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FAIR USE AND FAIRNESS ON CAMPUS [†]

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Copyright protection was meant to promote learning; yet copyright law too often thwarts this very purpose. Fair use is the primary means to restore the balance between the copyright regime's enablement of proprietary control and the public good of access. It is a right that must be exercised if it is not to be lost. This article demonstrates why fair use is so critical to higher education, and seeks to clarify legal ambiguities of the law of fair use in order to better align this doctrine with critical educational goals. To illustrate the importance of the issue, we present data demonstrating the lack of equality in campus access to and use of information. For educational institutions with limited resources, fair use is of crucial importance, enabling faculty and students to access reasonable amounts of unlicensed content for scholarly and educational purposes. For individual scholars with limited access to copyright counsel or institutional subsidies for permissions and fees, fair use is also of crucial importance, enabling dissemination and publication of research. Unequal resources makes the lack of clarity and reluctance to use and defend fair use within the academy especially problematic. Fair use muscles may atrophy

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and flex, but the latter mode of action is far more empowering to the academic mission and far better aligned with the Founders' understanding that copyright is intrinsically entwined with public access.

I. INTRODUCTION

The power to protect copyright law was written into the U.S. Constitution in order to stimulate, rather than limit, creative expression.[1] The nation's Founders believed that protecting copyrights would benefit society by stimulating greater public access to more work in order to encourage learning.[2] The Supreme Court has explained that the Copyright Clause "motivate[s] the creative activity of authors and inventors by the provision of a special reward, and . . . allow[s] the public access to the products of their genius after the limited period of exclusive control has expired."[3] Although our understanding of this particular constitutional purpose is often eclipsed by other policies, it remains an important consideration that merits more attention.

An examination of the history of U.S. copyright legislation reveals an expansion of copyright owner rights, a diminution of their responsibilities, and, as a result, a shrinking public domain.[4] More and more works have been given copyright protection, often to address new forms of expression made possible by new

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[1] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.' ").

[2] *See infra* notes 263–65 and accompanying text.

[3] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

[4] *See* Laura N. Gasaway, *A Defense of the Public Domain: A Scholarly Essay*, 101 L. LIBR. J. 451, 462 (2009) ("The quick answer to whether the public domain is shrinking is yes."); JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 241 (2008); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 24–25, 133–38 (2004).

technology.[5] Formalities once required to get the big bundle of copyrights have been discarded.[6] Copyright terms are now longer.[7] The application of copyright laws to new technologies and digital environments has become extraordinarily complex. The resulting legal uncertainties endanger the core values of public and educational access, scholarship, and creativity that copyright laws were meant to protect.

While the relationship between copyright and the First Amendment to the U.S. Constitution has often been explored,[8] this

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[5] In 1790 Congress only protected maps, charts, and books. *See* 1 Stat. 124 § 4 (1790). The Copyright Act now protects a wide array of content including dance and musical scores, film, audio and video, recordings, architectural works, and software. *See, e.g.*, 3 NIMMER ON COPYRIGHT § 2.03 (2009) (enumerating many diverse media protected by copyright law).

[6] Before the passage of the 1976 Copyright Act, claimants were required to adhere to a number of formalities such as depositing the work in the Copyright Office and affixing notice on published works in order to receive copyright protection. 35 Stat. 1075, § 19 (1909). These formalities are no longer required in order to secure copyright protection. *See* 17 U.S.C. §§ 401–412 (2006).

[7] Upon passage of the Copyright Term Extension Act ("CTEA") in 1998, copyright protection terms were expanded by twenty years so that works copyrighted before 1978 that were still under copyright received protection for 95 years from the date the copyright was originally secured. CTEA, Pub. L. 105-298, § 102(b)–(d), 112 Stat. 2827, 2827–28 (1998) (amending 17 U.S.C. §§ 302, 304). For works created on or after January 1, 1978, the CTEA provided a term of copyright protection enduring for the life of the author plus 70 years. *Id.* For works of joint authorship, protection was expanded to last for the life of the last living author plus 70 years, and for anonymous works, works made for hire, or pseudonymous works, protection lasts for 95 years from the year the work was first published or 120 years from the creation of the work, whichever ends first. *Id; see* Eldred v. Ashcroft, 537 U.S. 186, 193 (2003) (discussing the CTEA and prior extensions to the term of copyrights).

[8] *See, e.g.*, DAVID L. LANG & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT (2009) (exploring how observance of absolute first amendment values would change copyright law); William McGinty, *First Amendment Rights to Protected Expression: What Are the Traditional Contours of Copyright Law?*, 23 BERKELEY TECH. L.J. 1099 (2008) (asserting that changes to copyright law should be analyzed to determine whether they are unconstitutional under the First Amendment); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537 (2004–2005) (exploring the incompatibility of the First Amendment value of copying with copyright law and finding that "[a]s fair use has grown in doctrinal importance

article notes copyright's intersection with values anchored in other parts of the Constitution, namely the educational purpose of the Copyright Clause[9] itself and provisions dealing with equal protection. Access to copyrighted content in education is not simply a matter of free speech; it is also a question of social justice.

Wealthier institutions have many advantages. They can purchase and access greater amounts of content (especially in the sciences) and hire licensing specialists and copyright counsel to maximize their uses of these resources. They are also able to provide more monetary and legal resources to faculty whose research and publication projects hit the rocky waters of permissions and fees. Because access to information is a critical component of the academic experience, copyright control and increasing costs for digital materials have the potential to exacerbate inequalities in our nation's schools.

In this environment, it is more important than ever to understand the copyright exemptions that do not require permission or fees before content may be used for purposes central to higher education. Of these, the most critical mechanism, the

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as a means to harmonize copyright with the First Amendment, it has also, paradoxically, begun to shrink, excluding activities such as copying for research or educational purposes"); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002–2003) (enumerating conflicts between copyright law and the First Amendment and explaining which copyright provisions should yield to a "freedom of imagination"); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 81–85 (2001–2002) (arguing that the First Amendment should be utilized to "buttress" the fair use privilege); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000–2001) (demonstrating "that the idea/expression dichotomy and the fair use defense do not eliminate free speech problems; if anything, they make copyright seem even less supportable, a confusing body of law likely to deter speakers from speech that might potentially be thought to infringe"); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987) (discussing how fair use creates a conflict between the Copyright and First Amendment Clauses of the Constitution).

[9] U.S. CONST. art. I, § 8 cl. 8.

principle of fair use, provides a means of ameliorating inequalities in access to and use of information. Fair use accomplishes this goal by safeguarding many reasonable uses of content for teaching, research, and scholarship without requiring the payment of fees.[10] Surely if any societal institution has a moral and philosophical imperative to understand and exercise rights to fair use, it should be higher education. Yet many factors contribute to a fear of fair use and reluctance to exercise these rights within the academy.

In Part II, we explore the landscape that showed us the importance of thinking about access to information as a question of social justice. We provide summary statistics that demonstrate the inequality in access to content first among relatively resource rich research institutions and then across a broader spectrum of colleges and universities. Against this backdrop, we consider how the dramatic inequalities in online resources throughout academia should affect copyright jurisprudence and the understanding and application of fair use in a digital age.

Application of the fair use standard requires thought, judgment, and the time to keep a watchful eye over the ever-changing landscape of copyright precedent. In Part III, we argue that the lack of clarity (real and perceived) in copyright law provides exceptional challenges, especially for institutions without access to copyright counsel. When answers are not clear and potential liability is thought to be significant, saying "no" to a proposed use is often considered the safest course. The legal risks may be perceived as especially threatening at institutions with limited resources. In seeking clarity and avoiding risk, the temptation can be strong to act as if fair use does not exist and to shift campus copyright policy to a safe zone based on blanket licenses, fees, and permissions, even when law would not require these actions. We present reasons to resist that temptation, striving to clarify recent changes in fair use jurisprudence that support practices which foster equity in access to information.

Part IV reexamines well-established fair use myths in light of recent legal authority. Copyright fair use is dynamic. As federal laws have expanded authors' and publishers' copyrights, the courts

[10] *See* 17 U.S.C. § 107 (2006).

have recognized a parallel expansion in the doctrine of fair use. Although the boundaries of fair use continue to be unclear in many contexts, year by year, case law tends to contribute to clarity, often adding to the list of uses that a court would consider to be fair. Given the evolution of fair use jurisprudence, we must take the time to reflect on our assumptions about fair use as new authority emerges.

Part V illustrates the importance of understanding fair use through a practical application in the context of academic scholarship. Several recent incidents involving scholarly publications are recounted to demonstrate the difference that the assertion and defense of fair use can make.[11] Next, we demonstrate that in the context of scholarly writing, fair use will generally favor the reproduction of content that is necessary to support critical commentary. Finally, we conclude that the fair use right must remain a strong right on campus unless we want fear of copyright to interfere with the educational mission and exacerbate inequalities that affect both students and scholars.

II. THE IMPORTANCE OF FLEXING FAIR USE MUSCLES ON CAMPUS

New technologies have provided unprecedented means to distribute, research, use, and access content in the classroom. Today, most scholars expect to have electronic access to current research journals. Digital content provides many important advantages in that it occupies less physical space, provides access to multiple users simultaneously, and allows for searchability. Yet it also creates new costs, limitations, and complications under copyright law regarding who may access the content and how it may be used.

The significant differences in managing the use of hard and electronic copies present many difficult copyright issues. Books and journals printed on paper can be accessed, read, and assigned (perhaps by placing the text on a reserve shelf), as long as the copy remains in the library's collection, without additional compensation transferred to the copyright owner. The first sale

[11] *See infra* Part V.A.

doctrine provides a wide scope of protection that allows multiple users to read a printed book.[12] Once a print text is purchased, a library does not face recurring costs for access afforded its patrons. Additionally, libraries generally could develop consistent principled policies under the provisions of the Copyright Act relevant to the use and sharing of books and journals which reside in their collections as hard copies (including with other libraries through interlibrary loan provisions). In contrast, each electronic collection is governed by a different license agreement with different terms of use.[13]

In addition, access to current online journals is generally purchased annually.[14] As Ann Bartow astutely observes, "[m]ost electronic publications are licensed rather than sold under terms and conditions that may not be readily negotiable. It is not at all clear that digitalization enhances access, and it may instead be true that it decreases the scope of collections over time."[15] Many would describe the digital licensing relationship as more like a rental than a purchase in the sense that libraries must maintain a licensing relationship with the journal publisher to keep online access for the campus community.[16] Even though many astute research libraries negotiate provisions ensuring some archival rights to the annual

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[12] *See* 17 U.S.C. § 109(a) (2006).

[13] Most large journal publishers insist on confidentiality of library licenses, making comparison of pricing and contract terms very difficult to assess except in cases of public institutions subject to state open records laws. Ellen Finnie Duranceau, *License Compliance*, 26 SERIALS REV. 53, 55 (2000).

[14] Many libraries also license online journals in multi-year packages with "protected" price increases annually of, for example, 6%. Payment is often due on an annual basis in such multi-year deals. Agreement between University of Virginia and Elsevier B.V. (Nov. 26, 2008) (on file with the North Carolina Journal of Law & Technology).

[15] Ann Bartow, *Some Peer-to-Peer, Democratically, and Voluntarily-Produced Thoughts*, 5 J. ON TELECOMM. & HIGH TECH. L. 449, 464–65 (2006–2007). When a subscription expires or is canceled, the back issues of a periodical may be unavailable. *Id.* at 465.

[16] *Id.*; Bartow also notes that publisher bankruptcies or even obsolete technology formats pose a threat to the library access and the scholarly record. *See also* Gasaway, *supra* note 4, at 468 ("As licenses, as opposed to sales, become more common for copyrighted works, pay-for-use may become the norm. Unfortunately, license terms trump fair use.").

journal contents purchased each year,[17] few have the technological capability to host the electronic content in the journals independently. The publishers justify on-going access fees because their servers deliver content to the campus community, even though hard copies of the underlying annual journals themselves have been purchased by the library in question. It is not uncommon for libraries to purchase "backfiles" of journals that may partially include content for which the library also had a regular annual subscription.[18] Some publisher agreements define "users" narrowly so that not all who have access to a library may have access to the particular content.[19] For the legal databases, "LEXIS/NEXIS [sic] and WESTLAW [sic], use under the law library's contract is restricted only to that school's enrolled students, faculty and staff."[20] These licenses do not permit other

[17] For example, the University of Virginia's agreement with publishing giant Elsevier provides:

> Upon termination of all of the Subscriber's annual subscriptions on ScienceDirect online, the Subscriber may, at its option, (1) acquire, load and technically format on a server that enables access and use by Authorized Users an electronic copy of all or part of its Subscribed Titles for the publication years paid for cost at a rate of $1,250 per tape (adjusted annually for inflation and cost increases) and/or (2) continue to access such Subscribed Titles online for an annual access fee based on the number of full-text articles downloaded from such titles during the prior twelve (12) months at a rate of $0.081 per download (adjusted annually for inflation and cost increases), in accordance with the usage provisions of this Agreement, which provisions shall survive the termination of the Agreement.

Agreement between University of Virginia and Elsevier B.V. (Nov. 26, 2008) (on file with the North Carolina Journal of Law & Technology).

[18] *See, e.g.*, ScienceDirect, Journal Backfiles, http://info.sciencedirect.com/content/backfiles/ (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology) ("Elsevier Backfiles on ScienceDirect is a historical archive of journals from 1994 and older, many going back to Volume 1, Issue 1."); Springer Online Journal Archives, http://www.springer.com/librarians?SGWID=0-117-6-126299-0 (last visited Apr. 10, 2010) (on file with North Carolina Journal of Law & Technology) ("Springer has digitized nearly 1000 journals chronicled from Volume 1, Issue 1 in the Springer Online Journal Archives.").

[19] *See* Laura N. Gasaway, *Copyright Ownership & The Impact on Academic Libraries*, 13 DEPAUL-LCA J. ART & ENT. L. POL'Y 277, 299 (2003).

[20] *Id*. at 300.

patrons of a public institution, such as local lawyers or citizens trying to understand the law, to access these tools. Some pricing models based on pay-per-use make unaffordable the very access that the digital environment was supposed to facilitate.[21] Therefore, in the digital context, multiple uses can increase the price of the single electronic copy.

The ubiquitous availability and online searchability of digital content come at a significant cost. Supplying universities with the publications that document cutting-edge research has become a lucrative business.[22] The prices of scholarly publications, especially in the sciences, are increasing faster than library budgets.[23] Due to economic realities, every year libraries are forced to make tough choices regarding where to shrink their collections. Further, due to space limitations, decreasing budgets, and the preferences of the research community, universities often choose to purchase new material only in digital format.[24]

Libraries with sufficient resources may hire people to negotiate favorable terms such as broad definitions of users and permission

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[21] *See* Bartow, *supra* note 15, at 464 ("Budgetary demands preclude infinite access to pay per view resources.").

[22] Lee C. Van Orsdel & Kathleen Born, *Periodicals Price Survey 2007: Serial Wars*, 132 LIBR. J. 43, 43 (2007) ("Forecasts from commercial publishers touting collapse and disaster seemed oddly out of sync with the profits they enjoyed—around 25 percent on average.").

[23] *Id.* at 48 ("In 2007, academic libraries saw overall journal price increases just under eight percent for the second year in a row. U.S. titles rose nine percent on average; non-U.S., 7.3 percent."). In contrast, higher education budgets are static or falling. *See* Eric Kelderman, *More Cuts for Colleges Are Likely Even After States Pass Budgets*, CHRON. OF HIGHER EDUC., July 27, 2009, *available at* http://chronicle.com/article/Further-State-Budget-Cuts-Loom/47448/. The five-year consortial agreement with Elsevier of the seven public Virginia graduate institutions (University of Virginia ("UVA"), Virginia Commonwealth University, Virginia Polytechnic Institute and State University ("Virginia Tech"), George Mason University, The College of William and Mary, James Madison University, and Old Dominion University) provides for approximately six percent annual increases over five years, for a total expenditure of about forty million dollars. Agreement between University of Virginia and Elsevier B.V. (Nov. 26, 2008) (on file with the North Carolina Journal of Law & Technology).

