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Fair Use and Education: The Way Forward

Peter Jaszi

Abstract: The ability to make reasonable fair use of copyrighted material is both economically and culturally important to the enterprise of education. No other feature of copyright laws offers educators access of the same potential scope. In asserting fair use, teachers, librarians, and others cannot rely on a claim of "economic exceptionalism," for which there is no clear basis in U.S. copyright law. Nor can they expect to arrive at satisfactory shared understandings with copyright owners. Instead, they should seek to take advantage of current trends in copyright case law, including the marked trend toward preferring uses that are "transformative," where the amount of content used is appropriate to the transformative purpose. Over twenty years, we have accumulated considerable information about what constitutes "transformativeness," and members of the education community are well positioned to provide persuasive narratives explaining how educational uses significantly repurpose and add value to the copyrighted content they incorporate.

Keywords: *fair use / education / transformativeness*

In May 2012, Judge Orinda D. Evans of the federal district court in Atlanta issued a decision in *Cambridge University Press v. Becker*¹ that has been rightly hailed as a significant recognition of educators' rights to use copyrighted material in their teaching. The publisher plaintiffs, operating with a significant subvention from the Copyright Clearance Center (the rightsholders' licensing clearinghouse tasked with extracting rents from the education "market")² had sued Georgia State University officials for infringement in connection with the posting of unlicensed excerpts from monographs requested by professors on its electronic course reserves system. Eventually the case was narrowed to an individualized consideration of 74 specific instances, and the judge found that in fully 70 of these the fair

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use doctrine applied. But the university's victory in Judge Owen's court, which the publishers now have appealed to the Eleventh Circuit Court of Appeals, carries a sting in its tail: In framing her detailed analysis of the various excerpts, the judge gave significant weight to Georgia State's status as a "nonprofit educational institution."³ Beyond that, however, she explained her strong focus on the amount of material copied, measured as a percentage of the source work, by concluding "that this case involves only mirror-image, non transformative, uses," a "fact" that "favors market substitution (thus leaning against fair use), but [that] this tendency is reduced when the excerpt is small."⁴

I'll return in a moment to the merits—or demerits—of this analytic approach.⁵ Judge Owens' decision is only the opening act of a long and complicated show. As I'll suggest below, the courts have given us little, if any, specific guidance on how to think about fair use and education, and it seems unlikely that one district judge's opinion will be the last word. In fact, this essay concludes that, whatever the result of the Georgia State case, the education community has some urgent work to do if we really care about explaining why we sometimes should be allowed to "use" copyrighted material without getting permission or paying license fees.

But first things first: why, after all, should we care? Educational institutions *do* have licensing budgets, and an extraordinarily wide range of material currently *is* available under license, and more is (presumably) on the way. Two answers occur to me, one of which was poignantly suggested some years ago during a conversation about copyright and the classroom with K–9 teachers from a number of Philadelphia-area schools. When asked what difficulties they could foresee if they wanted video about the 1960s civil rights movement for classroom use, teachers from Main Line schools responded (with quiet self-satisfaction) that they could imagine none: "We'd ask one of our school librarians, and he would pull a selection of appropriate clips from one of several licensed video databases." Then an inner-city elementary teacher raised her hand and spoke from a place of both anger and resignation: "In my school we have no database licenses, no librarian; and—for that matter—no library. If I can't bring video I've purchased or recorded off-air into the classroom, then my kids will have to do without." It's simple to see that licensing solutions for access to content assume the means to pay, and that this assumption frequently may not be borne out in fact.

The other answer is harder to demonstrate, but arguably wider-reaching in its implications. It is far from clear that a fully monetized approach to information use in education will produce the best, or even anything near the best, learning results. Not only will some users do without, and others have to make do with material in a database that is not quite what they would have preferred, given the choice, but in such an environment everyone in and around the educational enterprise will—consciously or unconsciously—begin to monitor and regulate how they acquire and employ information. Knowledge cannot necessarily be measured out in coffee spoons, and the “efficiencies” that a ubiquitous market in information is claimed to promote are not necessarily ones we should desire in and around the classroom. Put otherwise, the best teaching and learning is a messy and gloriously inefficient enterprise, in which dozens of information objects may need to be sampled (and discarded) before the right one for the purpose can be identified. Or the heuristic value of a wide-ranging search may, in the end, outweigh the importance of any object finally retrieved.

