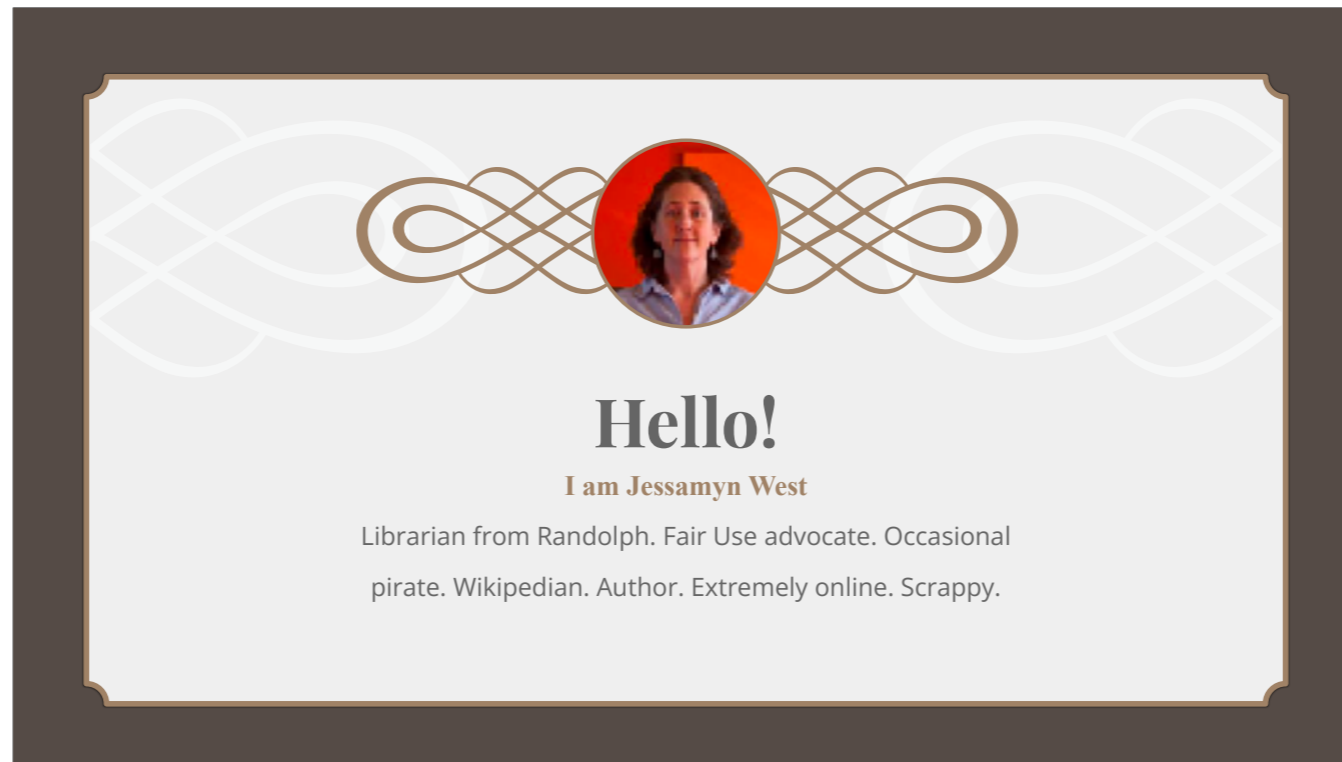
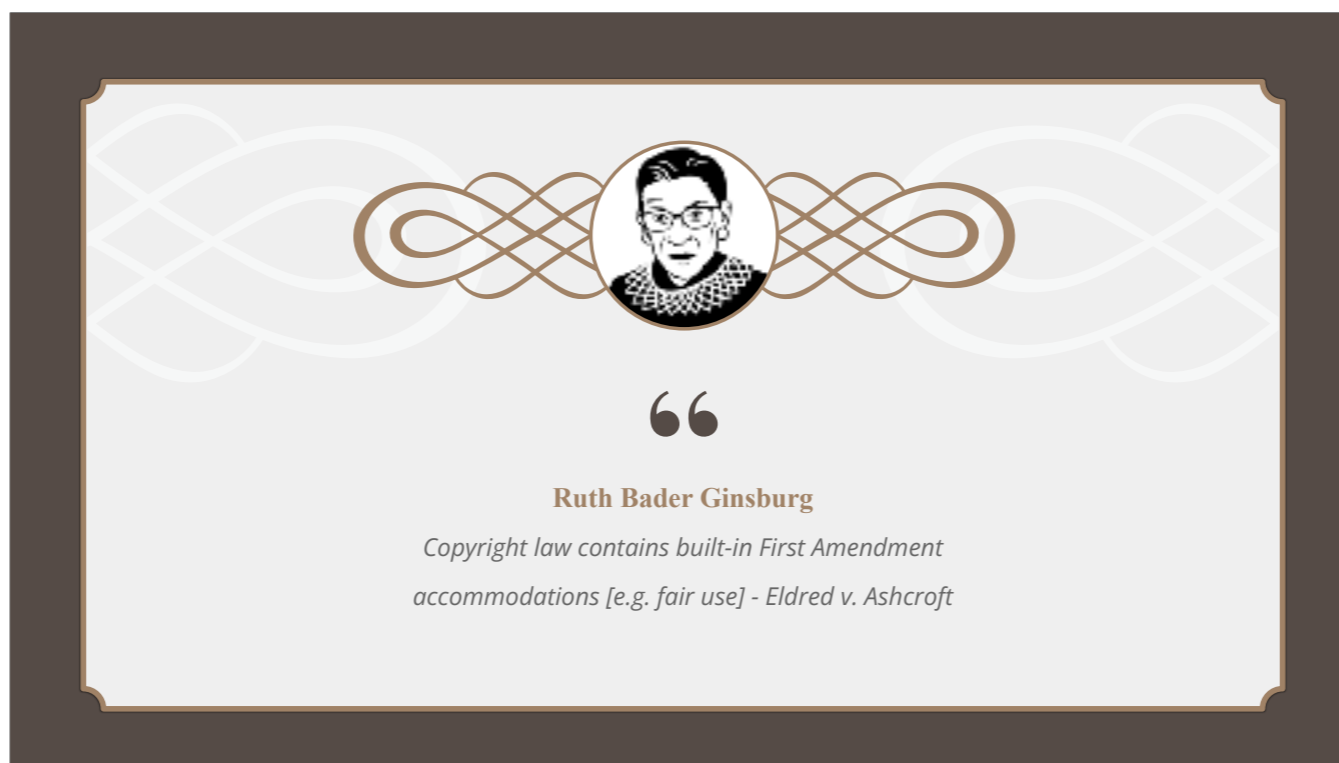