[24] *See, e.g.*, Van Orsdel & Born, *supra* note 22.

to place the purchased content on electronic reserve or to engage in other fair uses. Negotiations can result in more favorable terms only for the institution seeking them.[25] Generally, only institutions with the resources and courage to ask for greater access will get such accommodations. Many remain saddled with more restrictive license agreements. Similarly, academic libraries that are able to form consortial licensing arrangements often receive better pricing and terms than institutions negotiating alone.[26]

Clout can come with size. In 2007, The Massachusetts Institute of Technology ("MIT") terminated its subscription to the Society for Automotive Engineers ("SAE") Digital Library

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[25] *See* Gasaway, *supra* note 19, at 299.

[26] However, even consortial clout is often insufficient to ward off price increases. On January 4, 2010, the Committee on Institutional Cooperation ("CIC") (University of Chicago, University of Illinois, Indiana University, University of Iowa, University of Michigan, Michigan State University, University of Minnesota, Northwestern University, Ohio State University, Pennsylvania State University, Purdue University, and University of Wisconsin-Madison) issued an announcement expressing their opposition to Nature Publishing Group's new site-license pricing for *Scientific American* and their intent to cut subscriptions:

> NPG recently took control of this title from another publisher, proceeding to raise the library print subscription price almost seven-fold, and the electronic site-license price at 10 times the cost of a print subscription. The Nature publishing company has a history of aggressive pricing practices for its specialized scholarly journals, and is apparently intent on applying these practices to the more general interest content it acquires . . . .
>
> While the pricing of a single magazine or journal like Scientific American does not seriously imperil the bottom line of larger libraries, the pattern of commercial publishers buying up titles—scholarly or popular—with the intention of raising prices out of proportion to the costs of production and distribution, is indeed a serious threat to libraries and readers. The CIC libraries will work with our students and faculty to resist these predatory business practices that undermine our shared commitment to the broadest possible dissemination of knowledge.

Library Directors Respond to Pricing Proposal for Scientific American, COMMITTEE ON INSTITUTIONAL COOPERATION, Jan. 4, 2010, http://www.cic.net/home/NewsAndPubs/News/10-01-04/Library_Directors_Respond_to_Pricing_Proposal_for_Scientific_American.aspx (on file with the North Carolina Journal of Law & Technology).

because the society insisted on a "drastic" price increase with a new digital rights management regime that would have significantly restricted common scholarly uses such as downloading and emailing documents to colleagues.[27] MIT faculty and librarians joined forces to convince the SAE board to drop the proposed changes.[28] MIT viewed this issue as sufficiently significant to devote substantial resources to this effort.[29] This dispute is unusual in that MIT succeeded in convincing the SAE board to drop Digital Rights Management ("DRM") from its collection, resulting in broader access to all subscribers.[30]

The differences in the level of access are dwarfed by a factor that has a much greater impact—the extent to which a university can afford to purchase access to content at all. No academic institution can afford to purchase everything it would like to include in its collections. Due to increasing costs and a wide disparity in available resources, wealthy universities are able to spend a much smaller fraction of their budget purchasing much more content than institutions with fewer resources. The following charts illustrate the disparity that exists even among the most resource rich institutions. The data in these charts was collected by and is used with the permission of the Association of Research Libraries ("ARL").[31] The ARL member libraries "are research libraries distinguished by the breadth and quality of their collections and services. Each member also makes distinctive contributions to the aggregation of research resources and services

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[27] *See, After DRM Standoff, MIT Libraries and SAE Reach Accord*, 133 LIBR. J. 18, 18 (2008), *available at* http://www/libraryjournal.com/info/CA6543732.html#news2 ("SAE announced it intended to require use of a plug-in, called FileOpen, to access content from the SAE Digital Library, as well as instituting download limits and a 'drastic' increase in prices, noted MIT librarian Tracy Gabridge. MIT librarians argued that the restrictions also included curbed users from emailing or sharing documents and limited printing.").

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] For ARL statistics, *see* http://www.arl.org/stats/annualsurveys/arlstats/index.shtml (last visited on Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

in North America."[32] The criteria for membership include: sustained institutional commitment to the library over time (as evidenced by the nature and extent of resources allocated) and continuing investment that will support:

- distinctive research-oriented collections and resources of national significance in a variety of media;
- services to the scholarly community, including the availability of electronic resources;
- participation in national and/or international library-related programs;
- the creation of bibliographic records and their availability on one of the major bibliographic networks;
- the use made of the collections and services by faculty, students, and visiting scholars;
- the preservation of research resources;
- the leadership and external contributions of the staff to the profession [and]
- the effective and innovative use of technology.[33]

The vast majority of U.S. libraries do not qualify for membership in ARL. Of the thousands of colleges and universities in North America, only 124 were ARL members in 2009.[34] Therefore, the sample data set forth below reflects disparities among the most elite research institutions in the nation. Table I illustrates the

[32] Principles of Membership in the Association of Research Libraries, http://www.arl.org/arl/membership/qualprin.shtml (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

[33] *Id.*

[34] Staff Information Entry for Charles B. Lowry, Executive Director of ARL, http://www.arl.org/arl/staff/lowry~print.shtml (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology). The Carnegie Classification of Institutions of Higher Education 2000 Report (updated Oct. 29, 2004), lists 3,941 institutions of higher education in the U.S. Of these, 261 are Doctoral/Research Institutions ("Carnegie Code D"); 611 are Master's Colleges and Universities ("Carnegie Code M"); 606 are Baccalaureate Colleges ("Carnegie Code B"); 1,669 are Associate's Colleges ("Carnegie Code A"); 766 are Specialized Institutions, and twenty-eight are Tribal Colleges and Universities. THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, THE CARNEGIE CLASSIFICATION OF INSTITUTIONS OF HIGHER EDUCATION 14 (2001), *available at* http://classifications.carnegiefoundation.org/downloads/2000_edition_data_printable.pdf.

number of serial subscriptions reportedly available[35] at six ARL libraries.[36]

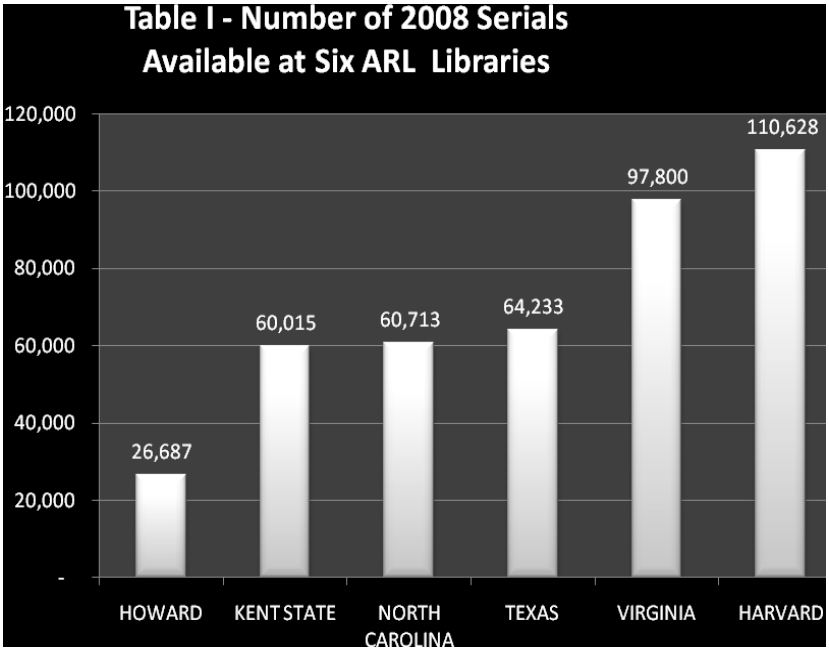


Table I documents significant disparities in access to content, even among these relatively resource rich ARL member institutions. Howard University provides access to less than half the number of subscriptions available at Kent State University, the University of

[35] "Available" serials include those purchased directly by the institution as well as serials made available through other mechanisms such as a statewide purchasing plans and "free" subscriptions offered as a part of a package with other acquisitions.

[36] For ARL Data, *see* http://www.arl.org/stats/annualsurveys/arlstats/mrstat.shtml. These statistics reflect the number of serials each institution reports in its documentation to ARL and are not independently verified. Each school uses different personnel and potentially different methods to report the number of serials. Therefore, the numbers reported above should be viewed as no more than rough estimates. In an effort to continually increase the reliability of such data, ARL continues to adapt its reporting standards.

North Carolina at Chapel Hill ("UNC"), or the University of Texas. A student at Harvard will have access to more than four times the number of serials compared to a student at Howard. Access to journals obviously does not define the complete academic experience. Nevertheless, this data does reflect basic differences in the immediate availability of content at different universities.

Table II illustrates the percentage of the library budgets that are dedicated to purchasing journal subscriptions.[37]

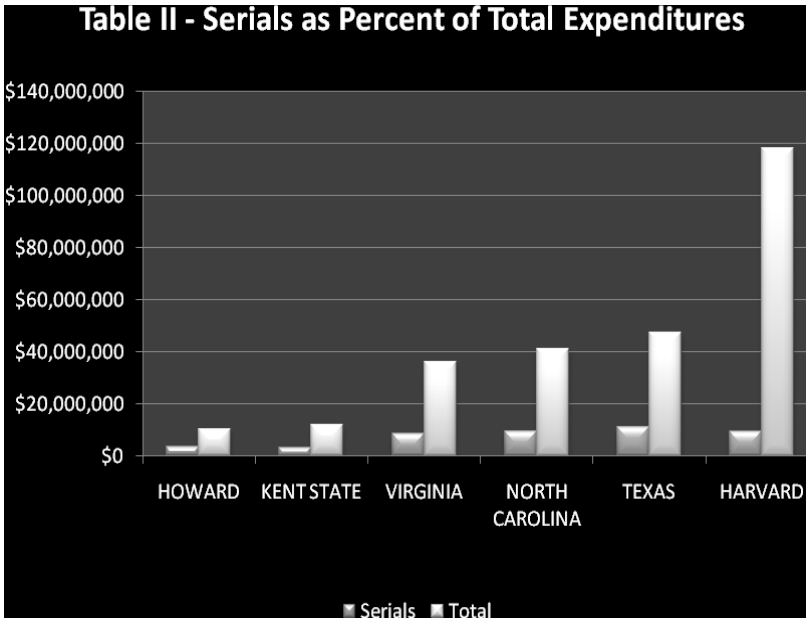
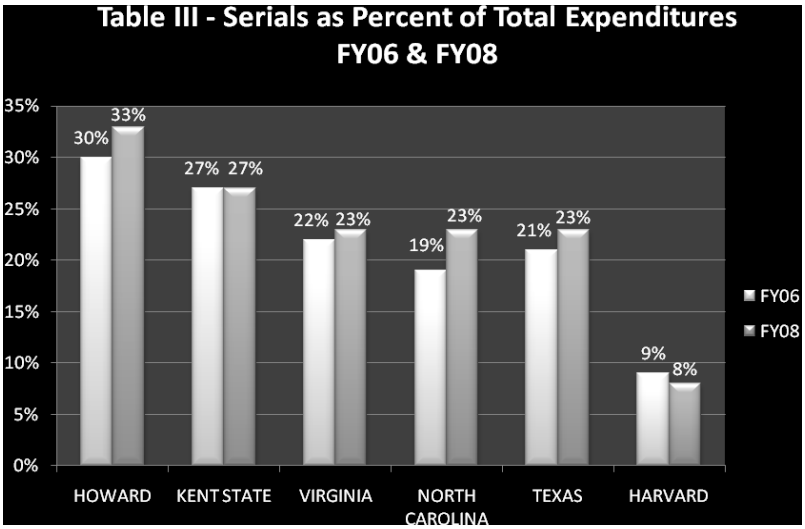


Table II demonstrates that university libraries with fewer resources spend a much greater percentage of their overall budget purchasing serials. No formula indicates the percentage of a library's budget that will be spent on serials. Instead, the data reflects that ARL libraries appear to purchase as much content as they can justify within their budgets. Howard University Library spends 33% of its budget to buy its journal subscriptions. Although Harvard is able to afford to spend more than six times the amount that

[37] *See supra* note 36.

Howard spends, it uses only 8% of its library budget to do so. For its investment, Howard students, faculty, and staff obtained access to 26,687 serials, whereas the Harvard community has access to 110,628 serials.[38]

Table III shows how the sampled library serial expenditures changed between 2006 and 2008.[39] It reveals a very narrow span of time; even so, it suggests that the inequalities illustrated above may widen. Between 2006 and 2008, Howard increased its spending on serials from 30% of its total budget to 33%.[40] Harvard, in contrast, was able to decrease the amount of its spending on serials from 9% to 8% of its total budget.[41] Even in challenging economic times, libraries with less may strive to provide more, while the richer institutions may afford to trim their budgets and still provide access to a vast array of scholarly content.



What does it mean in practical terms for one campus community to have online access through its library to vastly more

[38] *See* Table I.
[39] *See supra* note 36.
[40] *See* Table III. UVA, UNC, and the University of Texas also increased their serials spending as a percentage of total budgets. *Id.*
[41] *See* Table III.

substantial and diverse scholarly resources than another? At a most basic level, it means that one community has the ability to research, access, use, and read vastly greater amounts of information. It means that students and faculty with access to fewer subscriptions will likely pay more money for access to journal articles, course packs, individual subscriptions, images, data sets, and other materials. Considering the magnitude of the differences among even the most affluent research libraries in the United States, the inequalities on a national scale are significant indeed.[42]

The Association of College and Research Libraries ("ACRL") collects and publishes similar data from its vastly larger group of members.[43] The tables that follow document vast disparities in library spending and holdings among the 3007 ACRL member institutions responding to the survey.[44] These tables are organized

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[42] Of the numerous colleges and universities in the Commonwealth of Virginia, only UVA and Virginia Tech are included in the ARL ranks. Between those two institutions, UVA is ranked 24th overall in the ARL based on ARL's "investment index." Virginia Tech is ranked 105th. In North Carolina, only UNC, North Carolina State University, and Duke University make the ARL list. ARL Statistics 2007–08, http://www.arl.org/stats/annualsurveys/arlstats/arlstats08.shtml (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

[43] "ACRL, the largest division of the American Library Association, is a national organization of academic and research libraries and librarians with more than 12,000 members representing librarians working with all types of academic libraries—community and junior college, college, and university—as well as comprehensive and specialized research libraries and their professional staffs." Association of College and Research Libraries Membership Page, http://www.ala.org/ala/mgrps/divs/acrl/about/membership/index.cfm (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

[44] *See* Association of College & Research Libraries, 2008 Statistical Summaries, http://www.ala.org/ala/mgrps/divs/acrl/publications/trends/2008/index.cfm (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology). The ACRL distributes this data freely on its website and permits the use of it subject to the following statement:

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along the Carnegie classifications.[45] We have selected data showing both the high and median spending or resource availabilities to document not only the significant differences between institutions based on institutional type (e.g., associate's degree granting institutions versus master's/doctoral), but also within each category.

ACRL Library Data Tables 2007—Summary Data: Expenditures[46]				
Total Library Expenditures (Chart I)				
	Carnegie Code A	**Carnegie Code B**	**Carnegie Code M**	**Carnegie Code D**
High	$5,384,300	$9,863,971	$68,327,972	$110,849,458
Median	$394,234	$465,151	$1,148,032	$4,944,183

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American Library Association Web Copyright Statement and Release, http://www.ala.org/ala/footer/copyright.cfm (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

[45] "Carnegie Code A" refers to institutions granting Associates of Arts degrees. "Carnegie Code B" refers to institutions granting Bachelors of Arts. "Carnegie Code M" refers to Master of Arts and professional degree granting institutions. "Carnegie Code D" refers to doctoral degree granting institutions. *See* THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *supra* note 34.

[46] *See supra* note 44.

