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U.S. FAIR USE CASE SUMMARIES BY CATEGORY

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Completed May 12, 2009

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This document contains individual case summaries for the major learning-promoting fair use cases decided since the 1976 Act and important cases decided prior to the 1976 Act. The case summaries are grouped according to the six categories identified below. They are identically structured. Each contains information about the facts of the case, the court's holding and fair use analysis, and extracts the salient factors that seemed to dictate the court's decision. Most summaries also contain a brief discussion of the historical relevance of the case, subsequent use of the case by other courts, and a short analysis section that highlights interesting aspects of the court's reasoning.

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A. Individual Teachings Copying for Instructional Purposes

This group of cases involves single or multiple instances of wholesale copying by individual teachers for the purposes of instruction, both inside and outside the traditional classroom setting, and in both for-profit and not-for-profit contexts. Courts in these cases always note, and purport to weigh favorably, the “teaching” or “educational” purpose of the teacher’s use. And courts almost always examine the propriety of the use: how the teacher obtained the copied materials, whether the teacher took more than other teachers in similar situations, and whether the teacher gave proper attribution.

1. *MacMillan v. King*, 223 F. 862 (D. Mass. 1914)

Quick Holding: The court found it was not fair use for a private tutor to make outlines based on an economics textbook because the outlines potentially replaced the textbooks.

Case in Context: This case, involving copying of a textbook by a private economics tutor, was decided before the 1976 Copyright Act codified the fair use doctrine. *MacMillan* illustrates a fundamental principle underlying many of the holdings in educational fair use cases: use of copyrighted instructional materials, such as textbooks and educational videos, for the “same intrinsic purpose” as the originals—that is, for instruction and education—will likely weigh against a finding of fair use.

Facts: Defendant King tutored university students in economics for a fee. Plaintiff MacMillan Publishing Co. sued for copyright infringement when it learned King was making outlines drawn from a MacMillan textbook, authored by a Harvard economics professor, and distributing them to the students he tutored. Usually students bought the textbook or obtained it from libraries. But in some of King’s exam-preparation classes the outlines were the only instructional materials. King did not sell his outlines, and he

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generally asked students to return or destroy them. But many students kept the outlines and may have made copies. 223 F. at 863-4.

Holding: The court found King’s use of the textbook was infringement warranting injunction. *Id.* at 867. King argued that making the outlines was lawful because it was a customary teaching practice within the “implied license and consent” given by MacMillan in distributing and selling the textbooks. *Id.* at 863. But the court rejected this implied license defense for several reasons. First, King’s identity as a teacher was not dispositive: “[it is no] less infringement of the copyright because he is a teacher, because he uses [the outlines] 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.” *Id.* at 867. Second, the outlines were not supplements or visual aides, but complete “versions” of the textbook that allowed students to learn the whole economics course without purchasing the book. *Id.* at 866. Third, King allowed students to take the outlines home and potentially copy them. *Id.* at 867. Fourth, King made more extensive use of the textbook’s contents than other teachers preparing similar outlines. *Id.* at 865. King brought several teaching outlines before the court, but the only two that copied to the same level of detail were either copyrighted by the textbook’s author or made with permission of the copyright owner. *Id.* Finally, the court found King’s actions threatened MacMillan’s profits. While the evidence did not show the outlines actually reduced sales of the textbook, the court found it sufficient that they “might to do so, by enabling students to get along without the book who otherwise would have had to buy it.” *Id.* at 867-68.

In sum, King’s educational purpose did not overcome the court’s finding that the outlines potentially replaced the textbook and threatened the textbook publisher’s revenues.

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Analysis: King's implied license theory suggests the possibility of an alternative version of fair use, focusing on what kind and amount of copying teachers ordinarily do and to what extent buyers and sellers have a "meeting of minds" respecting these practices. But the court responded negatively to this argument, focusing primarily on potential harm to the plaintiff's textbook sales rather than on the propriety or educational nature of King's use. This reasoning is more in line with modern fair use analysis, where courts tend to give more weight to Section 107's fourth factor - harm to the market for or value of the copyright holder's work - than they do to the first factor - nature and character of the defendant's use.

Factors Weighing Against Fair Use

- Defendant's outlines potentially replaced students' use of the textbooks
- Defendant took more of the textbook's contents for his outlines than other teachers did
- At least one other teacher had obtained permission to make a similar outline
- Defendant did not ensure students returned the outlines or did not make additional copies
- Students' continued use of the outlines might harm the market for textbooks

Factors Weighing In Favor of Fair Use

- Defendant used the outlines for non-profit, educational purposes
- Other teachers also made outlines of textbooks for teaching purposes
- Defendant distributed his outlines to a limited number of pupils
- Defendant attempted to monitor whether his students returned or destroyed the outlines

Subsequent Use: *MacMillan* may not have precedential value. The main cases that cite to it were all decided prior to Section 107. See *Marcus v. Rowley*, 695 F.2d. 1171, 1175 (9th

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Cir. 1983) (citing *MacMillan* to show a nonprofit educational purpose does not compel a finding of fair use.) *See also Williams & Wilkins Company v. United States*, 487 F.2d 1345, 1352 (Ct. Clms. 1973).

2. Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962)

Quick Holding: Choir director distributing copies of sheet music for an infringing choral arrangement to his students is not fair use because “innocent intent” cannot excuse substantial copying under 1909 Copyright Act.

Case in Context: This case was also decided prior to the 1976 Act. Arguably it should no longer be used as precedent since the Eighth Circuit relied heavily on the 1909 Act, and held that fair use cannot apply when a defendant copies substantial portions of a plaintiff’s work. Nonetheless, *Wihtol* is still cited by modern courts.

Facts: Defendant, Nelson Crow, was a choir director who made a special arrangement of a choir song (“My God and I”) for his students. Crow made 48 photocopies of sheet music and distributed them to his two choirs for instruction. He then directed them in two public performances, one at a school chapel meeting, the other at Sunday church. Crow gave no attribution, naming himself as author of the arrangement on sheet music. However, he sent copies to the song’s original author, plaintiff Wihtol, asking if Wihtol was interested in Crow’s arrangement. Wihtol and his wife, who frequently obtained royalties from churches that performed Wihtol’s song, sued for copyright infringement. 309 F.2d 777, 777-79 (8th Cir. 1962).

Procedural History: The District court found fair use, classifying Crows’ copying and performances of the song as purely educational and experimental: “[Defendant] attempted

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no use of the new arrangement other than testing and experimentation...The use of the new arrangement by the school and the church choirs on one occasion was not an infringement.” The court found Crow “had no thought of financial gain” in contacting Wihtol. He “merely wanted [plaintiffs] to have the arrangement he made to complement the copyrighted score.” 199 F. Supp. 682, 685 (D.C. Iowa 1961).

Holding: The Eighth Circuit reversed, holding Crow was an infringer despite “innocent intent.” 309 F.2d 777, 783 (8th Cir. 1962). The court did not substantially re-examine the district court’s characterization of Crow’s uses as educational, or consider the extent of the harm to plaintiffs’ sales or royalties fees. Instead, the court simply stated: “It is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be ‘fair use’ merely because the infringer has no intent to infringe.” *Id.* Moreover, the court emphasized the strictness of the 1909 statute: “[i]t must be kept in mind that the applicable law is purely statutory and that the Copyright Act has little elasticity or flexibility.” *Id.* at 781.

In sum, according to the court, Crow’s use must be infringement because current copyright law did not make exceptions for wholesale copying despite a non-commercial, educational purpose.

Analysis: This case was decided before the 1976 Act codified the fair use doctrine and mandated that courts take into account whether a use is for non-profit, educational purposes. The appellate court did not actually perform a fair use analysis, but adhered strictly to the 1909 statute’s “inflexible” provision of copyright protection. Therefore, despite subsequent usage, arguably *Wihtol* should not be applied to fair use cases decided under the 1976 Act.

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Factors Weighing Against Fair Use

- Defendant copied a substantial portion of the copyrighted work

Factors Weighing In Favor of Fair Use

- Defendant was an instructor
- Defendant had no desire for financial gain
- Defendant made his arrangement for appreciation of music and musical education
- Distribution of the 48 copies of sheet music was for instructional use by the choir
- The public performances were nonprofit and ‘experimental’
- Defendant’s public performances of the songs were only once by each choir

Subsequent Use: *Wihtol* is cited for the principle that wholesale copying of copyrighted material precludes application of the fair use doctrine. *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983). In contrast, the court in *Williams & Wilkins Co. v. United States* wholly rejected *Wihtol*’s holding, noting that fair use clearly applies to wholesale copying for some scholarship purposes, such as hand-copying an article into notes for personal use. 487 F.2d at 1350. *Wihtol* is still cited today. For instance, in *Perfect 10 v Google*, plaintiff cited *Wihtol* in arguing that Google’s lack of intent to infringe did not excuse Google’s displaying Perfect 10 photos for its internet search engine. See “Reply Memorandum in Support of Motion of Plaintiff Perfect 10 Inc. for Preliminary Injunction,” Case No. CV 04-09484, 5 (2005). However,

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3. *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983)

Quick Holding: The court found it was not fair use for a teacher to copy, without attribution, from a cake-decorating book in order to make her own cake-decorating book for her class.

Case in Context: *Marcus v. Rowley* is arguably the most important case in this category because it is the only modern case involving a teacher copying for instructional use in the traditional classroom setting. As discussed below, the 9th Circuit's strict treatment of the teacher's copying and its reliance on the Congressional Guidelines provide a strong precedent for copyright holders. However, although *Marcus* is widely cited in modern educational fair use case law, an analogous case has not been brought before the courts to test the precedent set in *Marcus*.

Facts: Plaintiff, Eloise Marcus, was a home economics teacher and author of the book, "Cake Decorating Made Easy," which she used in her classes and occasionally sold at a nominal profit. Marcus brought suit when she learned that Defendant, Shirley Rowley, was teaching a food service career class using a cake-decorating booklet that copied eleven pages of Marcus' book verbatim, including supply lists and instructions. Rowley had made 15 copies of the book available for use by students. She presented the book as her own and did not credit Marcus. 695 F.2d at 1173-74.

Procedural History: The trial court found Rowley's copying of the cake decorating book was fair use since it was for non profit educational purposes and did not substantially harm Marcus' market for her own book. *Id.* at 1174, 1177.

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Holding: The 9th Circuit reversed, finding no fair use after employing the four factors codified in the 1976 Act. (1) Though Rowley’s use was for non-profit and educational purposes, the first factor nonetheless weighed against Rowley because her cake-decorating booklet served the same intrinsic function as Marcus’ own book. *Id.* at 1175. The court cited the opinion of the 1967 House Report that material prepared primarily for instructional purposes should be less susceptible to reproduction for classroom use than material prepared for general public distribution. *Id.* at 1175 (citing H.R. Rep (1967) at 34). Also, propriety weighed against Rowley because she neither credited Marcus nor tried to obtain Marcus’ permission despite copying verbatim. (2) The court characterized the cake-decorating book amorphously as containing both creative and factual elements, thus finding the second factor made no difference. (3) As to amount used, the court found verbatim copying of 50% of the booklet was too much, and that this weighed against Rowley. *Id.* at 1177. The court cited *Encyclopedia v. Crooks* - involving a non-profit organization’s regular copying and archiving of educational films for schools - for the principle that even copying for a non-profit, educational purpose can be too “excessive” to be fair. *Id.* at 1177. (4) On market harm, the court affirmed the trial court’s finding that Rowley’s copying did not harm the value of Marcus’ book – but did not consider this dispositive. Finally, the court noted that by copying more than 10% of the work, by failing to attribute Marcus, and by using the booklet consecutive years, Rowley had failed the “instructive” 1976 Congressional guidelines’ tests of brevity, spontaneity and cumulativeness. *Id.* at 1178.

In sum, the court found no fair use primarily because the copied book served the same intrinsic function as the original and because the copying was verbatim and failed the Congressional guidelines tests.

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Analysis: The Eighth Circuit's finding of no fair use relied heavily on the Congressional guidelines. However, assuming the guidelines do not represent the outer bounds of fair use, this case might come out differently today. First, in determining that amount taken weighed against fair use, the court relied on the "rule" that verbatim copying "precludes application of the fair use doctrine." *Id.* at 1176. But the Supreme Court explicitly rejected this rule soon after *Marcus* came down. See *Sony Corp.*, 464 U.S. 417, 449 (1984). The court also cited *Encyclopedia Britannica v. Crooks* to support that Rowley's copying was too "excessive" for fair use to apply, but that case involved wide-scale copying and archiving of educational films by a large institution. *Id.* at 1177. See 447 F. Supp. 243, 251-52 (W.D.N.Y. 1978). The court in *Encyclopedia* specifically distinguished between institutional-level copying and copying by an individual teacher: "This case does not involve an isolated instance of a teacher copying copyrighted material for classroom use but concerns a highly organized and systematic program for reproducing videotapes on a massive scale." *Id.* In sum, *Marcus* does not (or should not) provide an accurate rendition of what constitutes fair use in the context of classroom copying.

Factors Weighing Against Fair Use

- Defendant's booklet served the same function as plaintiff's original cake-decorating book
- Defendant gave no attribution and made no attempt to secure permission
- Defendant copied substantial portions of plaintiff's work verbatim
- Defendant failed the guidelines tests of brevity and spontaneity
 - Defendant took more than 10% of the work
 - Defendant compiled infringing book over the summer and made no attempt to secure permission despite time in which to do so
 - Defendant made consecutive use of the book over three years

Factors Weighing In Favor of Fair Use

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- Defendant's copying was for non-profit, classroom use
- Defendant's use did not harm the market for the original book

Subsequent Use: *Marcus* is a widely-used precedent in cases involving copying for instruction and classroom use. *Marcus* stands for the general principles that a nonprofit, educational purpose does not require a finding of fair use, and that using an educational work for instruction weighs against fair use because the use is not transformative, but is for the same purpose as the original. See, e.g., *Basic Books v. Kinko's*, 758 F.2d 1522, 1530 (S.D.N.Y. 1991); *Princeton University Press v. Michigan* 1048, 1048, n. 2 (E.D. Mich. 1994). *Marcus* is also used in modern case law for the supposedly outdated principle that wholesale copying "precludes" a fair use defense. See *Bridge Publications v. Vein*, 827 F. Supp. 629, 635 (S.D. Cal. 1993) (citing *Marcus* despite *Sony's* overturning this rule in 1984). Finally, some cases have cited *Marcus* to support using the Congressional guidelines to evaluate a defendant's conduct in a variety of contexts. See, e.g., *American Geophysical Union v. Texaco*, 60 F.3d 913, 919 (2d Cir. 1995); *Bridge*, 827 F. Supp. at 635.

4. Weissmann v. Freeman, 868 F.2d 1313 (2d Cir. 1989), rev'ing 684 F. Supp. 1248 (S.D.N.Y. 1988).

Quick Holding: The court found it was not fair use for a professor of nuclear medicine to use his junior colleague's copyrighted syllabus in his own course without giving her credit.

Case in Context: *Weissman v. Freeman* involves a dispute between close colleagues over authorship and academic credit. Scholars have commented that the final holding, in which the Second Circuit upheld a strong copyright in Heidi Weissman's academic syllabus and

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found no fair use, tests the boundaries between the “gift economy” of academia, in which academic authors are seen to “donate” their works to the public domain, and the world of intellectual property, where rights-holders sell their works on the market and protect them via injunctions.¹ The Second Circuit’s fair use analysis is highly unusual because it is altered to fit academic, versus economic, notions of what makes a copyrighted work “valuable” and what makes a particular use of that work “fair.”

Facts: Plaintiff Heidi Weissmann was a young researcher and physician of nuclear medicine with an appointment as associate professor at Albert Einstein College of Medicine. Defendant, Leonard Freeman, was a professor at Einstein and Weissman’s mentor. Beginning in 1980, they collaborated on several projects and jointly published a series of articles and book chapters in both their names. Together they produced a “syllabus,” a working paper summarizing research in the field, and used it to co-teach a course at Harvard Medical School. 684 F. Supp. at 1252-54; 868 F.2d at 1315-16. However, in the following years, Weissman independently modified the syllabus, adding elements and rearranging the presentation. *See* 868 F.2d at 1322. In 1987, Weissman learned that Freeman planned to use her modified syllabus in a review course at Mount Sinai and that he had made fifty copies and distributed nine of them to Sinai employees. 684 F. Supp. at 1250, 1257. When Weissman objected, Freeman did not use the syllabus in his course. But Weissman nonetheless sued for copyright infringement. Freeman raised several defenses, claiming he was joint author of the syllabus, that his use of the syllabus was fair use, and that the syllabus contained only facts in the public domain and so was not protected by copyright. *Id.* at 1251.

¹ *See* Coryn McSherry, *Who Owns Academic Work? Battling for Control of Intellectual Property* (Harvard University Press, 2001), 72.

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Procedural History: The district court found for Freeman and dismissed the case on the merits, finding that Weissman's "trivial variations" did not suffice for sole authorship of a new work, and that even if it did, Freeman's use was fair. (1) His use was non-profit and educational; (2) Weissman's syllabus was factual and scientific; (3) Freeman copied little of Weissman's independent additions; (4) and Freeman's use did not impair the value of the syllabus - if anything enhancing its value. *Id.* at 1261-62.

Holding: The Second Circuit reversed on appeal, remanding to the district court with directions that judgment be entered in favor of Weissman. Not only were Weissman's additions sufficient for authorship of the new version of the syllabus, but, when reexamined "in the context of scholarly scientific research and publication," the four factors weighed against fair use. 868 F.2d at 1326. (1) Though educational and not for monetary gain, Freeman's use was still 'for-profit' because in an academic setting, recognition and career advancement are better measures of profit than money, and Freeman had exploited Weissman's work to his own benefit. Moreover, Freeman's use was not "productive" because he did not significantly alter the syllabus and used it for the same purpose as Weissman used the syllabus. *Id.* at 1324. (2) The court did not weigh the factual nature of the syllabus in Freeman's favor since "contributors to the store of knowledge" also require "a fair return on their labors." *Id.* at 1325 (citing *Harper & Row*, 471 U.S. at 546). (3) As to amount taken, the court found - based on its new finding that Weissman had sole authorship of the new work - that this weighed against fair use since Freeman photocopied Weissman's new syllabus in its entirety, changing only name and title. *Id.* (4) Reinterpreting market harm in the context of academia, the court found that Freeman's use impaired the "value" of Weissman's work by using it without attribution because it reduced her chances of promotion and tenure. *Id.* at 1325-26.