Hello Young Lawyers and thanks for having me. How young do you have to be to be a young lawyer? This is the first public talk I've done since 2019. Nothing else to impart with that, just wanted to let you know. It's good to be somewhere where I can hear people's pens clicking and watch people check their phones or gently nap while I talk, truly. I've assembled a collection of links because for some of us it may be early and I talk quickly and if you want to read more about any of this, I've got the receipts (citations) because I am a librarian.



I'm a Vermont librarian in a state where most librarians do not share my attributes. Here are some of them. I grew up with a dad who was a technology guy (yes back in the 80s, I KNOW) so I grew up thinking computers were normal, that they often came bundled with video games, and that they were good at helping solve problems. Many other people of my generation had to use computers mainly for work, had to learn stuff on the fly in not the best of circumstances, and grew to feel that computers were the hurdle standing in their way. I get it. I do some digital divide research and I am a "qualifying authority" for the Internet Archive, helping print-disabled people get access to legally-for-them scanned books. I am frequently looking for legal loopholes to help me do what I want to do, what I feel I should be able to do. This talk is about one such legal loophole: Fair Use. Here's some data but mostly some anecdotal about how this stuff appears to me, not a lawyer.





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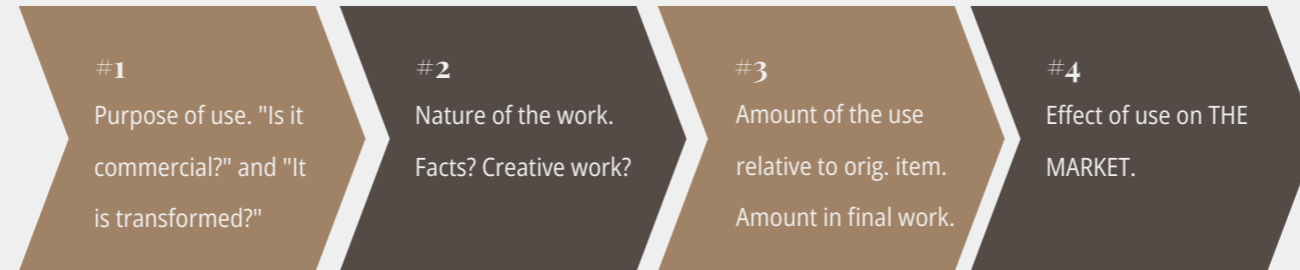
**Ruth Bader Ginsburg**

*Copyright law contains built-in First Amendment accommodations [e.g. fair use] - Eldred v. Ashcroft*

