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An Empirical Analysis of Learning-Promoting Fair Use Case Law

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
A. PURPOSE OF THE STUDY	1
B. LEARNING-PROMOTING USES	1
C. METHODOLOGY	2
D. STRUCTURE OF THE STUDY.....	3
II. INTRODUCTION TO COPYRIGHT LAW AND FAIR USE.....	5
A. RIGHTS AND REMEDIES OF COPYRIGHT OWNERS UNDER THE COPYRIGHT ACT	5
B. EXPLICIT STATUTORY EXEMPTIONS FOR SOME LEARNING-PROMOTING USES	5
C. INTRODUCTION TO FAIR USE.....	7
D. THE STRUCTURE OF A FAIR USE ANALYSIS	8
III. ANALYSIS OF LEARNING-PROMOTING CASE LAW AS A WHOLE.....	16
A. RESULTS REGARDING FACTOR ONE: PURPOSE AND CHARACTER OF THE USE	16
B. RESULTS REGARDING FACTOR TWO: NATURE OF THE COPYRIGHTED WORK	24
C. RESULTS REGARDING FACTOR THREE: AMOUNT AND SUBSTANTIALITY OF THE PORTION USED	27
D. RESULTS REGARDING FACTOR FOUR: EFFECT ON THE POTENTIAL MARKET OR VALUE OF THE WORK.....	27
IV. ANALYSIS OF THE CASE LAW BY CATEGORY.....	33
A. INDIVIDUAL TEACHERS COPYING FOR INSTRUCTIONAL PURPOSES	33
B. INSTITUTIONS ENGAGED IN SYSTEMATIC COPYING FOR EDUCATIONAL OR RESEARCH PURPOSES.....	40
C. AUTHORS COPYING IN CRITICAL COMMENTARY AND SCHOLARLY ANALYSIS.....	50
D. COPYING THAT PROMOTES ACCESS TO INFORMATION	63
E. COPYING OF PROTECTED STANDARDIZED TEST QUESTIONS FOR TEST PREPARATION PURPOSES.....	77
F. REQUIRED DISCLOSURE OF STANDARDIZED TEST QUESTIONS BY STATUTORY SCHEMES	83
V. SECONDARY SOURCES	89
A. STATUTORY SOURCES AND LEGISLATIVE HISTORY	89
B. LAW JOURNAL ARTICLES.....	89

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I. INTRODUCTION

A. Purpose of Study

Educators and educational institutions regularly engage in copying and frequently rely on fair use to avoid liability for copyright infringement. Yet fair use is an inherently unpredictable defense. The main way to predict whether a particular use is fair is to examine how courts have decided on similar cases in the past. The purpose of this study is to summarize, analyze and categorize fair use cases relevant to educational uses of copyrighted material, to extract salient factors that affected the outcomes of those cases and, where possible, to locate salient factors and trends that apply within certain categories of uses or across the whole body of educational fair use case law. This study should add clarity to this area of law and may help interested parties predict which types of educational uses will qualify as fair use in the future and which will not.

B. Learning-Promoting Uses

The area of inquiry for this study is fair use case law pertaining to educational uses of copyrighted content in a wide variety of real-world contexts. The following are just a few examples of educational uses that may or may not qualify as fair use within the current state of the doctrine: (1) teachers copying course materials to distribute to students; (2) teachers and institutions posting courses or course materials on their websites; (3) authors and scholars quoting copyrighted content in books, articles and blogs; (4) publishers and producers using copyrighted content in educational texts and other media; (5) public and private libraries copying for patrons or affiliates; (6) educators and educational institutions making copyrighted content available to the public online.

In order to better understand how fair use applies to such uses, this study gathers and discusses a wide range of fair use precedents. This body of opinions might be referred to as “educational” fair uses. However, due in part to the relatively small number of fair use cases that specifically involve individual teachers and educational institutions as defendants, some of the cases analyzed in this study take place outside formal educational contexts or do not directly relate to education at all. Yet the outcomes of these cases and the trends they indicate may help

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predict future outcomes or serve as valuable precedents. Accordingly, we use the broad term “learning-promoting” fair uses to encompass this whole body of case law.¹

C. Methodology

We began with a list of all fair use cases decided since the Copyright Act of 1976 (1976 Act) took effect and added a handful of cases decided prior to the 1976 Act. We amended this list to exclude cases that were clearly not pertinent to our inquiry and to include cases not explicitly related to education, but whose precedents potentially have important implications for educational users. At this point the list included approximately 70 cases. We read these cases and dismissed those that were too peripheral to education to be useful, that had been overturned, or that were redundant to other cases. We were left with a list of 33 cases with which to inform our study.

We sorted these 33 cases into six distinct categories based on the context in which the alleged infringement occurred, the entity that performed the copying, or other common features that made it useful to analyze the cases together. We then drafted structured summaries of each case. The summaries include, among other things, the case facts and outcome, a factor-by-factor explanation of the court’s fair use analysis, and important precedents that emerge from the case.

Next, we analyzed each category of cases as a whole, seeking trends and common features in courts’ analyses of the cases and in the outcomes of those analyses. For each of the six categories, we drafted an analysis that describes the category and indicates trends and common features that emerged across the category. Each category analysis is structured based on the four factors and multiple sub-factors that courts generally consider in fair use opinions, but is slightly tailored to the specific elements courts considered within that category.

¹The 1976 Copyright Act implies that uses of copyrighted content for the purposes of “criticism, comment, [...] teaching [...] scholarship, or research” are more likely to be fair use. 17 U.S.C. § 107. The statute also indicates courts should look favorably on uses for “nonprofit educational” purposes. § 107 (1). The term “learning-promoting” encompasses not only these favored uses, but also uses that have been classified by scholars, though not by courts, as “access to information-promoting” uses. *See* Pamela Samuelson, “Unbundling Fair Uses” 64-68, 37-43 (2008), <http://ssrn.com/abstract>. Our use of this broad term is primarily for the sake of convenience and should not be interpreted to mean that courts do not distinguish between learning-promoting uses that fall within favored categories and those that do not.

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Finally, based on our category-by-category analyses, we drafted a high-level summary and discussion of trends and patterns observable across the entire body of learning-promoting fair use case law.

D. Structure of the Study

1. Basics of Copyright Law

Part II lays out the basic protections afforded by the 1976 Copyright Act. It also discusses statutory exemptions and guidelines that Congress provided for certain educational uses of copyrighted materials. However, it only briefly mentions the four major statutory exemptions, for teachers, distance learning courses, libraries, and public broadcasters, respectively, because they are laid out in detail elsewhere and, as discussed below, they do not provide significant protection in many modern learning-promoting contexts. Part II also introduces the doctrine of fair use codified in the 1976 Act and lays out the analytical structure courts typically apply in fair use opinions.

2. Empirical Analysis of Significant Trends Across Categories

Part III provides the highest-level discussion and analysis of learning-promoting fair use cases as a complete body of case law and presents our most broadly applicable findings and conclusions. The analysis in Part III builds upon the analyses of the individual categories in Part IV, consolidating trends and commonalities that we observed across multiple categories and noting important differences that emerged between categories. This high-level analysis should be especially useful for someone with prior knowledge of fair use wishing to obtain a concise but highly generalized overview of this particular area of fair use case law.

3. Empirical Analysis of Trends Within Categories

Part IV provides a category-by-category analysis of trends and patterns that emerged within the six distinct categories of learning-promoting case law that we identified. Each category analysis proceeds through the four fair use factors and multiple sub-factors courts typically consider in a fair use analysis and describes how courts applied those factors and sub-factors to the cases within the category, noting recurring trends and, where possible, precedential

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implications. These category-by-category analyses provide more detail than the broad findings laid out in Part III and should be useful for someone interested in developing more specific and in-depth knowledge of learning-promoting fair use case law.

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II. INTRODUCTION TO COPYRIGHT LAW AND FAIR USE

A. Rights and Remedies of Copyright Owners Under the Copyright Act

Under Section 106 of the United States Copyright Act of 1976 (1976 Act), owners of copyrighted works have the exclusive rights to reproduce, distribute, publicly perform, publicly display and make derivative works of their original copyrighted materials. 17 U.S.C § 106. A wide range of uses can constitute infringement of these rights. When copyright holders choose to enforce their rights, potential infringers face not only injunctions prohibiting their use of the material, but also the threat of financial liability. Sometimes damages can be quite severe. Since the passing of the 1976 Act, for instance, a court may award as much as \$150,000 in statutory damages for a single willful copyright infringement, and the amount of the award need not bear any particular relation to actual damages that the infringement may have caused. *See* 17 U.S.C. §504.

B. Explicit Statutory Exemptions For Some Learning-Promoting Uses

In drafting the 1976 Act, Congress recognized that some uses of copyrighted content benefit the public and that making them actionable infringement in all cases would produce a chilling effect on these activities. While the 1976 Act did not create a general exemption for reproductions of copyrighted works for purposes such as education, scholarship and research, the statute does limit liability in four major areas:

- Educators may make performances and displays of copyrighted works during face-to-face classroom teaching at nonprofit educational institutions (including lawfully made copies of audiovisual works). 17 U.S.C. § 110 (1).
- Educators may make performances and displays of copyrighted non-dramatic literary or musical works during digitally transmitted courses that are part of the normal offerings of a nonprofit institution or governmental body, as long as the transmitted materials are directly related to the instruction and the transmission is made for reception in a place normally devoted to instruction, or to disabled persons. 17 U.S.C. § 110 (2).

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- Non-profit libraries open to the public or to non-affiliate researchers may copy for purposes of preservation, or at the request of patrons for non-profit, research purposes, in specifically limited amounts. 17 U.S.C. § 108.
- Public broadcasting entities may pay a compulsory license fee to perform or display non-dramatic musical works and published pictorial, graphic and sculptural works in public broadcasts. 17 U.S.C. § 118.

In addition, Congress created a set of minimum guidelines (“the Congressional Guidelines”) specifically for teachers and non-profit institutions that make copies for purposes of classroom use.² As long as an educator or institution passes the Guidelines’ tests of “brevity,” “spontaneity” and “cumulativeness,” and identifies the copyright owner, they will not be liable for infringement.³ The Guidelines do not have the force of law but, if followed, provide a safe harbor.

The specific statutory exemptions and the Congressional Guidelines were intended to provide educators and educational institutions with more certainty and insulate them from liability to some extent. However, while the exemptions are reliable and clear, they represent only minimum standards that are likely narrower than is common or practical for most users. Most are outdated in the digital age. For instance, neither Section 110 nor the Congressional Guidelines addresses to what extent educators may post course materials online for classroom use. They also do not apply to for-profit entities. Thus, they may be of limited use to individuals and organizations currently engaged in or planning to engage in copying for learning-promoting purposes.⁴

² See U.S. Copyright Office, Circular 21, *Reproduction of Copyrighted Works by Educators and Librarians*, 7-8 (1995).

³ For a clear rendering of the Guidelines, see: <http://www.custompublisher.com/category/copyright-law/guidelines-for-classroom-copying>.

⁴ See William Fisher and William McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age*, Produced by The Berkman Center for Internet and Society at Harvard Law School, Research Publication No. 2006-09, 43-45 (August 10, 2006).

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C. Introduction to Fair Use

In addition to the specific statutory exemptions, Section 107 of the 1976 Act codifies the judicially created doctrine of fair use, a historic exemption to copyright infringement dating back to the 19th century. 17 U.S.C. § 107. To the extent it applies, fair use is the most important defense for those who use copyrighted material for learning-promoting purposes, but do not fall under one of the explicit statutory provisions.⁵ Congress gave several indicators that copying for teaching or educational purposes is more likely to constitute fair use.⁶ However, there is no blanket exception for such uses.⁷ Rather, a defendant must demonstrate that a fair use exception applies to her particular case. If so, then her unauthorized copying is not actionable as infringement.⁸

The statute provides a loose set of criteria for courts to consider in determining whether a particular use is fair. First, the preamble to Section 107 lists six examples of types of uses that are more likely to be permissible, stating:

“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

17 U.S.C. §107. These are sometimes referred in copyright literature as “enumerated categories of fair use” or “preambular purposes.”

⁵ Many modern uses of copyrighted materials may simply be “tolerated” by copyright holders even though they are not technically fair use. See Tim Wu, *Tolerated Use*, 31 CLMJA 617, 620 (2008).

⁶ See 17 U.S.C § 107; H.R.Rep. (1976), reprinted in U.S. Copyright Office, Circular 21, *supra* note 2, at 6-7.

⁷ Some commentators assert that statutory language and congressional intent suggest a widely applicable statutory exception for educational uses of copyrighted material, particularly making “multiple copies for classroom use.” See *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381, 1400 (6th Cir. 1996) (Judge Ryan, dissenting); 99 F.3d at 1395 (Judge Merrit, dissenting).

⁸ Most courts characterize fair use as an affirmative defense. But some courts characterize fair use as a “privilege” of the public to use copyrighted content “in a reasonable manner” without the owner’s consent. See *Rosement Enterprises Inc., v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966). Moreover, Section 107 states that a fair use is “not infringing.” 17 U.S.C. § 107. Thus, it is not always clear to what extent the burden rests on the defendant to present evidence that his use is fair, or on the plaintiff to show the use is not fair.

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Additionally, Section 107 provides four factors for courts to take into account when determining whether a particular use is fair:

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

17 U.S.C § 107. In theory, these four factors are neither mandatory nor exhaustive and courts should adapt them “to particular situations on a case-by-case basis.”⁹ But courts nearly always structure their fair use analyses on the four factors.¹⁰

Notwithstanding the statute’s guidance, fair use is a notoriously unpredictable defense. Whether a use is fair ultimately depends on the context in which the copying occurs and the facts of a given case. Moreover, courts do not apply the statute’s preamble or the four factors in precisely the same way. They may add or subtract sub-factors and consider different factors more or less important. Some scholars claim that judges simply make up their minds beforehand and apply the factors as a formality, called “stampeding” to a conclusion.¹¹ A major purpose of this empirical study of fair use opinions is to provide some clarity and predictability regarding how courts apply the analysis in learning-promoting contexts.

D. The Structure of a Fair Use Analysis

The following section provides a general overview of how courts apply the four factors in a fair use analysis, including the sub-factors courts typically consider and how they typically affect a court’s fair use decision. The structure is based mainly on Supreme Court precedents

⁹ See U.S. Copyright Office, Circular 21, *supra* note 2, at 7.

¹⁰ See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. Pa. L. Rev. 549, 563-64 (2008).

¹¹ See *id.* at 549, 589-90.

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and other important authorities. In theory, it applies across the whole body of learning-promoting fair use law. But, again, courts do not uniformly follow these rules or authorities. To add more predictive value to this structure, we have drawn on Barton Beebe's recent empirical study of fair use opinions decided from 1978 to 2005. That study showed to what extent courts applied these rules across the entire body of general fair use case law. We perform a similar analysis but directed only at learning-promoting uses. Accordingly, we use the analytical structure provided here in the high-level analysis of the whole body of learning-promoting case law presented in Part III and in each category analysis presented in Part IV, in order to test these rules against empirical data and obtain further understanding of how courts actually apply the rules and general structure in learning-promoting contexts.

1. Purpose and Character of the Use

Section 107 states that, in determining whether a use is fair, a court should examine "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107. Courts generally examine three sub-factors under factor one: (a) whether the defendant's use is of the type favored under the statute (b) whether the defendant's use is commercial, (c) whether the use is transformative, and (d) the propriety of the defendant's conduct. *See, e.g., American Geophysical Union v. Texaco*, 60 F.3d 913, 918-26 (2d Cir. 1995).

a. Favored Purposes Inquiry

The statute states that when a defendant copied for a purpose such as "criticism, comment, [] teaching (including multiple copies for classroom use), scholarship, or research," his use is more likely to be fair. 17 U.S.C. §107. The decision to classify a particular use as being for one of the favored preambular purposes is fact specific.

Courts may also consider as a separate inquiry whether the use is "of a commercial nature or is for nonprofit educational purposes," as per the statute's mandate under factor one. 17 U.S.C. § 107 (1). The finding that a use is "nonprofit educational" should also weigh in favor of

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fair use, but is by no means conclusive. The decision to classify a particular use as “educational” is also fact specific.¹²

b. Commercial Use

Nearly all courts consider under factor one whether a defendant’s use was commercial. If the use is found to be commercial, this weighs against fair use; if the use is found to be non-commercial this weighs in favor of fair use. In either case, commerciality should not be conclusive and should be weighed along with other factors and sub-factors in a fair use decision. *See* H.R. Rep. No. 94-1476, at 66 (1976). However, in *Sony Corp. of America v. Universal City Studios*, the Supreme court stated that a commercial use of copyrighted material is “presumptively unfair exploitation [] of the copyright owner’s privilege.” 464 U.S. 417, 451 (1984). In *Campbell v. Acuff-Rose Music, Inc.*, the Court apparently repudiated this, stating: “*Sony* stands for the proposition that the ‘fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.’” 510 U.S. 569, 585 (1994). However, even after *Campbell*, courts have sometimes presumed a commercial use is unfair and allowed this to satisfy any burden on the plaintiff to prove market harm under factor four.¹³

Courts also frequently follow the Supreme Court’s mandate that they consider whether the defendant profited specifically from the “*exploitation* of the copyrighted material without paying the customary price.” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985) (emphasis added). A finding that the defendant exploited the copyrighted materials for profit always weighs against fair use.

¹² In this study, we examine both courts’ treatments of the purposes listed in the preamble and courts’ applications of the statute’s mandate that courts consider whether the defendant had a “nonprofit educational purpose.” In our analyses, we treat both discussions in this “Favored Purposes Inquiry” section. However, courts do not equally favor defendants with a preambular purpose and defendants with a “nonprofit educational” purpose. Barton Beebe reports that in the 27 cases decided between 1978 and 2005 where courts explicitly classified the defendant’s use as “educational,” win rates were no higher than average, despite the fact that win rates were “generally very high” when the defendant was deemed to have a favored preambular purpose. *See id.* at 609. The results of this study confirm and shed more light on this surprising result. *See* Part III.

¹³ *See* Beebe, *supra* note 10, at 600-601.

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c. Transformative Use

Most courts consider whether the defendant's use was "transformative" or "productive." If so, this will shift the balance of factor one in favor of fair use. According to the Supreme Court, a use is "transformative" if it does not merely "superced[e] the objects of the original creation," but "instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *See Campbell*, 510 U.S. at 579. Parody is a classic example of a use that is permissible because it "transforms" the original work. *See id.* In *Sony*, the Court further indicated that a use of copyrighted material is "productive," and therefore favored under factor one, if it "results in some added benefit to the public beyond that produced by the first author's work." 464 U.S. at 478. The archetypical example of a "productive" use is the researcher or scholar who quotes the work of a prior author in order to comment upon or add to the original work. *See id.* at 477-78.

d. Propriety of the Use

Courts also typically consider under factor one whether the defendant has acted in good faith. *See, e.g., Harper & Row*, 471 U.S. at 562-63. This includes such considerations as whether the defendant attributed the original creator, attempted to obtain permission from the owner, how the defendant obtained the materials, and whether the defendant breached other codes of conduct.

2. Nature of the Copyrighted Work

The statute states courts should consider "the nature of the copyrighted work." 17 U.S.C. § 107. Courts generally consider under this factor: (a) whether the copied work was factual or creative, and (b) whether the copied work was published or unpublished.

a. Factual or Creative

The main sub-factor courts consider under factor two is whether the original work is "creative," on the one hand, or "factual," "informational" or "scientific" on the other. The latter are generally given less protection under copyright because of courts' perception that there is a greater need to disseminate factual works than works of fiction or fantasy and that producers of factual works require less incentive than producers of creative works. *See Harper & Row*, 471

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U.S. at 563. In general, uses of factual, informational or scientific works are more likely to be fair use.¹⁴

b. Published or Unpublished

Courts may also consider under factor two whether the work was published or unpublished. If the work is not published this generally weighs against fair use; if it is already published, this usually weighs in favor of fair use. However, the statute clarifies this is not conclusive on the fair use analysis. *See* 17 U.S.C. § 107. *See also Harper & Row*, 471 U.S. 539 at 564.

3. Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The statute instructs courts to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107. Courts’ main inquiry under this factor is whether the defendant took too large a portion of the plaintiff’s original work to qualify for a fair use defense. Courts may also follow the Supreme Court’s mandate that they examine whether the defendant took the most important part or the “heart” of the plaintiff’s work. *See Campbell*, 510 U.S. at 587.

In general, the more the defendant takes the less likely it will be fair use. Some commentators assert that taking the plaintiff’s entire work can never be fair use except in “very limited situations” where the defendant copies the entire work “for a different functional purpose.”¹⁵ Supporting this assertion is the Supreme Court’s holding in *Sony* that wide-scale recording of television programs by private individuals was fair use, despite mechanical reproduction of the whole shows, because most people were copying for the purpose of “time-shifting,” which yielded social benefits. 464 U.S. at 449-50. *See also Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003) (“entire verbatim reproductions are justifiable where the purpose of the work differs from the original.”) However, courts have also

¹⁴ *See id.* at 611-12.

¹⁵ Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 13.05[D][1] at 139 (2007).

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made exceptions to this rule in cases where the defendant took the plaintiff's whole work without a distinct purpose.¹⁶

When the defendant uses less than the whole work, courts may rely on statutory guidelines or judicial precedents to determine whether the defendant copied within allowable limits. As discussed above, the 1976 Act and the Congressional Guidelines provide safe harbors for certain types of educational copying.¹⁷ Again, these do not apply in all circumstances and are not supposed to be conclusive. But some courts consider them a useful guide. *See, e.g., Princeton University Press v. Michigan Document Services*, 99 F.3d 1381, 1390-91 (1196).

Courts also may also consider the "reasonableness" of the amount taken, examining whether the defendant took only as much as he needed to achieve his purpose or copied significant amounts without justification. *See, e.g., Campbell*, 510 U.S. at 586.

4. Effect on the Potential Market for or Value of the Work

Section 107 states courts should consider "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. The structures of courts' analyses of market harm are inconsistent. The level of proof required to show market harm and the extent to which a court will consider market harm more important than other factors varies widely from court to court and decision to decision. Some scholars suggest that the "fourth factor essentially constitutes a meta-factor under which courts integrate their analyses of the other three factors and, in doing so, arrive at the outcome not simply of the fourth factor, but of the overall test."¹⁸ Nonetheless, we lay out the various approaches, most of which come from the Supreme Court's dicta in *Sony*. 464 U.S. at 451. Courts do not reliably divide the fourth factor into sub-factors. But we divide factor four into two elements, (a) harm to primary markets and (b) harm to licensing markets, for the sake of further clarity.

¹⁶ *See* Beebe, *supra* note 10, at 616.

¹⁷ *See* 17 U.S.C. § 108, 110 (1)-(2); U.S. Copyright Office, Circular 21, *supra* note 2 at 7-8.

¹⁸ *See* Beebe, *supra* note 10, at 617.

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a. Harm to Primary Markets

Courts may require the plaintiff to demonstrate that the defendant's use actually harmed the market for the plaintiff's work, whether in the form of decreased sales or reduced subscriptions. Most courts, though, only require a showing of *potential* harm to the plaintiff's market should the defendant continue his activities, or should analogous copying become "widespread." *See Sony*, 464 U.S. at 451. Some courts further presume that a commercial use has caused market harm and do not require plaintiffs to show any evidence of market harm at all. *See id.* On the other hand, some courts may require that a plaintiff show that "some meaningful likelihood of future harm exists," especially when the defendant's use is non-commercial. *Id.* Finally, some courts state that harm to the plaintiff's market is "the single most important element" in determining whether the defendant's use is fair, and thus outweighs other considerations. *See Harper & Row.*, 471 U.S. at 566.

b. Harm to Licensing Markets

A second crucial element courts sometimes consider under factor four is whether there was an established way for the defendant to license or obtain permission to use the copied content. Some courts will only find fair use where there was no reasonable option available to license the plaintiff's work. *See, e.g., American Geophysical Union v. Texaco*, 60 F.3d 913, 929-30 (2d Cir. 1994).¹⁹ However, other courts state that whether a defendant had the option to license her use is "besides the point" in a fair use analysis because the requirement to obtain a license necessarily implies the plaintiff had the right to claim a license and thus that the defendant's use was not fair. *See, e.g., Wright v. Warner Books, Inc.* 953 F.2d 731, 737 (2d Cir. 1991); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1357, n. 19 (Ct. Clms. 1973). Again, whether courts choose to consider harm to licensing markets and the burden of proof required to show market harm varies from case to case.

¹⁹ Wendy Gordon describes this as the "market breakdown" approach to fair use. *See* Wendy Gordon, *Fair Use as Market Failure: a structural and economic analysis of the Betamax case and its predecessors*, 82 CLMLR 1600, 1624-26 (1982).

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III. ANALYSIS OF LEARNING-PROMOTING CASE LAW AS A WHOLE

This part of the study presents our highest-level analysis and broadest conclusions regarding the whole body of “learning promoting” fair use case law. The following analysis and conclusions are informed by the category-specific analyses presented in Part IV, which are in turn informed by the individual case summaries and analyses presented in Part V. We present our conclusions in the order and structure provided in Part II, above, based on the four fair use factors and multiple sub-factors that courts typically consider in fair use cases. While the category-by-category analyses provided in Part IV provide more in-depth knowledge of this body of law and more detail with respect to courts’ decisions in individual cases, this analysis notes only the most meaningful conclusions regarding the whole body of case law and those that seem particularly relevant to uses of copyrighted content by educators and educational institutions.

A. Results Regarding Factor One: Purpose and Character of the Use

1. Having a “Teaching” or “Educational” Purpose Did Not Affect Outcome

According to the language of Section 107, a fair use analysis *should* generally favor activities that are either “nonprofit educational” or that fall within the statute’s enumerated preambular categories. *See* 17 U.S.C. § 107. One of the enumerated categories identified in the preamble is copying for the purposes of “teaching” and explicitly includes making “multiple copies for classroom use” as a favored activity. 17 U.S.C. § 107. However, in all the cases we examined, reproducing copyrighted content for “teaching” or “educational” purposes never significantly affected outcome.

In Category A (Individual Teachers Copying for Instructional Purposes), where the defendants were all clearly engaged in “teaching,” the courts never explicitly classified the uses as falling within the favored preambular “teaching” category. Rather, courts classified the teachers’ uses as “non-profit, educational.” *See, e.g., Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983); *Weissman v. Freeman*, 684 F. Supp. 1248, 1262 (S.D.N.Y. 1988). As discussed below, in all such cases, courts then found the teachers’ uses were not fair under factor one because they were not transformative; and consequently found no fair use overall.

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Similarly, in Category E (Copying of Protected Standardized Test Questions for Test Preparation Purposes), courts addressed Section 107's preambular purposes, but were skeptical that the defendants' activities constituted "teaching" within the meaning of the statute. One court determined that "teaching" required bestowing a degree or other credential upon the student and that, because exam preparation courses did not do this, the defendants were not copying for "teaching" purposes. *Association of American Medical Colleges v. Mikaelian*, 571 F. Supp. 144, 151-52 (E.D. Pa. 1983). As in Category A (Individual Teachers), courts in Category E then applied the transformativeness inquiry and found that the use could not be fair absent further transformation of the material.

Courts applied the favored purposes presumption consistently only in Category C (Uses by Authors in Critical Commentary and Scholarly Analyses). In that category, courts nearly always applied the rule that if a defendant's use "fit[s] comfortably" into the favored categories of "criticism, comment . . . scholarship [or] research," it is presumptively fair under factor one. *See, e.g., Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991) (citing § 107, deletions in original). In such cases, courts always found fair use overall.

As for Section 107's apparent mandate that courts should favor uses that are for "nonprofit educational purposes," courts gave very limited weight to the defendant's having an "educational" purpose, even when the defendant's use was also nonprofit. *See, e.g.*, from Category A (Individual Teachers), *Marcus*, 695 F.2d at 1175 (teacher copying from cake-decorating book for nonprofit educational purposes not fair use); from Category B (Institutions Engaged in Systematic Copying for Educational or Research Purposes), *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156, 1174 (W.D.N.Y. 1982) (non-profit educational institution engaged in off-the-air copying of educational programs to distribute to schools not fair use).

Thus, in sum, courts *never* presumed that copying by teachers and educational institutions was fair, despite their willingness to do so in cases involving authors quoting in new works for purposes of comment, criticism or scholarship. And courts did not significantly favor educators' activities under factor one or in the fair use analysis overall due to the additional requirement that

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they “transform” the material. Based on these results, it seems courts have virtually ignored the statute’s stipulation that teaching and education are activities that should be favored in fair use analyses.

2. Commerciality Alone Did Not Affect Outcome

Across all six categories of learning-promoting fair use, courts approached the commerciality inquiry quite similarly. The non-commercial or commercial nature of a defendant’s use *alone* did not significantly influence outcomes absent further findings of transformativeness, on the one hand, or exploitation, on the other.

On the one hand, a defendant’s non-commercial purpose only resulted in fair use when there was the additional finding that the use was transformative or otherwise served a distinct and socially beneficial function. *See, e.g.*, from Category C (Authors Copying for Critical Commentary), *Sundeman v. The Seajay Society*, 142 F.3d 194, 203 (4th Cir. 1998) (use of manuscript at academic conference was “noncommercial, educational,” but also constituted “productive” scholarly analysis within a new work of authorship).

These findings indicate that an educator’s or educational institution’s nonprofit status will not necessarily affect a court’s fair use determination absent a further finding that their use is transformative.

On the other hand, when the defendant was a for-profit corporation, or clearly had a commercial purpose, this fact alone did not lead to the conclusion that the use was not fair absent the additional finding that the use was “exploitative.” Courts generally found the defendant’s use was “exploitative” in three types of circumstances.

First, courts found exploitation in cases where the defendant profited specifically off the copied materials. For instance, courts found it was exploitative to offer instructional courses for profit when the copied materials were integral to the course material and the main basis for the defendants’ revenues. *See*, from Category A (Individual Teachers), *Bridge Publications, Inc. v. Vein*, 827 F. Supp. 629, 635 (S.D.Cal. 1993); from Category E (Test Preparation Companies Copying Exam Questions), *American Medical Colleges v. Mikaelian*, 571 F. Supp. at 152-53. Courts also indicated that prominently featuring copied materials in a publication or in marketing

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materials in order to enhance sales would be exploitative; but held that using copied materials inconspicuously only to enhance the substance of the new work was not. *See*, from Category C (Authors Copying for Critical Commentary) *Penelope v. Brown*, 792 F. Supp. 132, 137 (D. Mass. 1992); *Rubin v. Brooks/Cole Pub. Co.*, 836 F. Supp. 909, 917-18 (D. Mass. 1992).

Second, courts found exploitation where the defendant copied the plaintiff's protected expression in order to compete directly in the plaintiff's own market by selling an analogous product or service. *See*, from Category D (Promoting Access to Information), *Financial Information Inc., v Moody's Investors Service, Inc.*, 751 F.2d 501, 509-10 (2d Cir. 1984).

Third, courts found exploitation where the defendants copied in order to obtain an economic advantage in their own markets by not purchasing the copied materials or paying permissions fees. *See*, e.g., from Category B (Institutional-Level Copying), *American Geophysical Union v. Texaco*, 60 F.3d 913, 921-22 (2d Cir. 1995); *Princeton University Press v. Michigan Document Services*, F.3d 1381, 1386 (6th Cir. 1996) (defendant obtained economic advantage over other photo copy shops that paid permissions fees by not doing so).

However, it is important to note that when a licensing market exists for the defendant's use, a court can always find that the defendant obtained economic advantage by not paying licensing fees. Thus, whether a court finds that a for-profit educational institution's use is "exploitative" because it allows monetary savings may depend upon whether there is an established licensing market for the use. This finding could have significant impact on, for instance, a for-profit university that allows professors to post course materials online without paying permissions to copyright holders when reasonable licensing options are available.

3. Transformativeness Was Always Determinative

Across all categories of learning-promoting fair use case law, the transformativeness inquiry was determinative on outcome. Whenever a court found the defendant's use to be transformative, the court found fair use. Whenever the court found the defendant's use was not transformative, the court found the use was not fair. However, courts applied the transformativeness inquiry distinctly across categories. Their applications fall into two general approaches: (i) narrow notions of transformativeness requiring a literal transformation of original

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content into a new work, and (ii) more expansive notions of transformativeness taking into account the distinct purpose or beneficial public function of the defendant's new use. Notably, in the more formal educational contexts represented by Categories A, B, and F (all involving copying by various types of educators or educational institutions), modern courts *always* employed narrow versions of transformativeness that disfavored any significant amounts of wholesale copying. As concluded further below, it may be possible to apply the expanded notions of transformativeness articulated in less traditional learning-promoting contexts, such as in Category D (Promoting Access to Information), to copying by educators and educational institutions. However, the results of this study indicate that courts have yet to apply these broader articulations of transformativeness in formal educational contexts. Thus, it is not clear where there is a chronological trend towards allowing wholesale copying of full works, or simply an exception for certain types of learning-promoting uses, particularly by Internet search engines.

a. Narrow Notions of Transformativeness Applied in Educational Contexts

The requirement that a secondary use “transforms” the original content, as in a parody, would seem to be a significant hurdle for defendants copying in formal educational contexts, such as teachers photocopying for classroom use or libraries photocopying for patrons. Such uses generally involve making mechanical reproductions of whole works, involve using the copies for the same purpose as the originals, and do *not* involve creating a new work of authorship. Empirical results from Categories A (Individual Teachers), B (Institutional-Level Copying), and E (Test Preparation Courses), all involving wholesale copying for various types of educational or research purposes, confirm that courts have not generally considered such uses transformative.

In Category A (Individual Teachers), where the defendants were teachers making multiple copies of copyrighted content for instructional purposes, courts unanimously found the uses were not transformative because the teachers used the copied materials for the same purpose as the originals. *See, e.g., Marcus v. Rowley*, 695 F.2d at 1175 (finding no fair use because teacher used her cake-decorating book for “same intrinsic purpose” as plaintiff, who also taught

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a cake-decorating course; widely cited across categories for principle that a use is not transformative if for “same intrinsic purpose” as original).

Likewise, in Category E (Test Preparation Courses), where the defendants were engaged in copying secure test questions for use in exam preparation courses, courts did not even consider the possibility that verbatim copying of test questions could be transformative. *See, e.g., Mikaelian*, 571 F. Supp. at 152.

Finally, in Category B (Institutional-Level Copying), where the defendants were institutions engaged in systematic mechanical reproductions (usually photocopying) for research or educational purposes, modern courts always found the defendant’s use was not transformative. For instance, in *American Geophysical Union v. Texaco*, the Second Circuit held that researchers photocopying single articles from whole journals was not transformative because this only “transformed” the material object (journal) into new forms (single articles) and did not provide sufficient independent value beyond the original journals. 60 F.3d at 923-24. *See also, e.g., Basic Books v. Kinko’s*, 758 F. Supp. 1522, 1530-31 (S.D.N.Y. 1991) (copy shop making course packets not transformative because it involved mere mechanical binding of book excerpts, requiring no “literary effort”).

The only exception to this trend was *Williams & Wilkins Company v. United States* (Category B), which was decided prior to the 1976 Act and prior to courts’ adoption of the formal transformativeness inquiry. *See* 487 F.2d 1345 (Ct. Clms. 1973). In that case, involving a government research facility library engaged in regular photocopying of articles for patrons, the court did not ask whether or not photocopying literally altered the original journals, but simply weighed it heavily in favor of fair use that the research library’s copying was for the socially beneficial purpose of dissemination of knowledge and research. *See* 487 F.2d at 1348-54.

However, in every other case included in this study in which the defendant was an educator or educational institution making mechanical reproductions of entire or whole portions of copyrighted works, courts found no fair use due to insufficient transformation of the original content.

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b. Expansive Notions of Transformativeness Applied Outside Traditional Educational Contexts

In contrast, in learning-promoting cases that occurred outside traditional educational contexts, courts applied broader notions of transformativeness. And these broader notions allowed varying degrees of wholesale reproduction to qualify as fair use.

In Category C (Critical Commentary), courts always found the authors' copying to be "productive" uses of copyrighted content that should be encouraged under copyright law. *See, e.g., NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 482 (2d Cir. 2004) (copying for the productive purpose of effective criticism was fair even if it were to harm market for original work). These results are not surprising given that quoting and paraphrasing within new works of scholarship is an archetypical example of "productive" copying that yields social benefits and should be fair use. *See Sony Corp. v. Universal City Studios*, 464 U.S. 417, 474-49 (1983). However, some cases in this category suggested that an even broader range of uses might be considered productive. One case held that copying small amounts of example sentences from a highly academic linguistics paper in a beginner writers' manual was "productive" because the manual presented complex material in a simpler way in order to inform a more general audience. *See Penelope v Brown*, 792 F. Supp. at 136. Another case held that printing a psychologist's entire research tool in a psychology textbook was "productive" because the textbook was designed for higher learning and the textbook author attempted to engage college students in critical analysis of the copied material. *See Rubin v. Brooks/Cole Publishing*, 836 F.3d at 916 (though apparently limiting fair use holding to defendant academic publisher's past uses of the work and requiring future publishers to obtain permissions).

The results of Category D (Promoting Access to Information) are more surprising. In these cases, courts found the defendants' uses to be fair due to their distinct and socially beneficial purposes—even though the defendants made exact or nearly exact mechanical reproductions of the original works. *See, e.g., New York Times, Inc. v. Roxbury Data Interface*, 434 F. Supp. 217, 221 (D.N.J. 1977) (copying plaintiff's index to make a new personal names index was fair use due to benefit of facilitating access to information in original index); *Key*

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Maps, Inc. v. Pruitt, 470 F. Supp. 33, 38 (S.D. Tex. 1978) (fire marshal copying map to draw fire districts was fair use due to his beneficial public purpose); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-19 (9th Cir. 2003) (discussed below). *See also*, from Category F, *Newport-Mesa Unified School District v. California Department of Education*, 371 F. Supp. 2d 1170, 1177 (C.D. Cal 2005) (wholesale copying and distribution of test protocols to give to parents of special education children was fair use because it was possibly transformative and at any rate served valuable public function).

In the most recent case of this type, *Perfect 10 v. Amazon.com*, the Ninth Circuit reiterated its prior holding in *Kelly v Arriba Soft* and held that a search engine (Google) displaying thumbnail versions of plaintiff's full-size photos in its search results postings was "transformative" and fair use because Google used the images in a new context in order to achieve the new purpose of improving access to information on the Internet. *Perfect 10 v. Amazon*, 487 F.3d 701, 721 (9th Cir. 2007) (citing *Kelly v. Arriba Soft*, 336 F.3d at 818-19). The court further stated that a search engine's purpose in enhancing access to information was even more transformative than a parody because "a search engine provides an entirely new use of the original work, while a parody typically has the same entertainment purpose as the original work." *Id.*

Some commentators note that these cases may suggest a trend and that "educational users might fare better under these broader articulations of the transformativeness standard."²⁰ However, the results of this study indicate that, thus far, this expanded notion of transformativeness has not been applied in formal educational contexts. Thus, while an Internet search engine raising a fair use defense based on promoting access to information may be deemed to have a transformative purpose, a teacher or institution making copies for classroom use or other educational purposes may not.

²⁰ *See* William Fisher and William McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age*, Produced by The Berkman Center for Internet and Society at Harvard Law School, Research Publication No. 2006-09, 56 (August 10, 2006).

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4. Propriety of the Use Nearly Always Affected Outcome

Not surprisingly, when courts took into account the propriety of the defendant's conduct, the finding that the defendant behaved appropriately favored fair use, whereas a finding that the defendant behaved inappropriately generally led to a finding of no fair use.