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In sum, the court held Freeman's use of Weisman's syllabus was not fair use, even though for educational and technically "non-profit" purposes, because Freeman had exploited Weissman's work to his own academic benefit.

Analysis: A key factor in this case was the Second Circuit's perception that in using Weissman's syllabus Freeman failed to pay the proper price: attribution and recognition of Weissman's significant contributions to the field. As a precedent, this case demonstrates that a court may treat the fair use analysis distinctly in an academic context in which copyrighted works have little to no monetary value, but nonetheless benefit their authors through reputation and career enhancement. Given its unique application of the four factors, it is odd that, as discussed below, this case is cited so frequently for general fair use principles.

Factors Weighing Against Fair Use

- Defendant's use enhanced his academic reputation at the expense of plaintiff's
- Defendant barely altered the syllabus and used it to teach a similar course in the same field
- Defendant did not give plaintiff attribution
- Defendant's use reduced the chances that the syllabus would enhance plaintiff's career prospects

Factors Weighing In Favor of Fair Use

- Defendant's use was entirely for non-profit educational purposes
- Defendant believed in good faith he was co-author and entitled to use syllabus
- Plaintiff's work was factual and scientific
- Defendant's copying of plaintiff's independent contributions was *de minimis*
- Defendant did not harm monetary value, if any, of syllabus

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Subsequent Use: *Weissman v. Freeman* has been cited at least 118 times since it came down in 1989. In case law involving learning-promoting uses, *Weissman* is frequently cited to support the claim that using copyrighted content for the same purpose as the original weighs against fair use. See, e.g., *American Geophysical Union v. Texaco* 60 F.3d 913, 923 (2d Cir. 1995); *Bridge Publications, Inc. v. Vein*, 827 F. Supp. 629, 635 (S.D. Ca1. 1993). In *Texaco*, the Sixth Circuit used *Weissman*'s holding that market harm need not be monetary in order to support that *authors* of science articles suffered "market harm" when researchers copied their articles because authors' profits came in the form of professional advancement through increased publication, and their opportunities to get published would decline if *Texaco* did not pay publishers for its employees' copying. See *Texaco*, 60 F.3d at 927.

5. Bridge Publications, Inc. v. Vein, 827 F. Supp. 629 (S.D. Ca1. 1993)

Quick Holding: The court found it was not fair use for a teacher to offer private religious courses for-profit using unauthorized copies of L. Ron Hubbard's lecture tapes.

Case in Context: This case is unique within this category because the court classified the teacher's use of copyrighted films for her private religious course as "for-profit."

Facts: Defendant Enid Vein offered a private instructional religious course, entitled "Dynamism." The course provided scientology-like religious training and was sold to students for profit. She offered paying students copies of, or directed them to copy, "bootleg" copies of L. Ron Hubbard's tape-recorded lectures. Plaintiffs, Bridge Publications, the Religious Technology Center and the Church of Scientology International, sued for copyright infringement and misappropriation of trade secrets. Vein claimed her copying was fair use. She also claimed her First Amendment rights were

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violated because she needed to the tapes to practice her religion, and they were not offered elsewhere for sale. 827 F. Supp at 632, 635.

Holding: The court found that the use was not fair after a brief analysis in which the court weighed all factors against Vein, and granted summary judgment and permanent injunctive relief in favor of Bridge and the Church. *Id.* at 636. (1) The court did not classify Vein’s purpose as “educational.” Instead, the court found that because Vein sold her courses for sale and made a profit directly off of the tape recordings, the use was commercial and thus “presumptively unfair” according to the Supreme Court’s holding in *Sony*. *Id.* at 635 (citing, 464 U.S. at 449-51). Moreover, the court held it against Vein that she used the tapes “for the same intrinsic purpose as plaintiffs.” *Id.* (2) Factor two weighed against Vein because, according to the court, “[t]he undisputed evidence show[ed] that L. Ron Hubbard’s works are the product of his creative thought process, and not merely informational.” *Id.* at 636. (3) The court weighed factor three against Vein since she engaged in mechanical reproduction. The court cited *Marcus v. Rowley* for the (outdated) principle that “wholesale copying of copyrighted material precludes application of the fair use doctrine.” *Id.* (citing 695 F.2d at 1178). (4) Market harm weighed against fair use since Vein used the tapes for the same purpose intended by Bridge publishers and Church, and so her copies fulfilled the demand for the original and would diminish their value. *Id.* Finally, the court cited the Congressional guidelines, finding that since Vein’s copying was not spontaneous and she did not restrict copying to one copy per student this weighed against fair use. *Id.*

Analysis: The court in this case was particularly harsh in its fair use analysis, finding against defendant on all four factors and applying *Sony*’s outdated presumption of unfair use for commercial uses. This may have been due to the commercial and exploitative

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nature of Vein's use of the films, or the fact the films were unauthorized copies to begin with. It is not clear how the court would have come out if Vein had not been charging students based on her possession of Hubbard's lecture tapes; but the court's use of the Congressional guidelines suggests the court could still have found for plaintiffs, given that Vein distributed more than one copy per student and made long-term use of the tapes. At any rate, this case does not offer much hope for a teacher wishing to make a 'fair use' of copyrighted materials in order to make money off of teaching.

Factors Weighing Against Fair Use

- Defendant offered private course and profited directly off use of copyrighted materials
- Defendant used the materials used for same purpose as the originals
- Defendant's copying involved mechanical reproduction
- Copying was not spontaneous and involved continued copying of the same materials

Subsequent Use: The Church of Scientology and related interest groups have used the unfavorable fair use holding in *Bridge v. Vein* to support infringement and misappropriation actions respecting L. Ron Hubbard's works. See *Religious Technology v. Center v. Netcom On-Line Communication Services, Inc.* 907 F. Supp. 1361 (N.D. Cal. 1995). Perhaps most interestingly, the Ninth Circuit cited *Bridge* in another case involving religious texts to support that modern religious works can be considered "creative" works under the third factor of a fair use analysis. See, *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000).

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6. Bosch v. Bell, 2006 WL 2548053 (C.D. Ill. 2006)

Case in Context: This case, involving a teacher who used a prior teacher's instructional materials, has not been cited significantly. But it illustrates the importance of the propriety of a defendant's conduct in the academic setting.

Quick Holding: The court found it was not fair use for a teacher to re-use a departing colleague's syllabi and exam questions, mainly because of the impropriety surrounding her use and her failure to attribute her colleague.

Facts: Plaintiff Bosch was an associate professor of Clinical Pathology and course director at the University of Illinois College of Medicine who had prepared copyrighted syllabi and exam questions for the courses she taught. After she resigned, feeling "forced" to do so by her boss, the teacher replacing her (Defendant Ball-Kell) used Bosch's teaching materials in her own course. At one point, Ball-Kell entered Bosch's office without permission and removed Bosch's teaching materials. Plaintiff Bosch sued Ball-Kell and their boss for copyright infringement, also bringing various claims of harassment against her boss for the events surrounding her resignation. *Id* at 1-4. Ball-Kell defended that the use of the course materials was fair because it was for non-profit and for educational purposes.

Holding: The district court denied defendants' motion for summary judgment, and ruled against fair use. (1) Although the use was for non-commercial, educational purposes, and although Bosch's departure just before the start of fall classes may have generated "emergency" need, the court found the first factor was "not one-sided" for Ball-Kell because Ball-Kell's use was not transformative - Ball-Kell simply replaced Bosch's name on the materials with her own. Moreover, the court stated, "evidence of bad faith conduct

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or predatory intent [are relevant under factor one],” implying that Bosch’s allegations of improper conduct weighed against Ball-Kell. *Id.* at 9. (2) The court found for Bosch on nature of the work because while syllabi and exam questions are mostly factual and scientific, they may have involved original contributions and were unpublished. (3) The court found the degree and extent of Ball-Kell’s copying weighed sufficiently against her to reach a trial on the merits because she made wholesale copies of some of the syllabi and took complete portions of others. *Id.* at 10, 2, 5. (4) The court found sufficient evidence of potential market harm to pass summary judgment even though Bosch failed to show that her syllabus and teaching materials had actual market value. *Id.* at 10. Bosch had introduced evidence of a “potential” market for her pathology syllabi and exam questions, and had stated her intent to commercialize the materials in the future. *Id.* at 10. Thus, based mostly on allegations of impropriety and the substantial amount taken, the court found no fair use.

Analysis: In finding Ball-Kell’s use of Bosch’s teaching materials was not fair use, the court rejected Ball-Kell’s arguments that she needed to use Bosch’s syllabi and exam questions to teach an upcoming course and that her actions did not cause Bosch monetary loss. However, allegations of bad faith and Ball-Kell’s failure to give attribution were dispositive factors in the court’s holding. Thus, it is not clear from this case whether a teacher’s re-using prior teachers’ instructional materials when there is no time to obtain permission would be fair use.

Factors Weighing In Favor of Fair Use

- Defendant’s use was educational and non-profit
- Defendant used the teaching materials for an upcoming course with some emergency
- Plaintiff’s works were mostly factual and scientific

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Factors Weighing Against Fair Use

- Defendant did not adapt or add to the materials she re-used in her own course
- Defendant's conduct, including breaking into plaintiff's office, was deemed improper
- Defendant gave no attribution
- Plaintiff's teaching materials were unpublished and kept in private office
- Defendant directly copied entire works and large portions of the works
- Plaintiff offered some evidence that her teaching materials had monetary value

Subsequent Use: Bosch has not been cited in subsequent fair use cases.

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B. Institutions Engaged In Systematic Copying For Educational Or Research Purposes

This group of cases involves systematic and long-term mechanical reproduction of whole works or portions of works, such as articles, book excerpts or films, by non-profit or for-profit organizations, including libraries and commercial photocopy shops. Courts in these cases take into account the scope and premeditated character of the copying. They examine whether the institutions took appropriate measures to control copying and whether the institutions paid, or failed to pay, permissions fees when appropriate. The key issue in all these cases is whether the organizations systematically copied too much without paying copyright holders.

1. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Clms. 1973)

Quick Holding: A non-profit government research facility's regular photocopying of journal articles for patrons was fair use.

Case in Context: Until the 1990s, this was the leading case for library copying and copying at the institutional level for research and educational purposes. This case was decided prior to Section 107's codification of fair use and prior to Section 108's provisions for library copying. *See* 17 U.S.C. § 107, 108. But the court roughly tracked the recently proposed "four factor" test. The court in *Williams* applied the four factors somewhat differently than later cases, focusing less on harm to the copyright holders and more on the public benefits of the library's copying.²

² *See also* Pamela Samuelson, *Unbundling Fair Uses*, 39-41. Electronic copy available at: <http://ssrn.com/abstract=1323834>.

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Facts: Plaintiff, a major publisher of medical journals and books, brought suit against the United States through its principle medical research organization, the National Institutes of Health (NIH) and its library, the National Library of Medicine (NLM). NLM regularly made photocopies of articles from its collections, including Plaintiff's medical journals, both for individual researchers and for other libraries. The library followed self-imposed regulations for photocopying, including generally confining copying to single articles of journals (see details below). 487 F.2d at 1348-49.

Holding: In a 4–3 ruling, the appellate court overturned the trial court's finding of infringement, holding the library's copying was fair use and dismissing the case on the merits. First, the copying was for dissemination of knowledge and personal research, and neither the copiers, NIH and NLM, nor the end users, researchers, attempted to profit off copying or distribution of articles. *Id.* at 1354. Second, although a very large number of copies were made per year, the library restricted copying to “within appropriate confines.” *Id.* at 1354. Other libraries frequently engaged in photocopying similar amounts. *Id.* at 1356. Third, medical science would be “seriously hurt if such library photocopying were stopped.” Many journal back issues were not easily available, and it was unrealistic that researchers would subscribe the full journals if denied access to individual articles. *Id.* at 1358. Finally, although the trial judge had simply inferred the journals lost some revenues due to copying, the evidence – indicating the journal subscriptions grew over the period – did not show the publishers' business was actually hurt or sustain the assumption that it would be. *Id.* at 1357-58. The library and some researchers already subscribed to some journals, and it was not clear that subscriptions would increase absent copying. *Id.* at 1358. As for loss of licensing fees, the court stated: “it is wrong to measure the detriment to plaintiff by loss of presumed royalty—that standard necessarily assumes the plaintiff

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had a right to issue licenses . . . that conclusion results only if it is first determined that the photocopying is ‘unfair.’” *Id.* at 1357, n. 19.

In sum, in finding fair use, the court heavily favored the knowledge-dissemination and research benefits of the copying over merely potential market harm to either a primary or a licensing market.

Analysis: *Williams* is different from recent cases involving institutional copying in several ways. First, the court favored a liberal balancing of scientific and educational benefits against market harm, and analyzed these benefits in a separate factor. Second, the court rejected the notion that the existence of a licensing market should favor the plaintiff in a fair use analysis. According to the court’s reasoning, if a use is fair then it does not require a license because the copyright holder has no “right” to a license fee if the use is not infringing. *See id.* at 1357 n. 19. Third, with respect to amount taken, the court held the important factor was not the absolute amount of article copies the library made each year, but the fact that the library had effective policies in place for limiting copying, and limiting use of the copies to nonprofit, personal research purposes. *See id.* at 1355.

Factors Weighing In Favor of Fair Use

- Defendant was a non-profit research library affiliated with the government
- Neither defendant library nor researcher-patrons directly profited off photocopied articles
- Defendant library copied materials for patrons for their personal research use
- Researchers only required copies of individual articles rather than full journals
- Other libraries continually engaged in similar copying despite the 1909 statute
- Plaintiff showed no convincing evidence of reduced journal sales
- Defendant library and individual researchers subscribed to some medical journals
- Defendant had a “reasonable” policy for limiting copying:

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- *generally* 1 article per request
- *usually* less than 50 pages or half the journal
- *general rule* of single article per issue
- *with exceptions*, no copies made if work is on “widely available list”
- *no* copies of full journals or books in copyright

Factors Weighing Against Fair Use

- Plaintiffs might eventually suffer reduced sales due to continued copying
- Plaintiffs lost out on potential licensing fees due to defendant’s copying

Subsequent Use: On appeal, an equally divided Supreme Court affirmed the fair use holding in *Williams*. 420 U.S. 376 (1975). *Williams* was never overturned and theoretically represents a standard for fair use outside the bounds of the statute’s safe harbor for library copying and the Congressional guidelines for educational use. 17 U.S.C. § 108; U.S. Copyright Office, Circular 2, Reproduction of Copyrighted Works by Educators and Librarians, 7-8 (1995). But courts have consistently distinguished *Williams* in other cases involving copying at the institutional level. See *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156, 1177, 1179 (W.D.N.Y. 1982). (discussed directly below). In *Basic Book v. Kinko’s*, the court distinguished the holding in *Williams* as applying only when the institution does not profit off its copying. 758 F. Supp. 1522, 1536 (S.D.N.Y. 1991). In *Princeton v. MDS*, the court distinguished *Williams* as applying only when no licensing market exists for paying copyright owners permissions fees. 99 F.3d 1381, 1388 (1996).

2. Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982)

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Quick Holding: It was not fair use for a non-profit, state-funded organization to engage in wide-scale, off-the-air taping and archiving of whole educational programs for use in schools.

Case in Context: The finding of no fair use in this case presents a stark contrast to the fair use holding in *Williams & Wilkins Co. v United States*. The Supreme Court's subsequent holding in *Sony*, finding time shifting of TV shows by individual members of the public in their own homes was fair use, despite copying of the entire works, might have changed the outcome in this case. *See* 464 U.S. 417 (1984). But given the court's emphasis here on the *institutional* versus the private nature of the copying, it is unlikely.

Facts: Three corporations in the business of producing, acquiring and licensing educational shows and films brought suit against the Board of Educational Services (BOCES) of Erie County, New York, a non-profit organization created to provide various educational services for nineteen New York school districts, for infringing copyrights in plaintiff's programs. BOCES regularly videotaped and archived educational shows from public television stations and circulated copies on request to schools to use in classroom teaching, for free or at nominal cost. BOCES used sophisticated electronic equipment to capture large numbers of shows and distributed thousands of copies, some to for-profit, non-educational institutions. BOCES imposed no restrictions to ensure films were returned or to prevent further copying. *Id.* at 1162-64.

Holding: The district court granted plaintiff's request for a preliminary injunction. *See* 447 F. Supp. 243 (W.D.N.Y. 1978). At trial the court found no fair use. (1) The court found BOCES's videotaping was nonprofit and educational, but that they nonetheless merely substituted for the originals, available for sale and licensing from the film

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companies. *Id.* 1176. Given this option, the court rejected BOCES' argument that their time shifting had a further function because it promoted access to the television broadcasts by allowing teachers to plan their courses to include the shows and allowing students to watch them on class time. *Id.* at 1175-76. (2) The court found the works were factual and educational, but did not count this in favor of fair use since they were still compiled by the rights holders and were not difficult to obtain from the educational film companies. *Id.* at 1177-78. (3) On amount taken, the court rejected plaintiffs' contention that verbatim copying can never be fair use, but found the amount taken "unreasonable" in this case since BOCES made so many copies, archived them for long periods of time, and widely distributed them. *Id.* at 1179. (4) On market harm (which the court analyzed first) it was dispositive that the educational film companies offered films for sale or licensing on a national market. While there was no strong evidence of reduced revenues, the court found cumulative effects of BOCES' free copying of full films must ultimately harm sales revenues as well as plaintiffs' licensing revenues. *Id.* at 116970. Finally, the court also noted that BOCES failed the new Congressional guidelines' spontaneity test and restrictions on making multiple copies limited to the size of a class, and that the circulation of videos generally went "beyond the classroom." *Id.* at 1175.

In sum, in finding no fair use, the court emphasized the excessive scope of BOCES' activities in comparison to availability on the open market and potential negative impact on this market.