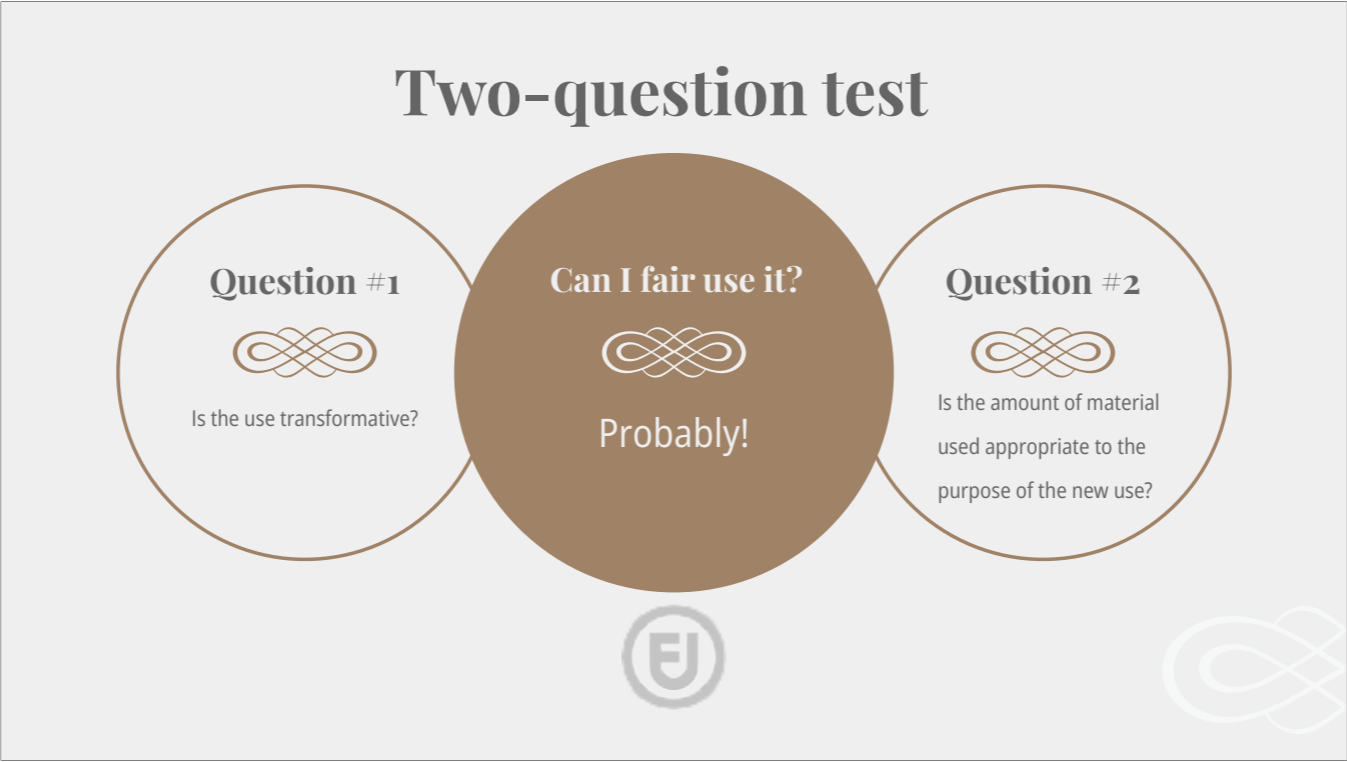
Ginsburg is quoted a lot in Fair Use essays, both because people like her a lot but also because of her written opinion in *Eldred v Ashcroft* in 2003. I certainly can't summarize the case but this quote gets tossed around a lot. Fair use is free speech, kinda.