In any event, one thing should be clear: educators who want to go on making their own decisions about what materials to teach (whether from or to), and who care about their students having a similar range of choices, have work to do in developing an account of how their current practices fit into the grid of legal analysis with which Congress and the courts have provided us. I’ll argue below, more specifically, that the courts have done use-communities (including education) a tremendous favor by reimagining the law of fair use in terms of the “transformativeness” standard⁶; that educators need to reciprocate by describing how their socially and culturally valuable activities relate affirmatively to that standard; and that this isn’t, in fact, very difficult work for anyone who has ever written a syllabus or a lesson plan.

It’s important to acknowledge, however, that the Copyright Act includes exceptions other than fair use, including some specifically (and rather narrowly) designed to address the needs of education itself, and others that speak to the ability of academic and school libraries to support education. One possible response to the challenge that copyright poses for educational practice would be to ask Congress for more of the same, inviting lawmakers to carve out new, robust exceptions for things like online course reserves, the appropriation of text and video in classroom remix projects, or the incorporation of content into the footnotes (or other

apparatus) of term papers, theses, and dissertations—all activities that, like many others, receive no specific warrant under U.S. law. This approach, I'd humbly suggest, is a nonstarter. There is absolutely no indication that educators could lobby Congress to expand their specified use rights under copyright (let alone those of their students), especially in an environment where rightsholders in general appear to have taken a pledge not to support any new exceptions to copyright, no matter how well justified.⁷

Another approach would be for educators to try, once again, to negotiate guidelines around acceptable educational uses of copyrighted materials with publishers, movie studios, music publishers, recording companies, professional photographers, and all the other communities of rightsholders who assert copyright control over material of educational value. Perhaps the best that can be said for this approach is that it has been tried, and the results have not been pretty. Negotiated guidelines tend (when they can be agreed upon at all) to be strict, narrow, and more focused on metrics than on the nature of the educational enterprise; worse still, rightsholders have shown an irrepressible tendency to interpret guidelines that were designed to create “safe harbors” for users as outer limits on permissible use.⁸

So in the end, educators don't have any good choices here—except to try to make the fair use doctrine as it stands work better for teachers and students today and tomorrow. That said, there are different approaches to accomplishing this, one of which might be dubbed “educational exceptionalism”—the notion that teaching and learning are so special, and so highly favored in copyright policy and fair use law, that it ought to be possible to get courts to cut education some special slack, beyond that which they extend to uses of third-party copyright material by filmmakers or musicians or publishers.⁹ After all, say advocates of the exceptionalist approach to educational fair use, mainstream education is, along with all its other sympathetic characteristics, a quintessentially noncommercial activity (undertaken without a profit motive and generally operating in the red). That, too, counts for something in fair use analysis—or should.

But there's the rub. There's little if any evidence for the proposition that education actually enjoys (as distinct from being morally entitled to enjoy) a preferential position in the array of positive human activities that, from time to time, may lay claim to special treatment under copyright law. True enough, the very first case decided under the legal rubric of fair use, back in

1841, was (in a loose sense) education-related—a conflict between dueling biographies of George Washington—but what’s sometimes lost is that although in *Folsom v. Marsh*, Justice Joseph Story announced and applied the new doctrine, he concluded that a later-coming popularizer had no defense against a claim of infringement by an earlier and more long-winded biographer.¹⁰ Even so, Story’s decision *could* have been the beginning of a string of fair use cases investigating the application of the doctrine to education and cognate practices. But as things turned out, it was not—a circumstance the reasons for which I will speculate upon a bit further along in this essay.

Notably, educational use does not even figure as a privileged use category in Alan Latman’s comprehensive review of the case law up to 1960.¹¹ In fact, the closer twentieth-century U.S. copyright case law got to general educational practice (though it never has gotten all that close), the less encouraging the results appear to be. In 1914, a court considered *Macmillan Co. v. King*,¹² involving an economics tutor who had prepared study sheets that borrowed content from a popular college textbook. Although there had been no showing of economic harm to the author, the court declined to excuse the activity, even though it was educational in nature:

I am unable to believe that the defendant’s use of the outlines is any the less infringement of the copyright because he is a teacher, because he uses them in teaching the contents of the book, because he might lecture upon the contents of the book without infringing, or because his pupils might have taken their own notes of his lectures without infringing.¹³

In other words, some educational activities may be noninfringing uses, but educators don’t necessarily get a general pass. The point is underlined in a more recent case, *Encyclopedia Britannica Educational Corp. v. Crooks* (1978), where a public school system had created a cooperative project to record educational TV programs off the air and make a library of them available to instructors. That, the court ruled, was not clearly a fair use: “I find that the substantiality of the copying and the possible impact on the market for education films tip the balance in favor of the plaintiffs, outweighing [the school system’s] noncommercial, educational purpose in copying the films.”¹⁴ Neither of these decisions addresses what we might think of as “core” educational use—that is, the use of copyrighted material in or around the classroom, or (as it is these days) on class-related websites.