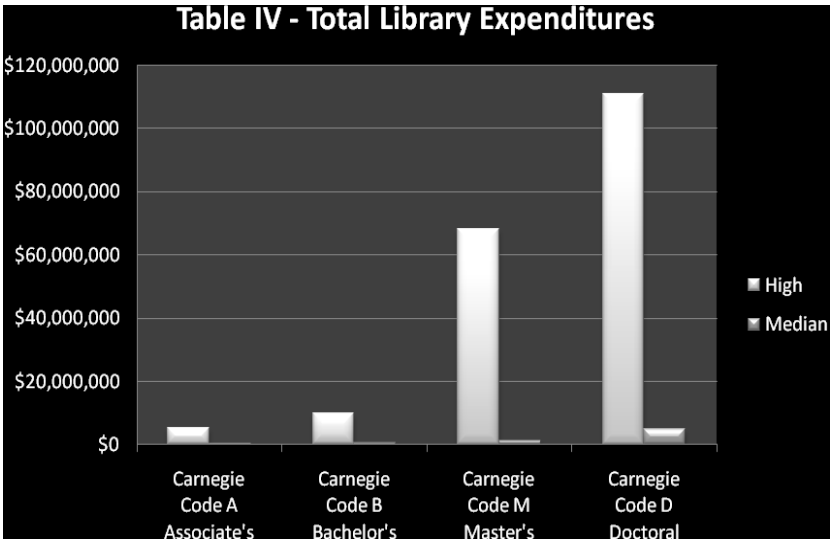
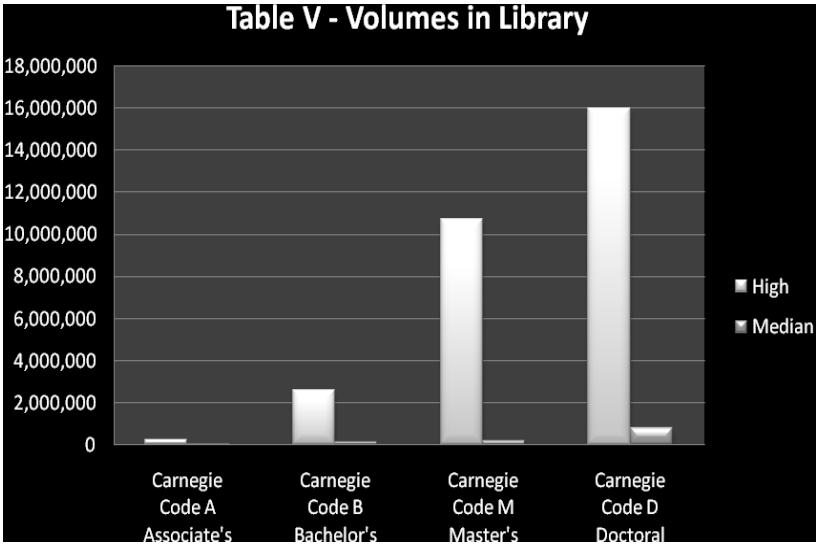


Table IV allows comparison of the total expenditures made by libraries in the four Carnegie classifications.[47] This data group makes clear the wide disparities in total library spending both within each Carnegie classification and from classification to classification. In Carnegie Code D (doctoral), for example, the high expenditure noted is more than $110,000,000, but the median even for this large university category, is under $5,000,000, or less than 5% of the resources available at the top. In comparing doctoral level institutions with associate's or bachelor's degree granting institutions (Codes A and B), one sees that even the top purchasers have only 5% and 10%, respectively, of the resources available to the richest doctoral institutions.

[47] *See supra* note 44.

ACRL Library Data Tables 2007—Summary Data: Collections[48]				
Volumes in Library (Chart II)				
	Carnegie Code A	**Carnegie Code B**	**Carnegie Code M**	**Carnegie Code D**
High	243,982	2,585,463	10,719,219	15,965,675
Median	50,204	122,510	195,965	808,954

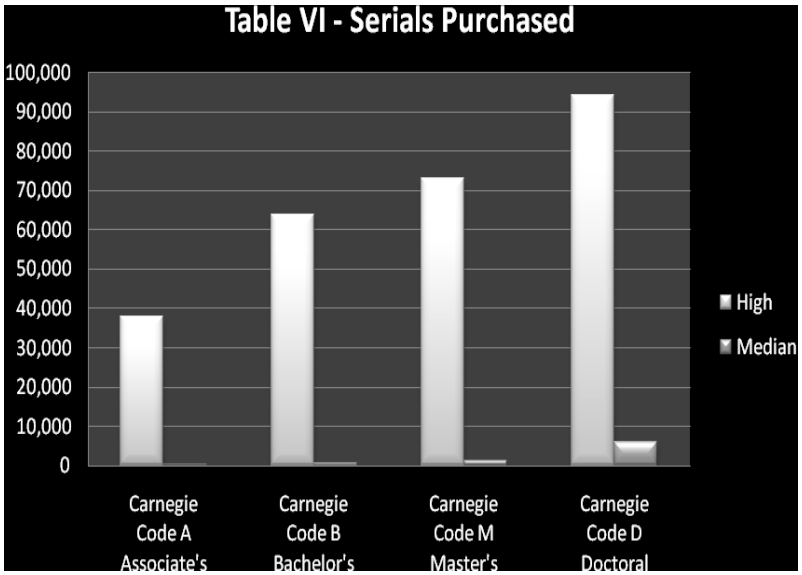


The volumes available in a research library constitute one essential resource to students and faculty on that campus. Table V again shows dramatic differences within each Carnegie classification group and from group to group.[49] As would be anticipated, doctoral institutions have vastly greater numbers of books available, with a high of sixteen million volumes at one institution.

[48] *See supra* note 44.
[49] *See supra* note 44.

However, within this classification, the median drops to well under one million volumes. The median at associate's degree granting institutions is 50,204 volumes; at bachelor's degree granting institutions is 122,510 volumes; and at master's degree granting institutions is 195,965 volumes.

ACRL Library Data Tables 2007—Summary Data: Collections[50]				
Serials Purchased (Chart III)				
	Carnegie Code A	**Carnegie Code B**	**Carnegie Code M**	**Carnegie Code D**
High	37,924	63,794	73,009	94,277
Median	215	626	1,328	6,078



[50] *See supra* note 44.

Table VI provides additional information across a broader range of institutions than those previously examined in the context of the ARL sample institutions in Tables I–III.[51] Whereas significant differences were noted among the elite ARC institutions, this ACRL data allows a look at a much broader spectrum. For Carnegie Code D doctoral institutions (institutions like those potentially eligible for membership in ARL), the median number of serials purchased is 6,078. This compares with a high in this data set of 94,277 serials.

These differences in available content, especially online journals that can be accessed through a link on a course website or electronic reserves, seem to be an especially significant factor illuminating inequalities. This data underscores the importance of preserving fair use as a basis for delivering "multiple copies for classroom use"[52] to students through course reserves, especially for institutions with fewer resources. An institution with ninety or a hundred thousand individual journal subscriptions is unlikely to need to worry as much about fair use, as its library already offers almost all of the current scholarly research and commentary the community might need through online linking. A college or university library with 215 (Carnegie Code A median), 626 (Carnegie Code B median), 1,328 (Carnegie Code M median), or even 6,078 (Carnegie Code D median) subscriptions is a library that will need to rely thoughtfully on fair use unless it is able to afford constant additional purchases to allow its students to engage with current scholarship and research for even the limited context of classroom learning.[53]

The vast discrepancies in educational resources between rich and lower-wealth educational institutions cannot be equalized by any easy measure, let alone the single principle of fair use. We do not suggest that institutions with smaller collections of books or limited numbers of journals are entitled to take and copy whatever their faculty might want to deliver to students without appropriate

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[51] *See supra* note 44.

[52] 17 U.S.C. § 107 (2006).

[53] Some of these inequalities may be ameliorated by other library practices, such as interlibrary loans. However, such access is not immediate and is only available if the source may be located within the library's network.

compensation to copyright holders. Many mechanisms are available for licensing book chapters or individual journal articles for reproduction in course packs or E-reserves systems. It is often appropriate to participate in such purchases. However, we believe it is not always necessary to do so under a copyright statute that explicitly recognizes that "multiple copies for classroom use" is an example of a practice that may be considered fair use.[54] A legal position that payment is always required in contravention of this explicit authorization exacerbates these fundamental disparities in access to information and removes an important remedial mechanism available by law.

III. THE ASSERTION OF FAIR USE ON CAMPUS IS THWARTED BY A LACK OF CLARITY (WHETHER REAL OR PERCEIVED) IN COPYRIGHT LAW

The previous section demonstrates significant disparities in the library materials and resources that are available at U.S. colleges and universities. Professors rarely limit their teaching to the materials that happen to be owned by the campus library. Therefore, some combination of student purchases of course materials and textbooks, as well as exposure to other materials in the classroom or via course reserves, occurs on every campus. The principal basis for providing students with additional classroom and research materials is afforded under the fair use provision of U.S. copyright law.[55] If the societal benefits that justify a regime of copyright require that "individuals learn from those [copyrighted] works, and '[l]earning requires access to the work in which the ideas to be learned are embodied,'"[56] it is of vital practical importance to consider the boundaries of fair use and determine how much and how often content that is not owned by the school may be used in teaching and scholarly pursuits.

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[54] 17 U.S.C. § 107.

[55] *Id.* Other copyright provisions may also support such use, such as the exemption for classroom displays and performances codified in 17 U.S.C. § 110 (2006).

[56] Douglas L. Rogers, *Increasing Access to Knowledge Through Fair Use—Analyzing the Google Litigation to Unleash Developing Countries*, 10 TUL. J. TECH. & INTELL. PROP. 1, 11 (2007) (quoting Patterson, *supra* note 8, at 5).

However, determining whether a use is fair use is difficult and time-consuming. This right, defined by statute, requires thought and engagement. The fair use provision of the Copyright Act provides:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[57]

The statute appears to create safe harbors, but judicial interpretation has muddied the clarity that could have evolved from section 107. It gives examples of uses that may be fair such as providing "multiple copies for classroom use" and "news reporting."[58] Yet both of these uses are sometimes considered fair and sometimes found to be infringement.[59]

The statute also contains gaping holes. It does not mention the Supreme Court's clear admonition that the factors must be

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[57] 17 U.S.C. § 107.

[58] *Id*.

[59] For educational copying, *compare* A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473 (E.D. Va. 2008) (making multiple copies of student works to detect plagiarism was fair use) *with* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) (finding it was not fair use for a commercial copyshop to make and sell coursepacks). For copyrighted content used in news reporting, *compare* Los Angeles News Service v. Reuters Television Int'l Ltd., 149 F.3d 987 (9th Cir. 1998) (using film of Reginald Denny's beating during 1992 Los Angeles riots for news reporting was not fair use) *with* Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 25 (1st Cir. 2000) (newspaper's reprinting and distribution of photographs of beauty pageant winner was fair use because the photos themselves were "newsworthy").

balanced in light of the purposes of copyright law.[60] The statute does not mention the increasingly important need to examine the extent to which the use is transformative. In summary, fair use analysis is not easy.[61] It is not neat.[62] It is not clear.[63] It requires a vigilant eye over current legal decisions and factual, case-by-case, intensive review of factors that sometimes conflict.[64]

The resources required to conduct such an intensive review are not typically available on an individual basis to most faculty and students. Professors at institutions with knowledgeable copyright counsel may have access to resources to use in determining whether particular uses are fair. Even at such institutions, however, it is not easy to find an academic or librarian who will declare that they are using content based on a firm belief and explicit legal guidance that their use is fair.

In many areas of law, legal responsibilities and rights do not correspond with practice. Discrimination persists notwithstanding anti-discrimination laws. Speeding persists despite clearly marked speed limits. For copyright questions involving fair use, the absence of clear standards and effective enforcement may exacerbate the gap between what is likely to be permitted by a court and what happens in practice.[65] Many factors contribute to the rare evocation of fair use rights. The expense of litigation, lack

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[60] *See infra* Part V.B.5.

[61] *See* Gasaway, *supra* note 4, at 467 ("There are many ambiguities in fair use analyses.").

[62] *Id*.

[63] In her wonderful book, *Permissions: A Survival Guide, Blunt Talk about Art as Intellectual Property*, Susan M. Bielstein describes fair use as "steeped in misunderstanding." SUSAN M. BIELSTEIN, PERMISSIONS: A SURVIVAL GUIDE, BLUNT TALK ABOUT ART AS INTELLECTUAL PROPERTY 79 (2006).

[64] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994) (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985)) ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."). For an interesting visual interpretation of the factors to be balanced, see Fair Use Visualizer, http://www.benedict.com/Info/FairUse /Visualizer/Visualizer.aspx (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

[65] *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 882 (2007).

of familiarity with the legal standards,[66] fear of an unfavorable outcome, or even the extraordinary power imbalance between a publisher and a scholar can lead to compromises even if a party believes the use is fair.[67] The lack of clarity (real and perceived) in copyright law provides exceptional challenges.

Whatever copyright complexities were faced in a pre-digital world have been dwarfed by those in our current digital learning environment. Internet technology has fundamentally transformed how our students learn, how our scholars teach, how academic research is disseminated, and how libraries function. Today, there are many new ways in which intellectual property can be taught, read, shared, copied, disseminated, stolen, and lost. These factors have led to additional far-reaching legislative changes in the form of the Digital Millennium Copyright Act ("DMCA"), enacted in 1998[68] and the Technology Education and Copyright Harmonization Act ("TEACH Act"), enacted in 2002.[69] Application of the fair use standard in the context of new laws and new technologies requires thought, judgment, and the time to keep a watchful eye over the ever-changing copyright landscape. In seeking clarity and avoiding risk to address broad needs, the temptation to avoid these detailed inquiries and paint "no" with a broad brush can become the safe zone, particularly when students and faculty are experimenting with technologies that are not well understood by legal counsel themselves.

Taking a policy position on fair use is itself deemed risky. As a result, a host of websites has been created with the hope of helping faculty and students sort through fair use issues, and many

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[66] *See infra* Parts II and III.

[67] As Lawrence Lessig points out, even corporate giant Google, Inc. elected not to wait and see if the courts would affirm the fair use of its book scanning project, settling with the publishers and authors who filed suit to challenge it. Lawrence Lessig, *For the Love of Culture*, THE NEW REPUBLIC, Jan., 26, 2010, http://www.tnr.com/article/the-love-culture. *See also* William M. Landes, *An Empirical Analysis of Intellectual Property Litigation: Some Preliminary Results*, 41 HOUS. L. REV. 749, 772 (2004).

[68] 17 U.S.C. § 512 (2006).