Courts always looked unfavorably upon the defendant's failure to attribute the plaintiff. *See, e.g.* from Category A (Individual Teachers), *Marcus v. Rowley*, 695 F.2d at 1175-76. In contrast, clear attribution always weighed in favor of fair use. *See, e.g.*, from Category C (Critical Commentary), *Penelope v. Brown*, 792 F. Supp. at 137.

Courts always looked favorably upon attempts to obtain permissions from copyright owners, regardless of whether the permission was actually granted. *See, e.g.*, from Category C (Critical Commentary), *Rubin v. Brooks/Cole Publishing*, 836 F. Supp. at 919.

Finally, allegations that defendants engaged in unacceptable behavior in obtaining the copyrighted materials generally weighed against fair use. *See, e.g.*, from Category A (Individual Teachers), *Bosch v. Ball-Kell*, 2006 WL 2548053, *9 (Aug. 31, 2006) (defendant broke into prior teacher's office to obtain her instructional materials); from Category E (Test Preparation Courses), *American Medical Colleges v. Mikaelian*, 571 F. Supp. at 150 (defendant apparently acquired exam questions by taking plaintiff's tests and copying test questions by hand). *But see*, from Category C (Critical Commentary), *NXIVM Corp. v. Ross Institute*, 364 F.3d at 477-78 (obtaining copied seminar manuals through former seminar participants who potentially breached fiduciary duties did not outweigh the benefit of making a critical analysis of the materials available to the public on defendant's website).

B. Results Regarding Factor Two: Nature of the Copyrighted Work

1. Factual or Creative Nature of the Copied Work Did Not Substantially Affect Outcome, But Courts Applied Sub-Factor Harshly to Educational Users

In general, across learning-promoting fair use case law, the factual or creative nature of the work did not significantly affect outcome. However, a surprising trend emerged: courts were disproportionately harsh in their treatment of educational users under this sub-factor. The main

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rationale for favoring fair use when the copyrighted work is factual is that such works need to be disseminated to the public. *See Harper & Row*, 471 U.S. 539, 563 (1985). Thus, it seems courts should be more willing to allow freely copying factual works for learning-promoting purposes, and particularly for the purposes of teaching or education. However, in traditional educational contexts, courts consistently found that factor two favored the plaintiff or favored neither party, even when the court classified the copied work as factual or could easily have done so.

In Category C (Critical Commentary), when the defendant quoted from a published and factual work, the courts always found this weighed in the scholar's favor. *See, e.g., Rubin v. Brooks/Cole Publishing*, 836 F. Supp. at 919 (factor two favored defendant because copied "Love Scale" was a science research tool dedicated to the public in order to advance the progress of science and knowledge). Likewise, in Category D (Access to Information), most courts predictably held copying factual works favored the defendant. *See, e.g., Roxbury*, 434 F. Supp. at 221 (plaintiff's indexes were works of diligence versus creativity); *Dow Jones & Co. v. Board of Trade of the City of Chicago*, 546 F. Supp. 113, 120 (S.D.N.Y. 1982) (stock indexes contained information useful to defendant).

In contrast, in Categories A (Individual Teachers), B (Institutional-Level Copying) and E (Test Preparation Courses), courts almost never favored the defendant under factor two, even when the copied work was published and seemingly of an instructional or scholarly nature. Instead, courts nearly always found, for various reasons, that factor two favored the plaintiff or at least did not favor the defendant. *See, e.g.,* from Category A (Individual Teachers), *Marcus v. Rowley* 695 F.2d at 1176 (factor two favored neither party because copied cake-decorating book contained both factual and creative elements); from Category B (Institutional-Level Copying), *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381, 1389 (6th Cir. 1991) (finding copied book excerpts were "creative").

This disproportionately harsh treatment of educational users under factor two bears explanation. The answer may lie in the fact that defendants in such contexts were merely making mechanical reproductions of plaintiffs' works. Thus, courts perceived no further need to allow the defendants to disseminate those works through copying since users could have

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obtained them just as easily by purchasing or licensing the original works. At least one court explicitly stated this rationale. *See*, from Category B, *Encyclopaedia Britannica v. Crooks*, 542 F. Supp. at 1177-78 (finding copied programs were educational and needed to be disseminated, but that this did not favor fair use because users could have purchased or licensed the exact same films from the copyright owners).

Thus, courts in educational contexts may have been applying their conclusions that the defendants' mechanical reproductions of content were not transformative in factor two as well as in factor one, once against disserving educational users.

2. Copying Widely Available Works Weighed in Favor of Fair Use

Courts in learning-promoting contexts generally followed the modern rule codified in Section 107 that the unpublished nature of the work does not preclude a finding of fair use. 17 U.S.C. § 107. *See, e.g.*, from Category C (Critical Commentary), *Sundeman v. Seajay*, 142 F.3d at 204-05. The exception to this was when the copied works were unpublished exam materials, which generally weighed heavily against fair use due to the security requirement that exam materials remain secret to retain their value. *See* S. Rep. No. 141, 102d Cong., 1st Sess. 6 (1991). *See, e.g.*, from Category E (Test Preparation Courses), *American Medical Colleges v. Mikaelian*, 571 F. Supp. at 153. *But see*, from Category F (Statutory Disclosure of Exam Questions), *Newport-Mesa*, 371 F. Supp. 2d at 1177-78 (public benefit of releasing test protocols and student answers to parents of special education children outweighed slight risk to integrity of tests).

On the other hand, when the copied work was published, this clearly weighed in favor of fair use. A particularly interesting trend emerged in the most recent cases in Category D (Promoting Access to Information), where search engines displayed copies of works that were already published and widely available on the Internet. In *Kelly v. Arriba Soft* and *Field v. Google*, the courts found it weighed in favor of fair use that the plaintiffs' images and written works, respectively, were already widely available on the plaintiffs' own website, free of charge. *See Kelly v. Arriba Soft*, 336 F.3d at 820; *Field v. Google*, 412 F. Supp. 2d at 1120. Even in

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Perfect 10 v. Google, where the plaintiff offered the copyrighted images on its website *for sale*, the court found it weighed in favor of fair use that the plaintiff had already “exploited its commercially valuable right of first publication by putting its images on the Internet for paid subscribers, [and was thus] no longer entitled to the enhanced protection available for an unpublished work.” 487 F.3d at 723-24. In consequence, in all three cases, the courts weighed factor two only slightly in favor of the plaintiffs, even though the copied works were creative.

These recent cases suggest that it should weigh in favor of fair use that a plaintiff has already made his works available to the public on the Internet—even, potentially, when the plaintiff charges a fee for access. This could have implications for an educator or educational institution copying, displaying or distributing works that are already widely available online.

C. Results Regarding Factor Three: Amount and Substantiality of the Portion Used

Across categories, an important division emerged with respect to courts’ treatment of the degree of exactitude with which defendants copied and the absolute amounts defendants took of the plaintiffs’ works. In the more traditional educational contexts represented by Categories A (Individual Teachers), B (Institutional-Level Copying), and E (Test Preparation Courses), modern courts never found exact replication of full works or of substantial portions of full works to be fair. *See, e.g.*, from Category A, *Marcus v. Rowley*, 695 F.2d at 1178 (copying over 10% of plaintiff’s book too much); from Category B, *American Geophysical v. Texaco*, 60 F.3d at 925-26 (copying full article from journals weighed against fair use because each article was “an original work of authorship”); from Category E, *American Medical Colleges v. Mikaelian*, 571 F. Supp. at 153, 148 (defendant copied 879 questions verbatim, constituting 90% of test). Within these categories, the only exception to this strict treatment of amount taken was in *Williams & Wilkins v. United States* (Category B), decided prior to the 1976 Act, where the court found a government research library’s systematic copying of whole articles was acceptable because the important issue was *not* the absolute amount copied, but whether the defendant had effective policies in place for limiting copying and use of materials. *See* 487 F.2d at 1355.

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In several of the formal educational cases, courts applied the minimum standards provided in the Congressional Guidelines for educational copying and found that failing these Guidelines was virtually dispositive against fair use, even if courts purported to use them only as a loose guideline. *See*, from Category A (Individual Teachers), *Marcus v. Rowley*, 695 F.2d at 1177-78 (not fair because more than 10% and not “spontaneous” copying); *Bridge v. Vein*, 827 F. Supp. at 636 (not fair because not restricted to one copy per student; not spontaneous). *See*, e.g., from Category B (Institutional-Level Copying), *Princeton v. Michigan Document Services*, 99 F.3d at 1389, 1391 (copy shops selling course packets containing book excerpts in excess of 1000-words and constituting as much as 30% of original works was not fair because “light years away” from safe harbor of Guidelines).

In contrast, in Categories C (Critical Commentary) and D (Access to Information), the courts were willing to excuse substantial amounts of verbatim copying and even, in some cases, copying of full works, so long as the copying was reasonably required to achieve the defendant’s secondary purpose.

In Category C (Critical Commentary) courts focused on the reasonableness of the defendants’ copying, considering whether the defendant’s copying fell within the amount required to accomplish the defendants’ “productive” scholarly purposes. *See, e.g., NXIVM v. Ross Institute*, F.3d at 481 (copying 17 full pages from a 500 page business seminar manual was not excessive because “reasonably necessary” to support defendants’ critical commentary).

In Category D (Access to Information), courts allowed defendants to take *entire works*, or virtually entire works, as long as it was reasonably necessary to promote access to the information. *See, e.g., Perfect 10 v. Google*, 487 F.3d at 724 (using entire images did not preclude fair use since Google only used amount Internet users required to recognize the image and decide whether to purchase it or obtain more information).

These results may suggest a modern trend toward allowing wholesale copying of full works when required to achieve some beneficial secondary purpose. However, the results of this category-by-category study indicate that, thus far, courts have not treated mechanical reproduction of full works favorably in more formal educational contexts. Therefore, educators

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or educational institutions wishing to copy, display or distribute full works or whole excerpts of works in order to promote learning may not fall under the holdings of these recent cases. Courts may decide they have appropriated too much copyrighted content to qualify for fair use.

D. Results Regarding Factor Four: Effect on the Potential Market for or Value of the Work

1. Finding of Market Harm Correlated with Findings on Transformativeness and Fair Use Overall

Across categories, market harm was a clear indicator of outcome. With one single exception, in every case where the court found market harm, the court found no fair use. *But see Perfect 10 v. Google*, 487 F.3d at 724-2. Conversely, with a single exception, when the court found no market harm, the court found fair use. *But see Marcus v. Rowley*, 695 F.2d at 1177. In general, courts selectively applied the burdens of proof established in Supreme Court dicta in order to reach a particular outcome. When the court required only a showing that “unrestricted and widespread” analogous copying would adversely impact potential markets for the original work, this led to the finding of no fair use. *See Sony Corp. v. Universal City Studios* 464 U.S. at 451. When the court required the plaintiff to show actual lost sales or at least “some meaningful likelihood of market harm,” this led to the finding that the use was fair. *See id.* Thus, the results of this analysis support the hypothesis that courts simply apply market harm as a “meta-factor” through which to integrate their findings on other factors and decide overall outcome.²¹

A more significant finding emerges with respect to the correlation between transformativeness and market harm. Whenever courts found the defendant’s use to be transformative, courts nearly always found no market harm under the rationale that the defendant’s new use of the materials did not merely replicate the publication or service provided by the plaintiff, but had a distinct function and added some new social benefit. *See, e.g.,* from Category C (Critical Commentary), *New Era Pubs. Int’l v. Carol Pub. Group*, 904 F.2d 152, 159-60 (2d Cir. 1990) (critical biography of L. Ron Hubbard did not “supplant” and if anything enhanced the potential market for Hubbard’s works); from Category D (Access to Information),

²¹ *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. Pa. L. Rev. 549, 617 (2008).

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New York Times v. Roxbury, 434 F. Supp. at 224-26 (defendant’s distinct and highly useful personal names index to the New York Times’ multivolume index would not reduce sales and might even enhance customers’ use of the Times’ index).

These holdings suggest that when a court finds the defendant’s use to be transformative under the first factor, the court will likely find no market harm under the fourth factor. However, again, this finding must be qualified with respect to educational users. As explained above, defendants making exact mechanical reproductions with an educational purpose may not be able to show that their uses literally “transform” the material or that they do not supplant the plaintiff’s markets for the original works. Thus, a court will be more likely to find a traditional educational use “nontransformative” and will also be more likely to find market harm.

However, at the same time, the recent fair use holding in *Perfect 10 v. Google* suggests the possibility that courts may be willing to excuse some finding of market harm so long as the potential benefits of the defendant’s new use of the materials outweighs the extent and likelihood of harm to plaintiff’s markets. In *Perfect 10 v. Google*, the Ninth Circuit found Google’s posting of thumbnails of plaintiff’s images might harm an alleged derivative market in reduced-sized images. However, the social benefits of Google’s activity outweighed this merely “hypothetical” market harm, which led to the court’s finding of fair use overall. 487 F.3d at 724-25. Thus, if more courts take the balancing approach recommended by *Perfect 10*, courts may be willing to excuse some market harm in exchange for the social benefit of promoting education.

2. Courts Considered Harm to Existing Markets for Licensing the Precise Uses Intended by Defendants

A relatively clear trend emerged with respect to courts’ treatment of harm to plaintiffs’ licensing markets. Across categories, courts only found that lost licensing revenues constituted cognizable market harm when there was a well-established way to license the work for the precise use intended by the defendant.

Licensing was particularly important in Category B (Institutional-Level Copying), where the defendants were institutions engaged in regular and wide-scale copying of plaintiffs’ works and where permissions markets were relatively well-established. Modern courts in this category

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always found factor four counted against fair use because the defendants had “reasonable” options for licensing the copied materials for the precise use intended. *See, e.g., American Geophysical v. Texaco*, 60 F.3d at 929-30; *Princeton v. Michigan Documents*, 99 F.3d at 1389-90. *But see Williams & Willkins v. United States*, 487 F.2d at 1357, n. 19 (licensing harm not appropriate in a fair use analysis).

There is no indication these holdings will not apply in other categories involving educational users when reasonable licensing markets exist. However, in learning-promoting cases where there was no reasonable licensing option for the precise use intended by the defendant, courts did not hold that harm to licensing fees constituted market harm. In Category C (Critical Commentary), courts did not take lost licensing fees into account. This makes sense because copyright law and the First Amendment do not require a writer to pay to criticize or analyze a prior work. *See Sundeman* 142 F.3d at 207.

Courts in Category D (Access to Information) also did not generally take plaintiffs’ lost licensing revenues into account under factor four because licensing options meeting the defendants’ precise needs were not available. *See, e.g.,* from Category D, *Dow Jones v. Board of Trade*, 546 F. Supp. at 121, n. 8, 9 (no harm to licensing market when plaintiff did not license out the precise use defendant required in order to disseminate plaintiff’s stock averages for informational purposes). In *Field v. Google*, the court held that a search engine storing and displaying “cached” versions of plaintiff’s website containing his written works did not harm a potential licensing market because there was no evidence that a market for licensing search engines the right to cache websites existed or was likely to develop. 412 F. Supp. 2d. at 1122. In making this determination, the court noted the prohibitively high transaction costs involved in forcing Google to obtain permissions from “literally billions of Web pages.” *Id.*

Thus, the results of this study indicate that a court may that find lost licensing revenues constitute market harm, but will likely only take this harm into account when there is an existent market for licensing the precise use the defendant intends, or it seems reasonable that a licensing market will develop. This finding is potentially significant for educators and educational institutions planning to use copyrighted content in educational resources. On the one hand, if the

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copied works are already frequently licensed out by copyright owners via permissions programs, courts will almost certainly take copyright holders' lost licensing revenues into account and weigh this against fair use. However, at the same time, under cases like *Dow Jones v. Board of Trade* and *Field v. Google*, educational users may be able to argue, first, that their purposes are distinct from the types of uses regularly licensed by the copyright owners, and, second, that the transaction costs involved in requiring them to license their uses are prohibitively high. *See Dow Jones v. Board of Trade*, 546 F. Supp. at 121, n. 8, 9; *Field v. Google*, 412 F. Supp. 2d. at 1122.

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IV. ANALYSIS OF THE CASE LAW BY CATEGORY

A. Individual Teachers 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.

Considered in this category are the following cases: *MacMillan v. King*, 223 F. 862 (D. Mass. 1914) (“*MacMillan*”); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1963) (“*Wihtol*”); *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983) (“*Marcus*”); *Weissman v. Freeman*, 868 F.2d 1313 (2d Cir. 1989) (“*Weissman*”); *Bridge Publications, Inc. v. Vein*, 827 F. Supp. 629 (S.D. Ca1. 1993) (“*Bridge*”); *Bosch v. Ball-Kell*, 2006 WL 2548053 (C.D. Ill.) (“*Bosch*”). Two of these cases, *MacMillan* and *Wihtol*, were decided under the 1909 Copyright Act, and do not employ the four factors in their fair use analyses. The four subsequent cases were decided under the 1976 Copyright Act, and all employ a standard four-factor analysis.

1. Purpose and Character of the Use

Based on the cases examined in this category, a teacher who reproduces copyrighted materials for instructional purposes is not likely to be favored under factor one if the teacher’s copied content serves the same purpose as the original materials. This will likely be the case even if the teacher has a non-profit, educational purpose, and is even more likely to be the case if the teacher uses the materials to make a profit.

a. Favored Purposes Inquiry

All six cases in this category involved copying for the purposes of teaching. However, none of the courts explicitly classified the use as falling under the favored preambular purpose of “teaching (including multiple copies for classroom use).” 17 U.S.C. § 107. Rather, in the three

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cases decided after the 1976 Act, the courts classified the uses as being for “non-profit, educational purposes” under the statute. *Marcus*, 695 F.2d at 1175; *Weissman*, 868 F.2d at 1324; *Bosch*, 2006 WL 2548053, *9 (C.D. Ill.) They counted this in the defendants’ favor under factor one. However, the courts nonetheless found factor one favored the plaintiff due to lack of transformativeness (as discussed below) and found no fair use overall. This indicates that copying for the purpose of “teaching” or for “non-profit, educational purposes” does not significantly enhance a teacher’s chance of success on fair use.

b. Commercial Use

Findings of non-commerciality did not seem to significantly strengthen defendants’ fair use defenses in this category. In all five cases where the court classified the instructor’s use as non-commercial, the courts nonetheless found no fair use.

However, these cases do indicate teachers can still obtain the benefit of an educational purpose under factor one even if they make some money off of their activities. Teachers’ mere receipt of a salary or payment for their services did not implicate commerciality or otherwise weigh against fair use. *See MacMillan*, 223 F. at 863-4, 867 (court considered use “non-profit” since teacher did not sell outlines or charge more as a result of infringing outlines); *Marcus*, 695 F.2d 1171, 1175 (9th Cir. 1983) (court considered classroom use of infringing cake-decorating book by paid teacher “non-profit”); *Weissman v. Freeman*, 684 F. Supp. 1248, 1262 (D. Ct. S.D.N.Y 1988) (using a syllabus to teach a review course not-for-monetary-profit despite receipt of \$250 honorarium; finding not disturbed on appeal to Second Circuit).

In sum, these cases indicate that some expectation of profits will not necessarily hurt a teacher’s fair use case. But they also indicate that a non-commercial purpose will not necessarily weigh strongly in the teacher’s favor.

c. Transformative Use

In all the cases involving individual teachers copying for instructional purposes, transformativeness emerged as a clear barrier to a finding of fair use. In each case, the court found the defendant’s use was not transformative and weighed against fair use because it fulfilled the same purpose as the original work. *See Marcus*, 695 F.2d at 1175 (finding teacher

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used her cake-decorating book for “same intrinsic purpose” as plaintiff’s); *Weissman*, 868 F.2d at 1324 (finding professor intended to use his colleague’s syllabus “for the same intrinsic purpose” as his colleague); *Bridge*, 827 F. Supp at 635 (finding religious teacher used L. Ron Hubbard’s Scientology lecture tapes “for the same intrinsic purpose” as the copyright owners); *Bosch*, 2006 WL 2548053, *9 (C.D. Ill.) (new teacher copied former teacher’s instructional materials to teach the same course). *See also MacMillan*, 223 F. at 866 (decided prior to 1976 Act, but finding tutor’s infringing outlines provided students the “same acquaintance” with economics as the copied textbook).