Here the trail goes cold; these decisions are about all the directly relevant case law there was,¹⁵ at least until *Georgia State*.

Nor does Latman's survey of historical attempts at copyright revision reveal any Congressional interest (sustained or otherwise) in the topic. A look at the prodigious legislative history of the 1976 Act doesn't suggest that the Congress had educational fair use on its mind at that time—with the single exception being that educational photocopying was presented as a threat to publishers' interests; indeed, it was this concern that was primarily responsible for the codification of the fair use doctrine, in its present form, in Section 107 of that Act. This helps explain why the reference to education in the the Section's preamble reads as follows: "[T]he fair use of a copyright work . . . for purposes such as criticism, comment, news reporting, *teaching (including multiple copies for classroom use)*, scholarship or research, is not an infringement of copyright."¹⁶

So what does this suggest? Two radically different stories can be fitted to this thin body of evidence. In the more optimistic one, the dearth of attention to educational fair use from relevant lawmakers is explained by the fact that education's highly privileged position in the universe of fair use is simply too clear ever to have required additional legislative attention or attracted much in the way of court challenges; in other words, copyright owners have long tolerated the unlicensed use of copyrighted material by educators precisely because they have no real choice. In the other account, the explanation is simply that—at least until quite recently—educational uses haven't generally been a source of particular, sustained concern to copyright owners (although when they were, as in the case of photocopying, the legal system responded). We may hope that the former account—in effect, a negative assertion of educational exceptionalism—is the truer of the two, though sustaining it requires various assumptions and leaps of faith, *Georgia State* notwithstanding. But we must prepare for the possibility that the latter may be closer to the mark.

If the cultural premises of educational exceptionalism are shaky, so are its economic foundations, even (or especially) after *Georgia State*. The fact that a use is for "nonprofit educational" purposes does carry some weight in fair use analysis; indeed, Section 107(1) says as much, indicating that an inquiry into the "purpose and character of [a given] use" can be informed by "whether such use is of a commercial nature or is for nonprofit educational purposes"—although courts have not told us much about exactly

why or how this works. We do know that, in general, “noncommercial” uses are treated with special solicitude. But the fact that educational activities may be conducted without a profit motive does not necessarily make them “noncommercial” in the sense that that term occurs in copyright discourse; as an influential 1984 decision put it, the “distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹⁷ Self-evidently, private schools and most institutions of higher education charge tuition and fees—to say nothing of selling course materials. Perhaps even more to the point, all schools are a “market” for ever-increasing kinds and numbers of firms trading in knowledge goods. Educators’ choices about what to buy or license, and what to use without payment, obviously can affect these businesses’ bottom line.¹⁸ This problem is only likely to increase as new business models for selling copyrighted material to schools proliferate.¹⁹

The challenge that these developments present for conventional fair use analysis is well illustrated by a 1995 case from outside the domain of education, *American Geophysical Union v. Texaco, Inc.*²⁰ The big oil company had made a practice of photocopying articles from academic journals to which it subscribed when requested by any of its 400 to 500 staff scientists, and when a publisher objected, the Second Circuit Court of Appeals ultimately found that the practice was not fair use. Two considerations helped to produce this decision. One was that the practice was deemed not to be meaningfully transformative: “Texaco’s photocopying merely transforms the material object embodying the intangible article that is the copyrighted original work.”²¹ The other was the existence of a “workable market” system for licensing the rights to make such photocopies (through the Copyright Clearance Center). In the absence of a finding of transformativeness, the fourth factor in fair use analysis, which looks to potential market harm from the use, dominated the court’s analysis and dictated its result.

If educational uses are subject to the same analysis, the proliferation of business models for licensing content to the education community will increasingly undermine fair use arguments. Notably, the Texaco case was an important point of reference for Judge Owens in *Georgia State*:

This Court agrees . . . that where excerpts are reasonably available, at a reasonable price, it is only fair for this fact to be considered in determining

whether Defendants' unpaid uses of excerpts constitutes a fair use. Fair use is an equitable doctrine. For loss of potential license revenue to cut against fair use, the evidence must show that licenses for excerpts of the works at issue are easily accessible, reasonably priced, and that they offer excerpts in a format which is reasonably convenient for users.²²

In many instances, the absence of proof that functioning licensing systems were in place for particular monograph excerpts helped to sway Judge Owens toward finding fair use.²³ But where she concluded that a challenged use was not fair, the state of the licensing market also played a significant part. On her way to concluding that a use of a chapter from C. Wright Mills' *The Power Elite* on the electronic reserves system constituted infringement, she put it this way:

Plaintiffs produced evidence demonstrating that there was a ready market for licensed digital excerpts of this work in 2009 through [the Copyright Clearance Center]. The unpaid use of the excerpt by Professor Harvey and her students caused very small, but actual, damage to the value of Oxford's copyright. In addition, widespread use of similar unlicensed excerpts could cause substantial harm. Oxford lost permissions income. Factor four strongly favors Plaintiffs.²⁴

The problem that such analysis poses for teachers and schools is obvious. In this half-hearted vision of educational exceptionalism, fair use is a likely casualty of innovations in licensing practice. So what is to be done? One possibility, of course, is to persuade the courts (including, given the importance of the issue, the Supreme Court) to take educational exceptionalism more seriously, making clear that serious teaching and learning enterprises deserve a special presumption of validity all their own in fair use analysis, entailing some insulation against factually grounded arguments that unlicensed use means a loss of licensing revenue to rightsholders.²⁵ Taking a risk on this kind of doctrinal innovation, I'd suggest, is a long shot at best. Not only are "test cases" in copyright law difficult to frame, but in general they ultimately are decided using novel applications of clear *existing* law. Educators' best chance, then, is to catch a ride on the train that is already moving—the clear trend toward transformativeness analysis.

Courts considering whether a particular challenged use is fair (rather than infringing), are directed in Section 107 to consider, among other things, four factors (derived, in turn, from pre-1976 judicial opinions):

- (1) the purpose and character of the use, including whether such use is of a 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; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

In recent decisions, moreover, federal courts (up to and including the Supreme Court) have indicated that a critical consideration in evaluating most (if not all) of these factors is whether the use can be considered “transformative”—whether it “adds something new, with a further purpose or different character”²⁶ If that is the case, the first factor can weigh in favor of fair use even if the use is “commercial” in character. Self-evidently, the second factor tends to favor transformative uses as well, precisely because they add value to the preexisting material rather than merely repeating it for its original purpose. Moreover, if the use is transformative, courts will approve the use of a greater proportion of the protected material in connection with the third factor. Finally, and crucially, if a use is a transformative one, it is likely to satisfy the fourth factor as well, because (as the federal Second Circuit Court of Appeals recently has recognized) copyright owners are not entitled to control the “transformative markets” for their works.

For an introduction to how fair use works today, it is instructive to examine the exceptionally detailed 2006 Second Circuit decision in *Bill Graham Archives v. Dorling Kindersley Ltd.*²⁷ In that case, the defendant published what the court described as a

480-page coffee table book [that] tells the story of the Grateful Dead along a timeline running continuously through the book, chronologically combining over 2000 images representing dates in the Grateful Dead’s history with explanatory text. A typical page of the book features a collage of images, text, and graphic art designed to simultaneously capture the eye and inform the reader.²⁸

The plaintiff owned the copyrights to posters and other graphic materials associated with the musical group’s historic appearances at Bay Area venues such as the Fillmore Auditorium. After a negotiation to establish

license terms for the use of these materials in the book broke down, the publisher proceeded to use seven of them without authorization, and the lawsuit followed.

The court's analysis began with the "purpose and character" of the use, emphasizing the "transformative" way in which the publisher deployed the images; the judges agreed with the trial court that the "use of images placed in chronological order on a timeline is transformatively different from the mere expressive use of images on concert posters or tickets. Because the works are displayed to commemorate historic events, arranged in a creative fashion, and displayed in significantly reduced form, . . . the first fair use factor weighs heavily in favor of DK."²⁹ In other words, the recontextualization and repurposing of the quoted material made all the difference.

The "nature of the copyrighted work," which often favors copyright plaintiffs, was judged here to be inconclusive; although the posters were creative works, the use focused on their value as historical artifacts. The "amount and substantiality" of the portion used also was deemed a toss-up, since to accomplish its transformative purpose, "DK displayed reduced versions of the original images and intermingled these visuals with text and original graphic art. As a consequence, even though the copyrighted images are copied in their entirety, the visual impact of their artistic expression is significantly limited because of their reduced size."³⁰

The result was sealed by the fact that a consideration of the "effect . . . upon the market" tilted conclusively for the defendant. How, it is reasonable to ask, could that have been the case when licensing the use of the images in question (and others like them) was an established part of the plaintiff's core business? The answer: "DK's use of BGA's images is transformatively different from their original expressive purpose [and] [i]n a case such as this, a copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work [C]opyright owners may not preempt exploitation of transformative markets"³¹ In other words, transformativeness trumped the obvious evidence of economic harm in the form of lost licensing fees.³²