[69] 17 U.S.C. § 110(2) (2006).

offer some guidance.[70] However, these resources are often drafted in general terms and without clear answers to specific scenarios in order to avoid liability. Therefore, it is difficult to find sufficient and specific guidance for professors to safely use in teaching and scholarship. Fearing (and perhaps, hoping) that fair use may apply differently to an individual researcher than an institution, many universities avoid proactive policy statements.[71] Lawyers and university administrators often advise taking conservative positions in drafting copyright policy and tutorials so they will not be targets

[70] For example, Information Circulars and Fact Sheets, United States Copyright Office, www.copyright.gov/fls/fl102.pdf; The University of Texas, Austin, Copyright Crash Course, http://copyright.lib. utexas.edu/; Association of Research Libraries ("ARL"), http://www.arl.org/sc /copyright/index.shtml; Columbia University, Libraries/Information Services Copyright Advisory Office, http://copyright.columbia.edu/; Stanford University Libraries, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/; Website of the North Carolina State Libraries, Digital Scholarship & Publishing Center, http://www.lib.ncsu.edu/scc/main.html; University of Minnesota, http://www. lib.umn.edu/copyright/; University System of Georgia, http://www.usg.edu /copyright/; The Catholic University of America, General Counsel's website, http://counsel.cua.edu/ copyright/resources/guidelines/; Center For Social Media, American University, http://www.centerforsocialmedia.org/files/pdf /copyright _backgrounder.pdf; Free Expression Policy Project at NYU School of Law, http://www.fepproject.org/policyreports/fairuseflyer.html; Berkman Center for Internet & Society at Harvard University, http://cyber .law.harvard.edu/home/; Electronic Frontier Foundation, http://www.eff.org/; University of Maryland, Center for Intellectual Property, http://www.umuc.edu /distance/odell/cip/links.html. Visual Resources Association, Copyright, Intellectual Property Rights, Fair Use, http://www.vraweb.org/resources /ipr/copyright.html; NINCH, http://www.ninch.org/copyright/; Resources Library of the Center For Social Media, American University, http://www. centerforsocialmedia.org/resources/; Copyright for Music Librarians, Music Library Association, http://www.musiclibraryassoc.org/ copyright/; JUNE M. BESEK, CLIR REPORT, COPYRIGHT AND RELATED ISSUES RELEVANT TO DIGITAL PRESERVATION AND DISSEMINATION OF UNPUBLISHED PRE-1972 SOUND RECORDINGS BY LIBRARIES AND ARCHIVES (2009), http://www.clir .org/pubs/reports/pub144/pub144.pdf. (all sites last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

[71] However, copyright policies do bubble up through university committees because some sort of assertive policy statement is necessary to avoid copyright liability in certain instances. *See* 17 U.S.C. § 512(i)(1)(A) (2006).

of the publishing industry.[72] Fear and risk aversion, rather than a reflective interpretation of the law, too often influence practical decisions and copyright policy.[73] Even institutions like ARL often shy away from taking a firm position on specific questions of fair use, even though it is highly unlikely that any liability could attach to such a policy statement designed to help its members.[74]

If fair use is so messy and so hard, why do we live with it? To answer this question, we must consider the alternative. If fair use did not exist, and a copyright owner could control all uses that otherwise would be considered fair, a critic would have to pay every time he or she wrote a review of a book that contained a quotation. Permission for use would become a vehicle for

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[72] This conservative conduct follows the reasoning explained by James Gibson in *Risk Aversion and Rights Accretion in Intellectual Property Law*. *See* Gibson, *supra* note 65, at 882 ("Intellectual property's road to hell is paved with good intentions. Because liability is difficult to predict and the consequences of infringement are dire, risk-averse intellectual property users often seek a license when none is needed. Yet because the existence (*vel non*) of licensing markets plays a key role in determining the breadth of rights, these seemingly sensible licensing decisions eventually feed back into doctrine, as the licensing itself becomes proof that the entitlement covers the use. Over time, then, public privilege recedes and rights expand, moving intellectual property's ubiquitous gray areas into what used to be virgin territory—where risk aversion again creates licensing markets, which causes further accretion of entitlements, which in turn pushes the gray areas even farther afield, and so on. This 'doctrinal feedback' is not a result of changes in the positive law but is instead rooted in longstanding, widely accepted doctrine and prudent behavior on the part of everyone involved. And because feedback is so ingrained in established law and practice, its various cures tend to create more problems than they solve.").

[73] *Id*.

[74] The current ARL website on fair use policy does little more than track the federal statute and cites only examples of individual uses such as to browse, read, make a single copy, and "experiment with variations of copyrighted material for fair use purposes, while preserving the integrity of the original." ARL, Fair Use in the Electronic Age: Serving the Public Interest, http://www.arl.org/pp/ppcopyright/copyresources/fair_use_electronic.shtml (last visited Apr. 5, 2010) (on file with the North Carolina Journal of Law & Technology). Notably absent is any reference to whether it would be fair use to engage in the common practice of including copyrighted content in a scholarly critique. *Id.*

censorship of critical commentary.[75] Copyright owners could bar uses by scholars who want to criticize their work or do not share their political orientation. Internet companies could not use images to help the public find information through search engines. Students at low wealth institutions might be unable to read the occasional scholarly article or book chapter assigned for a class from works not licensed by their institutions. If copyright owners could control criticism, news reporting, and the content we use in scholarship, teaching, and research, the educational missions of our institutions would be in grave danger.

It is important to realize that university practices around fair use will affect the law. Determining fair use involves a case-by-case analysis—each case considers the market and potential market for a work.[76] Evidence of "custom" may also influence a court's perception about whether a market exists.[77] Many uses of copyrighted works that occur on campus have traditionally been considered fair. Teachers continue to circulate hard copies of materials, use electronic reserves, and post content on password protected electronic courseware sites. A real danger, however, is

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[75] *See infra* Part V.A. As the real life examples discussed in Part V.A. point out, such censorship is a reality in situations where a scholar's research is seen as running counter to family or heirs interested in restricting information from an archive of previously unpublished materials by important literary or artistic figures.

[76] *See, e.g.*, Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 144–46 (2d Cir. 1998) (finding that the defendant's book, based exclusively on the plaintiff's television show, encroached on a market the plaintiff could develop and was not a parody; and therefore the fourth factor weighed against a finding of fair use); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 926–31 (2d Cir. 1994) (considering the potential effect of defendant's use of plaintiff's work on plaintiff's future journal subscription sales, licensing revenues, and fees); Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 804–06 (9th Cir. 2003) (finding that defendant's parodic work will not substitute for products in plaintiff's market for toy dolls); Rogers v. Koons, 960 F.2d 301, 311–12 (2d Cir. 1992) (finding that the defendant's two dimensional photograph based on plaintiff's three dimensional sculpture would undercut the plaintiff's potential market for licensed uses of his sculpture). *But see* Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006) (finding that Koons' use of a photographer's image in a series of paintings had no effect on the plaintiff's market).

[77] *See, e.g.*, *Texaco*, 60 F.3d at 924–25.

that fear of litigation or reaction to fair use's doctrinal complications will cause colleges and universities to give up on fair use and sign on to blanket licenses for all classroom and courseware use. If this happens, courts may have evidence (created by academic communities themselves) showing that the fair use right is outmoded and unnecessary in this context. Or perhaps even worse, courts may look to evidence created by our own campus copyright policies and conclude that the critical balance of factors inherent in fair use analysis has been altered radically.[78] If handing out copies for classroom learning is deemed not to be a fair use, providing supplemental copyrighted content to students will be a luxury only the richest institutions will be able to afford.

When the law is unclear, fear of litigation drives many to seek certainty in any form. The cost of certainty is giving away the argument that a use is fair. Academic authors often assign their copyrights to those who publish their work. We have both witnessed how surprised such authors are when their publisher insists that distribution of a chapter to their class is not a fair use. These authors never imagined that a publication contract would take away their right to share excerpts of their own writings with their students. We have both heard of graduate students who ask for permission to use content in a thesis, and who must ultimately change their work when the permission is denied or the requested fee is too high. We have also worked with faculty authors who are denied permission to use copyrighted works in scholarly monographs or have been unable to afford thousands of dollars in

[78] It is noteworthy that the complaint filed against Georgia State University over its course reserves practices and policies specifically notes the university's apparent failure to take advantage of the "campus license" or other revenue generating licensing mechanisms provided by such entities as the Copyright Clearance Center ("CCC"): "For example, through its Academic Permissions Services (APS), CCC offers professors, library personnel and other licensees a convenient mechanism for obtaining per-use copyright permission to photocopy, for coursepacks and classroom handouts, content from books, journals, magazines and other materials." Complaint at ¶42, Cambridge Univ. Press v. Patton, No. 1:08-CV-1425 (N.D. Ga., Apr. 15, 2008), *available at* http://docs.justia.com/cases/federal/district-courts/georgia/gandce/1:2008cv01425/150651/1/0.pdf.

permission fees requested by private copyright owners, museums, rights clearance houses, and archives in order to reproduce images in scholarly works that will never generate anything other than *de minimis* royalty payments.[79] We work with scholars who face academic publication contracts that include no acknowledgement of fair use, requiring written permission for every excerpt or quote used by the author before the work is accepted for publication.[80] As a result of scenarios like these, fair use wilts, and the educational mission suffers.

It need not happen this way. Fair use can also be a strong antidote. For example, we have experienced how an opinion letter from copyright counsel asserting that a particular scholarly use is fair can be the only path enabling publication of research in a way that documents the factual foundation for a scholar's critical analysis. Without strong advocates protecting fair use, academic institutions may lose the chance for our scholars, musicians, artists, and scientists to create transformative works that enrich our culture and expand our minds.

As we indicated above, copyright fair use is a dynamic principle. As federal laws have expanded copyrights, courts have recognized a parallel expansion in the doctrine of fair use. In recent years, many new cases have contributed to clarity, often adding to our list of uses that a court would consider fair. Before 1985, copying the heart of a work or the whole was not thought to

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[79] Although narrow in scope, recent guidelines published by the University of Chicago Press (with support from The Andrew W. Mellon Foundation) explain clearly what the Press considers to be fair use of its materials and provide helpful advance authorization to authors for at least some fair uses of their content in scholarly publications. *See* University of Chicago Press, Guidelines for Fair Use of Our Publications, http://www.press.uchicago.edu/Misc/Chicago/permissions.html (last visited Apr. 5, 2010) (on file with the North Carolina Journal of Law & Technology). If more content owners were willing to publish similar guidance on fair uses of their materials, some of the pressures on scholars might ameliorate.

[80] *See* BIELSTEIN, *supra* note 63, at 95 ("In an increasingly litigious society, publishers hesitate to risk publishing images for which rights have not been punctiliously cleared.").

be a fair use.[81] Twenty-five years later, we know of several ways in which both uses can be fair.[82] Litigation is leading to new case law that defines new boundaries for what constitutes copyright infringement and fair use in a digital world. Because much of this information involves use of content by technology for finding information, these new fair use beacons, such as *A.V. ex rel. Vanderhye v. iParadigms, LLC*[83] and *Perfect 10 v. Amazon.com, Inc.*[84] have much to teach institutions of higher education. Given the dynamic evolution of fair use jurisprudence, we must take the time to reflect on our assumptions about fair use as new authority emerges. In the section that follows, we strive to clarify some recent advances in fair use jurisprudence, so that old myths that no longer reflect current law are less likely to inhibit permissible practices.

IV. FIVE FAIR USE MYTHS

In this section, five common copyright myths are reexamined in light of recent authority. Many of the myths identified in this section have strong pedigrees. However, recent authority demonstrates that federal courts appear to be adopting a more expansive view of fair use. This section reexamines these myths and explores the authority pointing to different conclusions.

A. *The Market Myth*

The market myth is a common rule of thumb that is used by many as a fair use shortcut. It provides that if a market exists for the work, any use of it cannot be considered fair. An example of

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[81] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985) ("In view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the 'magazine took a meager, indeed an infinitesimal amount of Ford's original language.' ").

[82] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449–50 (1984) (holding that "time-shifting" a work was fair use even though the entire work was reproduced).

[83] 562 F.3d 630 (4th Cir. 2009).

[84] 487 F.3d 701 (9th Cir. 2007); *see also* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007); Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788 (9th Cir. 2007).

this reasoning can be found on the website of the Software & Information Industry Association. It claims that:

> If the use in question harms a market for the copyrighted work—whether it's an actual market or a potential one—fair use is unlikely. For example, if the copyright holder generally earns revenue by licensing the use of the work, fair use will probably not apply to someone who uses the work in the same way without paying for it.[85]

The fourth fair use factor requires examination of "the effect of the use upon the potential market for or value of the copyrighted work."[86] The myth that the market factor is more important than the other fair use factors has a strong pedigree. In 1985, the Supreme Court found the fourth factor to be the most important.[87] Nine years later, however, the Supreme Court revised its thinking on the fair use test. In *Campbell v. Acuff-Rose Music, Inc.,*[88] the Supreme Court found the Sixth Circuit Court of Appeals committed reversible error in "giving virtually dispositive weight" to the fourth factor.[89] Instead, it instructed that all four section 107 factors "are to be explored, and the results weighed together, *in light of the purposes of copyright.*"[90]

Review of other recent fair use cases shows that the use of works may be considered fair even if a licensing market exists.[91]

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[85] *See* Content Compliance and Fair Use, Software & Information Industry Association, http://www.siia.com/index.php?option=com_content&view=article&id=357:content-compliance-and-fair-use&catid=162:anti-piracy-articles&Itemid=384 (last visited on Apr. 5, 2010) (on file with the North Carolina Journal of Law & Technology).

[86] 17 U.S.C. § 107(4) (2006).

[87] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985) ("This last factor is undoubtedly the single most important element of fair use.").

[88] 510 U.S. 569 (1994).

[89] *Id.* at 584.

[90] *Id.* at 578 (emphasis added).

[91] Many cases permit use of an underlying work despite the existence of a licensing market. *See, e.g., Campbell*, 510 U.S. (finding commercial use to be fair where 2 Live Crew sought a license, in a well-established music market, to create a rap version of "Oh, Pretty Woman"); Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp.2d 191 (S.D.N.Y. 1999) (holding that no copyright supported such a market, and free use of the images was permitted notwithstanding the well established market for licensing photos of public domain images). This principle is applied outside the fair use context as well.

The Ninth Circuit Court of Appeals held that transformative use of thumbnail images by Google's image search engine was fair use notwithstanding the existence of a cellular phone download market for the thumbnail images.[92]

Similarly in *Bill Graham Archives v Dorling Kindersley Ltd.,*[93] the Court of Appeals for the Second Circuit (the traditional home for the American publishing industry in New York and not the most expected venue for a powerful opinion favoring fair use), found the unauthorized reproduction of seven images of Grateful Dead posters to be protected by fair use.[94] This decision is notable for its emphasis on the format (small but not quite thumbnail) of the images used, which the court found instrumental to its findings of transformative use; the immateriality of the commercial interest of the fair use proponent; and the almost total disregard paid to the copyright owner's complaint that the defendant ignored its "established market for licensing its images[.]"[95]The parties had negotiated for use of these images but were unable to arrive at an agreed upon price. In stark contrast to *Texaco*[96] where the Copyright Clearance Center's licensing program strongly affected the fourth factor, the Second Circuit held that:

> DK's use of BGA's images is transformatively different from their original expressive purpose. In a case such as this, a copyright holder cannot prevent others from entering fair use markets merely 'by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.'[97]

See, e. g., Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340 (1991) (holding the unpaid use to be legitimate because the compilation did not contain the requisite creativity required for copyright protection although there was a well-developed market for licensing directory information).

[92] *See* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 724–25 (9th Cir. 2007).

[93] 448 F.3d 605 (2d Cir. 2006).

[94] *Id.* at 615.

[95] *Id.* at 614.

[96] *See* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994).

[97] *Bill Graham Archives,* 448 F.3d at 614–15 (quoting Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 141, 146 n.11 (2d Cir. 1998)).

Because the plaintiff's use was transformative, the existence of a licensing market had to be analyzed in that context. Quoting *Texaco*, the court noted that only "traditional, reasonable, or likely to be developed markets" are counted in analyzing the fourth factor.[98] Markets for transformative works do not fall in those categories. The court explained:

> [A] publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images . . . . Since DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees.[99]

Although market harm will weigh against a finding of fair use, a thoughtful fair use analysis should not use this factor as a shortcut. Especially when the use is transformative, the use of the work may be considered fair even if market harm may be present.

B. *The Iterative Copying Myth: Federal Courts Have Decided that Providing Multiple Copies to Students is Not Fair Use*

It is not unusual for copyright owners to act as though there is definitive precedent regarding iterative copying in the educational context. The myth we have heard repeatedly is that settled federal law indicates that providing multiple copies to students is not fair use. One articulation of this myth can be seen at the web site for the American Association of Publishers:

> Although Section 107 of the Copyright Act includes teaching, scholarship and research, along with making 'multiple copies for classroom use,' as among the uses of copyrighted works that may qualify as fair use, none of these uses automatically qualifies as a fair use. Both Congress and the Supreme Court have rejected the notion that all 'educational uses' or all uses by educational institutions are fair uses.[100]

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[98] *Id.* at 614 (quoting *Texaco*, 60 F.3d at 930).

[99] *Id.* at 615.

[100] Association of American Publishers, Higher Education: Questions & Answers on Copyright for the Campus Community, http://www.publishers.org/main/Copyright/Copy/CopyEdCommittee/copyEdCommittee_01_02.htm (last visited Apr. 5, 2010) (on file with the North Carolina Journal of Law & Technology).