In sum, based on these precedents, a teacher who copies materials originally designed for instruction will have a difficult time arguing her use is transformative. Given that teachers frequently copy such works, transformativeness presents a significant barrier to a fair use defense in this context.

d. Propriety of the Use

In four of the six cases involving individual teachers, courts explicitly considered the general propriety of the defendant’s conduct under factor one, taking into account a variety of conduct.

All four courts noted unfavorably that defendants failed to give attribution. *See Marcus*, 695 F.2d at 1175-76; *Wihtol*, 309 F.2d at 779 (though no “factor one” because pre-1976); *Weissman*, 868 F.2d at 1325 (defendant exploited a junior colleague’s work by failing to give academic credit); *Bosch*, 2006 WL 2548053, *9 (defendant broke into plaintiff’s office to obtain the materials). Significantly, these four cases all involved individuals taking other individuals’ work.

Some courts also held it against defendants that they did not attempt to obtain permission from the author or copyright owner. *See Marcus*, 695 F.2d at 1176. In *MacMillan*, the court noted that the teacher’s copying from a textbook to make outlines was more difficult to excuse as non-infringing because another teacher had obtained permission from the copyright owner to make a similar outline. *See* 223 F. at 865. Likewise, in *Wihtol*, where the plaintiff regularly licensed his songs to church choirs, the court clearly took this into account in finding it was not

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fair use for the defendant to copy the song for use by his school and church choirs. *See* 309 F.2d at 777-79.

Based on these precedents, failing to give attribution to a colleague or other individual creator will weigh against fair use, as will other findings of bad faith conduct. Also, failure to obtain permission may weigh against fair use

2. Nature of the Copyrighted Work

a. Factual or Creative

Courts' treatment of this sub-factor was very negative towards defendants in this category. Although all four modern cases arguably involved factual or informational content, which would normally weigh in favor of fair use, the courts never weighed the nature of the works in favor of fair use in these cases.

In *Marcus* and *Bosch*, the courts classified the instructional materials as containing both factual and creative aspects, and held factor two therefore weighed for neither party. *Marcus*, 695 F.2d at 1176; *Bosch*, 2006 WL 2548053, *10 (holding that the record presented a genuine issue of material fact as to whether the unpublished instructional materials were wholly unoriginal compilations of facts or had some creative elements). Likewise, in *Bridge*, the court classified L. Ron Hubbard's lectures on religion as "the product of his creative thought process," and held factor two therefore weighed against fair use. 827 F. Supp. at 635-36. *Compare to New Era Pubs. Int'l v. Carol Pub. Group*, 904 F.2d 152 (2d Cir. 1990) (factor two favored fair use because L. Ron. Hubbards's writings on religion and human relations were "essentially factual on balance"; case discussed in Category C).

However, this negative treatment of factual works may not indicate any useful trend for predicting outcomes. *Weissman* illustrates how much discretion courts can exercise in their treatment of the second factor. The district court found that the factual and scientific nature of Weissman's nuclear medicine syllabus weighed "heavily" in favor of fair use since, according to *Harper & Row*, the law recognizes a greater need to disseminate factual works. *Weissman v. Freeman*, 684 F. Supp 1248, 1262 (S.D.N.Y. 1988) (citing 471 U.S. at 563). But in reversing the district court's finding of fair use, the Second Circuit held that the syllabus' factual and scientific

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nature favored neither party because, as the Supreme Court stated in *Harper & Row*, copyrights are also designed to “assure contributors to the store of knowledge a fair return on their labors” – so factual works need protection too. *Weissman*, 868 F.2d at 1325 (citing 471 U.S. at 563).

In sum, although uses involving factual works are supposedly more likely to be fair, this was not the case in this category. But given that, as *Weissman* illustrates, courts can easily go either way on this factor, this likely does not indicate a reliable trend for predicting outcomes.

b. Published or Unpublished

In the one case where the work was unpublished, the court counted this against fair use. *See Bosch*, 2006 WL 2548053, *10. But this case also involved the teacher entering the plaintiff’s office without permission to obtain the plaintiff’s copyrighted instructional materials, so it is not clear which the court found to be salient: the unpublished nature of the work or the impropriety of the defendant’s conduct. *Id.* at 1.

3. Amount and Substantiality of the Portion Taken

Courts were harsh towards teachers on this factor. In all six cases courts specifically noted under factor three that defendants took the whole work or at least engaged in verbatim copying, and found this weighed against fair use. *MacMillan*, 223 F. at 866 (teacher copied entire sections from textbook to make outlines of the material for students); *Wihitol*, 309 F.2d at 783 (“inconceivable” that copying all or substantially all of plaintiff’s work could be fair use); *Marcus* 695 F.2d at 1178; *Weissman*, 868 F.2d at 1325; *Bridge*, 827 F. Supp. at 636; *Bosch*, 2005 WL 2548053, *10 (21 pages of copying amounted to sufficient evidence of excessive copying to reach trial).

Two of the four modern courts turned to the Congressional Guidelines for guidance and found the defendants’ failure to comply counted heavily against fair use. *Marcus*, 695 F.2d at 1177-78 (more than 10%, not spontaneous); *Bridge*, 827 F. Supp. at 636 (not restricted to one copy per student, not spontaneous, and continual).

These results indicate that a teacher who copies the entire work or makes exact reproductions will have a reduced chance of fair use and that failing to follow the Congressional

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Guidelines reduces those chances still more. Given that teachers' copying is nearly always exact reproduction, factor three presents a significant hurdle to a fair use defense in this context.

4. Market Harm

a. Harm to Primary Markets

In the six cases analyzed in this category, courts did not require plaintiffs to submit substantial evidence of market harm even though, at least according to the Supreme Court in *Sony*, when a use is non-commercial, the plaintiff should have the burden to demonstrate “*some meaningful likelihood of future harm exists.*” 464 U.S. 417, 452 (1983).

In three of the five cases that considered market harm, the courts explicitly noted that plaintiffs' evidence of monetary injury was weak to non-existent, but still held factor four counted against fair use. *King*, 223 F. at 867-68; *Weissman*, 868 F.2d at 1326; *Bosch*, 2006 WL 2548053, *10 (accepting plaintiff's scant evidence of a market for her pathology syllabus, along with her testimony that she might commercialize it in the future).

In *Bridge*, the court held that commerciality and lack of transformativeness created a presumption of market harm for plaintiff: because the defendant sold her course for profit and used bootleg tapes that fulfilled the same purpose as the originals, they necessarily threatened sales of the originals. 827 F. Supp. at 636 (citing *Sony* that commercial use requires presumption of market harm, 464 U.S. at 451).

In *Marcus*, the court found the defendant's use did not harm or threaten the plaintiff's market for her copyrighted cake-decorating book at all, but stated that the mere absence of pecuniary damage was not dispositive and nonetheless found no fair use. 695 F.2d at 1177.

In *Weissman*, where a professor used his colleague's syllabus without attribution, the court found no *financial* harm, but still weighed the fourth factor against the defendant because continued use of plaintiff's copyrighted syllabus without attribution threatened plaintiff's chances for promotion and tenure. 868 F.2d at 1325-26.

In sum, based on these precedents, even if a plaintiff in similar contexts is required to demonstrate market harm, the court will not likely require a high evidentiary showing of actual lost profits or of likely future harm.

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b. Harm to Licensing Markets

Notably, none of the modern courts in this category explicitly considered harm to plaintiffs' licensing markets under factor four or otherwise considered a defendant's failure to obtain a license as salient to the fair use analysis. However, the modern cases all involved teachers copying from other individuals' work, so there were likely no established licensing markets. Courts might have taken licensing harm into account if the plaintiffs had been commercial textbook publisher or other licensing entities.

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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. Given courts' emphasis on the vastness of the defendants' operations, none of these cases definitively answers whether similar copying by educators or researchers acting alone would be fair use.

The cases that inform in the current analysis are *Williams and Wilkins Company v. United States*, 487 F.2d 1345, 1348 (Ct. Clm. 1973) (“*Williams*”); *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982). (“*Encyclopaedia*”); *Basic Books v. Kinko’s*, 758 F. Supp. 1522 (S.D.N.Y. 1991) (“*Kinko’s*”); *American Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1995) (“*Texaco*”); and *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996) (“*Princeton*”).

Williams and *Texaco* both involve photocopying by libraries. *Kinko’s* and *Princeton* involve production and distribution of course packets by commercial photocopy shops. *Encyclopaedia* involves a non-profit educational institution engaged in off-the-air taping and archiving educational films to distribute to schools.

Williams was decided prior to the 1976 Copyright Act. However, this case nonetheless figures prominently in the following analysis because the court relied on the recently proposed four factor test, and the court’s approach of balancing secondary benefits of copying against potential harm to copyright holders is very useful for understanding current trends in fair use law.

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1. Purpose and Character of the Use

The results of this analysis indicate that when an institution engages in long-term, systematic mechanical reproduction of copyrighted materials, a court will not likely find that factor one favors the defendant due to a failure to transform the materials. This may be the case even if the defendant is a non-profit institution regularly copying for an educational purpose, such as distribution of content to students for classroom use.

a. Favored Purposes Inquiry

In all four cases decided after §107 codified fair use, the courts in this category considered whether the defendant institutions' uses were for "educational purposes" or for some favored preambular purpose (e.g. "research"). See 17 U.S.C. § 107. The courts' finding of a favored purpose, either by the defendant or by end users, was not dispositive on the outcome.

In *Encyclopaedia*, which involved a non-profit educational institution, the court held that students and teachers might use the copied films for research and study and that the use was generally "non-profit, educational," but still found no fair use. 542 F. Supp. at 1174-74.

Three other cases suggest the institutions' uses may be analyzed distinctly from the purposes of end users. In the two cases involving production of course packets by for-profit copy shops, the courts found the educational purposes of students who purchased the materials did not mean the copy shop's purpose was "educational." *Kinko's*, 758 F. Supp. at 1531 (Kinko's course packets were "educational" only "in the hands of students"); *Princeton*, 99 F.3d at 1389-90 (MDS's copying was purely "commercial" rather than "non-profit, educational"). In *Texaco*, the court determined to take into account *both* the nature of the use by researchers, allegedly for the favored statutory purpose of "research," and the commercial nature of the user, Texaco, a for-profit corporation. 60 F.3d at 921-22. The court doubted the researchers' activity could properly be classified as "research" under § 107 at all since the researchers did not use the articles in their own published piece of research (as in scholarly quoting) but simply copied articles "as an intermediate step" in performing their research. *Id.* at 920, n. 7. In any case, the court went on to find that commerciality and other unfavorable findings—mainly, lack of transformativeness and market harm—trumped this favorable purpose, leading to no fair use. *Id.* at 922.

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In sum, these precedents indicate that even if a defendant's use is for a favored purpose under § 107 – whether for “educational purposes” or for “research” - this will not guarantee an institution's fair use defense, and may not even significantly strengthen it if the court finds negatively on other factors and sub-factors.

b. Commercial Use

In this category, classification of the defendant institution as “for-profit” always led to a negative finding of commerciality. While commerciality is not supposed to be dispositive, all four courts focused on the economic advantage obtained by the defendants in finding no fair use. *See Texaco*, 60 F.3d 913 at 921-22; *Princeton*, 99 F. 3d at 1385-86, n.2; *Kinko's*, 758 F. Supp. at 1531-32.

The additional finding that the defendant institution not only obtained economic advantage from its copying practices, but intended to profit directly off its copying and made significant efforts to do so, led courts to find the defendant had “exploited” the plaintiff's property, and weighed strongly against fair use. *See Kinko's*, 758 F. Supp. 1531-32 (emphasizing Kinko's marketing efforts); *Princeton*, F.3d at 1386.

In contrast, classification as a non-profit entity led to a positive finding of non-commercial, educational use, but was not dispositive. In *Encyclopaedia*, the court classified copying of educational programs by a New York county's Board of Educational Services as non-commercial, since BOCES was a non-profit entity and made no profits off copying the films, but nonetheless found not fair use. 542 F. Supp at 1176. In *Williams*, where the court found fair use, the defendant library, National Library of Medicine, was not simply non-profit; it was affiliated with a major government research institution, the National Institute of Health, and the repository of much of the world's medical literature. 487 F.2d at 1348. This may have contributed to the favorable fair use holding as much as non-profit status.

In sum, commercial status and perceived attempts to make profits directly from copying without paying fees will likely weigh strongly against fair use in the institutional category. But non-profit status will also not guarantee fair use.

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c. Transformative Use

In this category, the courts were strict in finding that lack of transformativeness weighed against defendants, with the sole exception of *Williams*, which was decided prior to the 1976 Act and prior to courts' adoption of the formal "transformativeness" inquiry. In *Williams*, the court did not examine to what extent the copying literally altered the original materials, but simply weighed it heavily in favor of fair use that the research library's copying was for the purpose of dissemination of knowledge and research, and treated this as an over-arching social benefit that should weigh in favor of fair use, regardless of any literal transformation. 487 F.2d at 1354.

In contrast, in later cases courts required a literal transformation, finding factor one weighed against fair use because the defendant institutions were mechanically reproducing the copyrighted materials and using them for the same purpose as the originals. In *Texaco*, the court found researchers' photocopying of journal articles was not transformative, despite the independent value of the science research that the copying enabled scientists to do, because the researchers, who archived the articles and kept them for reference, ultimately used them for the "same intrinsic purpose" as the original journals. 60 F.3d at 922-25. Any "independent value" gained from the photocopying could also have been obtained if Texaco had simply purchased additional subscriptions or paid the publishers fees for the photocopying via the Copyright Clearance Center. *Id.* at 924-25. *See also Encyclopaedia*, 542 F. Supp at 1175-76 (holding off-the-air taping of educational films not transformative despite ultimate educational value schools obtained due to enhanced access to the films, since the films were readily available for purchase from film companies).

In the photocopy shop cases, where producing course packets for students by compiling a variety of excerpts of whole books arguably involved 'transforming' copyrighted materials into new works, the courts distinguished between the "mechanical" creation of course packets by the photocopy shops, and the selection and arrangement of the material by professors or the educational use to which students ultimately put the materials. *See Kinko's*, 758 F. Supp at 1530-31 (holding it against Kinko's that it exercised no "literary effort" in compiling the packets) *Princeton*, F.3d at 1389 (holding it against MDS photocopy shop that it merely made a

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“mechanical ‘transformation’” of the copyrighted materials, regardless of end use by students and teachers for education).

Thus, in sum, the trend in this category has been towards a more restrictive notion of transformativeness. Under these precedents, institutions engaging in mechanical reproduction of copyrighted materials will have a difficult time demonstrating that their copying is transformative

d. Propriety of the Use

In this category, courts consistently evaluated the adequacy of the defendant-institutions’ photocopying policies and permissions practices. With the possible exception of *Texaco*, courts only examined the institutions’ conduct in regulating their employees’ copying, not the conduct of the individual employees who actually did the copying. *See Texaco*, 60 F.3d at 915 (where the court chose one scientist at random to represent the copying habits of all 400-500 Texaco employees, but nonetheless held Texaco responsible for controlling their copying).

i. Photocopying Policies

With respect to photocopying policies, courts seemed to become stricter after *Williams* in finding that institutions did not appropriately monitor and restrict copying. In *Williams*, the court found the library’s photocopying was fair use because the library had “reasonable” policies in place to limit copying (see case summary below for details), its copying was comparable with that of other libraries, and libraries had carried on such copying “with apparent general acceptance” under the 1909 Act. 487 F.2d at 1354-55, 1356.

In contrast, after *Williams*, courts found defendants did not effectively monitor and restrict copying and archiving of content. In *Encyclopaedia*, the court weighed it against fair use that the institution had no provisions for ensuring schools erased or returned copies of taped films; allowed copies to circulate beyond the classroom; and kept and used copies for up to ten years. *See* 542 F. Supp at 1175, 1179. In *Texaco*, where the absolute amounts of the journals the researchers copied were similar to those in *Williams* –single articles copied on a regular basis – the court distinguished *Williams* on the grounds that Texaco’s employees were archiving the articles. *See Texaco*, 60 F.3d at 924. However, there is no indication that the court in *Williams*

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knew for certain that library patrons were *not* archiving their articles. This implies the court in *Texaco* was simply stricter in its requirements.

Moreover, in all four modern cases, courts evaluated defendants' photocopying practices with reference to the strict Congressional Guidelines for classroom use and found the defendants' failed some aspect of the Guidelines, especially the requirements of spontaneity and limited cumulative effect. *Encyclopaedia*, 542 F. Supp. at 1175; *Kinko's*, 758 F. Supp. at 1536; *Texaco*, 60 F.3d at 919; *Princeton*, 99 F.3d at 1390-91. This too implies a trend towards requiring institutions to impose stricter copying policies.

In sum, based the trend indicated by these five cases, an institution's failure to strictly regulate employees' copying to ensure it meets or at least approaches the standards of the Congressional Guidelines will likely weigh against fair use.

ii. Permissions Practices

A clear trend also emerged after *Williams* with respect to how courts' treated institutional defendants' permissions practices: courts began consistently to consider whether a permissions market existed, and to hold it strongly against a defendant when they failed to pay fees. *See Encyclopaedia*, 542 F. Supp. at 1176; *Basic Books v. Kinko's*, 758 F. Supp. at 1534; *Texaco*, 60 F.3 at 929-30; *Princeton*, 99 F.3d at 1389-90.

At least one case further suggests that a defendant's failure to pay permissions fees when the defendant knows of established permissions markets may lead to enhanced damages. In *Princeton*, the district court had found MDS copy shop's infringement to be "willful," and accordingly awarded \$30,000 in statutory damages, because MDS's owner knew permissions fees were required after *Kinko's* and was "using [publishers'] property for personal gain." 855 F. Supp. 905, 908 (E.D. Mich. 1994). The Sixth Circuit ultimately reversed the district court's finding of willful infringement because of the copy shop owner's "reasonable" belief that *Kinko's* was wrongly decided and that making course packets was fair use. *See Princeton*, 99 F.3d at 1384.

However, taken as a whole, the four modern cases indicate that once a permissions market is reasonably well-established (discussed further below) the defendant's failure to pay

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permissions fees will weigh against fair use, and could potentially lead to a finding of willful infringement and enhanced damages.

2. Nature of the Copyrighted Work

a. Factual or Creative

This sub-factor was unhelpful for predicting outcomes in this category. Yet on the whole courts were harsh towards defendants. Even though the copied works always seemed to be factual, courts were capricious in their classifications of works as factual or creative and did not always weigh the factual nature of content in favor of fair use. In *Kinko's*, the court classified the copied excerpts as factual and held this weighed in favor of fair use. 758 F. Supp. at 1532-3. Yet in *Princeton*, the Second Circuit (though it followed *Kinko's* on every other factor) held that the book excerpts were “creative” and held this weighed against fair use. 99 F.3d at 1389 (stating, “it was certainly not telephone book listings that the defendants were reproducing”). In *Encyclopaedia*, the court did find the films were educational and needed to be disseminated, but did not weigh this in favor of fair use since customers could have purchased or licensed the films from copyright owners. 542 F. Supp. at 1177-78.

Thus, while generally inconclusive, these results at least indicate that an institution engaged in systematic mechanical reproduction should not expect a court to look favorably on the factual nature of the materials.

b. Published or Unpublished

No trends can be extracted on this sub-factor since all the works at issue in these cases were published.

3. Amount and Substantiality of the Portion Taken

a. Absolute Amount Taken

Courts' treatment of this sub-factor became stricter against defendants after *Williams*, focusing much more on absolute amounts and relying on the strict Congressional Guidelines.

