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Transformative Teaching and Educational Fair Use After Georgia State

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Abstract: The Supreme Court has said that copyright’s fair use doctrine is a “First Amendment safety valve” because it ensures that certain crucial cultural activities are not unduly burdened by copyright. While many such activities (criticism, commentary, parody) have benefited from the courts’ increased attention to first amendment values, one such activity, education, has been mired for years in a minimalist, market-based vision of fair use that is largely out of touch with mainstream fair use jurisprudence. The latest installment in the history of educational fair use, the 11th Circuit’s opinion in the Georgia State e-reserves case, may be the last judicial word on the subject for years to come, and I argue that its import is primarily in its rejection of outdated guidelines and case law, rather than any affirmative vision of fair use (which the court studiously avoids). Because of the unique factual context of the case, it stops short of bridging the gap between educational fair use and modern transformative use jurisprudence. With help from recent scholarship on broad patterns in fair use caselaw, I pick up where the GSU court left off, describing a variety of common educational uses that are categorizable as transformative, and therefore entitled to broad deference under contemporary fair use doctrine. In the process, I show a way forward for vindicating fair use rights, and first amendment rights, by applying the transformative use concept at lower levels of abstraction to help practice communities make sense of the doctrine.

I. Introduction

The 11th Circuit’s opinion in Cambridge University Press v. Patton is a landmark: the first application of the fair use doctrine to educational uses in the Internet era. Indeed, the opinion is the first application of the doctrine by a circuit court to a dispute between publishers and educators as such (as distinct from a scholar or a third party copy shop) since the passage of the 1976 Copyright Act. The case involves Georgia State University (GSU), which, like many universities, has a policy allowing teachers to share digitized excerpts of copyrighted books and journal articles from the GSU library with students via a secure course website. No license fees are paid nor permissions sought; GSU relies on fair use. With funding from the licensing body

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1 Practitioner-in-Residence, American University Washington College of Law. With great appreciation to Peter Jaszi, Jonathan Band, Rebeccia Tushnet, Dave Hansen, and the participants in the Berkeley Center for Law and Technology’s 2014 workshop on the future of educational fair use for their invaluable feedback on earlier drafts of this paper. I am also grateful to my colleagues in the WCL Clinical Program for their generous feedback. Thanks to Jack Vidovich for excellent research assistance, and to Dean Claudio Grossman for his generous support.

2 Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014) (“Cambridge Remand”).

3 But see Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983) (dispute between public school teachers regarding alleged infringement of cake decorating guide in subsequent “learning activity package”).


Copyright Clearance Center (CCC) and trade group the Association of American Publishers (AAP), three university presses sued GSU in 2008 alleging widespread copyright infringement. After a lengthy trial, the district court largely vindicated GSU’s practices, applying a mechanical fair use analysis that strongly favored GSU. The publishers appealed.

Almost immediately at oral argument the judges on the appellate panel raised the issue of “transformative use.” At least since the Supreme Court’s opinion in Campbell v. Acuff-Rose, which characterized transformative uses as “at the heart” of fair use, courts have shown deference to uses successfully characterized as “transformative,” and skepticism about most others. GSU counsel conceded that none of their uses were transformative. Judge Vinson then asked whether the uses were, therefore, market substitutes for licensed use in the same way that printed “coursepacks” had been found to be substitutional in a pair of cases in the 1990s. GSU’s response, that the electronic copies lacked a table of contents and a binding, and that the uses were more like a library’s reserve desk than like a copy shop, did not seem to persuade anyone on the bench. Again and again the judges returned to coursepacks, and to market effect. Observers were not optimistic for GSU.

When the appellate court finally issued its opinion eleven months later, it was not as hard on GSU as those of us who attended oral arguments had feared it might be. The majority agreed with the trial court that despite being non-transformative, the non-profit, educational character of GSU’s uses should favor fair use. They also mostly ignored the Classroom Guidelines and the so-called “coursepack cases” that the publishers had proposed as fair use yardsticks. These pro-education aspects of the opinion were offset, however, by the court’s