Analysis: The court in this case took great pains to distinguish the recent favorable fair use holding in *Williams & Wilkins v. United States*, which, as above, also involved large amounts of copying at the institutional level for nonprofit, research purposes. *See* 487 F.2d 1345 (Ct. Clm. 1973). The court argued that some (though by no means all) of the

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medical journals copied in *Williams* were out-of-print or not available in the single-article form required; that there is “a substantial difference” between copying only one entire article and copying an entire film; and that science authors, unlike educational film companies, do not need financial incentives to create. *Id.* at 1179, 1177. But in general the rule in *Encyclopaedia Britannica* is different than in *Williams*, focusing less on the educational benefits of the copying and more on potential market harm.

Factors Weighing Against Fair Use

- Defendant was an institution versus individuals or teachers
- Defendant copied educational films for same purpose as originals
- Defendant did not transform the films, but mechanically reproduced in full
- Defendant archived films for up to 10 years
- Defendant widely distributed this films to schools
- Defendant neither required the works be returned nor ensured they were erased
- Many of the copied educational films were available for purchase or for a licensing fee

Subsequent Use: This case is frequently cited to support arguments against fair use in educational contexts. *See, e.g., Princeton University Press v. MDS*, 855 F. Supp. 905, 1048, n. 2 (E.D. Mich 1994).

3. Basic Books, Inc. v. Kinko’s Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991)

Case in Context: Before eight major New York publishers brought Kinko’s photocopy shop into court in 1989, academic book publishers had already obtained favorable settlements from Gnomon Corporation and Tyco Copy Services based on course packet production and distribution. New York University, one of the schools involved in this case, agreed in the early 1980s to institute policies ensuring their professors did not copy

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more than allowed by the Congressional guidelines. The holding of no fair use in Kinko's gave force of law to these private agreements, and established with some degree of certainty that photocopy shops were legally required to pay permissions to make course packets.³

Facts: Defendant, Kinko's Graphics Corp., a nation-wide photocopying company, openly solicited syllabi from professors at New York schools and universities, including NYU and Columbia, photocopied the listed assignments, and compiled them into bound course packets to sell to students. 758 F. Supp. at 1528-29. Kinko's represented to teachers that it handled all permissions fees. Kinko's actively marketed its services, representing to faculty that it handled all permissions fees "at no charge." Kinko's made substantial profits off this practice. *Id.* at 1531. Kinko's course packets contained excerpts from books published by Plaintiffs, eight major academic publishers in New York. *Id.* at 1529. For instance, a packet prepared for an NYU course, "Art Therapy with Groups," contained 383 pages taken from 43 sources, including introductory material, full book chapters, and shorter excerpts. *Id.* at 1527-28. The publishers, who derived a significant part of their income from textbook sales and permissions fees, sued, alleging that Kinko's copied their books without paying the requisite fees. *Id.* at 1526.

Holding: The court found Kinko's photocopying was not fair use. (1) The court first found the use was not transformative because Kinko's merely "re-packaged" the excerpts into bound volumes and exercised "absolutely no literary effort" to "expand upon or contextualize" the materials in the course packets. *Id.* at 1530-31. The court then found that, despite the educational use of the course packets "in the hands of students," Kinko's

³ See Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 UPTLR 149, 169-184 (1998)

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own use was not just commercial but exploitative. Kinko's actively sought to make a profit directly off photocopying the materials and selling them to the maximal number of customers, marketing their service to students and offering professors a 10% discount if they got orders in early. *Id.* at 1531-32. The court cited the (supposedly overturned) *Sony* presumption that a commercial use is presumptively unfair. *Id.* at 1530. (2) The court followed the "general rule of thumb" that factual materials like the books at issue warranted less protection and held factor two weighed for fair use. (3) The court performed an in-depth analysis of the exact amounts taken from each work for each packet, and also considered whether the works were easily available and whether the packets contained the essential portions of the books. The court found all three considerations weighed against fair use since Kinko's usually copied entire chapters, most works were in-print, and it could be presumed professors chose the critical parts for their classes. *Id.* at 1532-33. As for copying works that were out-of-print and therefore difficult to obtain, the court accepted the publishers' argument that, given these books no longer sold on the open market, permissions fees might have been the only source of income for publishers and authors. *Id.* at 1533. The court concluded that the amount taken indicated that "these excerpts [were] not material supplemental to the assigned course material but *the* assignment." *Id.* at 1534. (4) The court found potential market harm both to the publishers' primary and licensing markets based on the fact that Kinko's operated on a mass scale and the course packets replaced the assigned reading – so it must eventually adversely affect textbook sales and permissions fees. *Id.* at 1534. The court emphasized that Kinko's was a "vast" nation-wide business whose copying presented a serious threat to publishers' revenues. *Id.* at 1534-35. Finally, the court addressed the Congressional guidelines for educational copying, which the court found to be at least relevant for evaluating Kinko's copying since it was done ultimately for college students. The court found, first, that since Kinko's was for-profit, it did not fall under the

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guidelines' safe harbor, and, second, even if it did, Kinko's copying was too excessive to meet the guidelines' requirements. *Id.* at 1536-37.

In sum, the court found no fair use despite the educational purpose of the course packets mainly because of the vastness of Kinko's enterprise and the threat to plaintiffs' sales and permissions.

Analysis: This case is not friendly in its treatment of Kinko's copying. However, notwithstanding the court's assessment that Kinko's simply took too much and its reliance on the Congressional guidelines in reaching this conclusion, Kinko's exploitation of the materials for profit and Kinko's failure to personally transform the materials were dispositive in the court's finding of no fair use. The court somewhat explicitly left open a fair use defense for professors who compile course packets themselves without charging students or making a profit. The court used *Sony's* notion of 'productive' copying for scholarly purposes and focused on the actual literary efforts Kinko's had expended in producing the course packets. In so doing, the court distinguished Kinko's efforts from those of the professors, who exercised judgment in selecting the materials and then "expand[ing] upon or contextualiz[ing] the materials copied" – and indicated this might be productive in the same way as scholarly quoting. *Id. See* 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). However, again, the court's reliance on the Congressional guidelines and the court's conclusion under factor three that the course packets constituted the entire assignment, would be a hurdle for a professor copying more than supplemental materials.

Factors Weighing Against Fair Use

- Defendant was a for-profit corporation

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- Defendant profited by photocopying without paying permissions fees
- Defendant's compiling and binding of course packets required no literary judgment
- Defendant's course packets replaced the assignments
- Defendant's took larger excerpts than allowed by the Congressional guidelines
- Defendant's copying was regular and premeditated
- Defendant's copying served as potential market replacement for original
- Defendant's copying potentially harmed plaintiffs' licensing markets

Subsequent Use: In *Princeton v. Michigan Document Services*, the Sixth Circuit cited and essentially replicated the fair use analysis in *Kinko's*. 99 F.3d 1381, 1384, 1385-90 (6th Cir. 1996). The court in *American Geophysical Union, Inc. v. Texaco* relied on *Kinko's* in using the Congressional guidelines' standards to evaluate the institution's copying. 60 F.3d 913 (2d Cir. 1994).

4. American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994)

Quick Holding: It was not fair use for a for-profit corporation to allow its researcher-employees to engage in regular copying and archiving of journal articles when a photocopy license was reasonably available.

Case in Context: This case is factually distinguishable from *Williams & Wilkins Co. v. United States* because the library at issue in *Texaco* was owned by a for-profit company and was not open to the public. But *Texaco* also employs a fundamentally different fair use analysis from the court in *Williams*, implying that a use can be unfair simply because the defendant has not secured a license when there is a "traditional" and "reasonable" licensing scheme available. As the dissent pointed out, this presents a "circularity problem" since licensing markets only become traditional and reasonable after copyright

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owners, content users, and the courts come to a consensus that this type of copying is not fair use. 60 F.3d at 937 (Judge Jacobs, dissenting).

Facts: Plaintiffs, American Geophysical Union and 82 publishers of scientific and medical journals, brought suit for copyright infringement against Texaco, Inc., a for-profit petroleum company engaged in scientific research for improving petroleum technology and in charge of a private research facility with a sizeable library containing subscriptions to many of plaintiffs' journals. Texaco employed up to 500 employees, all of whom frequently photocopied articles from plaintiffs' journals. The court used the example of one researcher's copying practices for the fair use analysis. The researcher copied articles regularly to keep abreast of the field. He was keeping at least eight full articles from one plaintiff's journal in his files for reference use. 60 F.3d at 914-17. Texaco argued the copying was fair use since researchers used the articles for research purposes and advancement of scientific knowledge. *Id.* at 915.

Holding: The Second Circuit upheld the District Court's holding of no fair use after a thorough re-analysis of the four factors. (1) The court found the use to be commercial and not sufficiently transformative to overcome a presumption of market harm. Though the link between Texaco's profits and the copying was attenuated, the for-profit nature of Texaco's activities led the court to classify the copying as exploitative: considering Texaco ultimately made money from its research, "at least some price" should be paid to copyright holders when researchers copied the articles. *Id.* at 922-25. Moreover, "conversion" of full journals into a more serviceable form was not transformative since researchers also archived articles in personal files and thus used them for the same intrinsic purpose as the originals, i.e. reference. *Id.* (2) The court weighed the factual nature of the articles for Texaco. (3) The court found copying of entire articles, if not

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entire journals, weighed against Texaco. (Compare to *Williams*, above, where the court found it in favor of fair use that library copying was restricted to single articles). *Id.* at 925-26. (4) Finally, although the court found no convincing evidence of harm to journal sales and doubted individual articles had substantial monetary value, the court found market harm was satisfied since the plaintiff gained revenues from photocopy licenses and there was a conventional market for obtaining licenses via the Copyright Clearance Center. *Id.* at 929-30. For the support, the court pointed to Section 108 of the Copyright Act, stating that, while 108 did not affect fair use rights, Congress' decision to restrict the conditions under which libraries could make copies implied that Congress intended to protect copyright owners' licensing royalties for photocopying. *Id.* at 931. *See* 17 U.S.C. §107. The court addressed the defendants' argument that relying on permissions harm to determine whether a use was fair constituted "circular reasoning," since it implied plaintiffs had a legal right to permissions by stating that only "traditional," "reasonable" or "likely to be developed" permissions markets need be examined. *Id.* at 930.

In sum, in holding no fair use, the court focused primarily on factor one – Texaco's for-profit status and researchers' use of the articles for the same purpose as the journals – and factor four – harm to licensing revenues.

Analysis: *Texaco* involves a for-profit corporation, which makes a fair use defense less likely. But the fair use analysis in *Texaco* is inherently different from that in *Williams*. First, *Texaco* does not consider harm to the advancement of science as a separate factor from transformativeness. This weakens the strength of a separate research or educational benefit in the fair use analysis since transformativeness is usually restrictive when the copied materials are also produced for science or educational purposes (e.g. science articles, text books). Second, *Texaco's* treatment of market harm contrasts markedly with

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that in *Williams*. While in *Williams* the court held licensing should not be considered during a fair use determination since the copyright holder has no right to a licensing fee if the use is fair, in *Texaco*, the court held threat to licensing fees can be considered as long as there is a “traditional, reasonable, or likely to be developed” licensing market. *Id.* at 930. The court specifically addressed the contrasting holding in *Williams*, but stated that *Williams* was decided “before the development of a market for institutional users to obtain licenses to photocopy articles. *Id.* at 931. In sum, under *Texaco*, as long as there is a convenient or customary means of obtaining a license, a fair use defense is unlikely. These concerns are also reflected by the dissent. *Id.* at 931 (Judge Jacobs, dissenting).

Factors Weighing Against Fair Use

- Defendant was by a for-profit corporation
- Defendant saved money by allowing researchers to photocopy articles
- Defendants’ researchers used copied articles for same purpose as original journals
- Defendant did not exercise enough control over its researchers’ copying
- Researchers regularly copied full articles and kept copies in their files
- Defendant could have obtained a license to make the photocopies
- Plaintiff’s licensing market was established and accessible to defendant

5. Princeton University Press v. Michigan Document Services, 99 F.3d 1381 (6th Cir. 1996)

Quick Holding: It was not fair use for a commercial photocopy shop to produce and distribute course packets for profit when a reasonable permissions fees market existed.

Facts: The facts in *Princeton* were similar if not identical to those in *Kinko’s*. Three major academic publishers brought suit against a for-profit corporation, Michigan Document Services (MDS), owned by defendant, James Smith, who operated a single photocopy shop in Ann Arbor, Michigan, which created course packets from syllabi

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submitted by professors at the University of Michigan, and sold them to students. Due in part to the *Kinko's* decision, most photocopy shops paid permissions fees to publishers for making course packets. 99 F.3d at 1384. Smith allegedly believed he did not need to pay permissions because *Kinko's* was wrongly decided, and publicized his opinion in speeches and advertisements to professors and students, where he stressed that they would not have to worry about the delays attendant upon paying permissions. He also consulted a lawyer, who told him that not paying permissions was “risky,” but that there were flaws in the *Kinko's* decision. *Id.*

Holding: A divided Sixth Circuit panel of thirteen judges upheld the trial court’s finding of no fair use, with five judges dissenting. But the court reversed the trial court’s finding that Smith’s infringement was willful, since the judges’ own sharply divided opinion evidenced that his belief his use was fair was “reasonable.” *Id.* at 1383, 1392. The majority found (1) MDS’s use was not simply commercial, but “exploitative”: Smith obtained an economic advantage over competitors by not paying permissions and maximized his own profits at the expense of the publishers. *Id.* at 1385. It was also not transformative: the “mechanical “transformation”” of materials into course packets did not resemble the “creative metamorphosis” accomplished by parodists. *Id.* at 1389. The court rejected the dissent’s arguments that students’ ultimate educational use was the pertinent use, and that “exploitation” required assessing the copyrighted works for market potential and profiting off the substance. *Id.* at 1386, n. 3. *See also id.* at 1400 (Judge Ryan, dissenting). (2) Unlike in *Kinko's*, where the court found the materials were factual, the court found the materials were “creative,” stating “it was certainly not telephone book listings that the defendants were reproducing,” and found this also weighed against fair use. *Id.* at 1389. *See* 758 F. Supp. at 1532-33. (3) For amount taken, the court relied on the Congressional guidelines and found that most of the excerpts far

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exceeded the 1000-word safe harbor for prose. *Id.* at 1389, 1390-91. As in *Kinko's*, the court presumed professors selected the most important parts of the works. *Id.* at 1389. See 758 F. Supp. at 1333. (4) The court characterized market harm as most important if not controlling on the analysis (and actually analyzed market harm first), and held there should be a presumption of market harm due to commercial use. *Id.* at 1385-86. Even if the presumption did not apply after *Campbell*, given that the course packets replaced the originals, it could be inferred that widespread copying without payment would harm sales, and would certainly harm the publishers' profits from permissions fees. *Id.* at 1386-87. See 510 U.S. at 587-89. The court distinguished *Williams*, where the court held licensing harm irrelevant to determining fair use, based on the assertion that in this case an established licensing market existed. *Id.* at 1388.

Analysis: The majority's fair use analysis was similar to that in *Kinko's*. However, the Sixth Circuit focused most attention on harm to publishers' established permissions markets, and found it virtually dispositive that others regularly paid permissions while Defendant Smith did not. To whether it would be fair use for students or professors to make the course packets themselves, the court stated that "the issue is by no means free from doubt." *Id.* at 1389. It is true that the Sixth Circuit's focus on copyright holders' loss of sales and permissions fees implies that the holding would also be no fair use. However, in that case, not only would making the course packets have been for non-commercial, educational purposes, it would more arguably have been transformative since professors would have exercised literary judgment in selection, and students would have used the copied materials for learning. The case would likely come down to whether the court treated fair use as a balancing of factors one and four, or treated factor four as controlling.

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Factors Weighing Against Fair Use

- Defendant was a for-profit corporation
- Defendant profited off copying without paying permissions fees
- Defendant's "mechanical" creation of course packets involved no creative transformation
- Defendant copied "creative" works
- Defendants took larger excerpts than allowed by the Congressional guidelines
- Defendant's copying was regular and premeditated
- Defendant's copying harmed plaintiffs' permissions fees, for which there was an established market

Factors Weighing In Favor of Fair Use

- Students ultimately used defendants' course packets for non-profit, educational purposes
- Defendants took only excerpts and not enough of the original works as to supercede them
- Plaintiffs did not present evidence showing likelihood of reduced sales

Subsequent Use: On appeal the Supreme Court denied cert. 520 U.S. 1156 (1997). Princeton is widely cited throughout fair use case law and is considered the leading case in the area of educational fair use. Some scholars believe *Princeton's* rule that "if it can be licensed, it must be licensed" spells that end of an exception for educators. See Pamela Samuelson, "Unbundling Fair Uses," 42.

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C. Authors Copying in Critical Commentary and Scholarly Analysis

This category involves copying by authors and publishers in a wide variety of critical commentaries and scholarly analyses, such as biographies, research papers and instructional textbooks. While the actors and contexts are distinct, the cases in this category all entail a defendant incorporating copyrighted text or figures into a new, publicly disseminated production for the purposes of critiquing or commenting upon the original work. 17 U.S.C. §107. Courts in these cases usually classify the defendant's use as a "productive" use of the original work, as distinguished from a more literal "transformative" use, such as in the case of a parody. *See Campbell v. Acuff-Rose v. Music Inc.*, 510 U.S. 569 (1994).⁴ In general, "productive" in this context means that the new work copies in order to criticize, comment upon, or build upon the original expression. But the determination of whether a work is productive is fact-specific.

1. New Era Pubs. Int'l v. Carol Pub. Group, 904 F.2d 152 (2d Cir. 1990)

Quick Holding: It was fair use for an author to use L. Ron Hubbard's published writings in his critical biography in order to communicate significant points about Hubbard's life and character.

Case in Context: New Era Publications International was a Danish corporation that held the copyright in many of the works authored by Church of Scientology guru L. Ron Hubbard, who died in 1986. New Era protected its rights vigorously. This case closely follows *New Era Publications International v. Henry Holt and Co.*, where the Second Circuit found it was not fair use for the author of *Bare-Faced Messiah: The True Story of*

⁴ See Pamela Samuelson, "Unbundling Fair Uses," 15-16. The empirical analysis in this category draws on her article section, "Productive Uses in Critical Commentary."

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L. Ron Hubbard to reproduce Hubbard's unpublished writings in order to inform his highly critical biography. See *New Era v. Henry Holt*, 873 F.2d 576, 583-85 (2d Cir. 1989), In that case, the court closely followed Second Circuit precedent set in *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987), holding that use of deceased author J.D. Salinger's unpublished letters to inform a Salinger biography could not be fair use given that the letters were unpublished. However, New Era had less success pursuing its rights against Henry Holt because Henry Holt used only Hubbard's *published* books in his biography.