In considering how this general analytic approach might be localized to the educational context, several observations are in order. To begin, it is clear that the transformative use rationale applies with full force to uses that

repurpose copyrighted material without creating new protected works. Section 107 exists to promote socially beneficial uses of protected content, but benefit can come in many forms, and in fair use analysis courts value the “highly transformative” contributions made by new indexing tools³³ and research databases³⁴ as much as those made by parodies or scholarly commentaries. According to Judge Harold Baer Jr. of the New York federal district court, “The use of digital copies to facilitate access for print-disabled persons is also transformative.”³⁵ Recently, an opinion of the General Counsel of the U.S. Patent and Trademark Office concluded that the practice by which applicants and patent examiners illustrate arguments about “prior art”—by exchanging unauthorized copies of journal articles—was a transformative fair use, notwithstanding the existence of an established licensing market for such reproductions.³⁶ In contemporary copyright law, a teacher who provides students with excerpts from copyrighted material to illustrate a lesson or provoke class discussion has fair use rights, just as does a textbook author (or academic critic).

That said, not all fair use claims based on transformativeness are necessarily of the same weight or value. Just as courts recognize some uses as “highly” transformative, they label others as “less” so.³⁷ In the latter instances, economic considerations such as the user’s profit motive or the owner’s lost licensing revenues may loom larger than would otherwise be the case.³⁸ It would be irresponsible to suggest that the case law so far points clearly to the emergence of a sliding scale, as such, in transformativeness analysis. But just as there is no bright line between transformative and nontransformative secondary uses,³⁹ there is no obvious demarcation dividing more and less transformative ones. It follows that educators must be prepared to give not merely a good account of their activities, but the best account possible.

Clearly, courts engaged in determining how transformative a use may be are moved by the stories that users tell about their goals and purposes. For example, in 2006, the Second Circuit Court of Appeals decided *Blanch v. Koons*, which concerned the artist-defendant’s incorporation of a portion of an image known as “Silk Sandals,” which had earned the fashion photographer–plaintiff a \$750 commissioning fee, into “Niagara,” a painting in the widely exhibited seven-painting “Easyfun-Ethereal” series commissioned by Deutsche Bank for \$2 million. Judge Sacks’s opinion quotes

Jeff Koons's explanation of his creative rationale for the use at length,⁴⁰ and then defers broadly to this account of the artist's creative process: "Although it seems clear enough to us that Koons's use of a slick fashion photograph enables him to satirize life as it appears when seen through the prism of slick fashion photography, we need not depend on our own poorly honed artistic sensibilities."⁴¹

What stories could educators tell about the transformative nature of their activities? Suppose, for example, that an instructor posted a number of individual songs from the 1950s and early 1960s as "assigned listening" on the class website for a course in Mid-Century American Popular Music, and referenced them (some in detail and some in passing) in lectures or class discussion? The use in question is profoundly different from that for which the music selections originally were composed or commercialized: there the objective was entertainment, and here (by contrast) it is learning. In effect the course itself, and the individual class sessions of which it is (in part) made up, do the work of recontextualizing and adding value to the music. Moreover, without using these (or other) copyrighted selections, it would be difficult to accomplish the instructor's teaching goals effectively. And, of course, it is unlikely that an excerpt of less than the two- to three-minute duration of the typical pop song would have been equally appropriate to those pedagogical objectives.

Shifting to the K-12 environment, consider a teacher who wants to introduce students to the ways in which mass media manipulate audience responses, and chooses to launch this lesson by providing the class with DVD copies of selected video clips. This material is being used not for the purpose of selling alcohol or personal care products but to illuminate the invisible processes by which commercial tastes are formed. Without the class component that is to come, students might or might not make the connections; without the illustrations, however, they would be less likely to benefit from the lesson. Or, to bring the discussion full circle, imagine an electronic reserves system on which, at the request of the instructor in a course on Trends in Central European Political History, a college library posted articles and book chapters illustrating historiographical trends in writing about the fall of the Austro-Hungarian Empire. These are scholarly writings being used in an academic setting, but whereas they were originally produced to provide authoritative specialist accounts of various features of the Dual Monarchy, they are being employed here for another,

independently valuable educational purpose: to display the ways in which thinking and writing about the subject have changed over time.⁴²

These may be neither the best examples nor the best explanations of them. Ultimately, educators will be the best narrators of their own practices and motives. But one thing is sure: the characterization of educational practices for fair use purposes is too important a topic to be left to judges alone. Nor should the question of how and why educational practices constitute fair use be left until the moment of litigation. Educators should recognize that: (1) they must rely on fair use for the accomplishment of their missions; (2) they cannot depend on educational exceptionalism; and (3) the turn of copyright doctrine toward transformativeness analysis presents them with an extraordinary opportunity. Who better than educators themselves to take this opportunity—to recount how instructional uses of copyrighted materials add value to, repurpose, and indeed *transform* such materials? It is time we started telling those stories.