17 U.S.C. § 107

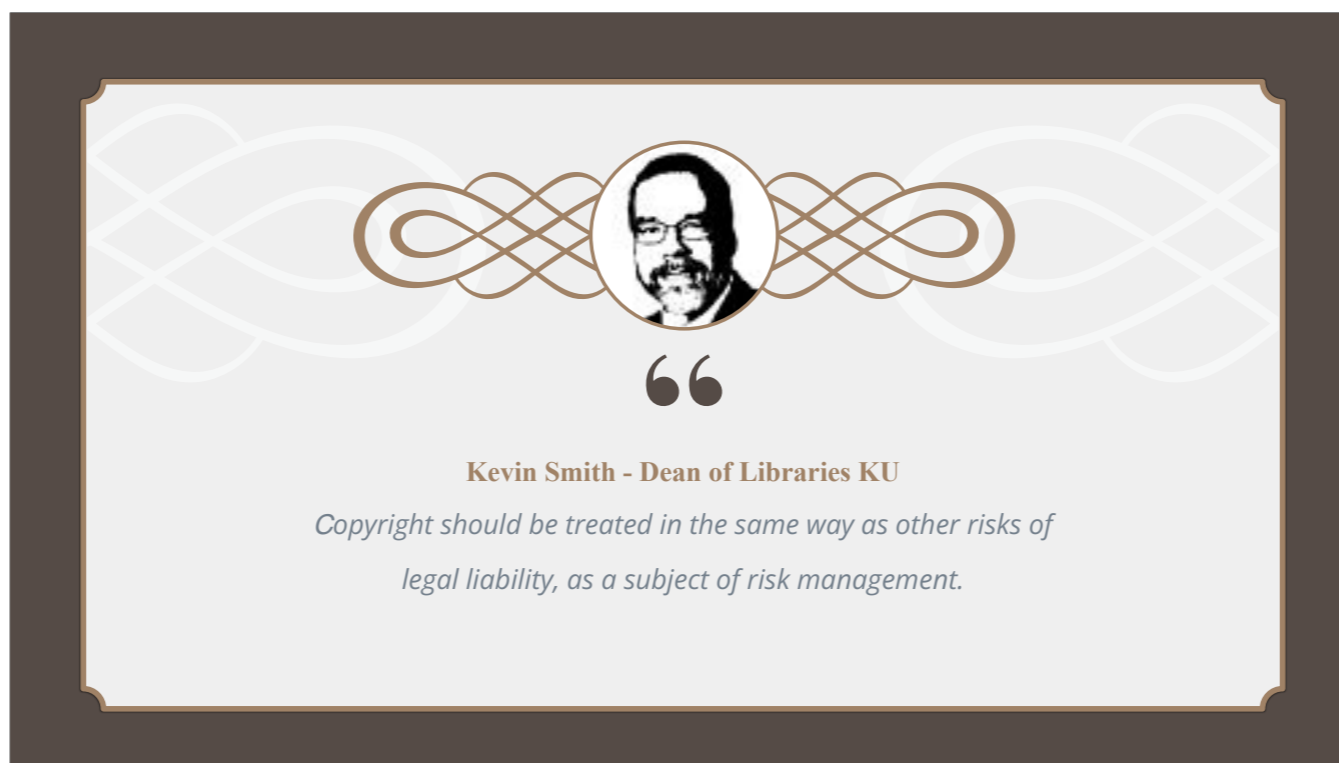
## Four-factor test



In case you don't know what fair use is, this is a crash course on one slide. It's a doctrine enshrined in copyright law. In short, copyright gives you the right to limit access to your intellectual property for a fixed period of time so that content creators can make a living. However, also there are some exceptions to that (the TEACH act is one I am not going into, libraries' right of first sale is another) and Fair Use is one. If you want to use someone else's copyrighted content you need to think about four things, these four things. Sometimes people think if you're just some schmo with a website you can't get sued. On the contrary it's often the schmoes that get sued! Anyhow, you're lawyers you don't need me to explain this.



Sometimes people sum it up more simply with something like this. Don't use much, especially in proportion to the new work, mostly transformative. Because, look, the answer to "Is this fair use?" is nearly always going to be "It depends," but that "It depends" can really sound more like *no* or more like *yes* depending on how you say it.



This guy is a bit of a hero of mine. He worked as Director of Copyright and Scholarly Communications at the Duke University Libraries where he was always willing to say "We should be able to use more, do more, as scholars and libraries" In 2016 he became the Dean of Libraries at the University of Kansas. He talks, quite sensibly about how making decisions around copyright is often treated as all (we don't care, sue us!) or nothing (never do anything that might get people mad) and neither is a valid strategy. Rather institutions need to weigh risks and think about liability in terms of risk.