Facts: Defendant, Carol Publishing Group, intended to publish a critical biography about recently deceased Scientology founder L. Ron Hubbard, entitled *A Piece of Blue Sky* and authored by Jonathan Caven-Atack, a former member of the church whose faith was shaken when he witnessed the Church's repressive practices towards dissident members. 904 F.2d at 153. Upon learning of the upcoming publication of the 527-page biography, which quoted widely from many of Hubbard's books and painted very unflattering portraits of the guru and the Church, New Era sued Carol for copyright infringement. *Id.* at 154. The district court held that the use was not fair and granted a permanent injunction. See 904 F.2d at 154-55.

Holding: The Second Circuit reversed on appeal, holding fair use. (1) Citing the earlier New Era case, *New Era v. Henry Holt*, the court found the author's purpose in summarizing Hubbard's life and commenting on his character defects "fit comfortably" into the categories of criticism, comment or scholarship and that therefore factor one automatically favored fair use—notwithstanding the publisher's or author's anticipation of profits from sales of the book. *New Era*, at 156-57 (citing 873 F.2d at 661). (2) The court characterized Hubbard's works about religion, human relations and the church as

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“essentially factual on balance” and found that this, along with the fact they were published, weighed in favor of fair use. *Id.* at 157-58. (3) The Second Circuit disagreed with the district court on factor three, finding that the quotes taken from the majority of Hubbard’s works were miniscule, and that the author took less than 10% from some of Hubbard’s shorter works. *Id.* at 158-59. (4) Finally, the court found the biography did not threaten New Era’s publishing markets. Even assuming New Era went through with its plan to publish an authorized biography of Hubbard, sales would likely be enhanced by defendant’s unfavorable portrait, rather than impaired. Moreover, even if the sales were impaired, copying for the purpose of criticism was explicitly allowed under copyright law. *Id.* at 159-60.

In sum, in its holding of fair use, the court found it dispositive that the author’s purpose was to explain and criticize Hubbard’s life and character and that he did not take more than necessary to support his points.

Analysis: *New Era* is quite similar to *Salinger v. Random House* and draws heavily on that case’s favorable finding that critical biographies are strongly favored under factor one because they “fit comfortably” into the statute’s favored categories of “criticism,” “scholarship” and “research.” *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987). But *New Era* does not address *Salinger’s* rigid rule respecting factor two because the defendant in *New Era* quoted only from Hubbard’s published books.

Factors Weighing In Favor of Fair Use

- Defendant’s purpose was to explain his subject’s life and to critique his character
- Plaintiff’s works about religion were “essentially factual” and were published
- Defendant copied no more than necessary to support his analysis
- Defendant’s use did not threaten the markets for plaintiff’s current or future

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- publications
- Defendant's use may have improved plaintiff's market

Factors Weighing Against Fair Use

- Defendant reproduced the most essential and expressive parts of his subject's writings

Subsequent Use: *New Era's* rule, which presumes that factor one favors fair use when a secondary author's work "fits comfortably" into the statute's favored categories, has been followed in subsequent cases involving critical biographies and other scholarly works that quote for the purposes of critical analysis. But courts generally cite this rule via the next case, *Wright v. Warner Books*, 953 F.2d 731 (2d Cir. 1991). *New Era* is also cited for its contention that the published nature of the copied work weighs in favor of fair use. See *Arica*, 970 F.2d at 1078.

2. Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991)

Quick Holding: Quoting from deceased author Richard Wright's unpublished letters and journals in a new biography was fair use.

Case in Context: At the time *Wright* was decided it was not yet established that copying verbatim from an *unpublished* work could be fair use, even if it was for the purpose of commenting on a subject's life in the context of a biography. See *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987); *New Era v. Henry Holt and Co., Inc.*, 873 F.2d 576, 583-85 (2d Cir. 1989). *Wright* drew on the recent fair use holding in *New Era* to overturn this rule.

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Facts: Defendant Warner Books, Inc. published a biography entitled *Richard Wright Daemonic Genius*, authored by co-defendant Margaret Walker, examining the life and career of the well-known writer Richard Wright. Wright's widow, plaintiff Ellen Wright, who held the copyrights to Wright's works, claimed that defendants' biography infringed some of Wright's estate's copyrighted materials by including passages from Wright's unpublished letters, some of which Wright sent to defendant-Walker in the 1930s, and Wright's unpublished journals. 953 F.2d at 734. Wright's widow sued for copyright infringement as well as breach of a research agreement. The parties moved for summary judgment. *Id.* at 734-735.

Holding: The Second Circuit upheld the district court's finding of fair use and granted summary judgment for the defendants. (1) Citing *New Era*, the court held that since a biography "fit comfortably" into the favored categories of "criticism," "scholarship" and "research," the factor one analysis "should be at end" and favor fair use, regardless of whether the biographer anticipated profits. *Id.* at 736 (citing 904 F.2d 152, 156 (2d Cir. 1990)). The court rejected Wright's claim that propriety of the use weighed against Walker and Warner Books since they did not obtain permissions for two reasons. *Id.* at 737. First, the court held author Walker acted in good faith by giving Wright's estate the letters he had sent her, and, second, it held paying permissions was "besides the point" in a fair use analysis. *Id.* (2) The Second Circuit slightly disagreed with the district court's finding that Walker's minimal use of unpublished materials was acceptable and held that the unpublished nature of Wright's journals and letters weighed against fair use on this factor, but did not preclude the defense overall. *Id.* at 737-38. (3) Factor three weighed in Walker's favor because Walker copied less than 1% of Wright's letters and journals; this was no more than she required to express Wright's views on writing, and she did not copy the heart of Wright's works. *Id.* at 738. (4) As to market harm, the court found marginal

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copying of the letters and journals in Walker’s biography would not harm the market for the complete letters and journals, even if Wright’s widow went through with a prospective deal to publish them. The biography did not “supplant” the market for the original works—if anything it would stimulate interest and increase sales. *Id.* at 739.

In sum, even though Wright’s letters and journals were unpublished, the court found fair use because a biography falls squarely within the favored statutory categories, the author took no more than required, and a biography would not harm the market for the original works if they were ever published.

Analysis: The holding in *Wright* is somewhat repetitive of the finding in *New Era: making* a critical biography is acceptable fair use, as long as the amount taken was necessary for accomplishing the author’s productive purpose. *New Era*, 904 F.2d 156 (2d Cir.) However, *Wright* is important to subsequent cases involving scholarly and educational uses for two reasons. First, *Wright* more explicitly holds that falling under a favored statutory purpose creates a presumption that the character and purpose of the defendant’s use is fair without further analysis of commerciality. Second, unlike *New Era*, *Wright* does not rely on the fact that the works were already published. Rather, *Wright* adopts the rule currently endorsed by Section 107 that copying unpublished works, while generally disfavored, is but one factor to be considered. *See* § 107.

Factors Weighing In Favor of Fair Use

- Defendant copied works as part of biography on well known author
- Defendant copied to illustrate original author’s views and perspectives
- Defendant copied no more than necessary to support her analysis
- Defendant’s biography did not threaten the market for future publications
- Defendant’s analysis may have helped market for future publications

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Subsequent Use: In this category *Wright* definitively stands for the proposition that having a purpose of criticism, scholarship or research creates the presumption that a defendant's use is favored under factor one. See *Arica*, 970 F.2d at 1077; *Rubin*, 836 F. Supp. at 917; *Sundeman*, 142 F.3d at 203; *NXIVM*, 364 F.3d at 477 (all citing *Wright* for this proposition).

3. *Penelope v. Brown*, 792 F. Supp. 132 (D. Mass. 1992)

Quick Holding: It was fair use for a popular fiction author to copy part of a grammar book in her instructional manual for writers.

Case in Context: *Penelope* is the first in this line of cases to explicitly refer to the secondary author's quotation of the original work as "productive." Though courts do not always use the term consistently, in this body of case law a "productive" use of copyrighted content is a type of transformative use in which the secondary work either "transforms" the original expression by giving it a new purpose or function—for instance, by quoting to illustrate a point, or builds upon the original work in some "productive" manner—for instance, by reproducing a prior author's theory in order to improve upon it. In either case, when the court claims a new use is "productive" the court is declaring that the use should be allowed because it advances knowledge and creativity.⁵ As *Penelope* illustrates, a court's declaration that a defendant's use is "productive" almost invariably leads to a finding of fair use.

⁵ See Kenneth D. Crews, *Copyright Law for Librarians and Educators, Creative Strategies and Practical Solutions* (American Library Association, Chicago: 2006), 54.

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Facts: Plaintiff, Penelope, was an English professor and author of *The Stylistics of Belief*, a complex discussion of use of syntax and diction to deceive and manipulate the reader, which was published in an academic anthology called *Teaching About Doublespeak*. 792 F. Supp. at 134. Defendant, Brown, a popular fiction writer, used portions of Penelope's book in her manual, *Starting from Scratch*, designed to teach novice authors how to write and also containing pop advice on subjects like diet and exercise. *Id.* at 138. Within her 218-page book, Brown borrowed from Penelope's book in a five-page section on the passive voice, where she copied verbatim Penelope's examples of the passive voice. *Id.* In the hard cover version Brown did not credit Penelope, but she acknowledged Penelope in the paper back edition after Penelope objected to the hardcover. *Id.* at 137. Nonetheless, Penelope sued for copyright infringement.

Holding: The court granted Brown's motion for summary judgment, finding that analysis of Brown's use of Penelope's examples led "inexorably" to the conclusion it was fair use. *Id.* at 136. (1) The court found factor one favored Penelope for three reasons. First, her use fell under what the Supreme Court, in *Sony Corp. v. Universal City Studios*, called a "productive" use that "results in some added benefit to the public beyond that produced by the first author's work." *Id.* at 136 (citing to *Sony*, 464 U.S. 417, 478 (1984)). Brown's work did not supercede Penelope's, which contained more detail and covered more subjects than Penelope's, but rather presented Penelope's passive voice examples in a simpler way in order to inform the average novice writer, rather than the grammar expert. *Id.* The court rejected Penelope's argument that Brown's use was not productive because Brown used the examples incorrectly (claiming some sentences were illustrations of passive voice when they were not) because the relevant point for productivity is whether a use "could have benefited the public marginally," not whether it actually did. *Id.* at 136. Second, the court did not hold Brown's commercial purpose against her. Although Brown

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stood to profit from sales of her book, she did not “exploit” on Penelope’s examples to sell her book but only used them to strengthen her short section on the passive voice. *Id.* at 137. Finally, propriety weighed in favor of Brown because she likely did not know her use of the examples was infringing and credited Penelope in the paperback edition after Penelope had objected. *Id.* at 137. (2) The scholarly nature of Penelope’s work and the fact it was only available in college book stores weighed in favor of fair use because scholarly works benefit the public and should be disseminated. *Id.* at 138. (3) The amount taken favored Brown because the few sentences Brown used were only a small portion of Penelope’s original work and were not the most qualitatively significant part. *Id.* at 138. The court cited to *Marcus*, favorably comparing the small amount Brown took with the 50% the defendant took in that case. *See id.* (citing *Marcus*, 695 F. 2d 1171, 1177 (9th Cir. 1983)). (4) Finally, the court found Brown’s book had not had and would not have an adverse effect on Penelope’s market because it was directed at a distinct audience: Penelope’s work was for serious educators and scholars, while Brown’s work was for a general audience of novice writers. *Id.*

In sum, the court found fair use because Brown’s book used only small amounts of Penelope’s scholarly work in order to inform and instruct a distinct audience of novice writers.

Analysis: *Penelope* is a potentially useful precedent for an author wishing to use excerpts from previously published scholarly works for the purpose of instruction or education. To fall squarely into the exception created by this case, the second author must use only small, non-essential portions of the original work and must use them for a distinct purpose and with a distinct audience in mind. However, in theory, *Penelope* could be extended to suggest that it should be fair use to publish mechanical reproductions of scholarly works—

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originally created for a narrow academic audience—in a new work that has a distinct instructional purpose and that is directed at a distinct general audience. For instance, publishing a single, highly technical economics article within a compilation of scholarly articles intended to inform and instruct college students might theoretically be deemed “productive” under *Penelope*. Moreover, *Penelope* does not prejudice commercial publishers. The hurdle for this argument is factor three, the amount and quality of the portion taken. The court in this case noted favorably that the sample sentences Brown took constituted only a small, relatively insignificant portion of the original and less than the defendant took in *Marcus v. Rowley*. 695 F. 2d 1171, 1177 (9th Cir. 1983) (finding that copying 50% was too much in part because it violated the Congressional Guidelines). However, significantly, neither *Penelope* nor any of the other cases discussed in this category cites the Congressional Guidelines or otherwise creates an absolute quantitative limit on the amount that a defendant may copy so long as it is reasonably necessary to achieve the defendant’s secondary purpose.

Factors Weighing In Favor of Fair Use

- Defendant used plaintiff’s work to illustrate complex linguistic concepts to lay readers
- Defendant did not exploit plaintiff’s work to make a profit
- Plaintiff’s work was scholarly and only sold in college book stores
- Plaintiff’s work was not widely available to general public
- The sentences taken constituted a small, nonessential portion of plaintiff’s work
- Defendant’s work was for distinct purposes and had distinct audiences
- Defendant’s work did not supplant plaintiff’s in market

Subsequent Use: *Penelope* has been cited heavily for various principles in other fair use cases involving productive uses for critical commentary. These principles include that the secondary author’s use can be “productive” even if it is inaccurate scholarship or did not

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actually benefit the public, so long as it “could have benefited the public marginally.” *See, e.g., Rubin*, 836 F. Supp. at 916.

4. *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067 (2d 1992)

Quick Holding: Copying passages and figures from a religious institute’s publication detailing a spiritual leader’s religious system and theories was fair use.

Case in Context: This case demonstrates the complexity that arises when a defendant copies a figure, rather than text, for the purpose of scholarly analysis. Whereas quoting small amounts of text is normally sufficient to achieve a productive purpose, analyzing a figure usually requires copying it in its entirety. The court in this case found the plaintiff’s figure was only copyrightable when it included the creator’s original labeling and sequencing. Thus, this case does not answer whether incorporating a fully copyrighted figure into an analogous critical analysis would be fair use.

Facts: Plaintiff Arica Institute was a non-profit educational organization that provided spiritual training at forty or so Arica training centers in the United States, Europe, and Australia. Arica’s programs were based on the work of its founder Oscar Ichazo, creator of a nine-level hierarchy of spiritual training that utilized Ichazo’s seven nine-pointed figures, which he called “Enneagons” or “Enneagrams,” as teaching tools. 970 F.2d at 1070-71. Defendant, Helen Palmer, a Clinical Psychologist and teacher at a private California college as well as at an “intuition training” center in Berkeley, California, authored a spiritual guide and self-help book called *The Enneagram: Understanding Yourself and the Others in Your Life*, published by co-defendant, Harper & Row. The book centered heavily around Ichazo’s nine-level spiritual hierarchy and nine-pointed figures and, Arica alleged, copied passages and figures from the Arica Institute’s

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publication, *Interviews with Oscar Ichazo*, laying out Ichazo's spiritual teachings. *Id.* at 1071. Arica sued for copyright infringement, also bringing claims of trademark infringement and unfair competition. *Id.*

Holding: The Second Circuit affirmed the district court's finding of fair use and granted summary judgment for the defendant. (1) The court cited *Wright* to hold that, because Palmer used the copied passages for "criticism, comment . . . scholarship [or] research," factor one presumptively favored fair use, regardless of any anticipated profits from selling the book. *Id.* at 1078 (citing 953 F.3d at 736). In finding Palmer's work fell into these categories, the court noted that Palmer cited passages from the *Interviews* in order to provide historical and theoretical background to the Enneagram figures and to explain Ichazo's theories. *Id.* at 1077-78. Thus, Palmer did not replace but "buil[t] upon Ichazo's work to further develop our store of knowledge in this area." *Id.* at 1078. (2) The court did not classify the *Interviews* or the Enneagrams as factual or creative, but simply found that since they were widely published, this favored fair use. *Id.* at 1078. (3) The court found amount taken favored fair use because the portion of original, copyrightable matter taken was insubstantial in relation to Ichazo's work as whole not the "heart" of Ichazo's work. The court's conclusion on this factor was based on its finding that Ichazo's figures were in the public domain and were only copyrightable when they included Ichazo's original labels and sequencing. So Palmer only actually copied by adding Ichazo's original labels and sequencing to the figures she used in her book. *Id.* (4) The court disagreed with the trial court that Palmer's book, which was also directed at those interested in emotional and psychological self-help, would not compete with *Interviews*. *Id.* The court admitted that Palmer's own self-help book might reduce purchases of Ichazo's original teachings. *Id.* However, the court nonetheless found factor four favored fair use because the relevant market effect is "that which stems from defendant's use of

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plaintiff's "expression," not that which stems from defendant's work as a whole." *Id.* Palmer was "perfectly entitled to create a competing work" so long as she did not rely substantially on Ichazo's creative expression in doing so. Since she only took Ichazo's original labeling and sequencing, rather than the full figures, her *actual copying* had a minimal impact on the market for Arica's book. *Id.* at 1178-79.

Analysis: The court found that Palmer copied Ichazo's text and distinctive nine-pointed figures in order to "buil[d] upon" Ichazo's theories and thereby contributed to knowledge in the area of spirituality and self-help. It seems this finding was determinative in the court's holding of fair use. However, in its analysis the court also relied substantially on its finding that Ichazo's nine-pointed figures were not copyrightable unless they included Ichazo's original labeling and sequencing, and that Palmer's only potential infringement was in her choice to copy those original elements of the work. Otherwise, the court would have had to admit that Palmer took the whole figures, which were arguably the most valuable feature of Ichazo's spiritual system, and used them in her own spiritual self-help guide to compete with Arica Institute's spiritual publications. Thus, it is not clear whether the court believed Palmer's work should be permissible because it was "productive" scholarship, yielding social benefits beyond Ichazo's original teachings, or whether the court believed that Arica Institute should not have a monopoly on Ichazo's spiritual philosophy.