1. *Cambridge Univ. Press v. Becker* (aka *Georgia State*), 863 F. Supp. 2d 1190 (N.D. Ga 2012).

2. See *infra* note 18.

3. *Cambridge Univ. Press*, 863 F. Supp. 2d at 1225 (“Because the facts of this case so clearly meet the criteria of (1) the preamble to fair use factor one, (2) factor one itself, and because (3) Georgia State is a nonprofit educational institution, factor one strongly favors Defendants.”).

4. *Id.* at 1232 and 1227. The rationale for this conclusion is not explained at length, although at pp. 1224 of her decision, Judge Evans notes that:

Plaintiffs strongly advocate that the nontransformative nature of the excerpts (mirror images of parts of the books) means that the first fair use factor must favor Plaintiffs. While Supreme Court decisions in other factual contexts have emphasized the importance of the transformative nature of the use in applying th[e] first factor, in *Campbell*, the Supreme Court said the following in discussing the first fair use factor: “The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.” (citing *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994), at 579 n.11)

For a further discussion of this somewhat cryptic dictum, suggesting that Judge Owens’ reliance on it may be misplaced, see *infra* note 15.

5. It may be worth noting here the obvious limitations of an approach to educational fair use that depends so heavily on percentages. Even in the context of excerpts from scholarly monographs—the only one considered by Judge Owens—a rule of thumb that requires special justification for copying that exceeds 10 percent of the original with suspicion may be overly restrictive in practice. And it is difficult to see what benefit this approach might yield teachers who are interested in posting photographs in connection with an art history or offering popular songs as objects of study for a music class, let alone film studies teachers who want to stream entire films to their students. See, e.g., *Ass’n for Info. Media & Equip. v. Regents of the Univ. of Cal.*, 2011 U.S. Dist. LEXIS

- 154011 (C.D. Cal., Oct. 3, 2011) (copyright claims dismissed on grounds that streaming was authorized by contract and that copying of physical media to enable streaming constituted fair use).
6. For more about transformativeness, see Pamela Samuelson, "Unbundling Fair Uses," 77 *Fordham Law Review* 2537 (2009); and Michael J. Madison, "A Pattern-Oriented Approach to Fair Use," 45 *William & Mary Law Review* 1525 (2004). See also *Campbell*, 510 U.S., in which the United States Supreme Court adopted this analytical approach.
7. The so-called TEACH Act of 2002, codified in Section 110(2) of the Copyright Act, illustrates the problem. This attempt to update the Section 110 exemption for classroom teaching to reach distance education was ultimately so burdened with exceptions and qualifications to be of dubious utility to its intended beneficiaries. See Kenneth D. Crews, "Copyright Law and Distance Education: Overview of the TEACH Act" (Aug. 17, 2010), at <http://copyright.columbia.edu/copyright/files/2010/08/teach-act-summary-by-kenneth-crews.pdf> (accessed December 2012). Efforts to update the library exemptions of Section 108 to take account of (among other things) changes in information technology have been unsuccessful to date. See "The Section 108 Study Group Report: An Independent Report sponsored by the United States Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress" (March 2008), at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf> (accessed December 2012). Legislative efforts to bring about a compromise solution to the problem of "orphan works" (i.e., those presumptively protected by copyright but lacking identifiable owners) have been snagged on hidden obstructions in political waters; the most progress such legislation has made, to date, has been the passage (by the Senate only) of the Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008). And so it goes.
8. See Kenneth D. Crews, "The Law of Fair Use and the Illusion of Fair-Use Guidelines," 62 *Ohio State Law Journal* 601 (2001), a magisterial study that remains as valid and valuable today as it was a decade ago.
9. It is one of the not-so-well-hidden features of the fair use landscape that, when they choose (or need) to do so, publishers can be among the most tenacious—and successful—advocates of broad fair use interpretation. And a good thing, too, since we owe to their tenacity many of the most promising dimensions of fair use case law. See the discussion of *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2006), below.
10. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (Story, J.).
11. Alan Latman, "Copyright Office Study No. 14, Fair Use of Copyrighted Works," *Studies Pursuant to Senate Resolution 240*, 86th Cong., 2d Sess. (Comm. Print, 1960).
12. 223 F. 862 (D. Mass. 1914).
13. *Id.* at 867; an extensive discussion of the case and its implications appears in L. Ashley Aull, "The Costs of Privilege: Defining Price In The Market For Educational Copyright Use," 9 *Minnesota Journal of Law, Science, & Technology* 573 (2008).
14. 447 F. Supp. 243, 252 (W.D.N.Y. 1978).
15. Footnote 11 of *Campbell*, 510 U.S. at 579, states, "The obvious statutory exception to th[e] general focus on transformative uses is the straight reproduction of multiple copies for classroom distribution." (The Supreme Court's language roughly paraphrases the preamble to Section 107; "straight reproduction" is not defined, but presumably refers to copying with little or no addition of value by the teacher.) However, this isolated sentence cannot plausibly be read to suggest *either* (1) that educational uses other than "straight" reproduction should receive special consideration in fair use analysis, *or* (2) that value-added educational uses cannot be considered transformative.
16. Emphasis added. Even if the final version of the preamble may express some Congressional concern for the importance of education generally, it would be a mistake to conclude that it liberates educators from the necessity of showing how their uses transform assimilated content. At the very best, "[t]here is a strong presumption that the use of a copyrighted work is