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The court in *Williams* did not even explicitly consider amount taken, instead holding that the “absolute amount” of copies the library made each year was not important when the library had reasonable policies in place to restrict copying. *See* 487 F.2d at 1355.

In contrast, post-1976 case focused heavily on absolute amount taken. In two cases, courts found that institutions’ mechanical reproduction of entire works of authorship weighed against fair use. *See Texaco*, 60 F.3d at 925-26 (copying full article from journals weighed against fair use because each article is “an original work of authorship”); *Encyclopaedia Britannica*, 542 F. Supp. at 1179 (copying entire educational films and keeping them for ten years weighed against fair use). In cases involving course packet production by copy shops, the courts found mechanical reproduction of whole portions of works - whole book chapters and shorter excerpts from books - to be excessive, with both cases referencing the Congressional Guidelines to support this conclusion. *See Kinko’s*, 758 F. Supp. at 1535-36, 1534 (taking 14 to 110 pages, representing 5.2% to 25% of the copyrighted works, was “grossly” out of line); *Princeton*, 99 F.3d at 1390-91 (finding taking more than guidelines’ limit of 1000 words for prose was too much).

In conclusion, the modern precedents indicate that an institution’s taking whole works or taking only portions of works, but failing to follow the Guidelines’ “brevity” test, will weigh against fair use.

b. Substantiality

In the photocopy shop cases, where less than full works of authorship were taken, “substantiality” automatically weighed against fair use since the courts reasoned that professors always assigned the most representative portions of works. *See Kinko’s*, 758 F. Supp. at 1533; *Princeton*, 99 F.3d at 1389-90.

c. Availability

Except for in *Williams*, lack of availability of the copyrighted works never weighed significantly in favor of fair use. In *Williams*, the court found it favored the defendant that absent the library’s photocopying researchers would not be able to obtain many of the articles, either at other libraries or by purchasing subscriptions of full journals. 487 F.2d at 1358. But in

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the photo copy shop cases, the fact that some of the copied excerpts came from out-of-print or out-of-stock books did not mitigate unfavorable findings on amount taken since the court reasoned that permissions fees would be more important to publishers and authors of out-of-stock works. *See Kinko's*, 758 F. Supp. at 1533; *Princeton*, 99 F.3d at 1389-90.

Thus, while copying out-of-print or otherwise unavailable works should weigh in favor of fair use, this may not help an institutional defendant engaged in systematic copying.

4. Market Harm

The results of this study indicate that a defendant in this category will not be favored under factor four even if the plaintiff does not present substantial evidence of actual harm to sales or subscriptions of works. Moreover, if there is an established way to license those works, the court will likely find this constitutes market harm. Finally, a court will likely find that potential harm to a plaintiff's primary or licensing market outweighs considerations of educational or research benefit and will find no fair use overall.

a. Harm to Primary Markets

In general, courts in this category considered market harm the most important factor in the fair use analysis or at least gave it substantial weight in the fair use analysis. *Texaco*, 60 F.3d at 927-30; *Princeton*, 99 F.3d at 1385. Moreover, modern courts in this category generally did not require plaintiffs to present substantial evidence of actual market harm or of likely future harm.

In *Williams*, the court actually examined the plaintiffs' evidence of market harm, which indicated that the plaintiffs' journal subscriptions had *increased* over the period and did not sustain the assumption that sales would eventually decrease. 487 F.2d at 1357-58. However, in three of the four modern cases, the courts simply inferred that the scope of the institutions' copying and the fact that the copies replaced the originals must mean reduced sales for plaintiffs. *Encyclopaedia*, 542 F. Supp. at 1169 (finding copying full films off the air would replace purchase of originals from film companies); *Basic Books v. Kinko's*, 758 F. Supp. at 1534 (finding students using course packets rather than buying books would lead to reduced book sales); *Princeton*, 99 F.3d at 13.89-90.

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In *Texaco*, the Second Circuit explicitly did *not* find that plaintiffs presented convincing evidence of reduced journal sales due to copying of single articles and doubted that the individual articles themselves had substantial monetary value. 60 F.3d at 929-30. However, the court found harm to licensing markets, as below. *Id.*

Thus, from this trend it appears plaintiffs' will not have to show substantial evidence of harm to sales when an institution engages in wide-scale copying of plaintiffs' entire works or of portions of plaintiffs' works. Even if some evidence of reduced sales is required, the plaintiff can still prevail by showing harm to licensing markets, as below.

b. Harm to Licensing Markets

A clear trend emerged after *Williams* with respect to the relevance of licensing markets to factor four of the fair use analysis: courts began to find that defendants' failure to pay permissions fees satisfied plaintiffs' burden to show market harm. In *Williams*, the court specifically held that the defendants' permissions practices had no bearing on the fair use analysis. 487 F.2d at 1357, n. 19. In contrast, in the later cases, the courts examined whether there were "traditional," "reasonable," or "likely to be developed" licensing markets and held that market harm was satisfied if defendants nonetheless failed to pay fees for use of the works. *See Texaco*, 60 F.3 at 929-30; *Princeton*, 99 F.3d at 1389-90 (citing *Texaco* for proposition that established licensing market weighs against fair use). *See also Encyclopaedia*, 542 F. Supp. at 1176; *Basic Books v. Kinko's*, 758 F. Supp. at 1534 (both taking into account licensing fees under market harm).

In sum, a finding that "reasonable" licensing markets exist will likely weigh heavily against fair use in cases involving regular, wide-scale copying by institutions.

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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).²² 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.

There have been numerous fair use cases involving productive uses in critical commentary and scholarly analysis. Unlike in other areas of learning-promoting fair use case law, courts in these cases employ consistent analyses, cite the same cases, and reach consistent holdings. Therefore, the case summaries we present are not exhaustive of the cases in this category. Rather, we selected only those cases that represent particularly important precedents within this category, or that have particular relevance to learning-promoting uses. For example, this analysis does not include *Rosemont Enterprises, Inc. v. Random House* because it was decided prior to the 1976 Copyright Act. 366 F.2d 303, 307 (2d Cir. 1966) (holding that use of copyrighted articles about Howard Hughes in a critical biography was fair use because it served the public interest in free dissemination of information and required use of the prior materials). The analysis discusses but does not include *Salinger v. Random House* and *New Era Publications v. Henry Holt Pub. Co.* because the rule of those cases that use of unpublished materials is presumptively unfair has since been overturned by statute as well as in case law, as

²² See Pamela Samuelson, *Unbundling Fair Uses*, U.C. Berkeley Public Law Research Paper No. 1323834, 15-16 (2009). The empirical analysis in this category draws on her article section, "Productive Uses in Critical Commentary."

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indicated in the following analysis.²³ See *Salinger*, 811 F.2d 90, 96 (2d Cir. 1987); *New Era v. Henry Holt*, 873 F.2d 576, 583-85 (2d Cir. 1989) (both finding not fair use for biographers to quote heavily from subjects' unpublished works).

Finally, this analysis does not include *Maxtone-Graham v. Burtchaell* because that case raises Free Speech issues that are beyond the scope of this study. 803 F.2d 1253 (2d Cir. 1986) (finding fair use for anti-abortion writer to copy from interviews in anti-abortion book).

The seven cases that inform the following analysis are: *New Era Pubs. Int'l v. Carol Pub. Group*, 904 F.2d 152 (2d Cir. 1990) ("*New Era*"); *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991) ("*Wright*"); *Penelope v. Brown*, 792 F. Supp. 132 (D. Mass. 1992) ("*Penelope*"); *Arica Institute, Inc. v. Palmer*, 920 F.2d 1067 (2d Cir. 1992) ("*Arica*"); *Rubin v. Brooks/Cole Pub. Co.*, 836 F. Supp. 909 (D. Mass. 1992) ("*Rubin*"); *Sundeman v. The Seajay Society*, 142 F.3d 194 (4th Cir. 1998) ("*Sundeman*"); *NXIVM Corp. v. Ross Institute*, 364 F.3d 471 (2d Cir. 2004) ("*NXIVM*").

These cases have similar fact patterns: the plaintiff, an author of creative, factual or scholarly materials, sues the publisher and sometimes the author of a new work for reproducing substantial portions of the original author's work.

The first two cases, *New Era* and *Wright*, both involve biographers quoting extensively from the published and unpublished works of their subjects in order to inform biographies of L. Ron Hubbard and Richard Wright, respectively.

In the third case, *Penelope*, a popular writer copied sentence examples from plaintiff's academic linguistics book in order to make an instructional manual for novice writers.

²³ In 1992, Congress amended Section 107 to state: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." See 17 U.S.C. § 107. Congress' decision was partly a result of the confusion generated by the Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564 (1985), where the majority stated that "the scope of fair use is narrower with respect to unpublished works," and the dissent declared that the majority's statement implied a "categorical presumption against prepublication fair use." *Id.* at 595 (Brennan, J., dissenting). See also Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 UPALR 549, 612-13 (2008).

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In the fourth case, *Arica*, a scholar and instructor of spirituality published a self-help guide that drew heavily on spiritual teachings and figures published in materials owned by a non-profit instructional foundation.

In the fifth case, *Rubin*, an academic publisher used a popular psychology research tool, the “Love Scale,” in a chapter of a widely-sold social psychology textbook without obtaining proper permissions from the Scale’s creator.

In the sixth case, *Sundeman*, a researcher at a non-profit educational institution copied portions of a deceased author’s unpublished novel to inform her unpublished academic paper, which she presented at a small conference at the University of Florida.

In the final case, *NXIVM*, the owner of a non-profit website raising awareness on “mind control” directed his employees to post a critical analysis of plaintiff’s business training seminars that copied entire passages from plaintiff’s training manuals.

In all eight cases the courts found fair use. However, in *Rubin*, the court found that while it had been fair use for the defendant to use the “Love Scale” and awarded no damages, future academic publishers would have to obtain proper permissions. 836 F. Supp. at 922. In the following analysis, *Rubin* is generally considered a finding of fair use; however, in the discussion of factor four, which was most salient to the court’s ultimate ruling that publishers must pay going forward, the analysis considers the consequences of *Rubin*’s unique rule.

1. Purpose and Character of the Use

The results of this analysis suggests when a court finds a defendant’s use to be for a favored purpose of criticism, comment, teaching, scholarship or research, or to be a “productive” use that comments or builds upon the plaintiff’s expression, the court will find factor one favors fair use, and will likely find fair use overall. The commercial nature of the defendant’s activities or even anticipation of some profits from the use will not affect this finding, so long as the defendant does not specifically exploit the copied material to make a profit. Good conduct, including attributing the plaintiff and at least attempting to obtain the plaintiff’s permission, will also weigh in a defendant’s favor.

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a. Favored Purposes Inquiry

In this category, falling under one of the favored statutory purposes substantially affected a court's finding of fair use. In six of the seven cases examined, courts explicitly stated that factor one favored the defendant regardless of commerciality because the defendant's use fell under one of the favored purposes of "criticism," "comment," "teaching," "scholarship," or "research." 17 U.S.C. § 107. See *New Era*, 904 F. 2d at 156 (holding that if a use "fits comfortably" into one of the categories in § 107 "assessment of the first fair use factor should be at an end"); *Wright*, 953 F.2d at 736 (citing *New Era* and holding that when defendant's use is for the purposes of "criticism, comment[,] . . . scholarship [or] research" there will be a strong presumption that factor one favors the defendant"); *Arica*, 970 F.2d at 1077 (citing *Wright* for the same proposition); *Rubin*, 836 F. Supp. at 917 (citing *Wright*); *Sundeman*, 142 F.3d at 203 (citing *Wright*, and also noting use of manuscript at academic conference was "noncommercial, educational"); *NXIVM*, 364 F.3d at 477 (citing *Wright*).

In *Penelope*, the court did not explicitly classify the use as for "scholarship," "teaching," "comment," or "research." 792 F. Supp. at 136-37. Yet the court nonetheless found factor one favored defendant and fair use overall based on the finding that defendant's use was "productive" scholarship that yielded social benefits and supplemented rather than supplanted the original work. *Id.*

This suggests if a court classified the defendant's use as for one of the favored purposes of scholarship, teaching, comment or criticism, this will always lead to factor one favoring the defendant and will likely lead to a finding of fair use overall.

b. Commerciality Inquiry

Courts in this category never found that the commercial nature of a defendant's activities counted significantly against fair use. Instead, all courts held that the defendant's anticipating profits from publication of the new work did not offset the presumption that factor one favored fair use due to the defendant's favored purpose of making critical commentary. *New Era*, 904 F. 2d at 156; *Wright*, 953 F.2d at 736; *Penelope*, 792 F. Supp. at 137; *Arica*, 920 F.2d at 1078; *Rubin*, 836 F. Supp. at 917; *Sundeman*, 142 F.3d at 203; *NXIVM*, 364 F.3d at 478.

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In *Penelope* and *Rubin*, the courts delved more deeply into the commerciality inquiry to examine whether the defendant “exploited” the plaintiff’s work. *Penelope*, 792, F. Supp. at 137; *Rubin*, 836 F. Supp. at 917-18. In both cases, the courts found the defendants did not use the materials specifically to enhance profits because they did not feature them prominently in their new publications in order to enhance sales, but used them sparingly and inconspicuously to add depth to their scholarship. *Penelope*, 792, F. Supp. at 137; *Rubin*, 836 F. Supp. at 917 (citing *Penelope* and likewise holding “it is difficult to see how [the author and publisher of the textbook] stood to profit directly from [using Rubin’s] Love Scale”). The court in *Rubin* contrasted the academic textbook’s use from that in Rubin’s prior suit against Boston Magazine, which featured the Love Scale as a the main feature of a popular article on romance in order to increase magazine sales. 836 F. Supp. at 917. See *Rubin v. Boston Magazine, Co.*, 645 F.2d 80, 84 (1st Cir. 1981)

In sum, these cases suggest commercial purpose will not weigh against a defendant using copyrighted content for critical or scholarly analysis as long as the defendant does not attempt to profit directly from copying the plaintiff’s work.

c. Transformativeness Inquiry

In each of the eight cases in this category, the court favored the defendant under factor one because the defendant’s use somehow added to, analyzed, or criticized the original work, thereby resulting in some added social benefit beyond the original work. *New Era*, 904 F. 2d at 156-57, *Wright*, 953 F.2d at 736; *Arica*, 970 F.2d at 1077; *Penelope*, 792 F. Supp. at 136; *Rubin*, 836 F. Supp. at 916; *Sundeman*, 142 F.3d at 202-03; *NXIVM*, 364 F.3d at 477. In the four later cases, courts used the term “productive” to describe these uses. In each case, this finding was determinative in the court’s finding of fair use overall. The court’s positive classifications of the defendants’ uses were fact specific, and are discussed individually below.

In *New Era* and *Wright* the courts found the uses were favored critical commentary because the authors quoted the copyrighted work in order to deepen the readers’ understandings of the subjects of their biographies. *New Era*, 904 F. 2d at 156-57; *Wright*, 953 F.2d at 736.

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In *Penelope*, the court found the author's use was productive because the defendant copied sample sentences from plaintiff's technical linguistics book for her novice writer's manual in order to "express some of the same material in a much simpler way so as to inform the average reader." 792 F. Supp. at 136. The court further held it did not matter that defendant used the sample sentences incorrectly, since the important point for productivity was not whether the defendant's use *actually* resulted in social benefits but whether it "could have benefited the public marginally." *Id.*

In *Arica*, the court found using plaintiff's copyrighted religious teachings and figures in a spiritual self-help guide was acceptable scholarly analysis because defendant cited passages to provide historical and theoretical background to the plaintiff's spiritual system and to explain how the system worked. 970 F.2d at 1077-78. Thus, the defendant "buil[t] upon" rather than replaced the original author's work and furthered knowledge in the area.

In *Rubin*, the court found printing a psychologist's copyrighted Love Scale in defendants' psychology textbook to be productive because the textbook was circulated on college campuses for the purposes of teaching and higher learning and because the textbook author critically analyzed the Scale, comparing the psychologist's theory with others and encouraging students to question its validity. 836 F.3d at 916. However, as discussed below, the court's decision to make future publishers pay fees for similar uses weakens the utility of this finding as a precedent. *Id.* at 922.

In *Sundeman*, the court found defendant's copying of portions of a deceased author's unpublished novel in her academic paper was productive because the defendant quoted and paraphrased to analyze the novel, and in order to shed light on the author's development and comment on her relationship with her mother. *Id.* at 202-03.

Finally, some cases placed specific emphasis on the *critical* nature of the analyses, finding it weighed in favor of fair use that the defendants were using the copied material in order to express dissenting opinions. *New Era*, 904 F.2d at 159-60; *Rubin*, 836 F. Supp. at 917; *NXIVM*, 364 F.3d at 482 (stating that copying for the purpose of effective criticism must be allowed under First Amendment even if it harms the market for the original work).

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As a whole, these cases show that in order for a court to classify a defendant's use as "productive," the secondary author must copy in order to make a point about the original work or to build upon it in a way that potentially advances knowledge and creativity, regardless of whether it actually does. Moreover, a court may be more likely to find a use productive if the defendant copies for the purpose of expressing a dissenting opinion regarding the original author or his work.

d. Propriety of the Use

Courts looked favorably on defendants' attributions to the original authors. *See, e.g., Penelope*, 792 F. Supp. at 137 (where defendant author credited original author in the paper back edition after author objected to defendant's copying in hardcover); *Rubin*, 836 F. Supp. at 918-19 (where a textbook publisher clearly attributed plaintiff and directed students to plaintiff's own textbook for further reading).

Courts also looked favorably on attempts to obtain permissions from copyright owners, regardless of whether the permission was actually granted. *See Rubin*, 836 F. Supp. at 919 (noting favorably that publisher attempted to obtain permission through legitimate channels and albeit incorrectly stated in the textbook that Love Scale was "reprinted by permission"); *Sundeman*, 142 F.3d at 203 (noting favorably that researcher did not publish her paper quoting from deceased author's unpublished novel because she was unable to obtain permission from author's estate).

At the same time, when courts found defendants' uses to be productive, they were willing to overlook some allegations of bad faith conduct.

In *Rubin*, where the publisher attempted to backdate permissions from other authors that might have objected to their use of copyrighted material in the textbook, the court held that, while it was "disturbed" by this dishonest conduct, it was sufficiently disconnected to the defendant's conduct towards the plaintiff and did not prevent factor one from favoring fair use. 836 F. Supp. at 919.

In *NXIVM*, the court looked negatively on the defendant's conduct in obtaining copyrighted seminar materials from former seminar participants who may have breached a

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fiduciary duty, but held that while bad faith weighed against fair use, it did not outweigh the productive benefit of the defendant's critical analysis 364 F.3d at 477-78.

2. Nature of the Copyrighted Work

Based on the results of this analysis, if the defendant copies from published materials that are factual, scholarly or scientific, factor two will favor the defendant. Even if the work is creative, if the work is published and widely available, factor two will still likely favor the defendant. If the work is unpublished, factor two will almost certainly weigh against fair use, but should not preclude a finding of fair use overall.

a. Factual or Creative

When courts found the copied work to be factual or scholarly as well as published, they always held factor two favored the defendants. *New Era*, 904 F.2d at 157-58 (factor two favored fair use because L. Ron. Hubbards's writings on religion and human relations were "essentially factual on balance"); *Penelope*, 792 F. Supp. at 138 (factor two favored fair use because copied linguistics work was scholarly); *Rubin*, 836 F. Supp. at 919.

In *Rubin*, the court supported its finding that the scholarly nature of the copied research tool favored fair use by citing the "Sampson doctrine," which states that "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." 836 F. Supp. at 919, n. 8 (citing *Sampson & Murdock Co. v. Seaver-Readford* 140 Fed. 539, 541 (1st Cir. 1905)). The court rejected the plaintiff's argument, based on comments in *Nimmer*, that the "Samson doctrine" was outdated, stating that "like other courts and commentators [this court] sees 'substantial merit' in the doctrine, even if it does not allow 'limitless fair use in the scientific arena.'" *Id.* at 919 n. 8 (referencing *Nimmer on Copyright* § 13.05[A][2] at 13-102.57 (1993))

Based on these cases, copying a published scholarly or scientific work for new scholarly purposes will favor fair use.