Factors Weighing In Favor of Fair Use

- Defendant used the copied textual passages in order to describe and provide historical background to defendant's theories
- Plaintiff's works were widely published
- Defendant copied minimal portions of plaintiff's original expression

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- Although defendant potentially competed in plaintiff's market for self-help books, the effect of defendant's actual copying on plaintiff's market was negligible

Subsequent Use: The Second Circuit, in *Castle Rock Entertainment, Inc., v. Carol Publ. Group, Inc.*, cited to *Arica* for its assertion that “[t]he ultimate test of fair use [] is whether the copyright law's goal of ‘promot[ing] the Progress of Science and useful Arts, [] ‘would be better served by allowing the use than by preventing it.’” 150 F.3d 132, 141 (citing *Arica*, 970 F.2d at 1077).

5. Rubin v. Brooks/Cole Publishing Co., 836 F. Supp. 909 (D. Mass. 1993)

Quick Holding: Using a popular psychology research tool in a commercial Social Psychology textbook without obtaining proper permissions was fair use as to defendant's use, but future academic publishers must obtain permission.

Case in Context: By the time psychologist Zick Rubin brought this suit against an academic publisher for using his well-known psychological tool, the Love Scale, Rubin had already succeeded in obtaining damages from Boston Magazine, which used his Scale in a popular article about romance. *See Rubin v. Boston Magazine, Co.*, 645 F.2d 80, 84 (1st Cir. 1981) (where defendant magazine had exploited Rubin's work to enhance it's readership). Here, however, where the defendant was an academic publisher, Rubin was awarded no damages but did manage to win an injunction against defendants, suggesting that educational publishers are not necessarily favored over popular news media when it comes to fair use.

Facts: Plaintiff, Zick Rubin, was a psychologist and the creator of the “Love Scale,” a copyrighted research tool consisting of tables and figures for rating a respondent's feelings

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towards another. The Scale was important in the field of psychology and was used with permission in many textbooks, making Rubin substantial royalties. Rubin also obtained damages from settlements with non-academic publishers who used the scale without permission. 836 F. Supp. at 913-15. Defendant, publisher Brooks/Cole, sought permission to use the Scale in its textbook *Social Psychology*, but sought permission from the American Psychological Association rather than from Rubin himself, believing the APA still held copyright. The APA did not inform Brooks/Cole that it had transferred copyrights to Rubin eight years earlier, and indicated Brooks/Cole could use a single table or figure for free provided Rubin agreed or could use the whole Scale if Rubin could not be located. *Id.* at 914. Brooks/Cole's permissions agent believed Rubin's permission was a mere courtesy and assumed using the Love Scale was fair use. Therefore, Brooks/Cole did not seek Rubin's permission and printed the Scale in its entirety in the textbook. The textbook referred to the Scale as "Zick Rubin's 'Love Scale'" and listed Rubin's own textbook as suggested reading. The Brooks/Cole textbook also stated in the credits that the Scale was copyrighted by the APA and "reprinted by permission." *Id.* at 915. When Rubin saw the advance copy of the textbook, he objected. Brooks/Cole's permissions manager wrote Rubin stating that while she believed use of the Scale was permissible and fair use, Brooks/Cole was happy to offer a permission fee. *Id.* Rubin did not respond. But three years later, after two subsequent printings, Rubin wrote Brooks/Cole that using the Scale in the textbook was not fair use and requesting they cease publication. When Brooks/Cole refused, Rubin sued for copyright infringement as well as unfair competition and unfair business practices. *Id.*

Holding: The court found Brooks/Cole's use of the Scale was fair use and granted summary judgment for defendants but also held academic publishers must pay permissions fees in the future. *Id.* at 922. (1) The court found factor one favored

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Brooks/Cole because the use was for the purposes of “criticism, teaching, scholarship or research” and, citing *Wright*, held this led to “a ‘strong presumption’ that the use is ‘productive,’” despite anticipation of profits. *Id.* at 916. 918 (citing *Wright*, 953 F.2d at 736-37). The court noted favorably that Brooks/Cole did not “exploit” the Love Scale for profit as Boston Magazine had in *Rubin v. Boston Magazine, Co.*, 645 F.2d 80, by featuring the Scale in an article on romance to enhance sales. *Rubin*, 836 F. Supp. at 917-18. In classifying the use as productive, the court noted that *Social Psychology* was a college textbook circulated for the purposes of teaching and higher learning. *Id.* at 916. Moreover, the author critically analyzed the Scale, comparing Rubin’s theory with others and encouraging students to engage with the material and even to question the validity of the Love Scale as an accurate measure of love and attachment. *Id.* at 916. Finally, the propriety of the use favored Brooks/Cole because it credited Rubin, even directing students to Rubin’s own textbook for future reading, and sent Rubin a free exam copy. Also, Brooks/Cole at least attempted to obtain permission from the proper copyright holder. But even if it had not, the court stated, “lack of permission is ‘entirely beside the point’ in cases in which reproduction of material is otherwise fair use.” *Id.* at 918 n. 6 (citing *Wright*, 953 F.2d at 737). (2) On nature of the work, the court found the Love Scale’s published and scientific nature weighed in favor of fair use. The court cited *Sampson & Murdock Co. v. Seaver-Readford* for the “Sampson Doctrine:” “works in regard to the arts and sciences . . . [are] given out as a development in the way of progress, and, to a certain extent, by common consent . . . others interested in advancing the same art or science may commence where the prior author stopped.” *Id.* at 919 (citing 140 Fed. 539, 541 (1st Cir. 1905)). (3) The court found Brooks/Cole’s taking the whole Love Scale, a central component of Rubin’s copyrighted works, weighed only slightly in favor of Rubin because the textbook author required the whole Love Scale to accomplish his critical goal. *Id.* at 920. (4) On market harm, the court cited *Sony* for the rule that a

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primarily noncommercial use shifted the burden to Rubin to show “at least *some* meaningful likelihood of future harm.” *Id.* at 921-22. (citing *Sony*, 464 U.S. at 451). The court found the textbook’s *particular* inclusion of the Love Scale in the book did not harm Rubin financially or detract from Rubin’s current or future ability to obtain royalties from others; inclusion in Social Psychology might even increase rather than decrease the value of the Love Scale. *Id.*

Thus, the court held Brooks/Cole’s use was fair because it had a productive purpose, credited the author extensively, was not exploitative, and did not cause Rubin financial harm. However, the court ultimately found that widespread application of its holding to the future conduct of other textbook publishers would harm Rubin’s permissions markets and would ultimately “tip the balance” in Rubin’s favor. *Id.* at 999. For this reason, the court held that future academic textbook publishers would have to pay Rubin permission fees. *Id.* at 922.

Analysis: In theory, *Rubin* supports the notion that an academic publisher reproducing a whole scholarly work within an academic textbook that is distributed to college students with the purpose of critically engaging students in the copyrighted material is fair use so long as the textbook credits the original author and does not prominently feature the scholarly work in order to enhance sales. However, the holding is not completely clear because the court limited its holding to past use by Brooks/Cole and held future academic publishers must obtain permission for similar uses of Rubin’s Love Scale.

Factors Weighing In Favor of Fair Use

- Defendant’s textbook was distributed to students for purposes of higher learning

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- Defendant used the Love Scale to analyze and critique plaintiff's psychological theory
- Defendant did not feature the Love Scale in its textbook in order to enhance sales
- Defendant gave plaintiff full credit and directed readers to plaintiff's works
- Defendant attempted to obtain permission and believed permission had been granted
- Original work was scientific in nature
- Defendant used the work to advance the progress of knowledge
- Defendant took only the amount required to fulfill its productive purposes
- Plaintiff did not demonstrate actual or future harm to sales or royalties

Factors Weighing Against Fair Use

- Defendants obtained some profits from textbook sales
- Defendants took plaintiff's whole work
- Similar copying, if widespread, would harm plaintiff's market for licensing his work

Subsequent Use: Rubin's victory over Boston Magazine, which used his Love Scale in a popular article for profit, was cited in *Penelope v. Brown* to stand for the proposition that if an alleged infringer's use is commercial rather than scholarly, this nullifies the benefit of the copyrighted work being scholarly under factor two. 792 F. Supp. 132, 138 (D. Mass. 1992). See *Rubin v. Boston Magazine, Co.*, 645 F.2d 80, 84 (1st Cir. 1981).

6. Sundeman v. Seajay Society, Inc., 142 F.3d 194 (4th Cir. 1998)

Quick Holding: It was fair use for a researcher to use portions of an unpublished novel in her scholarly appraisal of the author's life and work

Case in Context: This case, in which the estate and spouse of deceased Southern author Marjorie Kinnan Rawlings sued a secondary author for using Rawlings unpublished letters, is very similar to *Wright v. Warner Books*, discussed above. However, in this case

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the defendant used Rawling's letters to create a scholarly paper, rather than a biography. Also, in this case the defendant was an academic working for a non-profit educational foundation. She presented her research at an academic conference and never ended up publishing her paper.

Facts: Plaintiffs were the personal representatives of the estate of the late Marjorie Kinnan Rawlings and the owners of her copyrighted papers and letters, including Rawlings' first, as yet unpublished novel, *Blood of My Blood*. 142 F.3d at 197. Defendant, The Seajay Society, was a non-profit organization dedicated to enhancing public awareness of and interest in neglected aspects of South Carolina and southern culture. *Id.* at 199. Although Seajay purchased some of the Rawlings estate's documents, it was unable to purchase or obtain permission to use *Blood of My Blood*. *Id.* Nonetheless, Seajay made an entire copy of the novel and gave it to an officer of Seajay, researcher Dr. Anne Blythe, who used the novel to prepare a scholarly analysis of Rawlings life and work, which she presented orally at a conference at the University of Florida, attended by up to 200 people. Though Blythe wanted to publish her paper as an article, she was unable to obtain permissions and so her paper was never published. *Id.* Rawlings' husband brought suit for copyright infringement on behalf of Rawlings' estate when he learned of Seajay's copying of the book and Blythe's copying of portions of the novel in her work. *Id.* at 200-01.

Holding: The Fourth Circuit upheld the district court's finding of fair use. (1) Factor one favored fair use because Seajay's and Blythe's uses were for "noncommercial, educational purposes." *Id.* at 204. Seajay copied the entire book only in order to provide Blythe with a copy without damaging the original. *Id.* at 201. And Blythe's use was favored under the preamble to § 107 because it was a scholarly appraisal that quoted the novel in order to shed light on Rawling's development as a young author and to comment on the

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relationship between Rawlings and her mother. *Id.* at 202-03. “Thus, Blythe’s transformative paper fi[t] within several productive uses as criticism, comment, scholarship, and literary research.” *Id.* at 203 (citing *Wright*, 953 F.3d at 736, that this led to the “strong presumption” the use was fair). Also, Blythe did not attempt to “exploit” Rawling’s work for profit and would only have published her paper with proper permission, so potential earnings from her planned publication did not count against her. *Id.* at 203. (2) The novel was creative and unpublished, generally weighing against fair use, but the court rejected that the unpublished nature of the work precluded fair use and noted the 1992 amendment to Section 107 stating that the unpublished nature of a work “shall not itself bar a finding of fair use.” *Id.* at 204-05. (citing 17 U.S.C. § 107). (3) The court found factor three favored fair use because Blythe took only between 4-6% of the novel and did not take the heart of the work. *Id.* at 206 (favorably comparing Blythe’s quoting to the acceptable “miniscule” amounts of quoting for the biography in *New Era*, 904 F.2d at 158). Also, Blythe and Seajay took no more than required to fulfill their purposes of scholarly criticism and providing Blythe access to the novel, respectively. *Id.* at 206. (4) The court found no market harm because the University of Florida never published the book, and Blythe’s critical commentary was not a substitute for the novel. Blythe’s academic presentation, if anything, only increased demand for the unpublished novel. *Id.* at 207.

Analysis: The court easily classified the defendant’s verbatim copying of portions of a novel as for the purposes of “scholarship,” “research” and “criticism” because Blythe used the quotations to analyze and criticize the author’s work and life. Blythe’s purpose was not to replace the author’s work. The court was unclear whether Blythe’s use would have been fair even if she published her paper and did hold it in her favor that she at least attempted to obtain permission from the estate. The court also classified the Seajay

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Society as having a favorable “non-profit, educational” purpose in copying the novel to give to Blythe, implying that a non-profit educational institution’s limited copying of unpublished copyrighted content for dissemination to researchers and scholars should be fair. One controversial feature of this case was that the book was unpublished. However, after the 1992 amendment to § 107 and case law like *Sundeman*, it is well-established that fair use can apply even when the original works were unpublished. 17 U.S.C. § 107.

Factors Weighing In Favor of Fair Use

- Defendant-author copied for purposes of scholarly appraisal
- Defendant-non-profit educational institution copied to disseminate work to a researcher
- Neither defendant exploited the work for profit
- Defendant-author did not publish her paper
- Defendant-author planned to publish only if she obtained permission
- Defendant took only 4-6% of the unpublished novel
- Defendant’s presentation of her analysis did not harm potential market for original work

7. *NXIVM Corp. v. Ross Institute*, 364 F.3d 471 (2d Cir. 2004)

Quick Holding: It was fair use for a non-profit website to post a critique of plaintiff’s business seminar materials online.

Case in Context: Although this case is not directly related to education or academic scholarship, it provides a potentially relevant precedent for educational users because it allows posting a critical analysis on the Internet that includes seventeen full pages of copied content.

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Facts: Defendant, Rick Ross, ran non-profit websites in connection with his work as a for-profit “cult de-programmer.” The sites provided information to the public about controversial groups that people had accused of mind control. In the course of his cult de-programming job, Ross learned that plaintiff, NXIVM, a producer of business training seminars, might be engaged in mind-controlling activities. Ross obtained some of the unpublished seminar materials from a one-time NXIVM seminar participant and commissioned two contractors to write reports on NXIVM’s business training materials. They did so and posted their critical analyses on Ross’s websites, which incorporated approximately 17 pages from the 500 pages of NXIVM seminar materials. 364 F.3d at 475-76. NXIVM sued for copyright and trademark infringement.

Holding: The Second Circuit upheld the district’s courts finding of fair use and denied NXIVM’s motion for a preliminary injunction. (1) The court held factor one favored fair use because Ross’ websites’ use of quotations from the manual to support their critical analysis was transformative criticism and commentary and was a favored use under §107. *Id.* at 477. (citing *Wright*, 953 F.2d at 736). Though Ross also ran a for-profit business, this did not rebut the presumption that the use of the materials on the websites was favored. The court then considered the potential impropriety of Ross’s and his agents’ conduct in obtaining the materials because the one-time participant may have acquired them in breach of a duty. But the court held that while bad faith was relevant and weighed against fair use, this sub-factor did not outweigh the non-commercial, critical purpose of the analyses on factor one. *Id.* at 477-78. (2) The unpublished nature of the manuals weighed against fair use but did not preclude a finding of fair use. *Id.* at 480 (citing *Harper & Row*, 471 U.S. at 564). (3) The court found copying 17 pages of the 500 page manual was not too much, that Ross did not take the core of the manual, and that Ross took no more than needed for research and analysis and to support his critical

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commentary. *Id.* at 481. (4) The court found it weighed heavily in favor of fair use that Ross' critical analysis would not harm the market for the actual training manuals. Even if it did, criticism was allowed under copyright law and under the First Amendment. *Id.* at 482 (citing *New Era*, 904 F.2d at 160).

In sum, the court found fair use because Ross' use was for critical analysis and he took no more than required to accomplish this goal.

Factors Weighing In Favor of Fair Use

- Defendant copied seminar manuals in order to critique plaintiff's seminars
- Defendant did not take more than necessary to support his critical commentary

Subsequent Use: The district court in *Bosch v. Ball-Kell* cited to *NXIVM* to demonstrate that the "strong presumption" that favored non-profit educational uses in the first factor analysis only means that "factor one will normally tilt in the defendant's favor." 2007 WL 2572383, *3 (C.D. Ill. Aug. 29, 2007) (citing *NXIVM*, 364 F.3d at 477).

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D. Copying that Promotes Access to Information

This category is not defined by the type of actor raising the fair use defense. It involves copying by various types of individuals and institutions. Nor can the defendant's copying be classified as easily falling within one of the statute's favored categories of "criticism," "comment," "teaching," "scholarship," or "research," or as "non-profit, educational." Rather, the common element in these cases is that the defendants all contended their uses enhanced the public's access to copyrighted content or the information contained therein, and thereby served a beneficial public purpose. The most recent cases in this category involve Internet search engines making copyrighted content available to the public online, but this category covers a wide variety of information-disseminating activities.⁶

1. New York Times, Inc. v. Roxbury Data Interface, 434 F. Supp. 217 (D.N.J. 1977)

Quick Holding: For profit company's creation of an index to proprietary multi-volume newspaper index was fair use.

Case in Context: This case was likely the first "access-to-information" fair use case decided under the 1976 Copyright Act. Technically, it was decided before the 1976 Act went into effect, but the court followed the prescriptions of § 107 and formally addressed all four factors because, according to the court, they merely codified the fair use analysis generated in common law. The issue was whether a third party could index a copyrighted work, specifically a set of indexes, without authorization from the copyright holder.

⁶ Pamela Samuelson identified this category of case law as "Access to Information-Promoting Fair Uses." *Unbundling Fair Uses*, UC Berkeley Public Law Research Paper No. 1323834 (2009), 64-68.

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Facts: Plaintiff New York Times published annual indexes to its newspaper. *Id.* at 218. The annual index listed places, events, people, institutions, and subjects that had been written about in the paper that year and correlated those items with volume and page information. *Id.* The Times also published cumulative indexes that spanned across numerous years but were restricted by category. *Id.* at 219. The four cumulative indexes covered obituaries, film reviews, book reviews, and theatre reviews. *Id.* at 218, 219. Defendant Roxbury began publishing a 22-volume personal name index to the Times' indexes, which were over 100 volumes long. *Id.* at 219. Roxbury's index dealt strictly with names of people referenced in the Times indexes. *Id.* A reader could use Roxbury's index to locate a single name and be directed by the index to the various volumes of Times indexes that referenced the name. *See id.* Thus, in order for Roxbury's index to function, Roxbury had to copy at least some elements of the Times' indexes. *Id.* at 224.