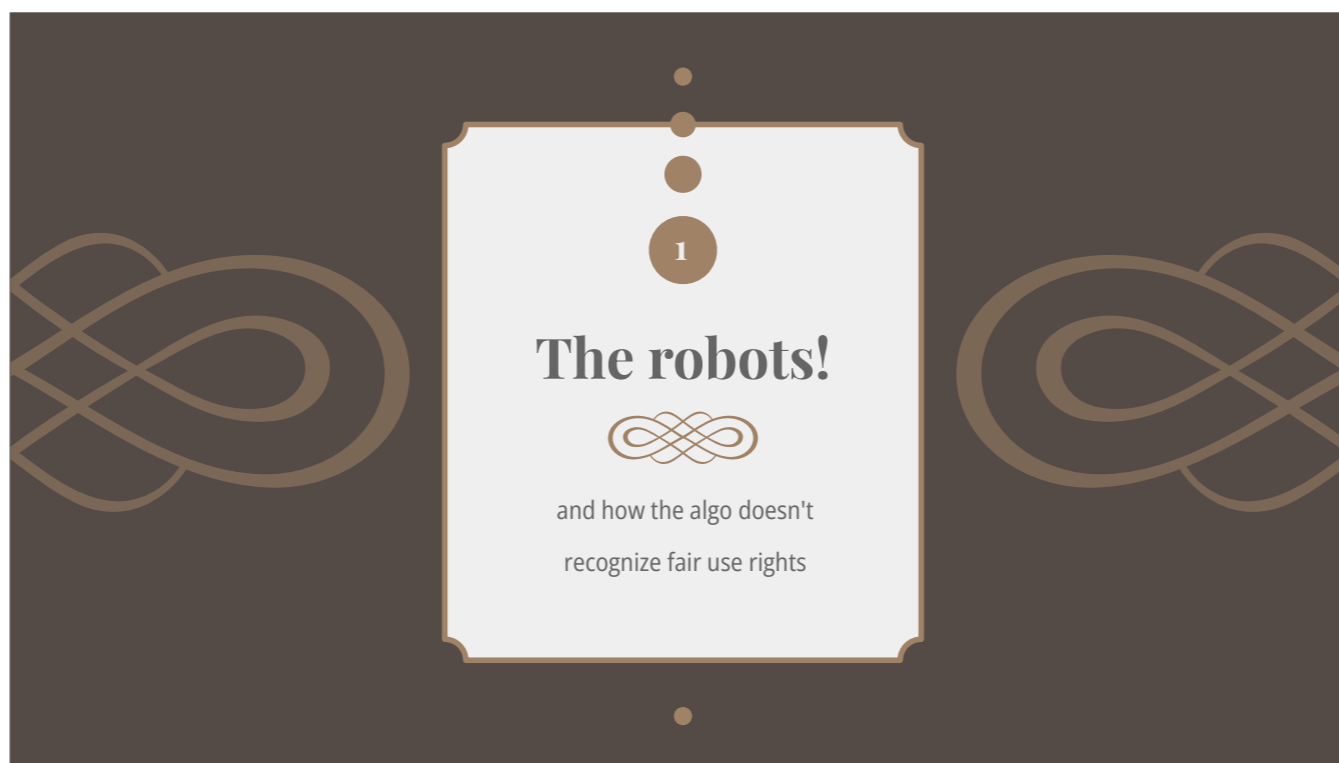


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**Richard Tallman**

*Fair use is uniquely situated in copyright law so as to be treated differently than traditional affirmative defenses... because 17 U.S.C. § 107 created a type of non-infringing use, fair use is "authorized by the law" and a copyright holder must consider the existence of fair use before sending a takedown notification. - Lenz v. Universal Music Corp.*

And this guy I don't know so well but he was the 9th Circuit Judge in *Lenz v. Universal Music*, you know that 30 second video of the baby rocking out to Prince (RIP) and his assertion, that fair use shouldn't just be an affirmative defense (i.e. it's there for you if someone sues you) but really needs to be considered by a lot of these algo-based DMCA takedown machines that we've gotten in whatever bad simulation version we're currently living through



So I'm going to talk about a few examples of how this works out for me, extremely online librarian, while I am trying to live my life. First off, robots.



7TH INNING STRETCH - FACEBOOK

## Robot says "No!"

I was watching my favorite FB Live show when they showed a two-minute home made video that featured copyrighted music. The FB Live video abruptly terminated with no recourse or "Hey is this fair use?" checkbox.