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b. Published or Unpublished

The published or unpublished nature of the quoted work was very important in this category. The courts in all seven cases considered this sub-factor, though none found it dispositive.

In the three cases where the defendants quoted from unpublished works, the courts held factor two weighed against fair use, but explicitly stated that this did not preclude a finding of fair use overall. *See Wright*, 953 F.2d at 737-38 (quoting from unpublished letters and journals was still fair use); *Sundeman*, 142 F.3d at 204-05 (quoting from unpublished novel was still fair use); *NXIVM*, 364 F.3d at 480 (posting unpublished seminar materials on Internet was still fair use). Rather, these cases all followed the rule adopted by §107 in 1992 that the unpublished nature of a work is not dispositive and overruled earlier cases, which essentially held copying from unpublished works could not be fair use even if for scholarly or critical purposes. *See Salinger v. Random House, Inc.* 811 F.2d 90, 96 (2d Cir. 1987); *New Era Pubs. Int'l v. Henry Holt and Co.*, 873 F.2d 576, 583-85 (2d Cir. 1989) (both finding not fair use for biographers to quote heavily from subjects' unpublished works).

On the other hand, when the copied work was published and widely available, courts always held that factor two favored fair use, regardless of whether the works were factual or creative. *See New Era*, 904 F.2d at 157-58 (noting favorably that biographer only copied L. Ron Hubbard's previously published works); *Penelope* (noting favorably that copied linguistics anthology was widely available in college bookstores); *Arica*, 970 F.2d at 1078 (not attempting to classify guru's spiritual teachings as either factual or creative, but noting that since they were already published and available to the general public this favored fair use); *Rubin*, 836 F. Supp. at 921-22 (noting favorably that Love Scale was widely published in several articles and texts). To support that the published nature of the copied work favored fair use, courts often cited the Supreme Court's statement in *Harper & Row* that the scope of fair use is narrower for unpublished works and then inverted this reasoning to find the published nature of the work favored fair use. *See, e.g., New Era*, 904 F.2d at 157; *Rubin*, 836 F. Supp. at 921-22 (both citing 471 U.S. at 564 for this proposition).

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These trends suggest that quoting from a published work is much more likely to be fair use than quoting from an unpublished work; but that the unpublished nature of the work will not preclude finding fair use overall.

3. Amount and Substantiality of the Portion Taken

This analysis indicates that reproducing small percentages of the plaintiff's work as part of a critical commentary or scholarly analysis will always weigh in favor of fair use. Moreover, even quoting larger amounts can still be fair use as long as the defendant's copying is necessary in order to achieve her productive purpose. Finally, two cases suggest that copying a full portion of an author's work, such as a figure, for incorporation into commentary or scholarly analysis may or may not constitute fair use, depending on the strength of the work's copyright protection and the availability of a license.

a. Absolute Amount of Portion Taken

Courts in this category never held that the defendant copied too much from plaintiff's works to deserve a fair use defense. With the exception of *Rubin*, discussed below, courts always found that quantitative amount taken favored the defendant.

Significantly, none of these cases cited the Congressional Guidelines' limits on the absolute amounts copyists may take from copyrighted works (for prose, less than 10% of plaintiff's whole work). But some courts noted favorably that the absolute amount of material that the defendant copied, proportionate to the plaintiff's works as a whole, was within allowable limits established by other courts. *See New Era* (often cited for its finding that quoting "miniscule" amount from 25 works, 5-6% of 12 works, and 8% or more of 11 short works was not too much for fair use to apply); *Wright*, 953 F.2d at 738; *Arica*, 970 F. 2d at 1078; *Sundeman*, 953 F.2d at 206 (citing *New Era* to support taking 6% of novel was not too much in part because this was "in allowable limits as found by other courts").

However, most courts held that the amount taken must be analyzed in light of the defendant's productive purpose. *Wright*, 953 F.2d at 738 (copying less than 1% of Wright's letters and journals was no more than author required to express Wright's views on writing); *Sundeman*, 953 F. 2d at 205-06 (quoting and paraphrasing 6% of unpublished novel not too

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much when researcher copied to make crucial commentary); *NXIVM*, F.3d at 481 (quoting liberally from 17 pages from a 500 page manual was “reasonably necessary” to support critical commentary of the copied materials).

This suggests that quoting or paraphrasing even substantial portions of a plaintiff’s textual work may still weigh in favor of fair use so long as the defendant does not take more than necessary to achieve her productive purpose.

Moreover, at least two cases suggest that copying plaintiff’s full works for incorporation into a critical analysis may not preclude a finding of fair use. In *Arica* and *Rubin*, where the defendants both printed entire versions of plaintiffs’ works in their publications, the courts did not find that this weighed substantially against fair use. *Arica*, 970 F.2d at 1078; *Rubin*, 836 F. Supp. at 920.

In *Arica*, where a scholar of spirituality published a spiritual self-help guide that printed entire reproductions of plaintiff’s nine-pointed figures, the court found the defendant did not take too much of the figures or the “heart” of the plaintiff’s work, and that factor three weighed in her favor. 970 F.2d at 1077-78. However, in making this determination, the court relied on its finding that the copied figures were not themselves copyrightable, but were only protected due to creative sequence and labeling. *Id.* Since the defendant only took the figures’ labels and sequencing, she only copied insubstantial amounts of plaintiff’s actual creative expression. *Id.* This suggests the court might have found copying the whole figures was excessive if the figures had stronger copyright protection.

In *Rubin*, where the textbook publisher printed the entirety of plaintiff’s copyrighted research tool, the court admitted that the publisher took both the entire tool and the critical and central component of Rubin’s work. 836 F. Supp. at 920. However, the court found this pointed “only slightly” in Rubin’s favor because the Love Scale was only a small proportion of Rubin’s entire set of copyrighted works and the text-book author required the whole Scale to enhance his analysis and critique. *Id.*

These two cases suggest that courts will not necessarily hold copying the entire work precludes or weighs substantially against fair use. However, it will likely be a much closer case.

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b. Substantiality of Portion Taken

Courts in this category always additionally examined whether, even if the defendant did not take too much, he nonetheless took the most important part of the plaintiff's work. However, with the exception of *Rubin*, discussed above, courts in this category never found that the defendant took the "heart" of the plaintiff's work. *New Era*, 904 F.2d at 159-60 (overturning district court's finding that defendant quoted from the most important and expressive parts of L. Ron Hubbard's works); *Penelope*, 792 F. Supp. at 138; *Arica*, 970 F.2d at 1077-78; *Sundeman*, 142 F.3d. at 205 (finding defendant quoted "significant" portions of novel, but not the "heart of the work," and rejecting approach of some courts that mere selection implies defendant took the most essential parts); *NXIVM*, 364 F.3d at 481.

This suggests that even quoting or paraphrasing significant parts of a plaintiff's textual work will not hurt a defendant's fair use chances.

4. Market Harm

The results of this analysis indicate that courts will probably not find market harm when the defendant has copied for the purpose of critical commentary or analysis. Even when the court finds the defendant's work is directed toward the same audience as the plaintiff's and may potentially harm plaintiff's market, the court will likely be lenient in allowing the defendant's use to continue in order to enhance the progress of criticism, science and creativity. However, one important caveat to this is that when a plaintiff has a thriving licensing market for the precise use intended by the defendant, the defendant likely will have to obtain permission. This is likely to be the case only when the defendant wishes to use the plaintiff's whole work or a whole portion of the plaintiff's work, rather than merely quoting and paraphrasing.

a. Harm to Primary Market

In general, courts in this category did not find market harm and found that factor four favored fair use.

In most cases, the courts easily found that the defendant's publications had not and would not harm sales of the plaintiffs' works because they did not replace the plaintiffs' works and might even stimulate interest in them. *New Era*, 904 F.2d at 159-60; *Wright*, 953 F.2d at 739

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(citing *New Era* to find critical biography did not “supplant,” and if anything enhanced, the potential market for subjects’ works); *Penelope*, 792 F. Supp. 138 (no market harm because beginner writers’ manual had a distinct audience); *Sundeman*, 142 F.3d at 207 (researcher’s paper analyzing unpublished novel did not harm potential market because defendant never published her paper and her conference presentation likely only stimulated interest in the novel); *NXIVM*, 364 F.3d at 482 (publication of critical analysis of seminars did not supplant market for seminars).

In cases where defendants’ works were critical, courts held that even if defendants’ critiques did reduce sales of plaintiff’s works, this did not constitute market harm protected by copyright. *New Era*, 904 F.2d at 159-60; *Sundeman*, 142 F.3d at 207 (copyright holders cannot control harm to their markets due to criticism); *Arica*, 970 F.2d (defendant entitled to compete with plaintiff’s work so long as defendant does not gain economic advantage due directly to copying); *NXIVM*, 364 F.3d at 482 (even if highly critical commentary on the plaintiffs’ business training seminars might reduce seminar sales, reduced sales due to criticism is allowed under the Copyright Act).

In sum, these cases indicate courts will find in future circumstances that a defendant’s critical commentary or analysis does not harm the market for the original work.

b. Harm to Licensing Markets

With the exception of *Rubin*, courts in this category did not take lost licensing fees into account. The court in *Sundeman* addressed the sub-factor, but held harm to licensing markets was not relevant when the defendant’s purpose was critical commentary, citing *Harper & Row* to explain that “there is no protectable derivative market for criticism.” 142 F.3d at 207.

However, in *Rubin*, the plaintiff regularly licensed his copyrighted Love Scale research tool to publishers or gave publishers and researchers the right to use the full figure or samples of the figure for free. 836 F. Supp. at 913-15. The court held that although defendant’s particular use of the Love Scale did not harm the plaintiff’s sales or licensing fees, widespread application of a fair use holding to similarly situated 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

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court held that future academic textbook publishers would have to pay Rubin permission fees. *Id.* This holding is very unusual and is not likely to be replicated. But it may imply that the precedential effect of *Rubin* is actually the familiar rule that when a well-established permissions market exists for the defendant's intended use, the defendant must obtain permission.

In sum, these cases indicate that licensing fees will not generally be relevant to evaluating market harm when a defendant copies for the purpose of critical commentary or scholarly analysis. But threat to licensing markets will likely be relevant when there is a well-established licensing market for the defendant's use already in existence. This rule seems particularly applicable to publishers of academic or educational resources wishing to print whole copyrighted works, such as figures or book excerpts, since such works are regularly licensed.

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. None of the defendants are educators or are involved in activities that can easily be classified as "nonprofit educational" or as falling within the statute's favored categories of "criticism," "comment," "teaching," "scholarship," or "research." § 107. 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.²⁴

In the first case, the court found it was fair use for an indexing company to copy from plaintiff New York Times' forty-volume index in order to make a distinct personal name index to the Times' index. *New York Times, Inc. v. Roxbury Data Interface*, 434 F. Supp. 217 (D.N.J. 1977) ("*Roxbury*").

²⁴ 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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In the second case, *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978) (“*Key Maps*”), the defendant was a fire marshal who made copies of plaintiff’s map to distribute to public officials. Though the court did not delve deeply into the fair use analysis, the defendant’s fair use defense succeeded primarily because his copying allowed him to access the information contained in the map and served the public interest in fire protection.

In the third case, *Dow Jones & Co. v. Board of Trade of the City of Chicago*, 546 F. Supp. 113 (S.D.N.Y. 1982) (“*Dow Jones*”), the court found it was fair use for a futures commodities exchange market to copy and disseminate time-sensitive stock market indexes to Board members and to a regulatory agency in order to comply with federal regulations.

The next two cases both involve information providers that copied data from their competitors’ data compilations and incorporated the data into their own, slightly distinct informational services that they sold to the public. *Financial Information Inc., v Moody’s Investors Service, Inc.*, 751 F.2d 501 (2d Cir. 1984) (“*Moody’s*”); *NADA Services Corp. v. Business Data of Virginia, Inc.*, 651 F. Supp. 44 (E.D. Va. 1986) (“*NADA*”). Despite similar facts, the fair use claim failed in *Moody’s* but succeeded in *NADA*.

The final three cases involve Internet search engines reproducing copyrighted content on the Internet in order to make it more accessible to Internet users. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (“*Kelly*”); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006) (“*Field*”); *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007) (“*Perfect 10*”).

The following analysis locates elements, trends and commonalities that emerge from these precedents, particularly noting features that might be relevant to educators and educational institutions.

1. Purpose and Character of the Use

Overall, the cases examined in this category suggest that a defendant will be favored under factor one when the court finds the defendant’s use served a new and socially beneficial function in enhancing access to information and that the defendant did not exploit the plaintiff’s work for profit or compete in the same market as the plaintiff.

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a. Favored Purposes Inquiry

None of the courts in these cases characterized the defendant's use as falling within the favored purposes enumerated in the preamble to § 107. Instead, this group of uses arose outside the statute's guidance at the discretion of judges who saw the defendants' uses as socially valuable, if not cognizable under the statute. Yet, despite the fact that none of the uses were for statutorily-favored purposes, seven of the eight cases in this category were found to be fair use: the highest rate of any category. This high win-rate indicates that a defendant arguing his use enhances access to information may have a better fair use defense than a defendant arguing his use has, for instance, a "research" or "educational" purpose.²⁵

b. Commerciality Inquiry

In this category, courts did not generally hold for-profit status or some expectation of profits against defendants. In five of the six cases where the defendants profited off their activities, the courts nonetheless found fair use. *Roxbury*, 434 F. Supp. at 224-26; *NADA*, 651 F. Supp. at 48-49; *Kelly*, 336 F.3d at 818; *Field*, 412 F. Supp. 2d at 1120; *Perfect 10*, 487 F.3d at 722-23.

In *Roxbury*, *Kelly*, *Field* and *Perfect 10*, the defendants facilitated access to information as part of their for-profit businesses. However, in each case the court also found that the defendant's purpose was socially valuable and distinct from the plaintiff's and that the defendant did not specifically exploit the plaintiff's work to make a profit. Accordingly, each court held that commerciality did not weigh significantly against the defendant. *Roxbury*, 434 F. Supp. at 224-26; *Kelly*, 336 F.3d at 818; *Field*, 412 F. Supp. 2d at 1120 (finding that Google's commercial status was of "minor relevance" and that the transformativeness of Google's use was "considerably more important"); *Perfect 10*, 487 F.3d at 722-23 (finding, as in *Kelly*, that Google did not "exploit" Perfect 10 photos because Google did not generate advertising revenues

²⁵ Note that courts theoretically could have stretched the statute's terminology to cover defendants' purposes in making information more accessible. In *Dow Jones*, the court noted that the Board's purpose in submitting Dow Jones Averages to a regulatory agency for approval could have been for the favored purpose of "research" or "education"; but that it was not because submitting exact copies of Dow averages was not absolutely required for regulatory approval. 546 F. Supp. at 120. Otherwise, courts did not address the statute's favored purposes.

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directly from posting thumbnail versions of the photos). In each of these four cases, the courts found factor one weighed in favor of fair use and found fair use overall.

In contrast, in *Moody's* and *NADA*, the courts simply applied the recent rule of *Sony* that commercial use requires the presumption that the use is unfair, and held factor one favored the plaintiffs. *Moody's*, 751 F.2d at 508-09; *NADA*, 651 F. Supp. at 48 (both citing *Sony*, 464 U.S. at 451). However, in *Moody's*, the court did not find that *Moody's* had a distinct purpose from plaintiff FII. Rather, the court noted that *Moody's* sold a similar, if somewhat more expansive informational service, and so competed in the same market as FII. 751 F.2d at 509-10. By freely copying instead of paying for the information, *Moody's* obtained a direct economic advantage over its competitor. *Id.* at 510. Thus, despite the court's presumption of unfairness, it may not have been *Moody's* commercial status alone that led the court to find no fair use, but the court's perception that *Moody's* did not add additional value to FII's work and that *Moody's* copying was exploitative. *See id.*

As a whole, these cases indicate that, regardless of a defendant's commercial purpose, a fair use defense based on facilitating access to information will likely be favored under factor one if the defendant has a distinct purpose from the plaintiff, and does not directly exploit the plaintiff's copyrighted materials for profit or use them to gain a competitive advantage in a similar market.

c. Transformativeness Inquiry

In seven of the eight cases in this category, courts either (i) found the defendant's use, while not literally transformative, served a secondary function beyond the original work; (ii) found the defendant's purpose in enhancing access to information was actually "transformative" despite mechanical reproduction of copyrighted content; or (iii) found the defendant's use was too similar to plaintiff's to weigh in the defendant's favor.

In all six cases where the courts found the defendant's use to be transformative or to serve a new public function, the courts found fair use. *Roxbury*, 434 F. Supp. at 221; *Key Maps*, 470 F. Supp. at 38; *Dow Jones*, 546 F. Supp. at 122, n. 10; *Kelly*, 336 F.3d at 818-19; *Field*, 412 F. Supp. 2d at 1119; *Perfect 10*, 487 F.3d at 721.

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In contrast, in the one case where the court found the defendant was producing a similar, competing product to the plaintiff, the court found no fair use. *Moody's*, 751 F.2d at 508, 509-510.

In the single outlier case, *NADA*, the court did not examine transformativeness, but nonetheless found fair use due to defendant's successful showing that there was no market harm. 651 F. Supp. at 48.

These trends indicate that a court's finding that the defendant's use in enhancing access to information was transformative or had a socially beneficial purpose that was distinct from the plaintiff's will result in a finding of fair use.

i. New Publicly Beneficial Purpose

The two earliest cases, *Roxbury* and *Key Maps*, did not consider the transformativeness of the works, presumably because the Supreme Court had not yet established the transformativeness inquiry when these cases were decided in 1977 and 1978, respectively. See *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994). Nonetheless, in *Roxbury*, the court found the purpose of defendant Roxbury's personal names index to the Times' multivolume index was to facilitate public access to the information in the Times' less accessible index and that factor one weighed in favor of fair use due to the public utility of this indexing activity. 434 F. Supp. at 221. Likewise, in *Key Maps*, the court found that a fire marshal's copying and planned distribution of plaintiff's map to public officials was fair use because dissemination of the information was for a beneficial public purpose. 470 F. Supp. at 38.

Thus, absent the transformativeness inquiry, these two courts held it in defendants' favor that they made a new and publicly beneficial use of the copyrighted content by promoting access to the information contained therein. Though they are early, these holdings suggest a use may be favored due to its public utility, apart from whether the new work literally alters the original. As below, the current expansion of transformativeness to cover this type of use suggest this may be a viable argument today.

ii. Expanded Notion of Transformativeness

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In the subsequent four cases, *Dow Jones*, *Kelly*, *Field*, and *Perfect 10*, the courts employed an expanded concept of transformativeness, finding that factor one favored the defendants, even though they mechanically reproduced the plaintiffs' works, because the defendants did so for a new and socially beneficial purpose. *Dow Jones*, 546 F. Supp. at 119-20; *Kelly*, 336 F.3d at 818-19; *Field*, 412 F. Supp. 2d at 1119; *Perfect 10*, 487 F.3d at 721. All four courts found fair use.

In *Dow Jones*, where the Board of Trade copied the entirety of the Dow's composite stock index for the purpose of submission to Board members and a regulatory agency, the court found that the defendant's copying and limited dissemination of the stock averages was a "productive" uses of Dow Jones' content because the Board's copies were designed for different purposes and directed to different audiences than the originals. 546 F. Supp. at 119-20. The court defined "productive" as a use that "performs a different function than that of the plaintiff's," and held that this case represented one of the "very limited situations wherein copying of even the entire work for a different functional purpose may be regarded as a fair use. *Id.* at 122, n. 10 (citing "Nimmer on Copyright," 13.05(b) at 13-62 (1981)).