Although the first sentence is literally true, the second sentence creates a misleading impression that federal courts have spoken on the specific issue in question and have rejected the idea that copying for classroom use is fair. In fact, they have not yet done so. What courts (although not the Supreme Court) have found is that a commercial copyshop may not profit from iterative copying of materials for coursepacks.[101] The issue has not yet been decided in a non-commercial context of a student or teacher making multiple copies for classroom use. However, we may soon have federal precedent directly on point.

On April 15, 2008, Cambridge University Press, Oxford University Press, and Sage Publications, Inc. filed a copyright infringement suit against four Georgia State University administrators alleging that they facilitated unauthorized distribution of copyrighted materials to students through electronic reserves and Blackboard sites.[102] If this case does not settle (as similar disputes have), it could shed much light on the extent to which providing multiple copies for classroom use may be considered fair.

Until this carefully watched issue is decided, we still do not have judicial precedent directly on point. No federal court has addressed the extent to which providing multiple copies for classroom use outside of a commercial context is fair use. Two federal courts have concluded that fair use does not permit a commercial copy shop to reproduce content in course packs and sell it for a profit.[103] A third more recent case holds that a transparent attempt to evade the outcomes in those cases by requiring students themselves to "push a button" at a commercial copy shop is not fair use if a commercial entity provides the site and facilities for student photocopying of readings provided by

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[101] See *infra* notes 107–112 and accompanying text.

[102] Cambridge Univ. Press v. Patton, No. 1:08-CV-1425 (N.D. Ga., Apr. 15, 2008).

[103] Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).

faculty.[104] Such for-profit "lending" is a violation of the distribution right.[105] It also has not been found to be fair use.[106]

All three decisions expressly decline to conclude that the copying would be outside the fair use safe harbor if it were done by an academic institution, an educator, or a student in a non-commercial context. In *Basic Books, Inc. v. Kinko's Graphics Corporation*,[107] the district court held that Kinko's commercial business of creating and selling course packs was not fair use, but specifically stated that "the decision of this court does not consider copying performed by students, libraries, nor on-campus copyshops, whether conducted for-profit or not."[108] In *Princeton University Press v. Michigan Document Services*, *Inc.*,[109] the Court of Appeals for the Sixth Circuit stated:

> As to the proposition that it would be fair use for the students or professors to make their own copies, the issue is by no means free from doubt. We need not decide this question, however, for the fact is that the copying complained of here was performed on a profit-making basis by a commercial enterprise.[110]

Similarly, in *Blackwell Publishing, Inc. v. Excel Research Group, LLC*,[111] the district court indicated that, "[t]his scenario is vastly different from a student, who happens to obtain a coursepack from a friend or other third party and comes into Excel's premises and makes a copy."[112]

As Chief Judge Merritt eloquently explained in his *Michigan Document Services* dissent, a powerful argument for fair use can be made by examining the plain meaning of the statute.[113] Section

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[104] Blackwell Publ'g, Inc. v. Excel Research Group, LLC, 661 F. Supp. 2d 786, 794 (E.D. Mich. 2009).
[105] *Id.* at 792.
[106] *Id.*
[107] 758 F. Supp. 1522.
[108] *Id.* at 1536 n.13.
[109] 99 F.3d 1381 (6th Cir. 1996).
[110] *Id.* at 1389.
[111] 661 F. Supp.2d 786 (E.D. Mich. 2009).
[112] *Id*. at 791–92.
[113] In *Princeton Univ. Press v. Mich. Document Servs., Inc*., 99 F.3d 1381 (6th Cir. 1996), Chief Judge Merritt dissented, writing: "There is no legal precedent and no legal history that supports our Court's reading of this phrase in a way

107 states that "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright."[114] When interpreting other Copyright Act provisions, the Supreme Court has held in favor of "[s]trict adherence to the language and structure of the Act" to preserve the balance of "carefully crafted compromises."[115] Many other federal circuit and district courts have similarly followed this basic rule of statutory construction in analyzing provisions of the Copyright Act.[116] If the

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that outlaws the widespread practice of copying for classroom use by teachers and students." *Id.* at 1394 (Merritt, C.J., dissenting).

[114] 17 U.S.C. § 107 (2006) (emphasis added).

[115] Community for Creative Non-Violence v. Reid, 490 U.S. 730, 748 n.14 (1989) (noting with respect to determining if a work is a "work for hire" under Section 201(b) of the Copyright Act that "[s]trict adherence to the language and structure of the Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises"); *see also* Stewart v. Abend, 495 U.S. 207, 235 (1990) (relying upon the plain language of §§ 7 and 3 of the 1909 Act to conclude that "they were enacted in no small part to ensure that the copyright in the pre-existing work would not be abrogated by the derivative work").

[116] *See* Broadcast Music, Inc. v. Roger Miller Music, Inc., 396 F.3d 762, 769 (6th Cir. 2005) (finding that, with respect to § 304(c) of the Copyright Act, "[t]o determine legislative intent, a court must first look to the language of the statute itself" and that "[i]f the language of the statute is clear, a court must give effect to this plain meaning"); Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 491 (3d Cir. 2003) (beginning "the process of statutory interpretation with the plain meaning of the statute" with regard to whether the digital audio transmission exemption under § 114(d)(1)(A) applies to AM/FM webcasting); Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 848 (11th Cir. 1990) (finding that devices that descramble only the video portion of satellite transmissions still violate 17 U.S.C. § 605 because the statutory language "defines 'encrypt' as modifying aural, visual, or both transmissions to prevent unauthorized programming receipt"); Traicoff v. Digital Media, Inc., 439 F. Supp. 2d 872, 882–83 (S.D. Ind. 2006) (indicating with respect to interpreting "sound recordings" under § 101 of the Copyright Act, 17 U.S.C. § 101 (2006), that "the Supreme Court admonishes that '[s]trict adherence to the language and structure of the Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises' " and that "[m]oreover, in interpreting a statute, the court must first begin with the text"

language of the fair use statute is to have any force, some copying of materials for classroom use will be permitted.

C. *The Fair Use is Dead Myth*

Pronouncements that fair use is dead or generally inapplicable abound. The Software and Information Industry Association ("SIIA") bluntly asserts that "[t]he rule of thumb is to assume that fair use does not apply."[117] A publication of the Motion Picture Association of America ("MPAA") and the Recording Industry Association of America ("RIAA") claims that, "[u]nless a user produces a license or subscription agreement from a legitimate music or movie service, you should assume that copies of music and movies on your computers are illicit."[118] Yet it is not difficult to think of many examples in which having an electronic copy of a film or musical work would be fair. For example, if a professor owns a DVD (we will assume that it is not protected by DRM) and copies it onto his laptop so that an IT colleague can help him isolate a clip to display in class, he would have a strong argument that his copying of the DVD was a fair use. Yet assertions like those of the SIIA, MPAA, and RIAA fuel a common belief that fair use is remote and shrinking, so it is unsafe and unwise to rely on it.

The claim that fair use is dead is also not supported by actual trends in copyright jurisprudence. Professor Barton Beebe conducted an empirical study in which he analyzed all fair use opinions decided between 1978 (the year in which section 107 of

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because " '[t]he plain meaning of the legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters' ") (quoting *Reid*, 490 U.S. at 748, n.14; Bowlds v. General Motors Mfg. Div., 411 F.3d 808, 811 (7th Cir. 2005)) (internal quotation marks omitted).

[117] Van Buren School District, Copyright Law and Related Issues, http://www.vbsd.us/copyright.aspx (last visited Apr. 5, 2010) (on file with the North Carolina Journal of Law & Technology).

[118] MOTION PICTURE ASS'N OF AM., RECORDING INDUSTRY ASS'N OF AM., A CORPORATE POLICY GUIDE TO COPYRIGHT USE AND SECURITY ON THE INTERNET (2003) http://www.mpaa.org/issues_activities/Corporate_Guide_to_Copyright_Use.pdf.

the 1976 Copyright Act went into effect) and 2005.[119] "Overall, 30.4% of the preliminary injunction opinions found fair use, while 24.1% of the bench trial opinions did so."[120] When the first and fourth fair use factors favor a finding of fair use, as they will in many educational contexts, a finding of fair use is nearly assured.[121]

Many recent developments indicate that the fair use defense is growing stronger in both industry and the courts. A study funded by the Computer & Communications Industry Association ("CCIA") found that "[i]n 2006, fair use industries generated revenue of $4.5 trillion, a 31 percent increase over 2002 revenue of $3.5 trillion."[122] The study further indicates that "[f]air use industries also grew at a faster pace than the overall economy. From 2002 to 2006, the fair use industries contributed $507 billion to U.S. GDP growth, accounting for 18.3 percent of U.S. current dollar economic growth."[123]

Recent court decisions also recognize the fair use of works in both new contexts and old.[124] After *Napster* and *Grokster*, one had

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[119] Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008) (In 72% of the cases Beebe studied, "factors one and four either both favored or both disfavored fair use. In all but one of these opinions, the outcome of the fair use test followed the outcome of these two factors.").

[120] *Id*. at 575.

[121] *See infra* Part V.B.1, 4, and 5. *See also* Beebe, *supra* note 119, at 584.

[122] THOMAS ROGERS & ANDREW SZAMOSSZEGI, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE 7 (Sept. 12, 2007), *available at* http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000085/FairUseStudy-Sep12.pdf.

[123] *Id.*

[124] Many recent decisions affirm fair use after careful evaluation of the four factors, especially if there is a strong finding of transformative use. *See, e.g.*, Warren Publ'g Co. v. Spurlock, 645 F. Supp. 2d 402 (E.D. Pa. 2009) (finding biographical work was intrinsically transformative and use of minor portions of magazines was within reasonable parameters); Bourne Co. v. Twentieth Century Fox Film Corp., 602 F. Supp. 2d 499 (S.D.N.Y. 2009) (holding that all four factors weighed in favor of fair use finding in action alleging copyright violations for parody of original popular song "When You Wish Upon a Star"); Lennon v. Premise Media Corp., 556 F. Supp. 2d 310 (S.D.N.Y. 2008) (finding

to wonder whether fair use could survive in a world that included cyberspace.[125] When it became clear that Internet functionality depends in large part on fair use, the federal courts were not prepared to let copyright interests interfere.

As discussed above, in *Perfect 10, Inc. v. Amazon.com, Inc.*,[126] Perfect 10 sued Google for infringing copyrighted photographs of nude models, alleging that Google's search engine provided access to full-sized images by directing users to third party sites that hosted them and provided access to thumbnail images of the photographs through Google's image search feature.[127] The court affirmed the lower court's ruling that in-line linking is not copyright infringement because Google did not display or distribute the image.[128] The court held that Google did, however, violate Perfect 10's display right by creating, storing, and displaying thumbnail images of Perfect 10's photographs.[129] Google could avoid liability only if the court found that its use of the thumbnail images was fair.

The Ninth Circuit proceeded with its fair use analysis. Instead of focusing on the fourth factor, it proceeded to focus on the first, specifically the "purpose and character of the use."[130] In examining whether Google's use of the work was transformative, the court looked not just at guidance from *Campbell* on whether the use added a new "expression, meaning or message,"[131] but also to whether a defendant uses the plaintiff's copyrighted work "*in a*

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movie producers were likely to prevail on fair use defense because use of the copyrighted song was transformative, amount and substantiality of the portion used were reasonable in light of producers' purpose, and the arguably commercial use and harm to potential market did not weigh as heavily).

[125] *See In re* Napster, Inc. Copyright Litigation, 191 F. Supp. 2d 1087 (N.D. Cal. 2002); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197 (C.D. Cal. 2007).

[126] 487 F.3d 701 (9th Cir. 2007).

[127] *Id.* at 713.

[128] *Id.* at 718–19.

[129] *Id.* at 717.

[130] *Id.* at 720–23.

[131] *Id*. at 721 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

new context to serve a different purpose."[132] Applying this principle to the facts before it, the Ninth Circuit held:

> Although an image may have been created originally to serve an entertainment, aesthetic or informative function, a search engine transforms the image in a pointer directing a user to a source of information. Just as a 'parody has an obvious claim to transformative value' because 'it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one,' a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.[133]

The court weighed the four section 107 factors in light of the purposes of copyright law.[134] In doing so, it reiterated that "[t]he fair use doctrine thus permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[135] The court relied on a reading of the purpose of copyright that embraces both promoting " 'the Progress of Science and useful Arts,' and serving 'the welfare of the public.' "[136]

The transformative nature of Google's search engine was the dominant force that led to a finding of fair use. It was the first factor, not the fourth factor, that tipped the balance. The Ninth Circuit explained that Google put the images "to a use fundamentally different than the use intended by Perfect 10."[137] Notwithstanding the commercial nature of the use, due to the high transformative value the court concluded that Google's use was fair despite the facts that a market existed and that the works themselves were creative.[138] A strong finding of transformative use was also instrumental in a recent Second Circuit decision in which that court emphatically affirmed that the use of copyrighted images

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[132] *Id*. at 722 (emphasis added).
[133] *Id*. at 721 (citation omitted).
[134] *Id*.
[135] *Id*. at 719 (citing *Campbell* and *Abend*).
[136] *Id*. at 720 (citing U.S. CONST. art. I, § 8 cl. 8 and Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 n.10 (1984)).
[137] Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 725 (9th Cir. 2007).
[138] *Id*.

by appropriation artist Jeff Koons was fair use.[139] In view of this recent authority, the myth that fair use is dead is empirically false. If fair use appeared to be in danger of demise, it has returned to our digitally connected world, stronger and more muscular than ever.

D. *The Risk Myth: The Burden of Proving the Right to Use Content in Education is on the University, and Failure to Meet that Burden Could Expose Academic Institutions to Exceedingly High Statutory Damages Awards*

Academic institutions often assume that a use is not fair unless they have permission or can find clear precedent indicating that it is fair use. Many FAQ's and other copyright information resources provided by copyright holders support this assumption. For example, Harcourt Education, a publisher of educational content provides the following information about fair use on its website:

> What is fair use?
>
> "Fair use" is a concept in copyright law that allows the reproduction of a small amount of copyrighted work without the owner's permission. Since this term's meaning can be obscure and penalties for infringement can be severe, we suggest you contact us for determination.[140]

This brief statement is the entire answer to the question. Although the first sentence is literally true, it falsely suggests that only the use of "small amounts" may be fair.[141] It does not provide any sense of the many mitigating factors at play when examining fair use in a noncommercial educational context. It also suggests that, in education, there is no presumption that a use is fair even though section 107 expressly provides that noncommercial educational use mitigates in favor of a fair use finding.[142] It also sends the strong

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[139] Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006). Interestingly, this 2006 decision affirmed powerfully the fair use claim advanced by "appropriationist" artist Jeff Koons. The same court had earlier dismissed such arguments by the artist in Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

[140] Harcourt Frequently Asked Questions: What is fair use?, http://permissions.harcourt.com/PermReq/PermFAQ.htm#2 (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

[141] *See infra* Part IV.E.

[142] 17 U.S.C. § 107 (2006).

signal that the wrong calculation on fair use can result in "severe penalties." Furthermore, it suggests that seeking the owner's permission is the only safe way out of the copyright minefield.

Yet, in copyright litigation, the burden of proof in such a case would likely be placed on the copyright owner once a prima facie showing of the defense is set forth.[143] For non-commercial educational uses, precedent indicates that a court would likely presume a use to be fair and place the burden of proof on the copyright owner to demonstrate that it is not. If the use of the copyrighted work is commercial, the burden of proof for the fourth factor rests on the alleged infringer.[144] However, if the use is not commercial, the burden of proof on market harm is on the copyright owner.[145] The Ninth Circuit addressed this issue for the first time in *Perfect 10*, holding in the context of a preliminary injunction proceeding that the copyright owner has "the burden of demonstrating a likelihood of overcoming Google's fair use defense under 17 U.S.C. § 107."[146] The *Perfect 10* decision did not make the commercial/non-commercial distinction; instead, it states that the defendant must offer some evidence of fair use, thereafter the burden of proof is on the copyright owner at the preliminary injunction stage.[147]

A university's good faith misstep in the area of copyright should not be seen as an automatic recipe for disaster as sovereign immunity and its status as a non-profit organization may protect it from having to pay high damages. Sovereign immunity has been found to shield state universities from damages for intellectual property liability.[148] Although sovereign immunity would not

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[143] *See* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 714 (9th Cir. 2007); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[144] *Sony*, 464 U.S. at 451 (stating that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright").

