Welcome to Linking, Embedding & Streaming: What's Legal? What's Not?, a Magna 20 Minute Mentor. My name is Linda Enghagen. I am an attorney and professor in the Eisenberg School at the University of Massachusetts. Like many of you, as an educator, I often find myself confronted with sorting out how to lawfully use media and online materials in my fully online and hybrid courses.

In this 20 Minute Mentor, we will explore about what we know is and is not legal when it comes to linking, embedding, and streaming. As is my practice, every time I deliver a copyright-related presentation, we will begin with the requisite disclaimer. The information contained herein is for educational purposes only. It is not a substitute for legal advice, nor is it to be construed as the rendering of a legal opinion.

As with many things in life, context matters. For our purposes, I'm going to be discussing linking, embedding, and streaming in the context of a traditional online course, that is the course is either fully online or a hybrid, part face-to-face and part online, and is offered for educational purposes.

Further, I am assuming the course is secured. So what I'm talking about here does not apply to nontraditional online courses such as MOOCs or other unsecured course offerings. Finally, we are talking about courses for which the materials used are available only to enrolled students. Now that the context is clear, let's take a look at what we know so far about what is and is not legal when it comes to linking, embedding, and streaming. We will begin by talking about linking.

Linking refers to copying a URL from the Internet and pasting it into your course materials. Once that is done, students simply click on the pasted URL and seamlessly connect to it. Let's begin with the basics. In the early days of the Internet, some website owners tried to prevent others from linking to their sites unless those wishing to do the linking obtained permission and paid linking fees. It is now well established that no one owns a URL. And therefore, website owners cannot require permission or fees.

A URL is the legal equivalent of the street address on a house or business. It identifies a location but is not owned by the homeowner or business owner. Consequently, it's perfectly legal to link to unsecured, that is, free, websites.

Having said that, it bears pointing out that linking to unsecured websites has potential downsides. One of the most important is that website owners sometimes change their sites. Linking to something today does not
guarantee it will be there later in the semester when you reach the point at which you want the students to utilize the materials.

For secured websites that are subscription based, you need to refer to the terms and conditions of the subscription to determine what is and is not allowed. Similarly, when linking to library databases, make sure you follow applicable institutional policies and protocols. Your librarians can be very helpful in this regard.

Finally, if you know or have reason to believe, something was posted to the Internet illegally, do not link to it. The fact that someone else committed the illegal posting does not let you off the hook. Linking in such a situation can constitute contributory or vicarious copyright infringement. Think of it as taking advantage of someone else's wrongdoing such as buying a computer that fell off the truck.

There are two other ways that linking can be problematic and should be approached with caution, deep linking and framing. Deep linking refers to linking to a page on a website that is not the home page. Though the legal status of deep linking is uncertain because there aren't a lot of cases involving the practice and none involve deep linking for educational purposes, there are some cases that have found deep linking to be illegal.

They tend to involve trademark infringement or lost revenue. Deep linking can make it unclear to users whose site they are on. And ad revenue from banner ads on websites is often based on home page hits. In the end, you have to decide what level of risk you are comfortable with in light of any applicable policies your institution has in place.

Like deep linking, the legal status of framing is uncertain for the same reasons. Framing refers to viewing one website from within another. Framing pulls or imports another website into your site so the border of your site frames it, sort of like a frame around a picture. It also raises the same questions of applicable institutional policy and risk. For what it's worth, personally, I avoid both by sending the students to the home page with instructions on how to locate the materials I want them to use. That is perfectly legal and requires only a modicum of additional effort on my part to accomplish.

This brings us to embedding. Embedding and linking are different from one another. Linking sends the user to a different site, the one that is being linked to. In other words, it's connected to the original. Embedding keeps the user on your site. The most common question I get about embedding concerns the legality of embedding YouTube videos.
So let's take a look at YouTube specifically. The first question you need to ask when considering embedding a YouTube video is whether it was lawfully posted or is likely there illegally. In making this determination, let common sense prevail. If you locate something typically sold on a commercial market, it is likely illegal. Just like linking to illegally posted materials, embedding a YouTube video illegally posted by someone else leaves you vulnerable for vicarious or contributory copyright infringement.

Again, think of it as akin to committing a crime, being in possession of stolen property, for example. Even though you were not the original thief, it is still illegal. So just don't do it. On the other hand, if all indicators are that it was posted legally, then you can link to it or embed it if the copyright owner posted it with the embed option turned on.

The relevant portion of the YouTube terms of service for those who post to YouTube reads as follows. You also hereby grant each user of the service a nonexclusive license to access your content through the service and to use, reproduce, distribute, display, and perform such content as permitted through the functionality of the service and under these terms of service.

Leaving the embedding option turned on is part of the functionality of YouTube. So when someone posts their work to YouTube with that in place, they are authorizing YouTube users to use, reproduce, distribute, display, and perform their work. Hence, you are allowed to use it accordingly.

The only caveat I would add to this is the following. Presumably, someone might post something to YouTube permitting it to be embedded only to later have a change of heart. If that happens, and you become aware of it, you need to act accordingly and no longer embed it.

Under the law, this kind of decision is not irrevocable. People are allowed to change their minds. The supplementary materials accompanying this mentor contain a listing of additional sources of free streaming media you might find useful. YouTube is certainly not the only one out there.