In the three Internet search engine cases, the courts characterized the defendants' virtually exact replications of plaintiff's copyrighted works as transformative, leading the courts to find the first factor favored fair use. In *Kelly*, the Ninth Circuit held that a search engine's use of thumbnail versions of copyrighted images was transformative because it did not perform the same function as plaintiff Kelly's photos, but served a new and publicly beneficial function in enhancing access to content on the Internet. 336 F.3d at 818-19.

Kelly's holding was virtually replicated in the next two cases involving search engines. In *Field*, the court found Google's caching of Field's works was transformative because it served "different and socially important purposes in offering access to copyrighted works through 'cached' links and [did] not merely supercede the objectives of the original creations." 412 F. Supp. 2d at 1119.

In *Perfect 10*, where Google displayed thumbnail versions of Perfect 10's photos in its search engine postings, the Ninth Circuit reiterated that "[t]he fact that Google incorporated

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entire Perfect 10 images into the search results [did] not diminish the transformative nature of Google’s use [because, as in *Kelly*,] Google [used] Perfect 10’s images in a new context to serve a different purpose.” 487 F.3d at 721 (citing 336 F.3d at 818-19). The Ninth Circuit went even further than *Kelly*, stating that a search engine’s purpose in enhancing access to information was even more transformative than a parody because “a search engine provides an entirely new use of the original work, while a parody typically has the same entertainment purpose as the original work.” *Id.*

Thus, these four cases indicate a trend towards an expanded notion of transformativeness, under which factor one will favor a defendant serving a distinct and socially beneficial purpose in facilitating access to information – even if the defendant does not substantially alter the original work.

iii. Too Similar to Plaintiff’s Purpose

In the single case in this category where the court did not find fair use, the court found the defendant did not substantially alter the plaintiff’s work and did not serve an additional public function by copying the plaintiff’s work.

In *Moody’s*, where financial data service provider Moody’s copied data from plaintiff FII’s data service, the Second Circuit rejected the district court’s finding that Moody’s use of FII’s data served a further “public function” by further disseminating the information contained in the bond cards FII offered for sale. 751 F.2d at 508. It was true that Moody’s new data service was more expansive, as well as more expensive than FII’s, but it did not serve a substantially different function from FII’s original service, and FII was willing to sell the same information at lower cost. *Id.* at 508-09. Thus, the public was not deprived of the information absent Moody’s service. *Id.* Moody’s was simply engaged in wholesale copying of its competitor’s data without providing a substantial public benefit. *See id.*

Especially when examined in contrast to the other cases in this category, the court’s holding in *Moody’s* suggests that when the defendant’s service in promoting access to information is essentially replicative of the plaintiff’s and does not serve a distinct public function, a fair use defense based on promoting public access to information will fail.

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d. Propriety of the Use

Only two courts in this category explicitly examined the propriety of the defendant's conduct. In *Key Maps*, the court looked favorably on the fire marshal's attempt to contract with the owner of the map before copying. 470 F. Supp. at 38. In *Field*, the court looked favorably on Google's following industry-standard protocols by giving website owners the opportunity to refuse to have their websites cached, though Google still cached them if owners did not instruct Google otherwise. 412 F. Supp. 2d at 1122, 1116-17. This suggests, not surprisingly, that acting in good faith, attempting to obtain permission, and following industry protocols will weigh in a defendant's favor.

2. The Nature Of The Copyrighted Work

Based on the outcome of the analysis, factor two will likely weigh in favor of a defendant basing his fair use defense on promoting access to information if the copied work is factual, so long as the defendant is not using the copied material to produce a competing factual work. Moreover, even if the copied material is creative, the court still may not hold this heavily in the plaintiff's favor when the copied material is published, especially if it is already widely publicly available free of charge.

a. Factual or Creative

Five out of the eight cases involved defendants copying factual works, which are generally given less protection under copyright because of courts' perception that there is a greater need to disseminate factual works than works of fiction or fantasy, and that producers of factual works require less incentive than producers of creative works. See *Harper & Row*, 471 U.S., 539, 563 (1985). In *Roxbury*, *Key Maps* and *Dow Jones* the courts followed this policy and found in favor of defendants under factor two because the copied works were informational. *Roxbury*, 434 F. Supp. at 221; *Key Maps*, 470 F. Supp at 38; *Dow Jones*, 546 F. Supp at 120. The court in *Roxbury* placed especial weight on its finding that plaintiff New York Times' Index was informational and a work of diligence rather than creativity. 434 F. Supp. at 221

However, in *Moody's* and *NADA*, the courts found that although the plaintiffs' compilations were highly factual, this did not weigh significantly in the defendants' favor

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because defendants were using plaintiffs' compilations to make material that was "similarly 'non-creative' and purely commercial." 751 F.2d at 509; *NADA*, 651 F. Supp. at 48 (citing *Moody's* and likewise holding it against defendant that it used plaintiff's guides to produce its own factual compilations). The court in *Moody's* based this conclusion on the fact that defendant *Moody's* was not using the copied data to make a distinct creative production, but was simply engaged in wholesale copying for the same purpose as plaintiff *FII*. 751 F.2d at 509. Therefore, there was no reason to give *Moody's* work greater protection. *Id.* Courts do not normally consider the nature of the *defendant's* work under factor two.²⁶ However, *Moody's* reasoning, which was replicated by the court in *NADA*, may still be useful for predicting courts' future responses to a similar scenario. 751 F.2d at 509; *NADA*, 651 F. Supp. at 48. Thus, a defendant may not be favored under factor two simply because he copied a factual work when the defendant copied simply to create a similar factual work.

In sum, these five cases suggest that the factual nature of the copied works will weigh in a defendant's favor. But given that courts take a variety of approaches to factor two, this result is not guaranteed, and a court is less likely to favor the defendant if he used the factual work to make a similar factual production.

b. Published or Unpublished

The cases examined also indicate that a defendant facilitating access to published versus unpublished works is more likely to be favored under factor two, even when the copied works are creative.

In the three Internet search engine cases, the courts found the copied works to be creative, which normally would have favored the plaintiffs., *Field*, 412 F. Supp. 2d at 1120; *Kelly*, 336 F.3d at 820; *Perfect 10*, 487 F.3d at 723. However, the courts held that since the works were already published and publicly available online, the third factor did not favor either party. In *Kelly* and *Field*, the courts emphasized that both plaintiffs made their works available on their

²⁶ However, the Supreme Court in *Campbell*, 510 U.S. 569, 586 (1994), held the nature of the work inquiry can consider whether the defendant's use is transformative. For instance, parodies frequently borrow from famous expressive works, which typically should be given greater protection, but will not necessarily be treated negatively under factor two because they provide social benefit by adding to the original work. *Id.* See also Pamela Samuelson, "Unbundling Fair Uses," 11.

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websites and did not charge the public for access to their works. 412 F. Supp. 2d at 1120; 336 F.3d at 820. But even in *Perfect 10*, where Perfect 10 offered its photos online *for sale*, the court still found this factor tilted in Google’s favor because posting thumbnails did not deprive Perfect 10 of its “commercially valuable right of first publication by putting its images on the Internet for paid subscribers.” 487 F.3d at 723.

This suggests that factor two will not necessarily weigh heavily against a defendant facilitating access to information even when the copied works are creative, as long as they are already publicly available, and especially if they are available free of charge.

3. The Amount and Substantiality of the Portion Taken

Courts in these cases were willing to find that mechanically reproducing a substantial portion of the plaintiffs’ work, if not the entire work, was acceptable as long as doing so was necessary to accomplish the defendant’s goal.

In *Key Maps*, taking the plaintiff’s entire map was acceptable because the fire marshal needed the entire map in order to accomplish his intended goal of using the map to draw fire districts. 470 F. Supp. at 38.

In *Dow Jones*, the court found the Board copied Dow Jones’ entire component stock lists, but that, even if each component list could be deemed a “complete work,” taking the whole work should not preclude fair use since the information was only useful for the Board’s purpose in this complete form. 546 F. Supp. at 120-21.

In *Kelly* and *Perfect 10*, the 9th Circuit found factor three favored neither party even though the search engines used the entire images since they only used low resolution thumbnails, which was all that users required to recognize the image and decide whether to purchase it or obtain more information. *Kelly*, 336 F.3d at 821; *Perfect 10*, 487 F.3d at 724. Likewise, in *Field*, despite the fact Google allowed access to the entirety of Field’s works, the court found factor three favored neither party since caching could not be accomplished effectively without copying the entire web page. 412 F. Supp. 2d at 1121.

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In contrast, in *Moody's* and *NADA*, the courts both found that factor three favored the plaintiffs because the defendants copied substantial amounts of the plaintiffs' information. *Moody's*, 751 F.2d at 509; *NADA*, 651 F. Supp. at 48 (nonetheless finding fair use due to defendant's successful rebuttal of market harm). In *Moody's*, the court overturned the district court's finding that *Moody's* only copied 1% to 2% of the time, instead accepting the opinion of FII's expert that *Moody's* copied 40% to 50% of the time. 751 F.2d at 504, 509. Again, the court's holding in *Moody's* was influenced by its finding that *Moody's* was merely copying FII's information in order to obtain advantage over a competitor. *Id.* at 509-10. Thus, it is not surprising that the court found that copying nearly half of FII's information was unjustified.

As a whole, these cases suggest copying the plaintiff's entire work or a substantial portion of the plaintiff's work will not weigh heavily against a defendant so long as the defendant provides a socially beneficial and distinct purpose from plaintiff in enhancing access to information.

4. Market Harm

Based on the outcome of this analysis, if a court finds that the defendant's use serves a distinct and publicly beneficial function in enhancing access to information, the court will likely find no market harm. With respect to licensing markets, a court will likely take harm to existent, reasonable licensing markets into account, but will require the plaintiff to show their licensing market was actually harmed by the defendant's activities.

a. Harm to Primary Markets

In all the cases where the courts found the defendants' use was transformative or otherwise served a distinct, publicly beneficial function, the courts did not find market harm, mainly because of the finding that the defendants' works did not replace the plaintiffs' or otherwise threaten their markets. *Roxbury*, 434 F. Supp. at 224-26; *Key Maps*, 470 F. Supp. at 38 (did not explicitly consider market harm, but implied fire marshal's use did not impair value of plaintiff's map); *Dow Jones*, 546 F. Supp. at 121; *Kelly*, 336 F.3d at 821-22; *Field*, 412 F. Supp. 2d at 1122; *Perfect 10*, 487 F.3d at 724-25. In contrast, in the one case where the court

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explicitly found the defendant's use was not distinct and socially beneficial, the court found the defendant's use directly threatened the plaintiff's market. *Moody's*, 751 F. 2d at 509-10.

In *Roxbury*, the court did not find market harm, reasoning that since Roxbury's personal names index served a different function from the Times' index, it would not reduce sales for the Times' index and might even enhance customers' use of the Times' index. 434 F. Supp. at 224-26.

Likewise, in *Dow Jones*, the court found there was no "logical link" between the Board's copying of Dow Jones' stock index for the purpose of disseminating the information to a regulatory agency and the alleged harm to Dow Jones' market for its stock index since the Board did not have a commercial purpose in disseminating the information and was not competing in the same market as Dow Jones. *Id.* at 121.

In the Internet search engine cases, the courts found that the defendants did not threaten sales of the original works by facilitating public access to slightly inferior mechanical copies of those works. *See Kelly*, 336 F.3d at 821-22 (finding thumbnail versions did not threaten sales of full-size photos that Kelly made available for free online); *Field*, 412 F. Supp. 2d at 1122 (finding that Google's displays of cached versions or "snap shots" of Field's website did not harm Field's market for his works when he did not sell or license them and allowed the public to access them on his website for free).

The situation was slightly more complicated in *Perfect 10* for two reasons: first, Perfect 10 did not make its photos available for free, but sold them through subscriptions to its website; and, second, Perfect 10 alleged it had a derivative market in reduced-sized images to be downloaded onto cell phones. 487 F.3d at 724. However, the Ninth Circuit followed *Kelly* in holding that because Google's thumbnails did not substitute for the full-size photos, Google's use did not hurt Perfect 10's market for full-size images. *Id.* As to Perfect 10's alleged derivative market, the court found that as Perfect 10 failed to produce evidence that consumers substituted their purchase of Perfect 10 cell phone downloads with Google's thumbnails, the potential harm to this market "remain[ed] hypothetical." *Id.* at 724-25. Unlike in *Kelly* and *Field*, the court found factor four favored neither party. *Id.* at 725. But after balancing the

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benefits of Google’s transformative use against the unproven harm to Perfect 10’s market, the court found fair use over all. *Id.*

In *Moody’s*, the only case in this category where the court ultimately found market harm, the trial court found no market harm because Moody’s operated in a distinct market from FII, and FII failed to produce evidence of reduced subscriptions. The Second Circuit, however, applied the *Sony* presumption of market harm for commercial uses on appeal, and found, in any case, that Moody’s was in fact competing in the same market because it offered a very similar data service. *Id.* 751 F.2d at 509-10.

In *NADA*, the court did not consider the transformativeness of the defendant’s use, but nonetheless placed a heavy burden on the plaintiff to prove market harm. 651 F. Supp. at 48. Even after finding that defendant BDV’s use was commercial and that BDV took a “substantial” amount of information directly from NADA, the court found fair use because BDV presented testimony that its customers would not have purchased NADA’s guides absent BDV’s copying. *Id.* at 48, n.3. However, given that no other cases in this category follow this approach, there is likely no trend here.

Taken as a whole, the above cases suggest that if a court finds the defendant’s use serves a distinct and socially beneficial purpose in enhancing access to information, the court will also find that the defendant’s use does not harm the plaintiff’s market.

b. Harm to Licensing Market

Courts in this category generally took harm to licensing markets into account under factor four. *See Dow Jones*, 546 F. Supp. at 121, nn. 8, 9; *Moody’s*, 751 F. 2d at 510; *NADA*, 651 F. Supp. at 48 n. 3 (finding plaintiff could have, but did not, claim harm to a licensing market); 751 F. 2d at 510. *See also Field*, 412 F. Supp. 2d at 1121; *Perfect 10*, 487 F.3d at 723 (both examining potential harm to copyright holders’ ability to sell or license their works, but finding insufficient evidence of harm to those markets).

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However, courts in this category took seriously the notion that licensing markets are relevant to the fair use analysis only when a reasonable licensing market for the intended use exists or is likely to develop. *See Campbell*, 510 U.S. at 592.

In *Dow Jones*, the court found no harm to Dow Jones' markets when there was no existing licensing market for the material. 546 F. Supp. at 121, nn. 8, 9. Although Dow Jones did license out the right to track its averages in futures markets, it did not license out the mere right to disseminate its averages for informational purposes. *Id.* Thus, failing to obtain permission to disseminate the averages for this purpose did not hurt the Board's fair use defense.

Similarly, in *Field*, the court found Google's caching did not deprive plaintiff Field of any revenues from licensing his written works because there was no evidence that a market existed for the precise use Google intended. 412 F. Supp. 2d. at 1122. That is, there was no market for licensing search engines the right to cache websites, or evidence that one was likely to develop. 412 F. Supp. 2d. at 1122. In making this determination, the court noted the high transaction costs that would be involved in forcing Google to obtain these permissions from "literally billions of Web pages." *Id.*

Moreover, for the most part, even when the courts found a licensing market might exist for the defendant's intended use, they required the plaintiff to actually prove harm to that market. *NADA*, 651 F. Supp. 48, n. 3; *Kelly*, 336 F.3d at 821-22; *Field*, 412 F. Supp. 2d at 1122; *Perfect 10*, 487 F.3 at 724. The single exception was *Moody's*, where, again, the court found Moody's competed in precisely the same market as FII and was exploiting a competitor's data without proper payment. *Moody's*, 751 F. 2d at 510

Taken as a whole, these cases indicate that when a court finds the defendant has a socially beneficial and distinct purpose from the plaintiff, the court will only examine potential harm to reasonable and well-established licensing markets for the particular use made by the defendant. Moreover, even when a reasonable licensing market does exist, the court may place a high burden on the plaintiff to prove that the defendant's use actually reduced the plaintiff's licensing revenues.

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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. In most instances, their disclosure will render them valueless. So they are strongly protected by their owners and, to some extent, are given special protections by Congress and the courts. For these reasons, copyright cases pertaining to standardized tests represent a special body of fair use law. Within this body of law, however, two distinct categories of uses emerge: (1) those involving regular copying and distribution of protected standardized test questions by institutions for test preparation purposes, and (2) those involving statutes that mandate disclosure of protected standardized test questions. Four prominent cases from the former category (“test preparation cases”) are discussed and analyzed here. The cases from the latter category (“statutory disclosure cases”) are analyzed below in Category F.

The four cases that inform this present discussion are the following: *Association of American Medical Colleges v. Mikaelian*, 571 F. Supp. 144 (E.D. Pa. 1983) (“*Mikaelian*”); *Educational Testing Services v. Katzman*, 793 F.2d 533 (3rd Cir. 1986) (“*Katzman*”); *Educational Testing Service v. Simon*, 95 F. Supp. 2d 1081 (C.D. Cal. 1999) (“*Simon*”); *National Association of Boards of Pharmacy v. Regents of University System of Georgia*, No. 3:07-CV-084, 2008 WL 1805439 (M.D. Ga. Apr. 18, 2008) (“*Pharmacy*”). In all of these cases, defendants were engaged in the practice of preparing students to pass standardized tests and were alleged to have acquired copyrighted test material, and made use of it, in a manner that violated the exclusive rights of the owners. Some defendants were private instructors, some were business owners, and some were university staff and administrators.

The courts did not find fair use in any of the cases. In two of these cases, the courts’ fair use analyses were quite superficial. See *Katzman*, 793 F.2d at 543; *Pharmacy*, 2008 WL 1805439 at 23. In *Simon*, the court rejected fair use without mentioning the factors at all. 95 F. Supp. 2d at 1090.

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1. Purpose and Character of the Use

Courts always found factor one weighed against the exam preparation company because the use was only marginally for educational purposes, for a commercial purpose, and not transformative. This was the case even when the exam-preparation course was run by a state university. This indicates a defendant engaged in wholesale copying of exam questions for purposes of operating an exam preparation course will have a difficult time proving the purpose and character of their use is fair, especially when they operate for profit.

a. Favored Purposes Inquiry

Courts in the test preparation cases were very reluctant to characterize defendants' activities as "teaching" within the meaning of §107. Three of the courts addressed the question of whether defendant's activity fit one of the enumerated activities protected by §107, and none decided that the activity qualified. *See Mikaelian*, 571 F. Supp. at 151-52; *Katzman*, 793 F.2d at 543; *Pharmacy*, 2008 WL 1805439 at 23. According to one court, defendants whose courses failed to bestow proper degrees or credentials were not teachers. *Mikaelian*, 571 F. Supp. at 151-52. Even defendants who taught a test preparation class at a state university for university students were not "teaching" within the meaning of §107. *Pharmacy*, 2008 WL 1805439 at 23. Three of the four courts proceeded with their fair use analysis, *in arguendo*, on the assumption that defendants activity *might* conceivably be called "teaching." *See Mikaelian*, 571 F. Supp. at 151-52; *Katzman*, 793 F.2d at 543; *Pharmacy*, 2008 WL 1805439 at 23. As a result of this general skepticism on the part of the courts, none of the defendants enjoyed any of the helpful presumptions that a court might normally bestow upon teachers in a fair use analysis.

b. Commerciality Inquiry

The courts found all the companies to be commercial operations, and weighed this against fair use. Defendants in three of the four case, *Katzman*, *Mikaelian*, and *Pharmacy*, were plainly operating for-profit test preparation businesses, and the courts in those case were quick to characterize the use as commercial. The *Katzman* court accomplished this in the course of one sentence and proceeded on to the next factor. 793 F.2d at 543. The *Mikaelian* court gave a more thorough discussion, but easily found commerciality. *See* 571 F. Supp. at 152-53. And the *Simon*

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court, as noted above, rejected fair use without inquiring into any of the factors, much less commerciality. *See* 95 F. Supp. 2d at 1090.