[145] *See* Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1385–86 (6th Cir. 1996) (citing *Sony*, 464 U.S. at 451) (focusing on the fourth factor of fair use).

[146] *Perfect 10*, 487 F.3d at 714.

[147] *Id.*

[148] *See* Florida Prepaid Postsecondary Educ. Expense Board v. College Sav. Bank, 527 U.S. 627 (1999) (holding that Congress did not have power to

protect private institutions, their non-profit status is likely to provide some protection from high damages awards. The damages section of the copyright statute provides:

> The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment . . . or such institution, library, or archives itself.[149]

Therefore, even for private institutions, the actual risk in taking a legally sound but proactive approach to fair use may be less harsh than many fear. If academic institutions or educators have reasonable grounds for believing that a use is fair, section 504(c)(2) can shield them from an exorbitant statutory damages award.

The idea that uses believed to be fair may expose an academic institution to high statutory damages is one of the most pernicious in this field of copyright myths. Sovereign immunity and the plain language of section 504(c)(2) should provide much comfort to the risk averse. Recent events provide additional reasons to calm these pervasive fears. In the copyright litigation lawsuit filed by several publishers against Georgia State University, the publishers requested a declaratory judgment and prospective injunctive relief.[150] They did not even ask the court for monetary damages.[151]

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abrogate a state's sovereign immunity because certain parts of the Patent Remedy Act could not be squared with the Due Process Clause of U.S. Const. Amend. XIV)*; see also* Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Georgia, No. 3:07-CV-084, 2008 U.S. Dist. LEXIS 32116, at *62 (M.D. Ga. Apr. 18, 2008) (holding that the Board of Regents of the University System for the State of Georgia and its members were protected through sovereign immunity from copyright infringement claims).

[149] 17 U.S.C. § 504(c)(2) (2006).

[150] Complaint at ¶1, Cambridge Univ. Press v. Patton, No. 1:08-CV-1425 (N.D. Ga., Apr. 15, 2008), *available at* http://docs.justia.com/cases/federal/district-courts/georgia/gandce/1:2008cv01425/150651/1/0.pdf.

[151] *Id*.

E. *The Whole Work Myth: The Fair Use Defense Is Not Available to Those Who Copy an Entire Copyrighted Work*

The fair use doctrine originated before the advent of the copying technologies in existence today. It was developed as a safe harbor for writers who wanted to use excerpts from older works as a platform for creating new ones.[152] In a print world, it would have been impossible to conceive of any reason to copy whole works for reasons such as digital indexing, delayed viewing, or key word searching. Copying an entire work was thought to bar a claim for fair use.[153] However, this whole work bar became a historical relic after the Supreme Court decision in *Sony Corp. of Am. v. Universal City Studios, Inc.*[154] In *Sony*, the Supreme Court held that copying entire television programs onto videocassettes for private home viewing is fair use.[155]

Although copying an entire work certainly does not favor fair use,[156] it is important to remember that the third factor alone does

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[152] *See* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 917 (2d Cir. 1994):

> The traditional fair use analysis, now codified in section 107, developed in an effort to adjust the competing interests of authors—the author of the original copyrighted work and the author of the secondary work that 'copies' a portion of the original work in the course of producing what is claimed to be a new work.

[153] *See, e.g.*, Benny v. Loew's, Inc., 239 F.2d 532, 536 (9th Cir. 1956).

[154] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[155] *See id.* at 449 ("[W]hen one considers the nature of a televised copyrighted audiovisual work, . . . and that *timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge*, the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use.") (emphasis added). Undeniably, copying an entire work often weighs against fair use. In *Texaco*, 60 F.3d at 917, the court held that creating a library of complete photocopied scientific articles by a Texaco research scientist was not fair use. In analyzing the first factor, the court relied heavily on the fact that the scientist's copies were made not for imminent use but to create a "mini-library" for "future retrieval and reference." *Id.* at 919. The Second Circuit considered it significant that the scientist had archived copies but had not even used five of the eight articles at issue in the case. *Id.*

[156] *See* Beebe, *supra* note120, at 615 (explaining that the more of an original work that is taken, the less likely there will be a finding of fair use).

not disqualify a use from being considered fair.[157] Even the conservative photocopying guidelines provide that giving copies of entire short works to students may be fair use.[158] Yet, many copyright industries vigorously promote the idea that copying a whole work cannot be considered fair use. For example, the International Association of Scientific, Technical & Medical Publishers ("STM") and the Professional Scholarly & Publishing division of the Association of American Publishers ("PSP") issued Guidelines For Quotation and Other Academic Uses of Excerpts from Journal Articles.[159] The guidelines permit "single text extracts of less than 100 words or [a] series of text extracts totaling less than 300 words for quotation[.]"[160] However, the STM guidelines suggest that the copying of whole works is prohibited under any circumstances: "The use of the entirety of journal articles or book chapters is not covered by this statement, and normal permissions clearances through publishers or rights clearance organizations should be followed for such matters."[161] Interestingly, the statement does not mention fair use. The publishers may argue that they intended to create a statement that could be used internationally, specifically in nations without fair use or fair comment protections. Yet, to a U.S. audience, the guidelines suggest that fair use does not apply in this context and that the uses mentioned are permitted only through the permission given by publishers. These guidelines incorrectly imply that copying a whole work is always outside fair use bounds.

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[157] *See, e.g.*, McGowan v. Cross, No. 92-1480, 1993 U.S. App. LEXIS 9134, 7 (4th Cir. 1993) (finding fair use in the copying of architectural plans for purposes of completing a house even though the third factor weighed in favor of the copyright owner).

[158] *See* H.R. REP. NO. 94-1476, at 68–69 (1976) (stating that educational fair use allows the photocopying of a complete poem less than 250 words or a complete prose piece of less than 2,500 words).

[159] INT'L ASS'N OF SCI., TECH., & MED. PUB., GUIDELINES FOR QUOTATION AND OTHER ACADEMIC USES OF EXCERPTS FROM JOURNAL ARTICLES, http://www.stm-assoc.org/2008_02_01_Guidelines_for_Quotation_From_Journal_Articles.pdf (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

[160] *Id.*

[161] *Id.*

Once again, recent federal authority tells a story that is different from the popular myth. In a variety of contexts, federal courts have found that copying of whole works constitutes fair use. Barton Beebe's empirical study demonstrates that "[o]f the 99 opinions that addressed facts in which the defendant took the entirety of the plaintiff's work, 27.3% found fair use. . . ."[162] Such a finding is more likely when, as is often the case in an educational context, the first factor weighs heavily in favor of fair use. A decisive tipping of the first factor tends to occur when the use is transformative. A work may be transformative in at least two ways: (1) when used as a platform for original expression[163] and (2) when used in a "new context to serve a different purpose."[164] In examining whether a work is transformative, many courts, relying on *Campbell*, have focused on whether the use added a "new expression, meaning, or message."[165] Copying an entire image may be permitted when necessary for criticism[166] or news

[162] *See* Beebe, *supra* note 119, at 616.

[163] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (finding that a work is considered transformative where it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message").

[164] *See* Perfect 10 v. Amazon.com, Inc., 487 F.3d 701, 722 (9th Cir. 2007) ("[A] use is considered transformative only where a defendant changes a plaintiff's copyrighted work or uses the plaintiff's copyrighted work in a different context such that the plaintiff's work is transformed into a new creation.").

[165] *Campbell*, 510 U.S. at 579; *see also* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006) ("[C]opying the entirety of a work is sometimes necessary to make a fair use . . ."); Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155 (9th Cir. 1986) (copying and distributing thousands of copies of the entirety of a parody from Hustler magazine was found to be fair use when distributed to criticize the content of the advertisement); Amsinck v. Columbia Pictures Industries, Inc., 862 F. Supp. 1044, 1050 (S.D.N.Y. 1994) (concluding that Columbia's portrayal of Amsinck's artwork on a baby mobile in approximately ninety-six seconds of its film constitutes fair use even though the artwork on the mobile was seen in its entirety during that timeframe).

[166] Sedgwick Claims Management Services, Inc. v. Delsman, No. C 09-1468 SBA, 2009 WL 2157573 (N.D. Cal. July 17, 2009).

reporting.[167] It may also be sufficiently transformative to use a reduced version of an entire work if the image is used to provide a visual reference for explanatory text.[168]

More recently, new uses have been deemed transformative even if they added no expressive value, but simply used "the plaintiff's copyrighted work in a different context."[169] In *A.V. ex rel. Vanderhye v. iParadigms, LLC*,[170] students sued a company that copied their academic papers for use on a plagiarism detection site. The defendant ran the online "Turnitin Plagiarism Detection Service," to help teachers catch plagiarists by analyzing whether the student work was original or copied from an outside source.[171] In order to function, the service copied all of a student's paper. The district court found that this use was fair.[172] The Fourth Circuit Court of Appeals affirmed because use of the student "works had an entirely different function and purpose than the original works; the fact that there was no substantive alteration to the works does not preclude the use from being transformative in nature."[173] This authority should not be ignored. Instead, academic institutions should thoughtfully consider the contexts in which

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[167] *See* Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 24 (1st Cir. 2000) (finding the third factor "as of little consequence" and holding that El Vocero's reprinting of Nunez's photographs in their entirety constituted fair use because it was necessary for a critique of whether the photographs were pornographic in nature).

[168] *See Bill Graham Archives*, 448 F.3d at 613.

[169] *Perfect 10*, 487 F.3d at 721 (quoting Wall Data, Inc. v. Los Angeles County Sheriff's Dept., 447 F.3d 769, 778 (9th Cir. 2006)) (concluding that Google's use of entire reduced quality Perfect 10 images was reasonable and fair for the purpose of a search engine); *see also* Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003); Field v. Google, Inc., 412 F. Supp. 2d 1106, 1121 (D. Nev. 2006) (finding fair use and indicating that "the third fair use factor is neutral, despite the fact that Google allowed access to the entirety of Field's works" because "like the fair uses in *Sony* and *Kelly*, Google's use of entire Web pages in its Cached links serves multiple transformative and socially valuable purposes" that "could not be effectively accomplished by using only portions of the Web pages").

[170] A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009).

[171] *Id*. at 634.

[172] A.V. v. iParadigms, LLC, 544 F. Supp.2d 473, 484 (E.D. Va. 2008).

[173] *A.V. ex rel. Vanderhye*, 562 F.3d at 639.

copying content may be just as fair as private taping of free television programs, copying student papers to catch plagiarism, and making thumbnail images to enable Internet search technology.

V. USE OF CONTENT IN SCHOLARLY PUBLICATIONS

One of the most significant fair use questions arises when a scholar seeks to use copyrighted content in a publication but is uncertain whether permission is necessary. Academic authors often need to provide their readers with a reduced sized image, song lyrics, a poem, or excerpt from a text in order to provide a foundation for their scholarly observations and to critically evaluate the subject of the research. However, neither faculty authors nor academic presses have abundant resources to pay permission fees for use of content in scholarly works or legal fees to obtain fair use opinion letters. Publishers, universities, and scholars would all benefit immensely from robust fair use practices in scholarly publications. Yet, too often, even the threat of a baseless suit appears sufficient to shut down the use of content in a scholarly work. Timidity has resulted in unfortunate deletions from modern scholarship. The following stories illustrate that reliance on fair use can make a profound difference in the quality of scholarship that is available to enrich our culture.[174] After recounting the stories, we will explain why copyright law will generally favor a finding of fair use for scholarly publications that critically comment on the works they quote or illustrate.

A. *Scholars' Stories*

1. *Liane Curtis*

Brandeis University musicologist Liane Curtis wrote a book about the composer Rebecca Clarke.[175] Richard Johnson owns the copyrights to Rebecca Clarke's unpublished works. After initially

[174] These examples were first presented in a paper delivered by Madelyn Wessel and Diane Walker of the University of Virginia Library to the Music Library Association Annual Meeting in Memphis, Tennessee in February, 2006.

[175] A REBECCA CLARKE READER (Liane Curtis ed., 2004) (withdrawn).

authorizing Curtis's scholarly references to the music, he apparently changed his mind after he learned that Curtis was critical of how he administered Clarke's musical legacy.[176] Johnson withdrew the permission he initially gave Curtis. After the book was released, Johnson threatened litigation.[177] In response, Indiana University Press recalled the book and the editor told Curtis to remove all contested material.[178] As a result, Curtis deleted three chapters from the book. She left individual lines and short quotations here and there, considering them to be well within the bounds of fair use and essential to illustrate her scholarly analysis.[179] The redacted book was 241 pages long.[180] The contested portions amounted to ninety-four lines of material, the equivalent of slightly more than two pages of the book and less than one percent of the text.[181] Johnson refused to accept even those fragmentary references. He sent a letter to the Press, threatening to sue. Then, "Ms. Rabinowitch, of Indiana University Press, contacted university lawyers after receiving the letter. An outside copyright expert was also consulted. 'Their advice,' she says, 'was to withdraw the book because of the inclusion of previously unpublished material.' "[182]

Lawrence Lessig offered the following analysis at the time the controversy erupted:

> [T]he restrictive interpretation of copyright asserted by Mr. Johnson and his lawyer is symptomatic of what has become a 'significant problem' for scholars. It is so significant . . . that many contracts between authors and presses seek to 'avoid any possibility of a lawsuit. Not legitimate lawsuits, but any.'[183]

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[176] *Id.*

[177] Richard Byrne, *Silent Treatment: A Copyright Battle Kills an Anthology of Essays About the Composer Rebecca Clarke*, CHRON. OF HIGHER EDUC., July 16, 2004, at A14, *available at* http://chronicle.com/article/Silent-Treatment/36247.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

Ms. Curtis wanted Indiana University Press to use her book to test fair use, but it would not take the risk. The Chronicle of Higher Education reported the incident in a context demonstrating that it is not unique:

> [A]s belts tighten at university presses, there is little cash or inclination to be guinea pigs for fair use. 'You could argue that this is fair use and you could argue that it isn't,' says Ms. Rabinowitch. She says the press chose caution over confrontation. 'No one has $11-million to test the gray areas,' concurs Ms. Sherwood.[184]

At this time, Sanford G. Thatcher served as director of the Pennsylvania State University Press and on the Copyright Committee of the Association of American University Presses. He agreed that most university presses have little freedom to test the provisions of the law. Mr. Thatcher said, "That's part of the setup with a university press. . . . The university tells you what to do. It's not as if the press has an independent say. The university will end up saddled with the bill."[185]

Indeed, such incidents are not unique.[186] As Wendy Seltzer, an attorney at the Electronic Frontier Foundation, observed:

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[184] *Id.*

[185] *Id.*

[186] British musicologist Sheila Whiteley's book, *Too Much Too Young, Popular Music, Age and Identity* was due for publication in Canada and the United States in July 2003. The book had been printed; she had received her advance copies and was looking forward to the book's promotion at a conference in Montreal. "Suddenly, a telephone call from my editor informed me that they had recalled the books, copyright permissions had not been received." Sheila Whiteley, *Copyright and Popular Musicology,* 23 POPULAR MUSIC, 203, 203 (2004). Whiteley had included lyrics from popular songs, carefully following the guidance offered by her publisher for quoting brief passages of poetry or prose. That guidance cited the "convention known as 'fair dealing for purposes of criticism and review'" and stated that under this convention permission "need not be sought for short extracts provided that the content is quoted in the context of 'criticism or review.'" *Id.* Specifically, the publisher defined a short excerpt "in poetry [as] not more than 40 lines from a poem, providing that this does not exceed a quarter of the poem." *Id.* at 204. Whiteley reports that in following this guidance, she limited the excerpts and transcriptions for each song she included. She believes that "if these were poetry or prose, they would be within the limits for 'fair dealing.'" *Id.* What Whiteley learned during that phone call from her editor was that her publisher was too afraid of litigation to attempt to enforce their policy on fair dealing.