Holding: The court denied the New York Times' request for a preliminary injunction. *Id.* at 227. Even assuming the Times' copyright covered the use of indexed personal names, the defendant's use was a fair one. *Id.* at 221. (1) The purpose of Roxbury's index was to facilitate public access to information. The purpose was also commercial, but the court did not let this preclude a finding of fair use. *Id.* (2) The Times' index was a collection of facts, not a creative work, and this weighed for defendant. *Id.* (3) The court did not hold factor three against Roxbury because, although the personal names in Roxbury's index were all entirely derived from the Times' indexes, Roxbury did not wholesale copy the Times' collection, but only extracted and compiled facts from the Times' indexes, and took no more than required to produce a useful index. *Id.* at 222-23. (4) The court did not find market harm. *Id.* at 226. First, Roxbury's index served a substantially different function from the Times' index. *Id.* at 224. Further, Roxbury's work referenced and built upon the Times' index, so Roxbury's work might have helped Times' market for its index.

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See id. The court rejected that the Times' copyrights in the indexes protected against harm to merely potential markets. *See id.* at 225.

In sum, in the court's finding of fair use, the beneficial function of Roxbury's index in providing increased public access to information, as well as the factual nature of the New York Times' work, outweighed concerns of potential market harm.

Analysis: In finding Roxbury's use of the index was fair because of an added public benefit, the court did not characterize the use as "transformative," perhaps only because that term had not yet entered fair use jurisprudence. Also, the court's dismissive approach to the potential market harm argument does not reflect current fourth factor jurisprudence. Most modern courts would have at least considered plaintiff's potential and derivative markets.

Factors Weighing In Favor of Fair Use

- Defendant's index would serve public interest in dissemination of information
- Plaintiff's index was a work of diligence, not creativity
- Defendant expended time and effort in creating its new index
- Defendant merely referenced pages in the plaintiff's index
- Plaintiff did not show likelihood of market harm

Subsequent Use: The Supreme Court in *Sony v Universal Cities Studios*, 464 U.S. 417 (1984), cited *Roxbury* favorably for the proposition that works of diligence deserve less copyright protection than works of creativity. The district court in *Basic Books v. Kinko's*, 758 F. Supp. 1522 (S.D.N.Y. 1991) cited to this case as an acknowledgement that financial gain does not always preclude a finding of fair use. There have been numerous other citations to this case, as it was one of the first drafted in accordance with the 1976 Act.

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2. Key Maps, Inc. v. Pruitt, 470 F. Supp. 33 (S.D. Tex. 1978)

Case in Context: This is one of the early access-to-info cases under the 1976 Act. Significantly, the court departed from the now-orthodox four-factor structure and focused primarily on the beneficial nature of the use and the user's proper conduct. *See id.* at 37-38. The fact-pattern is not specifically related to research, scholarship or even learning. *Id.* at 35-36. However, subsequent courts have used this case to stand for the principle that courts are "more willing to find a secondary use fair when it produces a value that benefits the broader public interest." *See, e.g. Newport-Mesa Unified School Dist. v. Cal. Dept. of Ed.*, 371 F. Supp. 2d 1170, 1177 (C.D. Cal 2005) (finding fair use for a state statute to require distribution of copyrighted exam questions and answers to parents of special-needs students because it was "in the public interest").

Facts: Plaintiff, the owner of Key Maps, held the copyright in a map of a Texas county. *Id.* at 35. His map business earned him regular revenue from the county. *Id.* Defendant, county fire marshal Pruitt, had acquired a copy of the map from plaintiff, and secured plaintiff's consent to draw fire district boundaries on the map. *Id.* Key Maps' owner understood that Pruitt intended to create copies of the resulting "composite map" and distribute them to county officials as references. *Id.* He reportedly assumed that Pruitt would contract with him in order to have the composite maps reproduced. *Id.* at 36. Initially, Pruitt did contract with plaintiff to create the reproductions, but after a long delay in which Key Maps failed to make the reproductions, Pruitt had the reproductions done elsewhere. *Id.* In the end, the maps were too small to use for the planned composite map. *Id.* Key Maps sued for infringement. *See id.* at 36-37.

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Holding: The court put the burden on plaintiff Key Maps to show that the fire marshal's non-commercial use was unfair. *Id.* at 38. Key Maps failed to meet that burden. *Id.* The court characterized Pruitt's copying and use of the map as "legitimate, fair, and reasonable" before even beginning the fair use analysis. *Id.* The court did not proceed through the four factors systematically, instead basing its decision primarily on the beneficial, non-profit purpose and character of Pruitt's use, as well as Pruitt's good faith in attempting to obtain permission and Key Maps implied license by initial contract. *See id.*

Factors Weighing In Favor of Fair Use

- Defendant made map for noncommercial purposes in service of the public interest
- Defendant only distributed the copies to county officials
- Defendant made good faith attempt to allow plaintiff to create reproductions.
- Plaintiff exhibited unreasonable delay in reproduction contract
- Plaintiff's knowledge of defendant's intent to reproduce created an implied license

- Defendant gained no benefit from the maps as the copies were too small for use

Subsequent Use: The *Newport-Mesa* court cited favorably to *Key Maps* for the proposition that: "[c]ourts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest." 371 F. Supp. 2d at 1177. The district court in *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*, 508 F. Supp. 854, 861 (N.D. Ga. 1981), cited to *Key Maps* for the proposition that "fair use presupposes good faith and fair dealings.

3. Dow Jones & Co. v. Board of Trade of the City of Chicago, 546 F. Supp. 113 (S.D.N.Y. 1982)

Quick Holding: Distribution of complete protected stock indexes for purpose of regulatory compliance was fair use.

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Facts: Defendant, the Board of Trade of the City of Chicago, was a non-profit organization in charge of the largest commodities exchange market in the United States. The Board's market was regulated by the Commodities Futures Trading Commission (CFTC), and the Board could not trade futures contracts without CFTC approval, which meant submitting certain financial information to the CFTC. Plaintiff Dow Jones, a for-profit corporation, was the publisher of several financial publications, including the Wall Street Journal, and maintained the Dow Jones News Service, through which it distributed financial news to subscribers. Its main product was the "Dow Jones Industrial Average," a stock index computed on the basis of current stock prices for various companies selected by Dow Jones' editorial board, which Dow Jones made available to the public in its publications. 546 F. Supp. at 113-15. Dow Jones also licensed to various financial entities, including the Board, the right to trade futures contracts based on the Dow Jones Average and to display the Dow Jones Averages on trading floors on a continuous, real-time basis. However, Dow Jones alleged that the licensing agreement reserved Dow Jones' right to disseminate information within the first 24 hours, and that the Board went beyond the licensing agreement by disseminating approximately 2000 copies of time-sensitive stock lists in its submissions to the CFTC, and for distribution to the Board's 2,052 members and approximately 50 staff. *Id.* at 117-18. To protect its monopoly on timely dissemination, Dow Jones sued the Board for copyright infringement and moved for a preliminary injunction. *Id.* at 113, 115. The Board raised several defenses including that Dow Jones had no copyright in the stock indexes, that the licensing agreement allowed Dow Jones' dissemination, and that Dow Jones' dissemination was fair use.

Holding: The court found Dow Jones' lists of component stocks were copyrightable because Dow Jones did not merely display information, but exercised effort and judgment

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in selecting companies and compiling their stocks in order to make the Dow Jones Average an accurate mirror of current market movements and an accurate reflector of market history. *Id.* at 116. However, the court denied Dow Jones' motion for a preliminary injunction, finding insufficient likelihood of success on the merits, in part because the Board had a strong fair use defense. (1) The court found that by submitting Dow Jones' stock averages to the CFTC and to Board members, the Board did not have a commercial purpose and was not using the timely information to trade on futures. *Id.* at 119-120. However, the court declined to classify the Board's use as falling under the favored purposes of "comment," "news reporting," "research" or "education" because submitting the information was not strictly necessary for accomplishing the Board's purposes—the CFTC did not actually *require* the Board to submit timely Dow Jones averages in order to engage in trades. *Id.* at 120. So the court found that despite a non-commercial motive, factor one weighed against fair use. (2) The court found that Dow Jones' averages, while not simply lists of data, contained information that was useful only in the complete component list form, and so this weighed in favor of fair use. *Id.* at 120. (3) The court found the Board copied the whole component lists, but that even if they could be deemed complete works, taking the whole work should not preclude fair use especially because the information was only useful in its complete form. *Id.* at 120-21. (4) Dow Jones failed to demonstrate that the Board's use harmed Dow Jones' markets in sales or licensing, nor that the use would impair the integrity of the lists. The Board was not a direct competitor with Dow Jones, which made it even less likely that the Board's use would injure Dow Jones' markets. *Id.* Furthermore, given the unique character of Dow Jones' index including the impossibility of using less than all of it, the instant case provides one of the "very limited situations in which copying of even the entire work for a different functional purpose may be regarded as a fair use." *Id.* at 122. (citing *Nimmer and Nimmer*, 13.05(B) at 13-62, 13-63, describing productive uses that justify taking an entire

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work). That is, the court concluded (under factor four) that the Board's use was "productive" and therefore likely fair use. *Id.*

In sum, despite finding that the Board's distribution of Dow Jones' stock lists did not constitute a favored purpose under the statute, the court found that the Board's dissemination of the entire list was for a new purpose, requiring use of the entire work, and was therefore fair use.

Factors Weighing In Favor of Fair Use

- Defendant's use was not commercial but for the purpose of regulatory compliance
- Plaintiff's information was only useful in its entirety
- Defendant was not in competition with plaintiff
- Defendant was engaged in a distinct, 'productive' activity
- Plaintiff failed to show defendant's copying harmed its market

Factors Weighing Against Fair Use

- Defendant's use was not one of the enumerated preferred uses
- Defendant used plaintiff's work in its entirety

Subsequent Use: *Dow Jones* has received relatively limited citation from subsequent courts. The district court in *Moody's*, below, however did cite to *Dow Jones* for the proposition that "[a]uthors of compilations . . . must be held to grant broader licenses for subsequent use than persons whose work is truly creative." *Financial Information, Inc. v. Moody's Investors Service, Inc.* 599 F. Supp. 994, 997 (citing to *Dow Jones*, 546 F. Supp. at 120).

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4. Financial Information, Inc. v. Moody's Investors Service, Inc., 751 F.2d 501 (2d Cir. 1984)

Quick Holding: For-profit financial publisher's reproduction and distribution of competitor's data was not fair use.

Case in Context: *Moody's* and *NADA Services* are both cases involving for-profit data companies that copied competitors' data and incorporated it into their own informational services. Both defended that their use was fair because it enhanced access to the data contained in plaintiffs' compilations. Here, in *Moody's*, the fair use defense failed. In *NADA Services*, below, the defense succeeded.

Facts: Plaintiff FII published financial information about municipal bonds and issuing municipal authorities. 751 F.2d at 502-503. It provided daily financial summaries to financial institutions, libraries, and government agencies, for a \$279 annual subscription. *Id.* Defendant Moody's Investor's Service was in the same business, but offered a slightly different service. Its publications contained only municipal bond information relating to securities it also independently rated. *Id.* Moody's publication also provided a significant amount of information not offered by FII, and charged about three times FII's price. *Id.* FII accused Moody's of copying its published summaries for Moody's own service. After planting errors in its data and finding they appeared frequently in Moody's publication FII sued Moody's for copyright infringement. *Id.*

Procedural History: The district court had found that Moody's qualified for fair use because (1) Moody's was performing an important public function in providing the information; (2) the financial compilations were far more factual than creative; (3) Moody's also monitored the same information and (according to the trial court) only

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actually copied 1% to 2% of its data directly from FII reports; and (4) there was no market harm because Moody's market was separate from FII's, and FII failed to produce evidence of harm to subscriptions. *Id.* at 504.

Holding: The Second Circuit reversed, finding that Moody's use of the data was not fair. *Id.* at 502. (1) The court emphasized the recent rule in *Sony* that commercial use required a presumption that the use was unfair. *Id.* at 508. The court found Moody's use commercial and rejected the trial court's determination that Moody's use was transformative or otherwise served a separate "public function," because the information was already available for a lower price from FII. *Id.* at 508-09. (2) The court also rejected that the highly factual nature of FII's data weighed entirely for Moody's, because Moody's was also using the facts to make a factual compilation—undercutting the reasoning that more protection was required for the secondary work than the original. *Id.* at 509. (3) As to amount taken, the court was persuaded by FII's expert opinion that Moody's copied rather than independently created at least 40-50% of the time and found this weighed against fair use. *Id.* (4) On market harm, the court reiterated the *Sony* presumption of market harm for commercial uses and also found that the parties were in fact competing in the same market despite providing slightly different services. Finally, the court found harm to a potential licensing market for FII's information. *Id.* a 509-10.

In sum, the court found the use unfair despite the highly factual nature of the copied information and Moody's role in disseminating that information, mainly because Moody's competed in the same market as FII and failed to rebut the presumption that its copying would harm FII's primary and licensing markets for its data.

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Analysis: *Moody's* is an illustration of a failed attempt at a fair use defense based on promoting access to information. While *Moody's* tried to depict its copying for the purpose of marketing an expanded data service as serving a separate "public function," the court did not agree with this argument. Instead, the court found that *Moody's* was not providing a distinct and socially valuable service by enhancing the public's access to the data: rather, *Moody's* was simply exploiting the hard efforts of a competitor and thereby obtaining economic advantage in the same market. The court's negative findings on all four factors can be explained by this general perception of *Moody's* activities as exploitative and merely repetitive of FII's, and therefore not deserving of a statutory exemption from copyright infringement.

Factors Weighing Against Fair Use

- Defendant published its infringing financial reports for profit
- Defendant's reports served a similar function as plaintiffs in a similar market
- Though plaintiff's work was highly factual, defendant's was also factual
- Defendant competed in the same market and profited
- Defendant's use threatened plaintiff's potential licensing market

Factors Weighing In Favor of Fair Use

- Defendant's dissemination of the information served a useful public function
- Defendant provided a distinct service and did not compete directly in plaintiff's market
- Plaintiff's financial reports were primarily factual not creative
- Plaintiff's financial information was available from other public sources
- Plaintiff showed no evidence of decreased subscriptions to service

Subsequent Use: *Moody's* received considerable attention in other cases, including other "learning promoting" fair use cases. See, e.g. *Weissmann v. Freeman*, 868 F.2d 1313, 1323; *N.A.D.A. Services Corp. v. Business Data of Virginia, Inc.*, 651 F. Supp. 44, 48. Most notably, however, the Supreme Court, in *Feist Publications, Inc. v. Rural Telephone*

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Service Co., cited Judge Newman’s concurring opinion in *Moody’s* as support for the fact that the Second Circuit repudiated its traditional theory that an author’s diligence and “sweat of the brow” alone was sufficient to secure copyright protection. *See* 499 U.S. 340, 360 (1991) (citing to *Moody’s*, 751 F.2d at 510).

5. N.A.D.A. Services Corp. v. Business Data of Virginia, Inc., 651 F. Supp. 44 (E.D. Va. 1986)

Quick Holding: For-profit vehicle valuation company’s reproduction and distribution of other valuation company’s data was fair use.

Case in Context: *Moody’s* and *NADA Services* are both cases involving for-profit data companies that copied competitors’ data and incorporated it into their own informational services. Both defended that their use was fair because it enhanced access to the data contained in plaintiffs’ compilations. Here, in *NADA Services*, the defense succeeded. Above, in *Moody’s*, the fair use defense failed.

Facts: Defendant Business Data of Virginia (BDV) was a for-profit business that provided vehicle valuation information in computer-generated documents to various governmental departments in Virginia, which then used the information for tax return purposes. *See id.* at 46-47. Plaintiff NADA published a copyrighted guide containing data on the value of vehicles, and also published much of the information onto tapes. *Id.* at 46. Defendant BDV had been obtaining some of its data from tapes it purchased from NADA. *Id.* at 47. However, when NADA stopped selling the tapes and instead began licensing a tape-version of the guide, BDV simply began copying the information from plaintiff’s paper guides, and incorporated that information into BDV’s own documents. *Id.* NADA sued for copyright infringement. *Id.* at 45-46. Defendant argued that it was not selling the information obtained from NADA but was simply providing a service of assessing motor

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vehicles and thereby using the NADA guides as they were meant to be used: to assess the value of motor vehicles. *See id.* at 47.

Holding: The court agreed that BDV's use was fair, despite its commercial character. (1) The court did not address whether BDV's use promoted access to information under the first factor. Instead, the court simply found the use was commercial and presumptively unfair. *Id.* at 47-48. (2) The court found that NADA's factual compilation had weak protection, but that this did not help BDV because defendant BDV's use of the material was also factual in nature. *Id.* at 48. (3) The court found BDV took a "substantial" amount of information: all the average values in the Guide and fourteen percent of the models of the vehicles listed in each edition. *Id.* (4) However, on the fourth factor, the court found BDV successfully established that NADA was not impaired by BDV's copying of the information onto the tapes. *Id.* BDV presented testimony that its customers would not have purchased NADA's guides. NADA failed to allege that BDV's copying of the paper guides threatened NADA's derivative market and the licensing fees NADA received from licensing its tape-based product, and the court consequently did not address that market harm. *Id.*

In sum, despite unfavorable findings on the first three factors, the court found fair use because defendant BDV successfully showed no market harm on the fourth factor.

Analysis: The court did not examine the transformativeness of BDV's service and presumed unfairness under factor one due to BDV's commercial purpose in copying NADA's guides for its own data provision service. Nevertheless, the court ultimately treated BDV's conduct favorably, stating that BDV was simply using NADA's guides for the purpose for which they were designed: providing motor vehicle information. But the

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court's favorable assessment was due more to its perception that NADA gave implied license for BDV to use the data, rather than any perception that BDV sufficiently transformed the original work. (BDV also raised implied license as a defense, though the court rejected it due to insufficient meeting of the minds).

What is more interesting about this case is that the court placed an unusually high burden on the plaintiff to show market harm. Unlike most modern courts, which infer market harm from limited evidence and frequently examine harm to licensing markets, here the court found the defendant successfully rebutted a presumption of market harm with testimonies from plaintiffs' potential buyers and strictly required the plaintiff to claim harm to derivative licensing markets. This approach is not likely to be widely adopted.