The defendants in *Pharmacy*, however, were instructors and administrators at a state university, a public institution. *See* 2008 WL 1805439 at 1. Plaintiffs alleged though that the instructors were selling the protected questions to students, and this allegation was apparently unchallenged by defendants. *See id.* at 23. Yet the *Pharmacy* court addressed the first factor in one sentence, and determined that the use was commercial. *See id.*

c. Transformativeness Inquiry

Three of test prep cases involved at least some amount of verbatim copying of test questions. *See Mikaelian*, 571 F. Supp. at 152; *Katzman*, 793 F.2d at 536, 40; *Pharmacy*, 2008 WL 1805439 at 1. Only in *Simon* was there no allegation of verbatim copying. *See* 95 F. Supp. 2d. at 1088. Courts have sometimes characterized verbatim copying as “transformative” when the new use was productive. *See, e.g., Sony Corp. of America*, 464 U.S. 417 (1984). Yet, none of the courts in the test preparation cases even entertained the argument that the defendants might have transformed the test questions by using them to teach the test.

d. Bad Faith Inquiry

With one possible exception, defendants in these test preparation cases had all acquired access to the test questions through somewhat dubious means. *Mikaelian* apparently took the tests multiple times himself and copied the questions by hand. *Mikaelian*, 571 F. Supp. at 150. *Katzman* allegedly retained copies of a stolen test he had acquired through unknown sources. *Katzman*, 793 F.2d at 536. And defendants in *Simon* and *Pharmacy* acquired information about test questions from clients who took the test and reported back to them. *Simon*, 95 F. Supp. 2d. at 1085; *Pharmacy*, 2008 WL 1805439 at *1, 2. The courts did not dwell on these allegations of misconduct, but the tone of the first factor analyses and the generally dismissive treatment that defendants received in all these cases seems to indicate that defendants’ propriety did play an important, though understated, role throughout the first factor analyses.

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2. Nature of the Copyrighted Work

a. Factual or Creative

None of the courts in the four test preparation cases discussed here found that the second factor weighed in favor of fair use. *See Mikaelian*, 571 F. Supp. at 153; *Katzman*, 793 F.2d at 543; *Simon*, 95 F. Supp. 2d. at 1090; *Pharmacy*, 2008 WL 1805439 at 23. Yet none of the four courts actually determined whether test questions were factual works or creative works. This oversight may partially have been due to the fact that the fair uses analyses in these cases were generally brief and lacking in detail across the board. However, the uniqueness of standardized test questions might also have accounted for this missing inquiry. As explained below, the typical considerations regarding “nature of the copyrighted work” (i.e. factual versus creative, published versus unpublished) seem to take a back seat to security considerations when the protected materials are standardized test questions.

b. Published or Unpublished

Publication has a unique dimension in the context of standardized exam questions. Where copyright holders can typically secure their highly sensitive work by simply not publishing it, the makers of standardized exams must print and distribute their exams to test takers. Yet their materials are nonetheless sensitive. Accordingly, testing companies have established various procedures that help them keep their exam questions secret and secure. Recognizing the effort that this requires, and the importance of that security, Congress addressed the issue in the Senate Report on the 1976 Copyright Act. *See* S. Rep. No. 141, 102d Cong., 1st Sess. 6 (1991). In that report, the Senate specifically stated that the fair use defense was *not* intended to reduce protection for standardized testing materials. In light of the senate report, and in light of the unique security concerns of testing companies, it is no surprise that the courts focused less on the published/unpublished dichotomy in their second factor analyses. Instead, courts emphasized the security that the tests required and the senate report that defends that requirement. This special security consideration consistently turned the second factor analysis in favor of plaintiffs. *See Mikaelian*, 571 F. Supp. at 153; *Katzman*, 793 F.2d at 543; *Pharmacy*, 2008 WL 1805439 at 23.

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3. Amount and Substantiality of the Portion Taken

The courts generally spent very little time discussing the amount and substantiality copied. In none of the cases did the third factor weigh for defendants. *See Mikaelian*, 571 F. Supp. at 153; *Katzman*, 793 F.2d at 543; *Pharmacy*, 2008 WL 1805439 at 23. Generally this was because the copying had been quite extensive, and frequently word-for-word. The defendant in *Mikaelian* allegedly copied 879 questions verbatim, constituting 90% of one test packet. 571 F. Supp. at 148. The record in *Katzman* did not support plaintiff's allegations of vast verbatim copying, but the court was satisfied the copying must not have been insubstantial, given that the Supreme Court had once held 300 words to be "substantial." *See* 793 F.2d at 543 (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564-66). The *Simon* court did not address substantiality. *See* 95 F. Supp. 2d. at 1090. And the defendants in *Pharmacy* had allegedly copied 633 questions verbatim. 2008 WL 1805439 at 1. If any of these allegations had been contested by defendants, the courts made no note of that fact.

4. Market Harm

a. Primary Market

None of the defendants in the test preparation cases were in literal market competition with the plaintiff testing agencies. As such, defendants' uses of the protected test questions never supplanted plaintiffs' uses of those specific materials in its tests, nor diminished the market demand for the plaintiffs' standardized testing services. However, the courts took a broad view of market harm. Each court that addressed the fourth factor found that disclosure of secure test questions rendered the questions worthless to the testing agencies, because their value as accurate testing measures depended upon their secrecy. *See Mikaelian*, 571 F. Supp. at 153; *Katzman*, 793 F.2d at 543; *Pharmacy*, 2008 WL 1805439 at 23. Technically this type of impact is not a "market harm." It is an "operational harm" or a security breach. But this technicality did not keep any of the courts from weighing the fourth factor for plaintiffs. As the Seventh Circuit observed in a case not discussed here, "There is no analytical difference between destroying the market for a copyrighted work by producing and selling cheap copies and destroying the subsequent years' market for a standardized test by blowing its cover." *Chicago Bd. of Ed. v.*

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Substance, Inc., 354 F.3d 624, 627 (7th Cir. 2003).

b. Licensing Market

Courts in these cases did not consider harm to plaintiffs' licensing markets. It is possible that plaintiffs might have intended to license their secure exam questions to third parties for some purpose. It is also possible that plaintiffs' markets in exam preparation material might have been harmed by defendants activities. However, those allegations never arose in any of the four test preparation cases discussed here.

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F. Required Disclosure of Standardized Test Questions by Statutory Schemes

As discussed above in the preceding section, standardized test questions constitute a special type of copyrighted work as their disclosure will render them valueless. The cases generally fall into one of two distinct categories. The first category, involving copying and distribution of standardized test questions for test preparation purposes, is addressed above in Section IV.E. The second category of cases, involving statutes that mandate disclosure of protected standardized test questions, is discussed and analyzed here. The uses are quite distinct between the two categories, but the underlying protected works (the test questions) are of course the same. As a result, parts of this discussion regarding the “statutory disclosure cases” will closely track the above discussion regarding the “test preparation cases.”

The three statutory disclosure cases that inform this present discussion are the following: *Association of American Medical Colleges v. Cuomo*, 928 F.2d 519 (2nd Cir. 1991) (“*Cuomo*”); *College Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554 (N.D.N.Y. 1995) (“*Pataki*”); *Newport-Mesa Unified School District v. California Department of Education*, 371 F. Supp. 2d 1170 (C.D. Cal. 2005) (“*Newport-Mesa*”). In all of these cases, the copyright disputes arose in response to state statutes that mandated disclosure of secure, copyrighted testing material.

The statute at issue in *Cuomo* and *Pataki* was New York state’s Standardized Testing Act (STA) which required all standardized testing agencies to disclose their testing forms to the state for use in a governmental study that aimed to ensure the objectivity and accuracy of the standardized test. *See Cuomo*, 928 F.2d 519 at 521-22; *Pataki*, 889 F. Supp. at 557-58. In both cases, testing agencies initiated actions for declaratory judgment against the state. *Cuomo*, 928 F.2d 519 at 521; *Pataki*, 889 F. Supp. at 558. The Second Circuit in *Cuomo* remanded the fair use issue to the district court. 928 F.2d 519 at 526. The *Pataki* court rejected the state’s fair use defense. 889 F. Supp. at 575. And in both case, the courts temporarily enjoined the state from fully enforcing the STA. *See Cuomo*, 928 F.2d 519 at 526; *Pataki*, 889 F. Supp. at 577-78. Both cases appear to have settled out of court.

The statute in *Newport-Mesa*, on the other hand, was a California state statute that

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required school districts to release copies of completed standardized testing forms to the parents of children in special education programs. *See* 371 F. Supp. 2d at 1173. In this case, a school district initiated the declaratory action against the state, and the testing agency intervened to assert its copyright interests. *Newport-Mesa*, 371 F. Supp. 2d at 1173-74. Contrary to the decisions in *Cuomo* and *Pataki*, the district court in *Newport-Mesa* found that the disclosure required by the statute plainly constituted fair use, and declined to issue an injunction. *See Newport-Mesa*, 371 F. Supp. 2d at 1179.

1. Purpose and Character of the Use

a. Favored Purposes Inquiry

None of the three “statutory disclosure” cases addressed the preambular purpose in any detail. The disclosure required by the New York state statute in *Pataki* was seemingly for research purposes. Because “research” is one of the protected categories enumerated in the preamble to §107, this fact would have weighed in favor of fair use. 17 U.S.C. 107. However, while *Pataki* praised the purpose of the statute as laudable, it did not specifically identify the purpose as “research,” and ultimately went on to conclude that the use was not fair. *See Pataki*, 889 F. Supp. at 566, 67, 75.

b. Commerciality Inquiry

Commerciality of the use was seldom a matter of dispute in the statutory cases. In all cases the defendants were government actors attempting to further educational and social goals in the public interest. The state defendants in *Cuomo* and *Pataki* were interested in verifying the fairness and accuracy of standardized tests. *See Cuomo*, 928 F.2d 519 at 521-22; *Pataki*, 889 F. Supp. at 557-58. In *Newport-Mesa*, the state statute was intended to provide transparency in testing for the parents of special education students. *See* 371 F. Supp. 2d at 1173. In all cases, the courts easily identified a valid and beneficial social purpose, and had no trouble recognizing it was noncommercial. *See Cuomo*, 928 F.2d 519 at 526; *Pataki*, 889 F. Supp. at 568; *Newport-Mesa*, 371 F. Supp. 2d at 1176-77.

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c. Transformativeness Inquiry

Despite these favorable findings of beneficial, non-commercial use, the transformativeness inquiry acted as a barrier for most defendants in this category. The Second Circuit in *Cuomo* did not address transformativeness, but left the district court's first factor analysis undisturbed. *See* 928 F.2d 519 at 524. In contrast, the *Pataki* court *did* address transformativeness and found it "beyond dispute" that the state's use was *non*-transformative. 889 F. Supp. at 568. The *Pataki* court based this finding on the fact that defendant's use required verbatim copying of the copyrighted testing material. *See id* at 567-68. The court then held that consideration to neutralize the finding of non-commerciality, such that the first factor favored neither party. *See id.* at 568.

Of the three "statutory disclosure" courts, the *Newport-Mesa* court was the only one to find transformativeness. 371 F. Supp. 2d at 1177. The state statute in *Newport-Mesa* called upon districts to give *completed* test forms to the parents of special education students. *Id.* at 1173. The completed forms would contain protected questions *as well as* student answers. *Id.* at 1177. The *Newport-Mesa* court reasoned that presence of student answers on the forms rendered their use transformative. *Id.* The court, though, went on to say that, even if this use was not "transformative," the public purpose served by the disclosure should tip the first factor for defendants and support a finding of fair use. *Id.* This reasoning clearly parts ways with *Pataki's* first factor analysis and represents a more contemporary approach. *Newport-Mesa* does not go so far as to say that "public purpose" can make a use "transformative" even when the use is verbatim, but its reasoning represents a step in that direction. And that analytic step is very much in keeping with a more contemporary, and expansive, understanding of transformativeness. *See, e.g., Perfect 10 v. Amazon.com*, 487 F.3d 701, 720-723. (9th Cir. 2007).

2. Nature of the Copyrighted Work

a. Factual or Creative

The courts in the statutory disclosure cases acknowledged that the exam questions and exam materials were factual works intended to test for information and knowledge. *See, e.g. Pataki*, 889 F. Supp. at 569. At the same time though, the courts were not at all hesitant to

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characterize exam questions as “creative” or “imaginative.” *Cuomo*, 928 F.2d 519 at 524; *Pataki*, 889 F. Supp. at 569; *Newport-Mesa*, 371 F. Supp. 2d at 1177-78. The creativity resided not just in the drafting of the questions themselves, but the selection and arrangement as well. *See, e.g. Newport-Mesa*, 371 F. Supp. 2d at 1177-78. Because defendants frequently copied systematically and word-for-word in the New York cases, the courts there had no trouble asserting that defendants had copied elements from a creative work. *See Cuomo*, 928 F.2d 519 at 524; *Pataki*, 889 F. Supp. at 569. The *Newport-Mesa* court, however, seemingly determined to find all factors weighing for defendant, held that the presence of student answers on the test forms rendered the original works “informational” in nature and diminished their status as creative works. 371 F. Supp. 2d at 1177-78. This reasoning seems to confuse “original works” with the works used by defendant, and thereby conflates the transformativeness inquiry with “nature of the copyrighted work” inquiry.

b. Published or Unpublished

As discussed above in the analysis of “test preparation” cases in Section E, publication has a unique dimension in the context of standardized exam questions. Where copyright holders can typically secure their highly sensitive work by simply not publishing it, the makers of standardized exams must print and distribute their exams to test takers. Yet their materials are nonetheless sensitive. Accordingly, testing companies have established various procedures that help them keep their exam questions secret and secure. Recognizing the effort that this requires, and the importance of that security, Congress addressed the issue in the Senate Report on the 1976 Copyright Act. In that report, the Senate specifically stated that the fair use defense was *not* intended to reduce protection for standardized testing materials. *See S. Rep. No. 141, 102d Cong., 1st Sess. 6 (1991)*. In light of the Senate report, and in light of the unique security concerns of testing companies, it is no surprise that the courts focused less on the published/unpublished dichotomy in their second factor analyses, and instead, spoke about the security that the tests required and the Senate report that defends that requirement. This special security consideration frequently turned the second factor in favor of plaintiff. *See Cuomo*, 928 F.2d 519 at 524; *Pataki*, 889 F. Supp. at 568-69. Only *Newport-Mesa* dismissed these security

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considerations to find the second factor weighing in favor of fair use. *See* 371 F. Supp. 2d at 1177-78

3. Amount and Substantiality of the Portion Taken

Treatment of the third factor was inconsistent among the three courts. The amount and substantiality of disclosure required by the New York state statute in *Cuomo* and *Pataki* was quite extensive. *See Cuomo*, 928 F.2d 519 at 521-22; *Pataki*, 889 F. Supp. at 557-58. The Second Circuit, in *Cuomo*, declined to reconsider the district court's finding that the third factor weighed strongly for plaintiffs. 928 F.2d 519 at 524-25. The *Pataki* court entertained a lengthy discussion about the third factor, and acknowledged that wholesale copying of an entire work does not preclude a finding of fair. 889 F. Supp. at 569-71. Ultimately however, the *Pataki* Court agreed with plaintiff test agencies that wholesale copying must at least tip the third factor in favor of copyright holders. *Id.* at 571. The *Newport-Mesa* court held that, even if the statute called for wholesale copying of protected tests, the amount was "reasonable in relation to the purpose of the copying." 371 F. Supp. 2d at 1177-78 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586).

4. Market Harm

a. Harm to Primary Markets

As was the case in the test preparation cases, none of the defendants in the statutory disclosure cases were actually in actual market competition with the plaintiff testing agencies. As such, none of the defendants decreased market demand for plaintiff's testing services, yet the courts did not treat this as dispositive within the fourth factor analysis. *See Cuomo*, 928 F.2d 519 at 525-26; *Pataki*, 889 F. Supp. at 571-75. In all three cases plaintiffs argued that disclosure would render the secure test questions valueless. *See Cuomo*, 928 F.2d 519 at 525-26; *Pataki*, 889 F. Supp. at 571-75; *Newport-Mesa*, 371 F. Supp. 2d at 1178. The *Cuomo* and *Pataki* courts engaged in lengthy, fact-intensive discussions of the fourth factor. *See Cuomo*, 928 F.2d 519 at 525-26; *Pataki*, 889 F. Supp. at 571-75. The discussions there centered around testimony from the state's expert witness pertaining to the possibility of re-using disclosed test questions without

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impacting the general security and accuracy of the standardized tests. *See Cuomo*, 928 F.2d 519 at 525-26; *Pataki*, 889 F. Supp. at 571-75. The Second Circuit in *Cuomo* found that district court had not properly considered fact issues raised by the expert testimony. 928 F.2d 519 at 526. The Second Circuit remanded to the district court specifically on this point, and observed that the state's use did not present the "relatively straightforward situation in which the potential harm to a copyrighted work flows from direct competition." *Id.* The *Pataki* court entertained very much the same discussion, but ultimately held that the fourth factor weighed for plaintiffs, as there was insufficient evidence to contradict plaintiffs' claims that they could not reuse test questions once disclosed. 889 F. Supp. at 575.

Newport-Mesa conducted the briefest of the fourth factor analyses. *See* 371 F. Supp. 2d at 1178-79. The parties there agreed that wide-spread access to the standardized tests would indeed have a negative impact on the market value of the test. *See id.* at 1178. The likelihood of such wide-spread access, however, was significantly less in *Newport-Mesa* than it was under the New York statute in *Cuomo* and *Pataki*, as the *Newport-Mesa* statute only required disclosure to individuals parents. *See Newport-Mesa*, 371 F. Supp. 2d at 1173. Accordingly, the court found insufficient evidence that such disclosures could result in widespread access and weighed the fourth factor in favor of fair use. *Id.* at 1179.

b. Harm to Licensing Markets

Licensing markets were addressed only once in the three cases. Plaintiffs in *Pataki* had claimed that they derived revenue from selling and licensing some official test questions after they had been used. *See* 889 F. Supp. at 573. The court noted plaintiff's concern and seemingly weighed that in plaintiff's favor. *Id.*

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V. SECONDARY SOURCES

A. Statutory Sources and Legislative History

Copyright Fair Use Clause, 17 U.S.C. § 107 (available [here](#)).

Classroom Exception Clause, 17 U.S.C. 110 (1) (available [here](#)).

Distance Learning Guidelines, 17 U.S.C. 110 (2) (available [here](#)).

Library Use Exceptions, 17 U.S.C. 108 (available [here](#)).

Secure Test Provisions, 17 U.S.C. § 408(c) (available [here](#)).

Classroom Guidelines, H.R. Rep. 94-1476, 65-74 (1976), reprinted in U.S. Copyright Office, Circular 21, *Reproduction of Copyrighted Works by Educators and Librarians*, 6-7 (1995).

B. Treatises and Law Journal Articles

Ann Barton, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. Pitt. L. Rev. 149 (1998) (available [here](#)).

Barton Beebe, *An Empirical Study of US Copyright Fair Use Opinions, 1978 – 2005*, 156 U. Pa. L. Rev. 549 (2008) (available [here](#)).

Kenneth Crews, *The Law of Fair Use and the Illusion of Fair Use Guidelines*, 62 Ohio St. L.J. 599 (2001) (available [here](#)).

William Fisher and William McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age*, Produced by The Berkman Center for Internet and Society at Harvard Law School, Research Publication No. 2006-09 (August 10, 2006).

Wendy Gordon, *Fair Use as Market Failure: a structural and economic analysis of the Betamax case and its predecessors*, 82 CLMLR 1600, 1624-26 (1982).

Kate Irwin, *Copyright Law – Librarians Who Teach: Expanding the Distance Education Rights of Libraries by Applying the Technology Education and*

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NOTE: This is not legal advice. This study of fair use case law was completed in 2009 and is intended to help increase understanding of the fair use doctrine as it applies in the educational context. It is not intended as a substitute for legal advice or as a comprehensive guide to fair use.