> Even when it's very likely that a short quotation would be fair, publishers are afraid to litigate and afraid of the potential damages if they lost. The economics of publishing makes presses and universities unduly risk averse. Too often, then, our fair use rights are lost not in court, but because no one even takes them to court.[187]

The impact of an increasingly litigious copyright community has caused many to question whether fair use will survive.[188]

Not every fair use battle can or should be resolved in a manner that will make the fair use proponent happy, but there is something terribly wrong if universities and publishers acquiesce in the removal of copyrighted content from scholarly works purely from fear of a lawsuit or a failure of legal support. It is critical not to forget fair use and to fight for its application when a work that is compliant with reasonable fair use guidelines is subject to bullying and threats of litigation. Our next story illustrates that these fights can be fought and won, at times with relative efficiency.

2. *Carol Loeb Shloss*

Carol Loeb Shloss wrote a book, *Lucia Joyce: To Dance in the Wake,* about the complex relationship between James Joyce and his troubled daughter, Lucia. The copyrights in works by James Joyce are controlled by his nephew, Stephen Joyce, who is notorious for denying scholars permission to quote from Joyce's works.[189] "In

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Their general rule, in spite of their guidance that brief extracts could be quoted without permission, was: "If the author is a well-known literary figure, you should seek permission as a matter of course. The general rule is: if in doubt, seek permission." *Id.*

[187] Transcript of "Colloquy Live" on-line discussion moderated by Richard Byrne, *The Chronicle of Higher Education,* http://chronicle.com/colloquylive /2004/07/copyright/ (July 14, 2004, 1–2 EST) (on file with the North Carolina Journal of Law & Technology).

[188] *See* MAJORIE HEINS & TRICA BECKLES, THE FREE EXPRESSION POLICY PROJECT, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL (Dec. 2005), http://www.fepproject.org/policyreports/ fairuseflyer.html.

[189] D. T. Max, *The Injustice Collector*, 82 THE NEW YORKER 34, June 19, 2006, *available at* http://www.newyorker.com/archive/2006/06/19/060619fa _fact (indicating that "[m]ore than a dozen Joyce scholars told me that what was once an area of exploration and discovery now resembles an embattled outpost of copyright law").

2002 . . . Stephen wrote to Shloss, implying that he might sue if she quoted from copyrighted material. He pressured her publisher, Farrar, Straus & Giroux, which asked Shloss to cut many quotations."[190] As the dispute was brewing, Shloss met Lawrence Lessig, and Stanford University's Fair Use Project decided to back her fair use claim. The book was first published in December 2003 without most of the quoted material.[191] Reviews of her book challenged her scholarship as lacking sufficient evidence.[192] Ms. Shloss responded by creating a web-based supplement to the work.[193] The Joyce Estate threatened to sue. In June 2006, Ms. Shloss filed suit in the U.S. District Court for the Northern District of California seeking a declaration that the material she wished to publish was a transformative academic work protected by fair use.[194] A settlement gave the scholar "exactly what she asked for in her complaint, and more."[195] Two years after settling the issue of fair use, Ms. Shloss settled her claims for attorneys' fees against the Joyce Estate for $240,000. Commenting on the settlement, Ms. Shloss stated:

> It's a breakthrough, not just for me but for everybody who has to deal with a literary estate . . . . This has been going on for decades. Scholars are not wealthy people. We don't have easy access to the legal system to determine and vindicate our rights if someone threatens us with a lawsuit. You just have to give in.
>
> They know that scholars have resources now. They just can't be bullies . . . . We've established that if you don't pay attention to the

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[190] *Id.*

[191] *See* Andrea L. Foster, *Lawsuit Over James Joyce Web Site May Clarify Copyright's Fair-Use Exemption*, CHRON. OF HIGHER EDUC., June 23, 2006, at A39.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *See* Leslie Simmons, *James Joyce copyright case settled in California*, REUTERS, Mar. 24, 2007, http://www.reuters.com/article/idUSN2427943720070324 (last visited Apr. 4, 2010) (on file with the North Carolina Journal of Law & Technology).

> rights of scholars, authors and researchers the copyright laws protect, you might have to pay something as the Joyce Estate has had to pay.[196]

As these stories illustrate, the assertion of fair use can make a huge difference in the quality of scholarship that will be available to enrich our understanding and appreciation of our culture.[197]

B. *Fair Use Analysis of Content Appearing in Scholarly Publications*

Too often, a blinkered view of fair use drives the extent to which scholars may display and quote copyrighted content in their published work. The fact that a rights clearing house is ready and willing to charge a fee for the use of an image, song lyrics, a few lines of poetry, or several paragraphs of text should not end the fair use analysis. The assumption that permission is required is especially unfortunate when permission is not available. We have both spoken with scholars who have been compelled to remove copyrighted content from scholarly works because permission was not attainable or the license fee was too expensive. Scholars should be supported in the belief that fair use provides a third option. This section outlines a guide to fair use analysis in such situations.

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[196] Cynthia Haven, *Stanford Researcher Gets Six-Figure Settlement From James Joyce Estate*, STANFORD REPORT, Sept. 28, 2009, http://news.stanford.edu/news/2009/september28/shloss-joyce-settlement-092809.html (last visited Apr. 10, 2010) (on file with the North Carolina Journal of Law & Technology).

[197] A growing number of university copyright counsel, law school clinics, and centers provide pro bono intellectual property services and may be willing to provide support for scholars facing fair use battles. *See, e.g.*, Samuelson Law, Technology & Public Policy Clinic, http://www.law.berkeley.edu/4391.htm; University of Connecticut Intellectual Property and Entrepreneurship Law Clinic, http://www.law.uconn.edu/content/intellectual-property-and-entrepreneurship-law-clinic; The Stanford Center for Internet & Society, http://cyberlaw.stanford.edu/; University of San Francisco School of Law Internet and Intellectual Property Justice Clinic, http://www.law.usfca.edu/clinics/internetjustice.html; Washington University Intellectual Property and Nonprofit Organizations Clinic, http://www.wulaw.wustl.edu/IPTech/; DePaul University College of Law Center for Intellectual Property Law & Information Technology, http://www.law.depaul.edu/centers_institutes/ciplit/curriculum/clinic.asp (all sites last visited Feb. 24, 2010) (on file with the North Carolina Journal of Law & Technology).

To determine the general arc of fair use analysis in academic scholarship, we will assume that an academic author would like to use excerpts from a copyrighted work as the foundation for critical commentary in an academic essay, article, or book. We will also assume that the scholar is seeking to use individual units of copyrighted content that would fill less than a single printed page, such as an entire reduced quality image, a poem, several paragraphs from a longer textual work, or lyrics and musical notations for a song.

Our hypothetical author seeks to use the copyrighted content in a publicly available format. Therefore, the use may violate the copyright owner's exclusive rights to reproduce, adapt, publicly display, and publicly distribute the work unless a defense is available.[198] The copyright statutes indicate that these exclusive rights belonging to a copyright owner are "subject to" certain exceptions, including fair use,[199] and that the fair use of the copyrighted work is "not an infringement" of copyright.[200] As noted above, fair use analysis requires the balancing of four statutory factors in light of the purposes of copyright law.[201] The need to weigh these factors in light of copyright purposes is just one of many examples provided below in which thoughtful fair use analysis requires knowledge beyond the plain language of the statute.

We turn next to the many considerations that should be weighed within each factor. We caution our readers, that by definition, the fair use analysis includes these factors but is not limited to those we list. Rather, each case presents unique considerations that should be analyzed.

1. *The First Factor*

The first factor requires examination of the purpose and character of the defendant's use of the copyrighted work.[202] It instructs the courts to examine "whether such use is of a

[198] *See* 17 U.S.C. § 106 (2006).
[199] *Id.*
[200] 17 U.S.C. § 107 (2006).
[201] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994).
[202] *See* 17 U.S.C. § 107(1) (2006).

commercial nature or is for nonprofit educational purposes."[203] It has been interpreted to mean that "nonprofit educational" uses will weigh in favor of fair use and "commercial" uses will weigh against such a finding.[204] But these are not the only elements weighed in the first factor.

In analyzing the nature of the use, the Supreme Court indicated that it is helpful to consider the "preamble paragraph" of section 107 appearing before the first factor.[205] It states:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.[206]

The scholarly use being analyzed here is clearly for purposes deemed to be fair in the preamble of the statute—specifically, "criticism," "comment," "teaching," "scholarship," and "research."[207] The plain language of section 107 suggests that such scholarly use would be fair. However, publishers exercise caution about interpreting these categories as exemptions. In view of current precedent, they are right to do so. The "mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness."[208] Courts have not interpreted the uses

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[203] *Id*.

[204] *See Campbell*, 510 U.S. at 577–80.

[205] *See id.* at 577.

[206] 17 U.S.C. § 107(1).

[207] *See* H.R. REP. NO. 94-1476, at 66 (1976) (stating that 17 U.S.C. § 107 was created based on the "long controversy over the related problems of fair use and the reproduction . . . of copyrighted material for educational and scholarly purposes"); s*ee also* STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (Comm. Print 1961) (noting examples protected under fair use when the purpose of the use was to illustrate, clarify, or comment on a specific point).

[208] Campbell v. Acuff-Rose Music, Inc., 510 U.S 569, 584 (1994). *See id*. at 577–78 ("The text employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the

listed in the preamble as circumscribed safe harbors.[209] However, the Supreme Court indicated that these uses do provide "general guidance" about uses that have been traditionally deemed to be fair ones.[210] When a use matches examples from the preamble, that fact will tend to weigh in favor of fair use when analyzing the first factor. Even if a use is commercial in the sense that the author may profit from it, the first factor may weigh in favor of fair use if the context matches one of the categories listed in the preamble.[211] Therefore, although the scholarly, research-oriented, and critical nature of the use is not *per se* fair, it does weigh heavily in favor of a fair use finding.

All of these scholarly purposes tip in favor of fair use on another critically important variable in analyzing the first factor: the extent to which the use is "transformative."[212] In determining whether a work is transformative, many courts rely on *Campbell* and focus on whether the use adds new "expression, meaning, or message."[213] A scholarly use does just that. It is transformative because it uses the copyrighted work as a foundation to communicate original ideas and critical analysis. Just like a lawyer before a jury, in order to convince the audience of her theory an academic needs to provide the evidentiary basis to support her argument.[214] An academic must quote from the work on which she

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examples given . . . which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.").

[209] *See supra* notes 103–106 and accompanying text (indicating that creating multiple copies for classroom use may not be considered fair if done or made possible by a commercial enterprise).

[210] *Campbell*, 510 U.S at 577–78.

[211] *Id.* at 584–85.

[212] *Id.* at 579 (defining transformative use as use that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message").

[213] *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006); Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155 (9th Cir. 1986) (copying and distributing thousands of copies of the entirety of a parody from Hustler magazine was found to be fair use when distributed to criticize the content of the advertisement).

[214] An elegant demonstration of such a tactic is found in the Supreme Court's own decision in *Campbell*, where the Court cited the entire lyrics from both

bases her theory. Such a discussion is the kind of transformative work Congress intended to protect when drafting the fair use statute, as it fits squarely within five of the six illustrative examples from the preamble.[215]

Recently, uses of copyrighted works have been deemed transformative even if they added no expressive value but simply used the plaintiff's work in a "different context"[216] and for a "new purpose"[217] such as "an electronic reference."[218] Similarly, an academic author fits within this more liberal definition by offering the work, not to replace a use by the copyright owner, but to comment on the work and explain something about its significance. Such scholarly uses are more transformative than many of the uses described in recent cases because in addition to using the work for a different purpose and in a different context, scholarly analysis adds much expressive content. Application of the fair use doctrine in such settings is also critical in order to assure that copyright law is not used as a tool to suppress critical speech protected by the First Amendment to the U.S. Constitution. The Supreme Court has encouraged counsel to remain mindful that to support expressive interests, "the fair use defense affords considerable 'latitude for scholarship and comment.' "[219]

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songs as a way to illustrate its fair use analysis. Campbell v. Acuff-Rose Music, Inc., 510 U.S 569, 594–96 (1994).

[215] *See supra* note 57 and accompanying text; *see also* 17 U.S.C. § 107 (2006).

[216] Wall Data Inc. v. L.A. County Sheriff's Dep't, 447 F.3d 769, 778 (9th Cir 2006).

[217] Kelly v. Arriba Soft Corp., 336 F.3d 811, 819 (9th Cir. 2003).

[218] Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 721 (9th Cir. 2007); *see also Kelly*, 336 F.3d at 821; Field v. Google Inc., 412 F. Supp. 2d 1106, 1121 (D. Nev. 2006) (finding fair use and indicating that "the third fair use factor is neutral, despite the fact that Google allowed access to the entirety of Field's works" because "like the fair uses in *Sony* and *Kelly*, Google's use of entire Web pages in its Cached links serves multiple transformative and socially valuable purposes" that "could not be effectively accomplished by using only portions of the Web pages"); A.V. v. iParadigms, LLC, 544 F. Supp.2d 473, 484 (E.D. Va. 2008) (holding that it is fair use to copy student papers for an on-line tool to detect plagiarism).

[219] Eldred v. Ashcroft, 537 U.S. 186, 220 (2003) (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985)).

In analyzing the first factor, one must also examine the extent to which a use is "commercial."[220] Although a professor may have a primary motive of advancing her research agenda and exposing new thoughts about prior work, publication may also lead to financial benefits. The publication may generate royalties, improve her reputation, or lead to a lucrative job offer or research grant.[221] Therefore, to the extent that the use might be regarded as "commercial," it would weigh against a finding of fair use but will not necessarily defeat it.[222]

However, even if the work is offered for sale, the extent to which a work is considered transformative may be dispositive of the finding with respect to the first factor. Barton Beebe found that:

> [I]n those opinions in which transformativeness did play a role, it exerted nearly dispositive force not simply on the outcome of factor one but on the overall outcome of the fair use test . . . . [A] finding of tranformativeness trumped a finding that the defendant's use was commercial for purposes of determining whether factor one favored fair use. In 28 opinions, the court found the defendant's use to be both commercial and transformative under factor one, and in 26 of these opinions, the court found both that factor one and the overall test favored fair use—with one of the two outliers reversed on appeal.[223]

More and more courts since *Campbell* are finding that the expressive value of highly transformative works justifies a finding of fair use even if the use may result in commercial gain to the user.[224] As the Supreme Court noted in *Campbell*:

> [The] goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[225]

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[220] 17 U.S.C. § 107(1) (2006).

[221] John J. Siegfried & Kenneth J. White, *Teaching and Publishing as Determinants of Academic Salaries*, 4 J. ECON. EDUC. 90 (1973).

[222] Campbell v. Acuff-Rose Music, Inc., 510 U.S 569, 579 (1994).

[223] *See* Beebe, *supra* note 120, at 605–06.

[224] *See Campbell*, 510 U.S at 572.

[225] *Id.* at 579.

Clearly, an academic's use of a work for the purposes of research and criticism would be at least as transformative as the parody in *Campbell*. Moreover, a scholarly use of content in a critical text is not primarily commercial. Such works sell far fewer copies and reap far fewer financial gains than even conventional literary works, let alone the type of new recording by popular artists validated in *Campbell*.[226] For all of the reasons set forth above, a scholarly work that uses limited portions of copyrighted content as a foundation for critical commentary mirrors many of the fair use examples in the preamble and is both highly transformative and non-commercial. Therefore, the first factor should tip decisively in the scholar's favor.