Factors Weighing In Favor of Fair Use

- Defendant offered an informational service to state government units
- Plaintiff's guides were highly informational
- Plaintiff showed no evidence that its sales were reduced
- Plaintiff failed to allege harm to derivative markets or licensing markets

Subsequent Use: The case was cited by the Fourth Circuit in *McGowan v. Cross* for the proposition that "a use which does not materially impair the marketability of the copyrighted work will be deemed fair." 991 F.2d 790 (4th Cir. 1993) (finding fair use for landscape architect to use copyrighted house plan drawings to complete a dwelling).

6. Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)

Quick Holding: Search engine's display of thumbnail versions of plaintiff's images for use in image search was fair use because of the defendant's distinct and socially beneficial purpose in promoting access to information on the Internet .

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Case in Context: Internet search engines regularly use automated software to make copyrighted content available on the Internet. The finding of fair use in *Kelly* was very significant and explicitly shaped courts' applications of the fair use factors and sub-factors in subsequent cases. This is especially true with respect to *Kelly's* groundbreaking holding that a search engine's uses of copyrighted content could be transformative even though it mechanically reproduced whole works, because it served a different function from the originals.⁷ *Kelly* thus became an important precedent in *Perfect 10 v. Amazon.com*, a subsequent Ninth Circuit image search case.

Facts: Defendant Arriba Soft Corp. operated an internet-based image search website. *Id.* at 815. Users could visit Arriba's site, enter a search term, and would then be directed to a page that contained thumbnail versions of various images that were responsive to that term. *See id.* The low-resolution thumbnail versions of these images resided on Arriba's servers. *Id.* Arriba's software searched the internet for the originals, indexed the locations of the originals, and created thumbnails of those images to be stored on defendant's server. *Id.* When a user clicked on a thumbnail image, Arriba's website instructed the user's browser to open a frame and load the content of the original image into that frame. *See id.* at 815-16. As part of this project, Arriba indexed and converted to thumbnails Plaintiff Kelly's online photographs. *Id.* at 815. Plaintiff Kelly sued on the grounds that both the thumbnails and the framed originals were violations of copyright. *Id.* Arriba argued fair use against both allegations. *See id.* at 815-16. The district court held for Arriba, and Kelly appealed to the Ninth Circuit. *Id.* at 815.

⁷ *See* Pamela Samuelson, "Unbundling Fair Uses," 64-66.

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Holding: The Ninth Circuit found that Arriba’s use of the thumbnail images was fair use.⁸

(1) Arriba’s use of thumbnails was commercial but not highly exploitative, as they provided Arriba no direct profits. *Id.* at 818. Arriba’s use of the thumbnails was also transformative, because they served a new function from Kelly’s original work and “benefit[ed] the public by enhancing information-gathering techniques on the internet.” *Id.* at 820. (2) The second factor weighed slightly for Kelly because, while the images were creative, they were also published on Kelly’s website. *Id.* at 820. (3) While Arriba copied entire images from Kelly’s site, Arriba only took the amount necessary for its purpose, and so the third factor weighed for neither party. The court did not address size and resolution under this factor. *Id.* at 821. (4) The thumbnails did not harm the market for Kelly’s photos, because their poor resolution made them inadequate substitutes for the originals. Indeed, the thumbnails might help Kelly’s market by directing more traffic to his website. *Id.* at 821-22.

Thus, in sum, the court found fair use despite the commercial nature of Arriba’s operation based on the transformative nature of its search engine and a limited showing of likelihood of market harm.

Analysis: The court in *Kelly* took a unique view of transformativeness by not requiring a literal transformation of the copyrighted work: the thumbnails, while smaller and low resolution, were mechanical reproductions of the originals, arguably no less exact than a low-quality photocopy. Pamela Samuelson suggests the court characterized the use as

⁸ The Ninth Circuit initially held that Arriba’s framing of the full images, unlike its posting of thumbnails, was *not* a fair use. However, after some public outcry, the court withdrew that portion of its opinion, leaving only its pro-fair use analysis of the thumbnails. The Ninth Circuit was forced to re-address the framing issue four years later in *Perfect 10 v. Amazon.com, Inc.*, but the court avoided the fair use issue by finding that Google did not “display” the full-sized images by linking users to third-party sites, and therefore did not implicate Perfect 10’s copyrights at all. 487 F.3d 701 (9th Cir. 2007).

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“transformative,” rather than simply stating they had a new purpose from the original work in order to avoid a presumption of market harm. *See* Pamela Samuelson, “Unbundling Fair Uses,” 65.

Factors Weighing In Favor of Fair Use

- Defendant’s use of the thumbnails was not highly exploitative despite being commercial
- Defendant’s use of thumbnails facilitated public access to information
- Defendant only took the amount necessary, despite taking the whole image
- Defendant’s thumbnails did not substitute for the original photos in the market
- Defendant’s display of the thumbnails increased public visibility of plaintiff’s originals

Subsequent Use: *Kelly* was cited extensively by the 9th Circuit in subsequent cases involving Internet search engines, discussed below. *See Field v. Google, Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006); *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

7. Field v. Google, Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006)

Quick Holding: Search engine’s mechanical copying of entire copyrighted works, for caching purposes, was fair use.

Facts: Plaintiff Blake Field, an author and attorney, sued Google, owner of the world’s most popular search engine, asserting that by “caching” links to over fifty of Field’s works, published on Field’s website, Google copied and distributed Field’s work to the public. *Id.* at 1110. “Caching” occurred when Google’s automated search program sought new sites to include in the Google search index, and, coming upon Field’s website, “cached” a version of the site to include in search results. *Id.* at 1110-11. A user clicking

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on the link to the cached version could then view a “snapshot” of the actual webpage containing the contents as they appeared the last time Google’s program visited the page in smaller font and with a prominent disclaimer stating the user was only viewing a snapshot. *Id.* at 1110-11, 1019. This function was valuable to users trying to view websites currently unavailable or that had been lost due to computer problems. It also allowed users to determine how a particular website had changed over time and to see their search terms highlighted in snippets from the site posted in the list of search outcomes so that they understood why the program identified this particular site as relevant to their search. *Id.* at 1111-12. Website creators had the option of using technical means to prevent Google from caching their sites. *Id.* at 1112.

Holding: The district court granted summary judgment for Google, finding the caching was fair use. *Id.* at 1123. The court cited *Kelly* to support its (virtually identical) holding on each factor. *See id.* at 1118-23. (1) First the court found transformativeness because Google’s caching feature serve[d] different and socially important purposes in offering access to copyrighted works . . . and [did] not merely supercede the objectives of the original creations.” *Id.* at 1119. As to commerciality, the court held Google’s identity as a commercial operation was of “minor relevance” and that the transformativeness of Google’s use was “considerably more important.” *Id.* at 1120. (2) The court held the creativity of Field’s written works weighed only slightly in Field’s favor because Field published them on the Web, making “his works available to the widest possible audience for free.” *Id.* (3) The court found that though Google reproduced Field’s entire works, this factor was neutral because it was mitigated by the transformativeness of Google’s copying. The court cited both *Sony* and *Kelly* for the proposition that mechanical reproduction can be fair use when the new use serves a different function. *Id.* at 1120-21. The amount taken was reasonable, as Google could not have accomplished the purpose of

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enhancing users' access to the web pages without taking the whole web pages. *Id.* at 1121. (4) Notably the court did not cite *Sony's* rule on presumption of market harm for commercial uses, instead finding that evidence of market harm to Field's works lacking. Field made the works available for free and received no compensation from selling or licensing. *Id.* at 1121. Moreover, there was no evidence that a market existed or was likely to develop for licensing search engines the right to allow access to website for caching purposes. *Id.* at 1122.

Analysis: Like *Kelly*, this case takes an expansive view of transformativeness. However, like the holding in *Kelly*, the court's view of transformativeness is limited by the requirement that the new use of the work not present a significant threat to the market for the original. Like *Kelly*, Field did not sell or license his works, and the court specifically noted there was no licensing market for this type of use. Therefore, *Kelly* does not raise the more controversial issue raised in the subsequent internet search engine case, involving the subscription-based photography site, Perfect 10: what happens when a search engine's posting images online threatens the copyright holder's ability to sell his works for profit?

Factors Weighing In Favor of Fair Use

- Defendant's use promoted public access to information
- Defendant's use did not supercede original use
- Plaintiff published works on Internet
- Defendant's copying of entire work was reasonable, in light of purpose
- Plaintiff demonstrated no market for his work

Factors Weighing Against Fair Use in *Field*:

- Defendant was a for-profit business
- Defendant took entirety of plaintiff's work

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- Copying was mechanical

Subsequent Use: The court's fair use analysis of caching was later cited by the district court in *Perfect 10 v. Google* as support for the assertion that local browser caching must constitute fair use. *See Perfect 10 v. Google*, 416 F. Supp. 2d 828, 852 (2006).

8. Perfect 10 v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007).

Quick Holding: A search engine posting thumbnail versions of plaintiff's photos was fair because the defendant did not exploit the plaintiff's works for profit and had a distinct and socially beneficial purpose in promoting access to information.

Case in Context: This is the latest in a series of copyright infringement cases involving the adult magazine, Perfect 10. It is also an important successor case to *Kelly v. Arriba Soft* as the Ninth Circuit here addressed copyright issues related to image search that it had originally reached in *Kelly* and later retracted. This case originated under the name, *Perfect 10 v. Google*. Despite the title of the case on appeal, the relevant defendant here is Google, not Amazon.

Facts: Plaintiff Perfect 10 operated an adult magazine that provided images of nude women to its subscribers on its website and through downloads to cell phones. *Id.* at 713. Defendant Google operated a service that (1) scoured the Internet for image files, (2) created small "thumbnail" copies of those images, (3) stored the thumbnail images on its server, and (4) made those images available to users through Google's image search feature. *See id.* at 711-12. Users could view the thumbnail images stored on Google's server, or users could click a link that allowed them to view the full size image on the original third party websites, but within a browser frame. *Id.* at 712. Some of images

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Google scoured from the Internet were pirated copies of nude images that belonged to Perfect 10. Perfect 10 sued for copyright infringement on two grounds: (1) that Google was publicly displaying or distributing its full-size images by linking-to and framing the full-size images on infringing third party websites and (2) that Google's thumbnails were infringing displays or reproductions. *See id.* at 710, 715-19.

Procedural History: The district court found that Google was not liable for framing the images from the third-party sites, because this was not a "display" under the Copyright Act. *See id.* at 710. The district court did, however, find Google's posting of thumbnail images, which were stored on Google's servers, was not fair use and granted a preliminary injunction. *Id.* On appeal, Google asked the 9th Circuit to decide whether Google's linking to full-size images was a "display" or "distribution" implicating Perfect 10's copyrights, and whether Google's use of the thumbnails was fair use. *See id.*

Holding: The Ninth Circuit upheld the district court's findings that Google had not "displayed" or "distributed" full-size images by framing the images from the third-party sites. *Id.* at 716-19. However, the court vacated the injunction and reversed the district court's finding that the thumbnail images were not fair use. *Id.* at 719. (1) Although Google profited from its advertising program, factor one weighed for fair use because the transformative nature of Google's use outweighed its "minor" commerciality. *Id.* at 723. As to transformativeness, the court followed *Kelly* in finding that Google's thumbnails served an entirely new function. *Id.* While the purpose of the original photos was entertainment, Google's image search transformed the images into pointers directing users to sources of information, thereby benefiting the public interest by improving public access to information. *Id.* at 721. As to commerciality, the court found that the use, while commercial, did not directly exploit Perfect 10's images for profit because Google made

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profits off advertising, which could not be directly linked to Google's use of Perfect 10's images. *Id.* at 722-23. (2) The creative nature of the photos weighed only slightly in favor of Perfect 10 because they were published online. *Id.* at 723-24. (3) The third factor favored neither party. Although Google took the whole image, it used a low-resolution thumbnail-size photo, thus using only the amount necessary to accomplish the functionality of Google's search engine. *Id.* at 724. (4) The Ninth Circuit found that market harm could not be presumed because Google's use was transformative and, as Perfect 10 failed to produce sufficient evidence of market harm, the fourth factor favored neither party. *Id.* at 725. The court followed *Kelly* in holding that thumbnail versions of the photos did not affect Perfect 10's ability to sell or license full-size images. *Id.* at 724. As to Perfect 10's argument that it had a derivative market for small images sold on cell phones, the court held Perfect 10 showed insufficient evidence that Google users substituted Google's thumbnail images for Perfect 10's cellular downloads. *Id.* at 724-25.

After balancing the significant transformative benefit of Google's search engine against the unproven threat to Perfect 10's markets "in light of the purpose of copyright," the court found Perfect 10 was unlikely to be able to overcome Google's fair use defense. *Id.* at 725.

Analysis: The Ninth Circuit's fair use finding here presents an expanded understanding of transformativeness that takes into account Google's distinct purpose in enhancing access to information and emphasizes the beneficial public function of this new purpose. This concept of transformativeness nonetheless required that Google at least nominally transform the photos by turning them into low resolution thumbnails. Moreover, the court's conclusion that Google's use was fair overall depended on the court's

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determination that Google's thumbnails did not supplant the market for Perfect 10's full-size images.

Factors Weighing In Favor of Fair Use

- Defendant's use was for distinct purpose and was highly transformative
- Defendant's thumbnails improved public access to information
- Defendant's profits were not directly linked to use of plaintiff's images
- Plaintiff's original images were already published on Internet.
- Thumbnails were low-resolution and only took necessary amount of original
- Plaintiff's presented insufficient evidence of market harm

Factors Weighing Against Fair Use

- Plaintiff's original images were somewhat creative works
- Defendant was a for-profit business
- Defendant took entire images

Subsequent Use: The case has received considerable attention in the relatively short time since it has been decided. References to the case, however, have focused more on its discussion of inducement and contributory liability and less on fair use. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* 518 F. Supp. 2d 1197, 1234 (C.D. Cal. 2007); *Perfect 10, Inc. v. Visa Intern. Service Ass'n*, 494 F.3d 788, 795. (9th Cir. 2007).

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E. Copying of Protected Standardized Test Questions for Test Preparation Purposes

Standardized test questions constitute a special type of copyrighted work, because they are especially sensitive materials, and because disclosure could potentially destroy their value. As such, these cases represent a special body of fair use law. Within this body of law, two distinct types of uses emerge. Accordingly, the test question cases fall into one of two distinct categories: first those involving copying and distribution of protected standardized test questions for test preparation purposes, and second, those involving statutes that mandate disclosure of protected standardized test questions. Four prominent cases from the former category (“test preparation”) are summarized here. Cases from the latter category (“statutory disclosure”) are summarized in Section F.

1. Association of American Medical Colleges v. Mikaelian, 571 F. Supp. 144 (E.D. Pa. 1983).

Quick Holding: For-profit test preparation company’s verbatim copying of protected standardized exam questions was unlikely to be fair use. The court granted a preliminary injunction.

Case in Context: This was the first in a line of suits brought by standardized testing companies against private exam preparation companies that copied and distributed protected exam questions to their students. The facts and findings of the subsequent test prep cases deviate only slightly from the facts and finding (no fair use) here.

Facts: Defendant Mikaelian operated an MCAT test preparation business. *Id.* at 145. To prepare his students for the MCAT, he had acquired verbatim copies of nearly 900 MCAT questions from former administrations of the test. *Id.* at 148. The facts suggested that he had acquired these questions by taking the test himself and copying the questions word for

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word. *Id.* at 150. The test questions were copyrighted but unpublished because plaintiff AAMC, who created and administered the tests, had a practice of reusing former questions. *Id.* at 147. AAMC sued for copyright infringement, seeking a preliminary injunction. *Id.* at 145. Defendant argued fair use, amongst other claims. *Id.* at 151.

Holding: The court rejected the fair use defense before even reaching the factors, as defendant's use did not fall within one of the protected categories of activity enumerated in §107. *Id.* According to the court, Mikaelian's activities did not qualify as "teaching" because the instruction failed to bestow any degree or credential on his clients. *Id.* at 151-52. The court also denied that the use was "educational." *Id.* (1) The first factor (character and purpose) weighed for AAMC because the copying was verbatim, commercial, not educational, and took place on a massive scale. *Id.* at 152-53. (2) The second factor (nature of the original) weighed for AAMC because the MCAT questions were "original works painstakingly drafted" and were copyrighted precisely to secure the reliability and fairness of the test. *Id.* at 153. (3) Mikaelian lost the third factor (amount and substantiality) because 90% of his infringing work was copied directly from the original. *Id.* And finally, (4) he lost the fourth factor (market harm) because his use effectively "destroyed" the value of the material for the plaintiff. *Id.* The court thus concluded that plaintiff had shown a high likelihood of success in litigation, and granted the preliminary injunction. *Id.* at 153-54.

Factors Weighing Against Fair Use:

- Test questions require special protection since disclosure threatens their value
- Copying of test questions was virtually verbatim with no conversion into new form
- Test questions were acquired by deceitful means
- Copying was by a private, for-profit exam preparation company

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- Copying was frequent and systematic

Subsequent Use: The court's reasoning in *Mikaelian* has been well followed by subsequent courts when confronted with similar exam preparation cases. *See, e.g., Educational Testing Service v. Katzman*, 793 F.2d 533 (3d Cir. 1986); *Educ. Testing Service v. Simon*, 95 F. Supp. 2d 1081 (C.D. Cal 1999); *Nat'l Ass'n of Board of Pharm. v. Regents of Univ. Sys. of Ga.*, 2008 WL 1805439 (M.D. Ga. 2008) (where defendants were state university educators and officials). *Mikaelian* has been commonly distinguished, however, in cases where the defendant was a state actor requiring disclosure of standardized exam questions in order to improve the quality, fairness, or utility of the test. *See, e.g., Newport-Mesa Unified School Dist. v. Cal. Dept. of Ed.*, 371 F. Supp. 2d 1170, 1175 (C.D. Cal 2005).

2. Educational Testing Services v. Katzman, 793 F.2d 533 (3rd Cir. 1986).

Quick Holding: Circuit court held that for-profit test preparation business' copying and distribution of protected standardized questions was unlikely to be a fair use. The Court affirmed in part a preliminary injunction.

Case in Context: This was one of the few test preparation case to be heard by a Circuit Court. The facts of the case were very similar to the facts in *Mikaelian*, above. The Third Circuit cited to *Mikaelian* frequently and relied on similar reasoning in dispensing with the fair use defense. *See id.* at 539-43. *Katzman* has been cited extensively, especially among cases involving secure exam questions.