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8 The rise and dominance of the transformative use paradigm is discussed in detail in Section II infra. For a rare recent dissent from the transformative approach, see Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (characterizing the Supreme Court’s adoption of the transformative use concept in Campbell as a “mention” of the concept and a “suggestion” to courts, which Judge Easterbrook declines to follow).
10 See, e.g., Kevin Smith, A discouraging day in court for GSU, SCHOLARLY COMMUNICATIONS @ DUKE, Nov. 20, 2013, http://blogs.library.duke.edu/scholcomm/2013/11/20/a-discouraging-day-in-court-for-gsu/.
11 Judge Vinson’s concurrence gives a glimpse of how bad things might have been. While he concurs in the decision to reverse and remand, Judge Vinson argues that the proper fair use analysis would rely heavily on the coursepack cases and the Classroom Guidelines, just as the publishers had argued, and would find that all of GSU’s uses were per se infringement because analogous uses by copy shops routinely involve paying for permission.
12 Cambridge Remand at 1261 (limiting the effect of the coursepack cases), 1274 (rejecting the Guidelines as controlling the analysis under third statutory factor). For more about these phenomena and their place in educational fair use history, see Section III infra.
finding that because GSU’s uses were not transformative, the market harm of GSU’s uses should be given “additional weight.”

The appellate court did not rule on the fairness of the uses at issue in the case. Rather, after objecting to the mechanical nature of the district court’s fair use analysis (specifically, Judge Evans’ arithmetic adding of the four statutory factors, as well as her application of a 10%/1 chapter quantitative bright line for the third factor, and her use of a binary factual/fictional standard to determine the nature of the work used), the appellate panel remanded for a more flexible application of the doctrine in light of the appellate court’s various findings. What that application will look like is anyone’s guess. The factors are in apparent equipoise, with favored educational purpose squaring off against potentially weighty market harm. As the University of Minnesota’s Copyright Program Librarian Nancy Sims observed, “NOTHING HERE WILL HELP EVEN ONE TEACHER MAKE FAIR USE CALLS.” Nor, one might add, is the decision likely to help even one judge. Somehow the district court will have to weigh the favored nature of the use against the potentially substantial market harm to find the right outcome for each individual use.

Most fair use determinations come down to a competition between those two considerations, the user’s laudable purpose and the copyright holder’s market prerogative. Breaking the tie in a principled way involves recourse to a conception of the purposes and values of fair use and copyright. Part II of this paper tells the story of how, over the last two decades, the focus of most fair use decision making in the courts has shifted from a presumption that the market should trump to a focus on the user’s justifying purposes, with courts strongly favoring uses that are “transformative,” which broadly connotes use for a new, productive purpose. With a transformative use story in hand, even billion dollar companies can disdain license demands; without one, however, the market prerogative reasserts itself and even core fair use beneficiaries (scholars, teachers, non-profit educational institutions) face the same uncertainty as GSU must now face in the wake of the Circuit Court’s reversal.

Some education-related uses have already been blessed as transformative. For example, a group of universities was recently vindicated in its claim that digitizing millions of in-copyright books for a variety of education-related purposes constituted fair use. In Authors Guild v.

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13 Cambridge Remand at 63 ff.
14 Id. at 107, 111.
16 As of this writing, the appellate court has denied the publishers’ motion for rehearing en banc, so the remaining paths forward are an appeal to the U.S. Supreme Court or else a new trial court opinion on remand.
17 A copyright holder’s non-pecuniary interests have occasionally played a role in fair use outcomes, but moral objections to a defendant’s use have a censorious aspect that can as easily favor as disfavor fair use.
19 See, e.g., Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (search engines are transformative fair use and can copy and use millions of images from the Internet without a license).
HathiTrust, the Second Circuit found that digitizing and reproducing books to create a search index (which enables users to locate books containing specified search terms) and to facilitate text-mining research (which enables researchers to use computer algorithms to identify trends and connections across the text of millions of books) was not a “market substitute” for access to the digitized books, and was, therefore, transformative. The HathiTrust court decisively rejected the Authors Guild’s claims regarding lost profits, explaining that such claims are irrelevant where transformative uses are concerned. In another case involving digitization and indexing, A.V. ex rel. Vanderheyde v. iParadigms LLC, the Fourth Circuit found that large-scale, systematic copying of student papers to power a plagiarism detection tool was a transformative fair use. The success of the HathiTrust and of iParadigms illustrates the potential power of the transformative use framework in the educational context. And the GSU case begins to close the door on a historically deformed application of the doctrine.

That deformation has an origin story, which has been told before but bears a little revisiting in Part III. From the inception of the 1976 Copyright Act, educational photocopying and its technological descendants have been a source of anxiety among educational publishers, who rely on schools and students as the core market for their prepackaged materials. While part of this anxiety seems to be a concern about substitutional copying of textbooks, workbooks, and the like, publishers and their licensing agents have also sought to suppress “competition” in the form of teachers making their own teaching resources using materials that may not have been originally designed for teaching use. By a systematic campaign of litigation, threats of litigation, and copyright “education,” commercial interests have promulgated a vision of fair use that hinges first and foremost on alleged lost revenue. This vision, which views all teaching uses as “coursepacks” and all coursepacks as subject to the strictures of the Classroom Guidelines, is dramatically out of step with contemporary fair use case law, particularly the concept of transformative use.