transformative when the allegedly infringing work falls within one of several categories described in § 107, ‘criticism, comment, news reporting, teaching . . . , scholarship or research.’” *Hofheinz v. Discovery Commc’ns, Inc.*, 2001 U.S. Dist. LEXIS 14752, at *11 (S.D.N.Y. 2001) (citing *New Era Publ’ns Int’l ApS v. Carol Publ’g Group*, 904 F.2d 152 (2d Cir. 1990).

17. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1984), and see 4 *Nimmer on Copyright* Sec. 13.05 (“Commercial uses’ are extremely broad”). For an unusual example in which the noncommercial nature of a scholarly use *did* figure prominently in fair use analysis, see *Sundeman v. Seejay Soc’y, Inc.*, 142 F.3d 194 (4th Cir. 1998).
18. See *Cambridge Univ. Press*, 863 F.Supp. 2d, at 10 n.2 (“The CCC is financing 50% of this copyright litigation”) (unpublished order granting in part and denying in part defendants’ motion for summary judgment and denying plaintiffs’ cross-motion for summary judgment), at <http://www.scribd.com/doc/38583528/Cambridge-University-Press-v-Becker-N-D-Ga-Sept-30-2010> (accessed December 2012).
19. It should go without saying that a school or teacher couldn’t claim fair use for copying an in-print textbook or workbook and distributing it to students. Today, however, vendors are selling other kinds of education-related products as well: academic libraries buy licenses to databases and serials, schools are presented with opportunities to pay for access to streaming video of a wide range of audiovisual works, and publishers encourage educators to pay for the right to include excerpts from noneducational materials in class materials.
20. 60 F.3d 913 (2d. Cir. 1994).
21. *Id.* at 923.
22. 863 F. Supp. 2d at 1237.
23. See, e.g., the discussion of class-related excerpts from a book entitled *Liszt: Sonata in B Minor* (Kenneth Hamilton, 1996), *id.* at 1293–94 (“There is no evidence in the record to show that digital excerpts from this book were available for licensing in 2009 The absence of a ready market shifts the factor four analysis to favor fair use.”).
24. *Id.* at 1359.
25. In this connection, Professor Netanel has noted that

while transformative purpose is almost universally a sufficient condition for fair use, at least assuming that the defendant has not copied more than reasonably needed for the purpose, courts have repeatedly stated, citing *Campbell* and *Sony*, that transformative use is not a necessary requirement for a finding of fair use. In stating that transformative use is not required, *Campbell* gave as an example the making of multiple copies for classroom use, which is included among the favored uses in the introductory clause of section 107 In short, the judicial embrace of the transformative use paradigm does not exclude other possible categories of fair use that fall outside the parameters of transformative uses.

Neil Netanel, “Making Sense of Fair Use,” 15 *Lewis & Clark Law Review* 715 (2011), 770 (citing *Campbell*, 510 U.S. at 579 n.11, and *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)). Whether educators can take much comfort from this observation is another question.

26. *Campbell*, 510 U.S. at 579.
27. A more extensive version of this discussion appears in Jaszi, “Copyright, Motion Pictures and Fair Use,” *Utah Law Review* 715 (2007).
28. *Bill Graham Archives*, 448 F.3d at 607.
29. *Id.* at 609.
30. *Id.* at 613.
31. *Id.* at 614–15 (quotation marks and citations omitted).
32. Would the result have been the same if the plaintiffs had taken seventy images rather than seven? Probably not, because in applying transformativeness analysis, courts have adopted what might be called a standard of proportionality, that is, the amount of protected material used should be appropriate to the transformative purpose:

If the use is transformative and the defendant has not copied excessively in light of the transformative purpose, the use will most likely be held to be a fair use. This is so even if the copyright holder might enter or already has entered a licensing market for similar uses, and indeed even if the copyright holder would have been willing in principle to license the use in question.