Facts: Plaintiff Educational Testing Services (ETS) was a non-profit corporation that administered a variety of national standardized tests. *Id.* at 535. Defendant Katzman

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operated Princeton Review, a test preparation business. *Id.* at 536. Katzman acquired a stolen copy of an official ETS test some years prior to this litigation, and had used it in his test preparation business. *Id.* After this was discovered by ETS, the two parties entered into an agreement whereby Katzman would return the forms and discontinue such activity in the future. *Id.* ETS subsequently came to believe that Katzman was continuing to make use of improperly acquired test questions and brought this suit. *Id.* ETS alleged verbatim copying, though the record revealed predominantly paraphrased copying. *See id.* at 540.

Holding: The district court granted a broad preliminary injunction without addressing fair use, and Katzman appealed the injunction to the Third Circuit. *Id.* at 535. The Third Circuit found the preliminary injunction problematic for various reasons, but declined to vacate the injunction entirely, as none of the doctrines defendants had invoked on appeal demonstrated a likelihood of success on the merits. *Id.* at 543. The court expressed serious doubt that defendant's behavior even qualified as "teaching" within the meaning of the statute. *Id.* The court treated this point as a threshold matter which might have foreclosed the fair use discussion, but proceeded with a very brief four factor analysis nonetheless. *Id.* (1) The use was highly commercial. *Id.* (2) The court did not address the creative or factual nature of the original work, nor whether it was published or unpublished. *See id.* The fact that the original work was a "secure test" tipped the second factor for ETS. *Id.* (3) The copied material was not the "heart of the work" but was also not "insubstantial." *Id.* Finally, (4) though Katzman was not competing with ETS, his use rendered the original material valueless to ETS. *Id.* All four factors seemed to weigh for plaintiff ETS, and accordingly the Third Circuit affirmed the preliminary injunction in part. *Id.* at 547.

Analysis: The Third Circuit adopted essentially the same reasoning, with respect to fair

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use, that the district court had used in *Mikaelian*. The secure nature of the test, and the alleged impropriety of defendant's acquisition permeated the analysis. The Third Circuit's analysis here was very brief and, as a result, quite conclusory at some points.

Factors Weighing Against Fair Use:

- Defendant's activity may not have qualified as "teaching"
- Defendant's use was highly commercial
- Original works were secure tests
- Defendant's use rendered original material valueless

Subsequent Use: *Katzman* is perhaps the most widely cited case pertaining to secure exam questions. Nearly all subsequent cases in the "test preparation" category (category F) as well as the "statutory disclosure" category (category G) have cited to *Katzman*. See, e.g. *Educational Testing Service v. Simon*, 95 F. Supp. 2d 1081, 1084; *Boards of Pharmacy*, 2008 WL 1805439, 22; *AAMC v. Carey*, 728 F. Supp. 873, 880; *Educational Testing Service v. Miller*, 1991 WL 212181, *4. And many of the courts in these subsequent exam question cases have followed the Third Circuit's lead in quickly dispensing with fair use arguments. One court that dealt with a fair use argument pertaining to protected exam questions in a different context declined to extend *Katzman*. *Newport-Mesa*, 371 F. Supp. 2d 1170, 1175. That case is summarized in Section F.

3. Educational Testing Services v. Simon, 95 F. Supp. 2d 1081 (C.D. Cal. 1999).

Quick Holding: For-profit test preparation company's copying and reuse of protected standardized exam questions was not fair use.

Case in Context: The facts of this case fall in line with the fact pattern from *Mikaelian*

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and *Katzman*, above. Unlike *Mikaelian*, however, there was no allegation here that the defendant copied the test questions verbatim. Also, the court's fair use analysis here does not exhibit the thoroughness and structure that such analyses typically exhibit.

Facts: Defendant Simon operated a for-profit test-preparation business, aimed at elementary school teachers who were required to take a specific standardized test as part of their credentialization process. *See id.* at 1083, 84. Simon was aware that plaintiff ETS, who had developed and administered the test, commonly recycled test questions into later tests. *Id.* at 1085. Simon obtained information regarding the content of test questions from students (often clients) who had taken the test and reported back to him, sometimes verbally, sometime in writing. *Id.* at 1085, 86. Defendant Simon then used that information to craft similar questions to use in preparing future clients for the test, and represented to their clients that they would use practice questions that resembled questions they might confront on the actual test. *Id.* at 1086. ETS sued for copyright infringement, but made no allegation of verbatim copying. *See id.* at 1088.

Holding: The court did not perform a structured fair use analysis, nor did it explicitly state that defendants had raised a fair use defense. *See id.* at 1090. It did, however, observe that Congress had gone out of its way to say that special protection should be provided for secure standardized tests. *Id.* (citing to S. Rep. No. 141, 102d Cong., 1st Sess. 6 (1991)). The court also quoted Ralph Oman, a former Registrar of Copyrights, who had observed, during his 1991 testimony before the Senate, “[S]o far as we are aware, the courts have never upheld a fair use claim advanced by any private entity with regard to copying of secure tests or test questions.” *Id.*

Analysis: The *Simon* court extended the rule from *Mikaelian* so as to prohibit not just verbatim copying, but also approximate copying of protected exam question for private

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test preparation.

Factors Weighing Against of Fair Use

- Congress gave special protection to secure test questions
- Courts had never upheld a fair use claim with regard to secure test questions

4. National Association of Boards of Pharmacy v. Regents of University System of Georgia, 2008 WL 1805439 (M.D. Ga. 2008).

Quick Holding: University's verbatim copying and use of protected standardized test questions for test preparation course was not a fair use.

Case in Context: This case was the most recent addition to the *Mikaelian* line of test preparation cases. The defendants here were officials and staff of a state university. The infringing activity, however, was essentially the same as that found in *Mikaelian* and *Simon*, and was unfair for the same basic reasons. The case has not yet been referenced by any other courts.

Facts: Plaintiff organization, Board of Pharmacy ("Board"), developed and administered a national pharmacist credentialing exam, and held copyrights in the unpublished test questions that constituted the exam. *Id.* at 1. Defendants taught exam preparation courses for pharmacy students at the University of Georgia. *Id.* When the Board acquired copies of defendants' exam preparation materials, they found that over 633 of defendants practice questions were either verbatim, or nearly verbatim, copies of actual copyrighted exam questions. *Id.* Defendants made a practice of acquiring exam questions from pharmacy students who took the exam. *Id.* In fact some pharmacy students had received academic credit for acquiring and compiling exam questions. *Id.* at 2. The Board investigated defendants for similar activity in the past, but had resolved the matter by signing a cease

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and desist agreement. *Id.* The Pharmacy Board sued here for copyright infringement, and defendants argued fair use. *Id.* at 22.

Holding: The court performed a very brief fair use analysis, which roughly tracked the reasoning from *Mikaelian*. *See id.* at 22, 23. (1) The court was not convinced that defendants activity qualified as “teaching” within the meaning of the fair use clause. *Id.* at 23. The purpose was commercial because instructors allegedly sold the protected material to students, and copied questions verbatim. *See id.* (2) The originals were intended to be secure, unpublished exam questions. *See id.* (3) The amount taken was substantial, and the text was often copied verbatim. *See id.* And (4) the consequent insecurity of the exam questions destroyed their value to plaintiffs. *See id.* All four factors weighed in favor of plaintiff, and defendants’ prior copyright litigation history indicated to the court that defendants were well aware that their use was unfair. *Id.* Accordingly the court quickly concluded that the fair use defense failed. *Id.*

Factors Weighing Against Fair Use:

- Test questions require special protection because disclosure threatens their value
- Defendants copied test questions verbatim
- Defendants acquired test questions by deceitful means
- Copying was by a private, for-profit exam preparation company

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F. Required Disclosure of Standardized Test Questions by Statutory Schemes

Standardized test questions constitute a special type of copyrighted work, because they are especially sensitive materials strongly protected by their owners, and because disclosure could potentially destroy their value. As such, these cases represent a special body of fair use law. Within this body of law though, two distinct types of uses emerge. Accordingly, the test question cases fall into two distinct categories: first, those involving copying and distribution of protected standardized test questions for test preparation purposes, and second, those involving statutes that mandate disclosure of protected standardized test questions. Prominent cases from the *latter* category are summarized here.

1. Association of American Medical Colleges v. Cuomo, 928 F.2d 519 (2nd Cir. 1991).

Quick Holding: Lower court had failed to properly consider state's expert testimony in fair use analysis, and thus the state's fair use defense warranted reconsideration by the lower court on remand.

Case in Context: This is one in a series of suits between New York state and various standardized testing companies. The suits all pertain to the state's Standardized Testing Act, which required disclosure of exams in order to increase quality and ensure fair testing procedures. This litigation had been underway for nearly a decade at the time of the Second Circuit's decision. *Id.* at 521. The district court had rejected New York's fair use defense and granted summary judgment for the testing companies. *Id.* at 520. The Second Circuit, here, reversed in part and remanded. *Id.* at 521.

Facts: New York State's Standardized Testing Act required the disclosure of medical school admissions test questions and related materials in order to increase reliability and

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fairness of testing procedures. *Id.* at 521, 22. Plaintiff organization (“AAMC”), which administered the MCAT exam nationally, sought a declaratory judgment that the act was preempted under federal Copyright Law, and that the act interfered with federally granted ownership rights in copyright material. *Id.* at 522. Defendant New York state (“State”) argued, that the act’s disclosure provisions were protected under fair use. *Id.* at 521.

Holding: The Second Circuit reversed the lower court’s finding that use was not fair and vacated the injunction against defendant. The Second Circuit found that most of the factors favored fair use, and remanded to the district court on one factual issue. *Id.* at 521. (1) The lower court’s findings on the first factor – that the use was non-commercial and for a laudable social purpose – were left undisputed by either party, so the court left that finding undisturbed. *Id.* at 524. (2) The second factor had correctly favored plaintiff AAMC at trial. The court, however, strengthened that finding by adding that it found the MCAT tests to be “creative, imaginative, and original.” *Id.* (3) The third factor was also left undisturbed, as both parties had agreed that the Act required substantial disclosure from plaintiff. *Id.* at 525. (4) The fourth factor, however, is where the Second Circuit parted ways with the lower court, agreeing with the State’s expert testimony that disclosure of test questions did not necessarily make the questions unusable in subsequent tests. Thus, there was not enough evidence of market harm. *Id.*

In sum, the Second Circuit reversed the finding of no fair use and remanded to further examine the State’s evidence that there was no market harm. *Id.* at 525-26.

Factors Weighing in Favor of Fair Use:

- Statute’s use was non-commercial and clearly in public interest
- Expert testimony suggested disclosure would not harm market

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Factors Weighing Against Fair Use:

- Test questions were creative, imaginative, and unpublished
- Statute called for disclosure of *all* test questions.

Subsequent Use: The Supreme Court subsequently denied *certiorari*, 112 S.Ct. 184, and there is no record on remand. Thus the final consequences of this litigation are somewhat unclear. Outcomes of related litigation, however, suggest that the parties settled on some limited disclosure of testing materials. This case was cited extensively in (and distinguished by) the closely related case, *College Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554 (N.D.N.Y. 1995). The district court in *Newport-Mesa*, declined to extend the Second Circuit's reasoning here. 371 F. Supp. 2d 1170, 1175-76.

2. College Entrance Examination Bd. v. Pataki, 889 F. Supp. 554 (N.D.N.Y 1995).

Quick Holding: State statute requiring full disclosure of standardized test questions was not protected by fair use.

Case in Context: This case arose in response to the same New York state statute that sparked the litigation in *Cuomo*, above. The district court here was not as tolerant of the state's fair use defense as the 2nd Circuit had been in *Cuomo*. The case has not been extensively cited or relied upon in subsequent cases.

Facts: New York State's Standardized Testing Act required the disclosure of various standardized testing materials by the organizations that researched, prepared, and administered standardized tests within the state. *See id.* at 558. The law was aimed to

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ensure the validity and reliability of the tests and to guarantee that they were in no way discriminatory against some groups of test takers. *See id.* at 567. Plaintiffs (collectively “CEEB”) administered and held copyrights to various standardized tests. *Id.* at 557. CEEB sought a preliminary injunction and declaratory judgment that the act conflicted with exclusive rights granted under federal copyright law. *Id.* at 557, 58. The State defended that the act’s disclosure provisions were protected under fair use. *See id.* at 562.

Holding: The court found that the first factor (1) weighed equally for both parties. The use would be non-commercial and would clearly serve the public good, favoring the State; yet the use was also verbatim and non-transformative (favoring CEEB). *Id.* at 566-68. The second factor (2) favored CEEB: “[g]iven the secure nature of these materials, the creativity involved in their development and compilation, and the special consideration normally afforded unpublished works, the court conclude[d] that [the second] factor weighs heavily in favor of the moving plaintiffs.” *Id.* at 568, 569. The third factor (3) also favored CEEB, as the law required disclosure of *all* testing material. *See Id.* at 569-71. The court entertained a *Sony*-based argument that complete reproduction of the original was sometimes permitted under fair use, but distinguished *Sony* and rejected the argument. *Id.* at 570, 71 (*citing Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50). Finally, the fourth factor (4) also weighed for CEEB, as there was insufficient empirical evidence to support the State’s contention that disclosed test questions could still be reused on future tests. *Id.* at 571-75. CEEB also alleged a harm to the licensing market, which defendants apparently did not contest. *See id.* at 573. In sum, the court found three factors for plaintiffs CEEB, determined CEEB were likely to succeed on the merits in litigation, and granted the preliminary injunction. *Id.* at 575.

Analysis: The court’s conception of “transformativeness” here is notably very narrow.

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Although the State planned to use the protected material for a very different purpose than plaintiffs, the court nonetheless found the use non-transformative, based upon the fact that the State was not transforming the literal text of the protected material. Also, the court presumed the existence of market harm and burdened defendants with the task of demonstrating that their use did not harm plaintiff's market. Whether defendants or plaintiffs bear this type of burden is one of the many unsettled aspects of fair use.

Factors Weighing In Favor of Fair Use

- Use was noncommercial
- Use would serve the public good

Factors Weighing Against Fair Use:

- Use involved verbatim copies of text
- Test questions were creative and unpublished
- Use required disclosure of *all* test materials
- Defendant failed to rebut presumption of market harm

3. Newport-Mesa Unified School District v. California Department of Education, 371 F. Supp. 2d 1170 (C.D. Cal 2005)

Quick Holding: State law requiring school districts to disclose standardized testing materials to parents would not cause school district to violate copyright because use would be protected as fair use.

Case in Context: This case was an outlier among the various cases involving state statutes requiring disclosure of standardized testing materials. The company that administered the tests here did not initiate the litigation, though did later intervene. 371 F. Supp. 2d at 1174. The purpose of the statute here, while still in the public interest and still

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requiring disclosure of test material, was very different than the purpose of the New York state statute in *Cuomo* and *Pataki*. *Id.* at 1173. And the court found that the statute fell within the bounds of fair use, “contrary to the body of law on competitive admission testing.” *Id.* So far this case has only been cited by one other court.

Facts: The California State Education Code required that school districts provide parents of special education students with protocols regarding standardized achievement tests. *Id.* (Protocols refer to completed paper test materials, questions, and student answers.) *Id.* at 1175, n.5. Plaintiff, a California school district, failed to provide the materials to a parent, and was thus out of compliance. *Id.* at 1173. The school district sought a declaratory judgment that the state law would force the district to violate the rights of the test publisher who held the copyrights to the protocols in question. *Id.* The test publisher intervened to assert its copyright interest. *Id.* at 1174. The state argued that the use required by the state law was protected by fair use and was thus not infringement. *See id.* at 173. Both parties moved for summary judgment. *Id.* at 1173.

Holding: The court found all factors weighing in favor of defendant, state of California. *See id.* at 1176-79. (1) The intended use by parents of special education students was non-profit, educational use not for commercial gain.” *Id.* at 1176. The court distinguished this from “highly commercial” uses of test questions by exam preparation companies like Princeton Review. *Id.* (citing *Educ. Testing Services v. Katzman*, 793 F.2d 533, 543 (3d Cir. 1986)). The court found the use was “transformative” because the law mandated disclosure of tests with identifiable students’ answers, not identical reproduction of copyrighted test materials. *Id.* Even if not transformative, the court found the use promoted education of special education students and was thus “in the public interest.” *Id.* The court cited the Supreme Court’s statement in *Sony Corp. v. Universal City Studios*,

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464 U.S. 417, 545, 455, n. 40 (1983), that copying can be fair use when it “yields societal benefits,” and also cited *Key Maps v. Pruitt*, 470 F. Supp. 33, 37-38 (S.D. Tex 1978), holding copying fire zone maps was fair use in light of the public interest in fire prevention. *Id.* at 1176-77. (2) The court bent the second factor in favor of fair use, holding that test questions are normally considered creative and original, but “with the addition of a student’s answers, the questions and answers are informational in nature[.]”*Id.* at 1177-78. (3) The amount to be copied was no more than necessary for the purpose of assessing the student’s educational needs, and thus the third factor also weighed in favor of fair use. *Id.* at 1178. (4) And finally the court found the plaintiff showed no “meaningful likelihood” that the disclosure harmed any market for the tests or threatened the security of the test-taking process, so the fourth factor favored fair use. *Id.* at 1178-79. As a final consideration, the court observed that parents were already able to view the test protocols in the school offices, and compared the additional step of conveniently providing parents with a copy to the time-shifting of television shows allowed in *Sony*. *Id.* at 1179 (464 U.S. at 449).

In sum, the court found fair use because disclosing text questions and answers to parents of special education children was for non-profit educational purposes and in the public interest.

Analysis: The court in *Newport-Mesa* used an expansive view of transformativeness and applied various precedents holding that uses requiring exact reproduction of copyrighted material can be fair when they are in the public interest. This represents a dramatic departure from the first factor reasoning in *Cuomo*, and *Pataki*, above, where the courts were reluctant to find wholesale copying of test materials transformative. The court here even leveraged transformativeness as a consideration in the second factor analysis,

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suggesting that student responses on the test forms transformed the nature of the originals.

This was also

Factors Weighing In Favor of Fair Use

- Defendant's use was non-profit, personal, and in the public interest.
- Student responses on test forms made original work more informative, less creative
- Defendant copied no more than necessary
- Plaintiff presented no evidence of harm to market for tests or threat to integrity of testing process

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