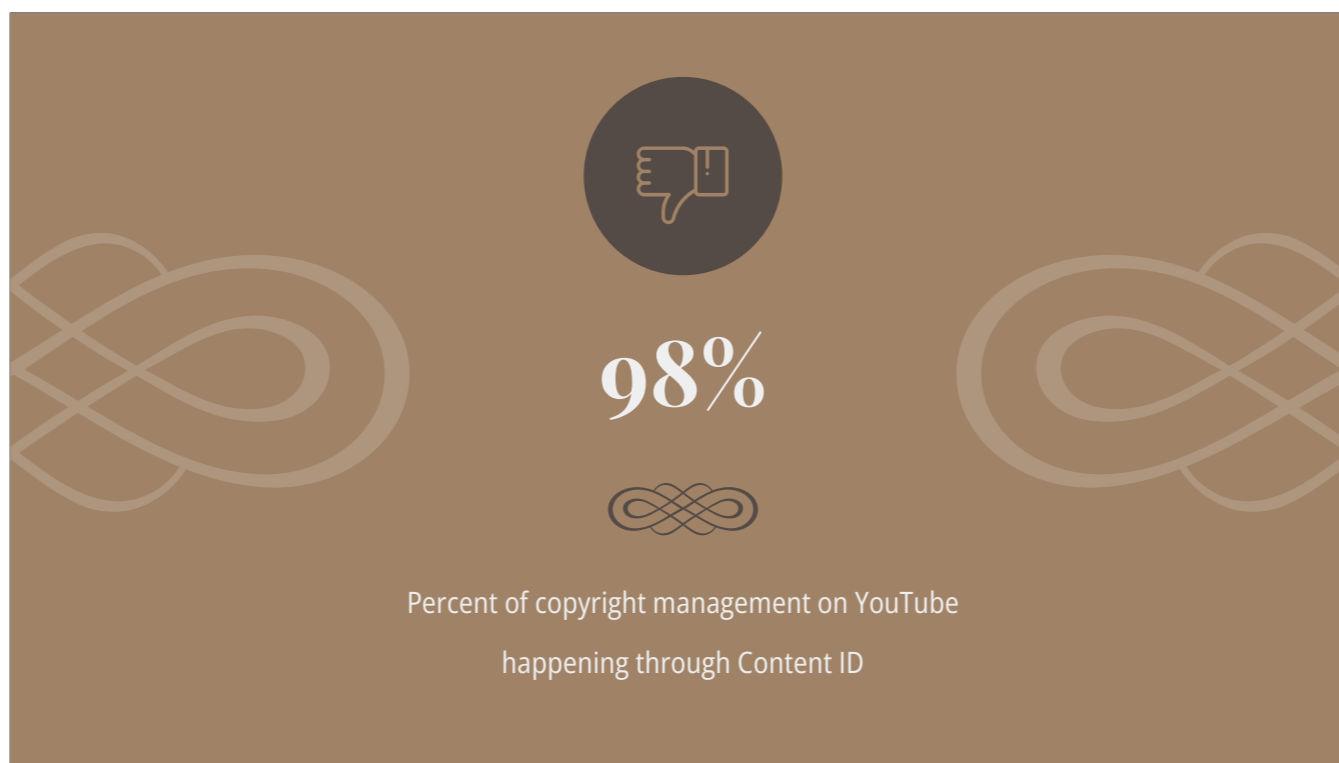
**Don't be that algo.**



The Tallman quotation is about the YouTube algo specifically overreaching. That was in 2007. I don't know if any of you have YouTube channels but if you put up a video with copyrighted music, there's a Content ID system that can catch you and give you a few options, depending on a secret number of things. It might put ads on your video, or it might make you take it down (or it will take it down for you) or it might give you a strike and you might risk losing your channel. But more and more stuff is LIVE lately. I saw things get a bit more sophisticated a few weeks ago when I was watching a Facebook Live stream that abruptly terminated because the man doing the show played a short clip on his phone (yes, held up to his laptop screen) of a video with some (apparently) copyrighted music. Was it fair use? Almost certainly. Did the robot care? It did not. I'm sure this kind of thing will eventually have its day in court, it hasn't yet.



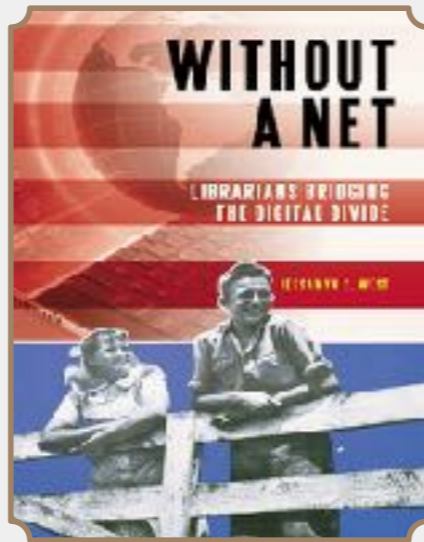
And just a few stats about the Content ID system. It's a moneymaker for rights-holders.



And it's robots all the way down. You can appeal a ruling (and probably should) but that takes time and often money.



In 2011 I wrote a book. I signed a bunch of contracts including one that said I was legally responsible for copyright violations. My book was about how to teach people to use computers.



2011

## Can I use a screenshot?

My publisher's lawyers made me contact Facebook legal for the right to republish a screenshot of a Facebook web page. They, of course, did not get back to me. My publishers threatened to not publish my book over this. I called their bluff.

**Don't be those lawyers.**



That book included a number of screenshots, assuring it would be out of date nearly immediately. My publisher, being very risk averse (and blaming their lawyers) told me I needed permissions for all of my screenshots. I dutifully wasted a bunch of time writing away for these, often got permission, but some people never wrote me back at all including, no surprise, facebook. My publisher didn't want to go ahead with the publication. I said I was out of ideas, we were at a stalemate. They eventually saw reason.



I also edit Wikipedia, it's a mess of an encyclopedia except for all the worse ones. I am generally someone who enjoys making things better so I help out there.



WIKIMEDIA COMMONS VS. WIKIPEDIA

## I See Dead Librarians

Everyone needs a hobby. Mine is adding fair use images to Wikipedia of dead librarians. But! Unlike most of the fair use stuff I'll be talking about, Wikipedia dislikes fair use because... it's not free content. And nerds argue for months about disallowing fairly used images.

**Don't be those nerds.**

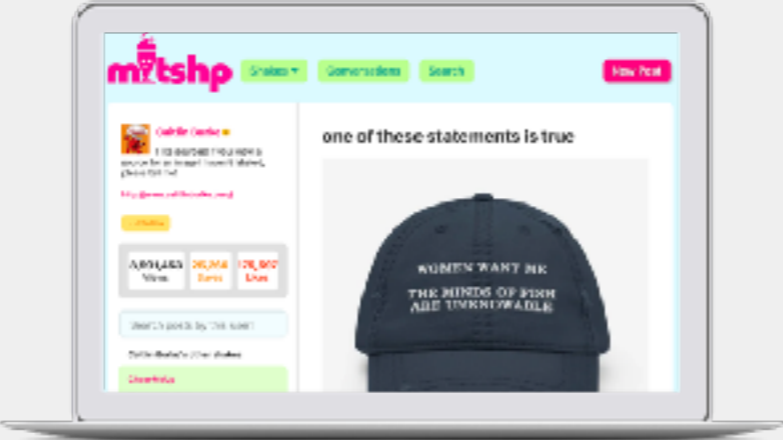


I think Wikipedia articles are better when you can see the people. And there's a provision in Wikipedia's 10,000+ word Non-Free-Content policy that says fair use images are acceptable in a very limited set of circumstances (only on Wikipedia, not Wikimedia Commons, low, res, only if you fill out a fair use justification). Great! I decided that 2022 was going to be my year of making sure all deceased people had a fair use image added to their articles. I'd keep an eye on the page that listed the people who had recently died and go track down images. Easy peasy and a LOT easier than finding old images of long-dead never-famous librarians. But! There's a huge nerd war on Wikipedia about this because Wikipedia wants all their content to be FREE and so fair use is too limiting. So while you technically can do this for recently-dead people, there's kind of a gentleman's agreement to not do this before about six months have passed or a nerd might revert you. So I went back to finding pictures of long dead librarians instead. Not as simple but the nerds leave you alone.