Neil Netanel, "Making Sense of Fair Use," 768 (discussing *Warner Bros. Entmt., Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008), the Harry Potter litigation).

33. E.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (concluding that Google's use of copyrighted images in a thumbnail search index was "highly transformative," even though the images themselves were not altered, in that the use and the protected images served different functions); see also *The Authors Guild, Inc. v. HathiTrust*, 2012 U.S. Dist. LEXIS 146169 (S.D.N.Y.), at *46–47 (new search tools enabled by digitizing library collections).
34. See, e.g., *A.V. ex rel. Vanderhye v. iParadigms LLC*, 562 F.3d 630 (4th Cir. 2009), regarding the detection of student plagiarism. As the appellate panel noted with approval, the trial judge had found that iParadigms' use of plaintiffs' works was "'highly transformative,' . . . and 'provides a substantial public benefit through the network of educational institutions using Turnitin [an online plagiarism-detection service].'" *Id.* at 638 (quoting the trial court). See also *Authors Guild*, 2012 U.S. Dist. LEXIS 146169 at 45–46 (creating database to enable "text mining" as transformative).
35. *Authors Guild*, 2012 U.S. Dist. LEXIS 146169, at *50. The author of this article is part of the litigation team representing the National Federation of the Blind in this litigation.
36. "USPTO Position on Fair Use of Copies of NPL Made in Patent Examination" (Jan. 19, 2012), at http://www.uspto.gov/about/offices/ogc/USPTOPositiononFairUse_of_CopiesofNPLMadeinPatentExamination.pdf (accessed December 2012).
37. See *Los Angeles News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002); see also *Bill Graham Archives*, 448 F.3d at 615 n.6 ("The licenses BGA sold to other publishers were for substantially less transformative uses of its posters.").
38. An example is *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 185, 190 (D. Mass. 2007) (re-use of new photograph in new journalistic context is less transformative than some other instances, more transformative than others; the fair use defense is ultimately rejected). For another example, see *Castle Rock Entertainment v. Carol Publishing Group*, 150 F.3d 132 (2d Cir. 1998).
39. *Fitzgerald*, 491 F. Supp. 2d at 185.
40. Koons's statement was as follows:

Although the legs in the *Allure Magazine* photograph ["Silk Sandals"] might seem prosaic, I considered them to be necessary for inclusion in my painting rather than legs I might have photographed myself. The ubiquity of the photograph is central to my message. The photograph is typical of a certain style of mass communication. Images almost identical to them can be found in almost any glossy magazine, as well as in other media. To me, the legs depicted in the *Allure* photograph are a fact in the world, something that everyone experiences constantly; they are not anyone's legs in particular. By using a fragment of the *Allure* photograph in my painting, I thus comment upon the culture and attitudes promoted and embodied in *Allure Magazine*. By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary—it is the difference between quoting and paraphrasing—and ensure that the viewer will understand what I am referring to.

Blanch v. Koons, 467 F.3d 244, 255 (2006). Most educators, I suspect, could do as well or better in describing their use of copyrighted material in teaching practice.

41. A more extensive discussion of the *Blanch* decision appears in my chapter, "Is There Such a Thing as Postmodern Copyright?" in *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective*, eds. Mario Biagioli, Peter Jaszi, & Martha Woodmansee (2011), 418–20.

42. A process by which communities of information users can develop shared narratives about the importance that fair use has to their shared missions is described in Patricia Aufderheide & Peter Jaszi, *Reclaiming Fair Use: How to Put the Balance Back in Copyright* (2011). One interesting and highly relevant recent instance is the Poetry Foundation's *Code of Best Practices in Fair Use for Poetry* (2010), at <http://www.poetryfoundation.org/foundation/bestpractices> (accessed December 2012), which specifically addresses the transformative use of copyright poetry in teaching in Principle 4. Another is the Visual Resources Association's *Statement on the Fair Use of Images for Teaching, Research, and Study* (December 2011), at <http://www.vraweb.org/organization/pdf/VRAFairUseGuidelinesFinal.pdf> (accessed December 2012), which articulates rationales for the educational use of copyrighted images in and around art and art history classrooms. Most recently, the Association of Research Libraries sponsored research on a consultative process that generated the *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012), at <http://www.arl.org/fairuse> (accessed December 2012), which deals with such issues as the online availability of selections of copyrighted material of all kinds in support of college and university courses.