Now let's tackle streaming. Streaming refers to the electronic transmission of audio and/or video feeds. From both a technological and legal standpoint, streaming can be accomplished a number of different ways. Let's begin with the easy ones. Many university libraries now subscribe to collections of streaming media such as Films on Demand.

It is certainly lawful to stream content from such selections to an online course or a face-to-face classroom. Similarly, based on the court rulings to
date, it is lawful to digitize and stream media from the library's collection, such as DVDs, if the library bought public performance rights when the materials were purchased.

Increasingly, publishing companies provide extensive supplementary materials for their textbooks. It is lawful to stream such supplementary materials that accompany texts adopted for a particular course. In doing so, you are using the materials for their intended purpose. But bear in mind that the same is not true for supplementary materials for books that are not adopted for the course.

In a similar vein, many free or open access materials, including media, are available for use at no charge. Many are available under a Creative Commons license. So make sure you use them in a manner consistent with the permission granted. Finally, public domain works may be used. Works created by the federal government are often useful and fall into this category.

Now we move on to the situations that require closer consideration. While going into the details of compliance are beyond the scope of this mentor, if your institution is TEACH Act compliant, you are allowed to stream certain types of materials for certain purposes.

If you are unsure whether or not you are compliant, your librarians or instructional media staff should be able to help you find that out. For those that are TEACH Act compliant, you are permitted to stream performances of nondramatic musical and literary works as long as other audiovisual works. In addition, you are allowed to display other types of materials.

When considering the following examples, it is important to remember two things about the TEACH Act. First, it applies to online courses only. Its rules do not apply to face-to-face classrooms. Second, it applies only to activities that are meant to replicate the in-class face-to-face experience. It does not apply, for example, to homework assignments or other outside of class activities.

Nondramatic musical and literary works may be streamed in their entirety if you are TEACH Act compliant. Think audio works here, musical recordings, sound recordings of short stories, that kind of thing. For other audiovisual works, the portion allowed must be reasonable and limited. While the law does not define reasonable and limited, nor does it require you to use the smallest segment possible.

Most copyright experts agree that reasonable and limited must be considered in relation to the educational goals. In other words, tailor the portion used to meet the goal. In this category, we're talking about media
that contains both audio and visual aspects, such as opera, music videos, musicals, and films.

Finally, other materials may be displayed in portions that are comparable to that used in a face-to-face classroom. So things like charts, graphs, photographs, illustrations, etc. may be displayed via streaming. If your institution is not TEACH Act compliant, or you want to use streaming for a homework assignment, you are not completely out of luck. The rules of Fair Use may permit you to stream.

Like the TEACH Act, a detailed analysis of it is beyond the scope of this mentor. So the following only gives you a general idea of how it works. In evaluating whether Fair Use applies, you will have to evaluate the Fair Use factors, the purpose or character of the use. Using materials for educational purposes favors fair use. So that shouldn't be a problem.

The nature of the work used. If the materials you want to use are nonfiction, that weighs more in favor of Fair Use. Fiction and creative works weigh less in favor of Fair Use.

Three, the portion used. Are you using the heart of the work? That is, does the portion used summarize the whole and therefore serve as a market substitute? If yes, Fair Use does not apply. What about the impact on the market? What impact, if any, does this use have on the market? If the negative impact is too significant, Fair Use does not apply.

Your institution may have specific policies on how it evaluates Fair Use. So make sure you check to see if you can get guidance there as well. With that in mind, let's look at a couple of Fair Use examples. First, the Oliver Stone classic, Wall Street. You want to use it in a business ethics class with an accompanying assignment in which students must analyze Gordon Gekko's motto, Greed is Good, in relation to the demise of Enron and incarceration of Jeffrey Skilling.

Here is one way to make the case that streaming a video to your students is allowed under Fair Use. Clearly, the purpose is educational. Further, even though it's a work of fiction, it is being repurposed for the purposes of illustration and analysis. Students will critique it in relation to current events relevant to the course content. The film was lawfully accessed or acquired. It wasn't pirated. And the film is not specifically marketed for student purchase.

In contrast, the DVD for student nurses is a different story because this DVD is typically sold for student purchase. For this reason, streaming the entire DVD is not likely to be allowed under Fair Use, though using a small segment, the 5% by way of example, may be defensible.
As you may have already discerned from previous comments, if materials are created and sold for student purchase in the educational market, students must purchase them. None of the rules we've considered permit them to be streamed. This includes everything from workbooks to DVDs and access codes for online materials.

Finally, I want to say a few words about Netflix because it's a question I get repeatedly. Many faculty members ask me whether it's okay to use their personal Netflix account to stream videos in their classes. While I'm not aware of Netflix suing anyone, at least so far, Netflix has made it clear that it disapproves of this practice and believes that it is a violation of their Terms of Use.

Whether or not that's true remains to be seen. But having said that, let me add two things. First, as I've said in other contexts, check your institutional policy. If it forbids it, don't do it. If it is silent, as it may well be, you will have to decide for yourself.

As for me and how I decide that one, I don't do it. It makes me nervous. And I'm not the nervous type. With that, this brings Linking, Embedding and Streaming: What's Legal? What's Not? to a close. Thank you for joining me in this Magna 20 Minute Mentor. Here is a link to the mentor evaluation form. We'd appreciate your feedback. And again, thank you.