In other parts of the internet, the rules are a little more SRS BZNS. You are probably familiar with copyright trolls. They use Content ID like tools (or paralegals, I don't know) to track down websites that are using copyrighted imagery, usually from photographers or artists who they represent.





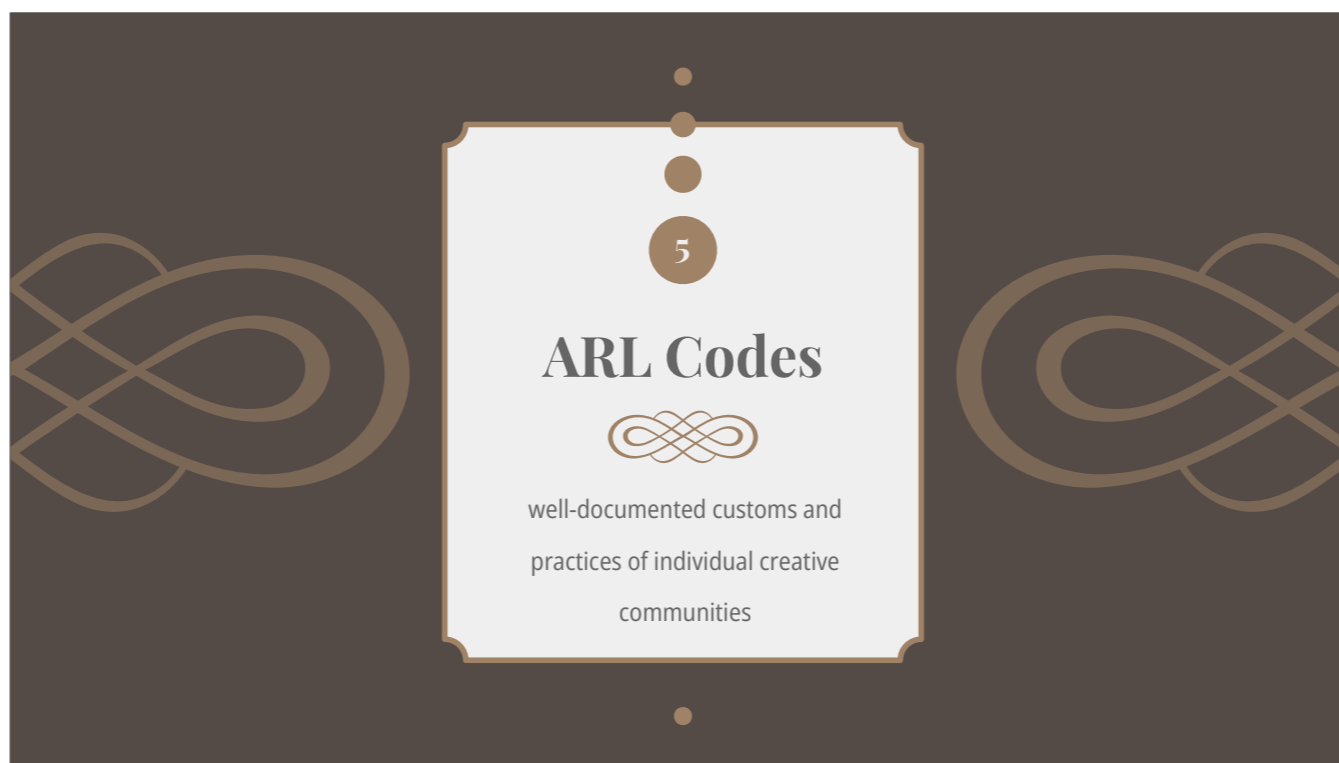
MLTSHP v. 7410 INC (HIGBEE)

## MLTSHP v. Trolls

Or "How I stopped worrying and learned to love the DMCA." Copyright trolls harassed us for an image they had to use a reverse image search to even find and which we promptly removed. This is their job.

**Don't hang out with those lawyers.  
Be those other lawyers.**

This is a longer story than I'm relating but, in short, I run a very small image-sharing site called MLTSHP and it's a closed community. However we have a "best of" twitter account that tweets images that are popular there. It's mostly dumb memes, pictures of cats, and dinner, a kind of old people instagram. I love it. I took over the site from its previous owners and one of the things I didn't do (didn't know to do) was register as the DMCA agent for the site. So when one of the images made the "best of" twitter feed and was found by the copyright troll's robot (or paralegal) they sent me a letter demanding 15K for infringement and "damages." There's a lot of handwavey stuff here about how we handled it but basically we took the image down within 15 minutes, registered as DMCA agent immediately, and told the trolls we didn't have any money to pay them (mostly true) and they harassed us for MONTHS asking for money, threatening to take us to court, all the stuff. And later found another image (by then I was registered as DMCA agent) and got more threatening letters. I finally got the fine folks at Public Citizen involved pro bono (after paying a lawyer) and they did a lot of fancy footwork and got the copyright troll (not naming in text, will say out loud) to cave, give the site a retroactive license, and then piss off which I appreciated.