2. *Second Factor*

The second factor requires examination into "the nature of the copyrighted work" at issue.[227] This factor tends to favor the copyright owner when a work is creative but may favor the person

[226] As explained by Penny Kaiserlian, Director of the University of Virginia Press and a past President of the Association of American University Presses, most academic presses operate non-commercially, particularly in regards to their publication of scholarly monographs. This fiscal reality has become starker over time. Whereas a scholarly book published in the 1970s may typically have had an initial print run of 2,500 to 3,000 copies, the number would now more likely be between 500 and 1,000, depending on the seniority of the scholar and her prior publishing record. Academic presses cannot maintain their operations solely on monograph sales. All seek other revenue sources or subsidies, whether from their home universities, grants, or other publications. Many scholarly books today can only be published with payments from the institution of the individual academic author to help subsidize the cost of publishing the book. This is especially the case for works in art history, architecture, or other disciplines where works include significant numbers of images. Such payments are in addition to the permissions fees and other image costs that authors are routinely expected to bear in their publication agreement with presses. The Association of American University Press does a survey each year. The operating statistics for 66 reporting presses in 2008 show that overall 86.6% of costs for book publication were covered by sales income or other Press efforts. The remaining 13.4% came from parent institutions, endowment income, or title subsidies. Telephone Interview with Penny Kaiserlian, Director, University of Virginia Press (Jan. 10, 2009).

[227] 17 U.S.C. § 107(2) (2006).

seeking to use the work if it is factual.[228] If the works were previously published and are readily available through other media, this factor does not necessarily weigh as heavily in favor of the copyright owner.[229] Similarly, if a work has been widely published on the Internet, the second factor is weighed less heavily in favor of the copyright owner than other less accessible works such as those not yet published.[230]

Although musical works are quintessentially creative, some additional mitigating factors may be important. Much popular music may be based on prior works in the public domain. Unfortunately, sometimes musicians assert copyright ownership in songs that they did not write.[231] If litigated, each copyright owner would only be able to assert ownership over material he or she independently created. If the extent to which much of this material is protected by copyright is debatable, evidence indicating that a prior version is in the public domain or was created by another would weaken the copyright owner's argument for this factor.

Works that are creative and unpublished will weigh most heavily against a finding of fair use. But it would be clearly erroneous to permit this factor alone to drive the fair use analysis. In 1990, Congress amended section 107 to make explicit that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use . . . ."[232] As the Supreme Court cautioned in *Campbell*, when a use is transformative this factor is deemed less important in

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[228] *See* Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1153–54 (9th Cir. 1986) ("The scope of fair use is greater when 'informational' as opposed to more 'creative' works are involved.").

[229] Perfect 10, Inc. v Amazon.com, Inc., 487 F.3d 701, 723–24 (9th Cir. 2007).

[230] S. REP. NO. 94-473, at 64 (1975) ("A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user. If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case.").

[231] *See* JOCELYN R. NEAL, THE SONGS OF JIMMIE RODGERS: A LEGACY IN COUNTRY MUSIC (2008) (demonstrating that some popular blues songs may be in the public domain even though many in the music industry treat them as protected by copyright).

[232] 3 NIMMER ON COPYRIGHT § 13.05 (2009).

"separating the fair use sheep from the infringing goats."[233] Important new scholarship often focuses on previously unpublished archival materials. The personal writings of a famous poet or musician, including letters, drafts, or other previously unpublished works, might be highly creative. For unpublished works, this factor may be found to weigh in favor of the copyright owner. However, scholarship that reveals buried intellectual treasures would be especially transformative. Therefore, any tipping of the second factor on this basis would likely be counterbalanced by a heavy weight in favor of fair use on the first factor.

3. *The Third Factor*

In order to assess the third factor, one must weigh "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[234] One must ask whether the use is "reasonable in relation to the purpose of the copying."[235] The evaluation of this factor is highly contextual. The Supreme Court indicated that "substantial quotations might qualify as a fair use in a review of a published work or a news account of a speech"[236] but not if the work was an unpublished presidential memoir that was stolen so one publisher could "scoop" a competitor.[237] In some situations, such as the unauthorized downloading of a copyrighted song readily available at a reasonable price, copying the entire copyrighted work may weigh strongly against a finding of fair use.[238] As noted above, in other contexts copying an entire work

[233] Campbell v. Acuff-Rose Music, Inc., 510 U.S 569, 586 (1994).
[234] 17 U.S.C. § 107(3) (2006).
[235] *Campbell*, 510 U.S. at 586.
[236] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 601 (1985).
[237] *See id.* at 542.
[238] *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001) ("While 'wholesale copying does not preclude fair use per se,' copying an entire work 'militates against a finding of fair use.' ") (quoting Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1118 (9th Cir. 2000)).

may be considered fair, especially if the use does not interfere with the copyright owner's market or potential market.[239]

Courts are more likely to conclude that an entire work may be copied if the use is transformative—for illustrative purposes or for comment and criticism. For example, as noted above, in *Bill Graham Archives v. Dorling Kindersley Ltd.*,[240] the use of reduced sized images of Grateful Dead posters in a retrospective book was found to be fair.[241] In *Nunez v. Caribbean Int'l News Corp.*,[242] the reprinting of modeling photographs in their entirety constituted fair use because they involved a critique of whether the photographs were pornographic in nature.[243] In *Nunez*, the third factor was deemed "of little consequence."[244] In *Perfect 10*, reduced size images of nude models displayed by an electronic search engine were found to be fair use.[245] Although the entire image was copied, the court held that in this transformative context, the third factor "favored neither party."[246]

For short works, it may be necessary to copy the whole work in order to give one's audience a sufficient quantity for evaluation. Therefore, for cases involving short works, the third factor may not be weighed as heavily. In *Hustler Magazine, Inc. v. Moral Majority, Inc.*,[247] the copying and distribution of thousands of copies of the entirety of a parody was found to be fair use because the intent was to criticize the advertisement.[248] The work at issue included 300 words of text.[249] The district court indicated that "[i]n the case of such a short work the court believes that the substantiality of the copying should not be given great weight in

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[239] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449 (1984).
[240] 448 F.3d 605 (2d Cir. 2006).
[241] *Id.* at 613.
[242] 235 F.3d 18 (1st Cir. 2000).
[243] *Id.* at 20.
[244] *Id.* at 24.
[245] Perfect 10, Inc. v Amazon.com, Inc., 487 F.3d 701, 708 (9th Cir. 2007).
[246] *Id.* at 724.
[247] 796 F.2d 1148 (9th Cir. 1986).
[248] *Id.* at 1154–55.
[249] *Id.* at 1154 n.10.

determining fair use."[250] Use of an entire work that is short mitigates against attaching substantial weight to the third factor.

Use of an entire long work may weigh against a finding of fair use with respect to this factor. But again, this factor alone should not drive the conclusion, and use of an entire work does not necessarily mean that the third factor weighs heavily against fair use. Based on the precedent set forth above, the third factor may be found to be neutral even if a scholar has used the entirety of a short work or an excerpt from a longer one. It is also important to note that a court should examine the third factor in relation to the particular use. Although the statute is silent on this point, the Supreme Court has stated that in examining the third factor, "context is everything."[251] Therefore, if a use is highly transformative, a court is likely to permit more quantitative and qualitative copying.

4. *The Fourth Factor*

For the final factor, a court must examine "the effect of the use upon the potential market for or value of the copyrighted work."[252] The Supreme Court in *Sony* indicated that "[i]f the intended use is for commercial gain, . . . likelihood [of market harm] may be presumed."[253] However, in *Campbell* the Court qualified this statement by holding that "[n]o 'presumption' or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes."[254] The academic uses discussed in this section are not mere duplication. Instead, the works are copied as platforms for transformative scholarly commentary.

When a work is used as a foundation for a scholarly, educational, and critical message, this factor tips decisively in favor of the academic writer. The Supreme Court has

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[250] Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F. Supp. 1526, 1538 n.4 (C.D. Cal. 1985).

[251] Campbell v. Acuff-Rose Music, Inc., 510 U.S 569, 589 (1994).

[252] 17 U.S.C. § 107(4) (2006).

[253] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

[254] *Campbell*, 510 U.S at 591.

unequivocally held that "the law recognizes no derivative market for critical works."[255] Because a copyright owner is not likely to license a work for critical commentary, there is no true market for use of an excerpt. Generally, only "reasonable" markets may be usurped under the fourth factor.[256] The Supreme Court has explained:

> [T]here is no protectable derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.[257]

Thus, in contexts involving critical commentary, the law does not recognize an actual or potential market. For this reason alone, critical scholarly works do not infringe on any market that exists, or would reasonably be developed by the copyright owners. Therefore, the fourth fair use factor would weigh in favor of fair use. However, there are additional considerations.

In practice, licensing markets exist. Permissions for use of images, text, and music in scholarly texts are assessed and paid by scholars and publishers for the uses we claim to be fair. Still, looking directly at this factor, we predict it is unlikely that a scholarly text that quotes a song would be found to damage an actual or potential market for the recording or musical composition. Moreover, an elusive market that is meant to muzzle a critic is not a true market. As the Curtis and Shloss examples demonstrate, sometimes copyright owners will assert rights even when a use is fair in an effort to silence critical speech.[258]

If a scholar is prevented from using content to support a scholarly claim, then market failure has served as a prior restraint on speech, and both copyright and First Amendment values are compromised. It is precisely this loss to education and culture that

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[255] *Id.* at 592.
[256] *Id.*
[257] *Id.*
[258] *Supra* Part V.A.

fair use is meant to avoid.[259] Finally, we believe that assessment of the fourth fair use factor in light of a demand for fees should take into account the disparity in access to legal and financial resources. Unfortunately, such a situation is more likely to occur for those who have smaller coffers in which to dip for permission fees and less access to copyright counsel for the assertion of fair use.

5. *Weighing the Factors in Light of Copyright Purposes*

Fair use analysis is not complete after examination of the four factors listed in section 107. Here again, it is essential to have access to the advice of knowledgeable copyright counsel because the statute does not reveal the next step in the analysis. After the four fair use factors have been weighed individually, "[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright."[260] For cases involving critical commentary, the first and fourth factors will always weigh heavily in favor of fair use. Even if the second and third factors are analyzed as a counterweight, they are unlikely to tip the balance, especially when weighed in view of the purposes of copyright law.

The U.S. Constitution gave Congress the power to pass copyright laws "[t]o promote the Progress of Science and useful Arts."[261] Permitting references to copyrighted works in academic scholarship advances this constitutional purpose. Narrowing fair use to enable censorship of critical commentary would thwart the progress clause and other constitutional values. In order for copyright to function without unduly burdening First Amendment expressive values, the fair use doctrine must continue to serve as a

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[259] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection. Specifically, 17 U.S.C. § 102(b) provides: 'In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.' ").

[260] Campbell v. Acuff-Rose Music, Inc., 510 U.S 569, 578 (1994).

[261] U.S. CONST. art. I, § 8 cl. 8.

safe harbor for new ideas that evolve out of copyrighted works.[262] Favoring fair use in this context advances copyright goals and protects First Amendment values of free expression.

Copyright law was enacted to fuel the educational mission, not to thwart it. The very first copyright statute, the Statute of Anne, on which our system was initially modeled, began with the words, "[a]n act for the encouragement of learning."[263] Our nation's Founders similarly thought that protecting copyrights would enhance education. The constitutional provision giving Congress the power to pass copyright laws[264] is the only time in which the framers connected a congressional power to a specific purpose.[265]

Evidence of this belief that copyright was designed to be consistent with the educational mission is also reflected in the first federal copyright statute of 1790 which began, like the Statute of Anne, with the words, "[a]n Act for the encouragement of learning . . . ."[266] The stated purpose of these Acts does not support an interpretation that the encouragement of learning would apply only to rich institutions. Rather, if fair use is to survive as something more accessible than a luxury retreat, we must work towards clarity and discard old myths so those without access to copyright counsel can reap its benefits as well.

Copyright law was designed to be the engine that would drive the educational mission and creative thought, not limit it. The Founders believed that protecting rights to compensation would actually enhance free speech and public access.[267] Although it is

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[262] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

[263] Statute of Anne, 1710, 8 Anne. c. 19 (Eng.).

[264] U.S. CONST. art. I, § 8 cl. 8.

[265] *See* LESSIG, *supra* note 4, at 215.

[266] Act of May 31, 1790, ch. 15, 1 Stat. 124.

[267] Patterson, *supra* note 8, at 5 ("Copyright's basis as a proprietary concept is that it enables one to protect his or her own creations. Its regulatory basis is that when these creations constitute the expression of ideas presented to the public, they become part of the stream of information whose unimpeded flow is critical to a free society. The right to control access to one's own expressions before publication does not engender free speech concerns, but publishers' control of access after publication does. This explains why historically copyright was deemed a monopoly to be strictly construed and to be shaped to serve the public

sometimes ignored, this theme continues to resonate in current copyright doctrine. In *Fogerty v. Fantasy, Inc*.,[268] the Supreme Court noted that "copyright law ultimately serves the purpose of enriching the general public through access."[269] By encouraging creative expression through limited monopolies, the Copyright Clause "promot[es] broad public availability of literature, music, and the other arts."[270] In some instances, the Supreme Court has indicated that the public goal of cultural enrichment is more important than the conflicting copyright purpose of providing economic incentives for authors and publishers: "The primary object of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and the useful Arts.' "[271] William Patry eloquently emphasized the need to return to this important copyright policy, observing that "copyright debates rarely focus on the only relevant question: Will the proposal actually serve the public good by promoting learning?" [272]

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interest over that of the copyright owner. The public interest to be served was reasonable access to the copyrighted work.").

[268] 510 U.S. 517 (1994).

[269] *Id.* at 527.

[270] Golan v. Gonzales, 501 F.3d 1179, 1183 (10th Cir. 2007) (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)) (reversing the district court's dismissal of action claiming First Amendment violation in removal of works from the public domain through Section 514 of the URAA, 17 U.S.C. § 104A, and sending case back to district court for further review).

[271] Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8 cl. 8).

[272] WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS xviii (2009). *See also*, Ruth Okediji, *Givers Takers and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 127 (2001) ("If copyright's goal is to encourage production, access, and use then it seems self-defeating to preclude another party from engaging in creative expression based on the first work, while also giving the first author the right to restrict access to the work."). Okediji also points out:

> The careful balance between protecting rights of 'owners' and ensuring public benefit by facilitating access to protected works has been the framework within which the constitutional imperative to 'promote the progress of science and the useful arts' has historically been pursued. The irony imposed upon this assiduously crafted system of copyright protection is that the artificial constructs of real space, such as 'authorship' and 'copy,' which lie at the heart of copyright, must now

In assessing the interplay of the four fair use factors in the context of scholarship, the preceding discussion suggests that the first and fourth factors will generally heavily weigh in favor of a fair use finding. While the second and third factors may tip against such a finding in specific cases, we believe that most courts, when confronted with academic use of content in scholarship, would find that the use strongly promotes copyright purposes and ultimately find the use to be fair. Our belief from reading many fair use opinions is supported by the data collected by Barton Beebe. He found 214 cases in which both factors one and four either favored or disfavored fair use. "In all but one of these opinions, the outcome of the fair use test followed the outcome of these two factors."[273] For all of these reasons, when a scholar seeks to use copyrighted content in academic or creative writing, we believe that a balancing of the fair use factors, when viewed in light of copyright purposes, will generally weigh in favor of fair use.

VI. CONCLUSION

The educational community must assert and defend fair use if it is to retain some autonomy over academic content and preserve some equity in the delivery of its mission. Access to information is a theme resonating within legal and philosophical constructs of both free speech and equal protection in a society that considers itself just. In a world where technology makes so much content available for educational use, the copyright laws that were originally conceived to promote education are instead often routinely applied to inhibit it. Unequal access to counsel and profound disparities in the content available on campus exacerbate the problem.

Fair use is the primary means to restore that balance. Despite the myths that abound, fair use jurisprudence is a dynamic, fact-based, ever changing body of law and courts are more willing than

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> be deconstructed to make that same system work in cyberspace. How to do so is the difficult task. What is not difficult, however, is that the central objective of promoting public welfare and the normative principles that have developed for this purpose remain unchanged.

Id at 111–12.

[273] *See* Beebe, *supra* note 119, at 584.

one might expect to find fair use when equity demands it. Whether the issue is classroom access to research and scholarship or the publication of a substantive scholarly critique, we think both copyright jurisprudence and equity will often support fair use. We have seen fair use muscles atrophy and flex and can vouch for the fact that the latter is far more empowering to the academic mission and far better aligned with the Founders' understanding that copyright is intrinsically entwined with public access.