But this isn't all bad news and bad lawyers. Some of my favorite lawyers, like Kevin Smith who I mentioned above, have been doing some great work helping people use fair use intelligently and usefully.



CODES OF BEST PRACTICES

## Best defense = good offense

How can fair use principles be used in common recurring contexts? What do you need to think about? How can you exercise your rights and be fair to rights holders? How can you just do your job well and not have to worry about lawyers and creeps and nerds and robots?

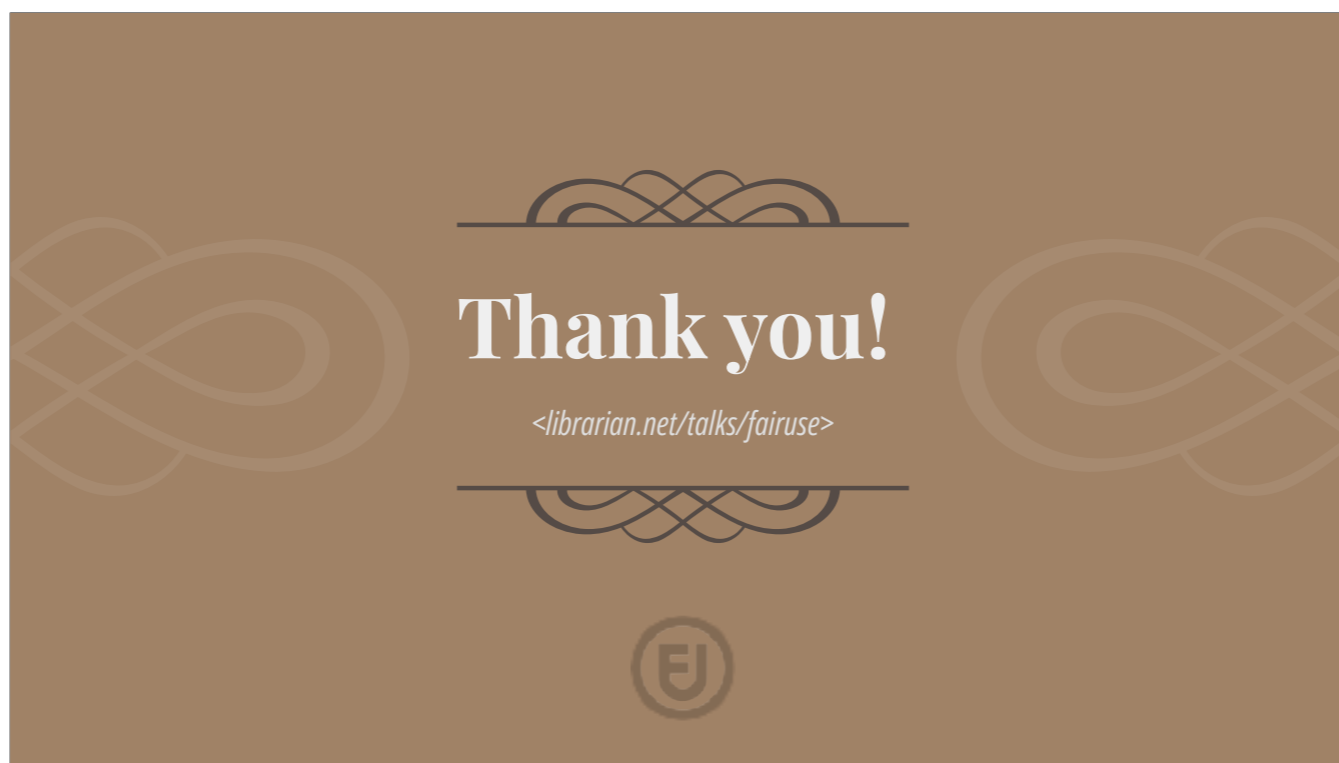
**Be those lawyers.**



One of the things that they found, through examining many many fair use lawsuits, is that having a rubric or code for determining fair use within your professional context, and demonstrating that you were applying that code, was one of the better determiners of winning a fair use challenge. So the ARL (Association of Research Libraries) and the Center for Media and Social Policy helped put together these codes of best practices. They have them for poetry, dance, filmmaking, visual arts, open educational resources, journalism, media literacy education, open courseware, software preservation, dealing with orphan works, and online video. It's the single best tool (along with Creative Commons licensing) I can give to people, as a librarian, that will help them make educated and informed choices about how they use and share and reuse content. And lawyers made it. And for that I am grateful.



It's a great world of remixing out there, if we let it be.



Thank you, again my slides are at this web address.