The 11th Circuit’s opinion in the GSU case is a half-measure in the right direction. It marks the end of the Guidelines-coursepack paradigm, but it does not offer a useful substitute. Indeed, while the GSU decisions have both recognized the value of education, and minimized the Classroom Guidelines and the coursepack cases, they have also joined other courts in finding

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20 755 F.3d 87 (2d Cir. 2014).
22 The court also found that providing digitized texts to print-disabled library users was fair use, though not transformative. This holding is also revealing. For more on the continuing relevance of non-transformative fair uses, see Section V below.
23 755 F.3d at 99 (“[A]ny economic “harm” caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work.”). This analytical move, the result of a series of decisions in the Second Circuit, is a major contribution of the transformative use approach, and it is discussed at greater length in Section II.B. below.
24 562 F.3d 630 (4th Cir. 2009).
that absent a transformative use argument, the availability of a license for the use could still be
decisive against a fair use claim. The GSU opinions have taken educators out of the frying pan,
but they may well throw them into the fire. Only a compelling transformative use argument can
free teachers from license demands and the uncertainty of weighing their favored purpose against
the publishers’ alleged market harm.

In Part IV of this paper I echo Peter Jaszi in suggesting that teachers can and should
“catch a ride on the train that is already moving,” transformative use, and I give examples of
how some common teaching uses should be understood in terms of that paradigm, rather than the
market-subordinate vision applied to allegedly non-transformative uses in the GSU case. While
these kinds of arguments have been made in amicus briefs and best practices documents, this is
the first scholarly article to argue with specificity that teachers make a wide variety of clearly
transformative uses.

Finally, in Part V I explain the continuing relevance of market failure arguments for non-
transformative educational uses. For decades publishers have argued that teachers typically fail
every fair use test: their uses are not transformative, and market options are adequate to serve
educational needs. The truth is exactly the opposite: teaching uses are very often transformative,
and where they are not, the market continues to fail in significant ways.

II. The rise of the transformative use paradigm

A. Fair Use Generally

Fair use is an equitable, common law doctrine created by judges to ensure that socially
beneficial uses (and particularly uses that advance the goals of copyright law) are not frustrated
by an author’s exclusive rights. Its modern history in the US is often traced to Judge Joseph
Story’s opinion in Folsom v. Marsh, the first opinion to describe what have become the four
statutory factors that courts consider in deciding whether a use is fair. The doctrine has roots in
English common law.

Fair use was first codified in U.S. law as part of the Copyright Act of 1976. The process
that led to its codification was famously contentious, and dominated by the question of
educational photocopying. A committee of educational associations advocated a blanket

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26 While the court is sensitive to concerns about licensing and circularity, it ultimately finds that
availability of a license makes a use less likely to be fair, and that the non-transformative nature of the use
makes “the threat of market substitution more serious,” which requires courts to give the fourth factor
“additional weight.” Cambridge Remand at 100, 106-07.
section 107 has centered around questions of classroom reproduction, particularly photocopying.”) See
generally, Robert Kasunic, Fair Use and the Educator’s Right to Photocopy Copyrighted Material for
exemption for all non-profit educational copying, while publishers insisted on a case-by-case determination.\(^{31}\) Educators wanted certainty, while publishers were concerned a blanket exception could cannibalize revenues for textbook, reference book, and scientific publishing.\(^{32}\)

Congress ultimately split the difference, preserving case-by-case adjudication rather than a blanket exemption, but including the phrase “for purposes such as ... teaching (including multiple copies for classroom use), scholarship, or research” “to assure educators ‘that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for members of a class.”\(^{33}\) Congress also included “non-profit, educational use” as a favored purpose in the statute.\(^{34}\) Finally, Congress added a provision at Section 504(c)(2) “‘to provide innocent teachers and other non-profit users of copyrighted material with broad insulation against unwarranted liability for infringement.”\(^{35}\) Congress thus reassured educational users that their uses were among those that would be found fair under appropriate circumstances, but did little to assure them as to exactly what those circumstances would be. Instead, courts were instructed to continue to develop the doctrine in a common law mode.\(^{36}\)

The text of Section 107 reads:

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;

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\(^{31}\) Classroom Use, 19 J.C.U.L. 271, 277-80 (1992)(describing the legislative history of Section 107 as it relates to educational use).


\(^{33}\) Kasunic, supra n. 30 at 280, quoting House Report at 67.

\(^{34}\) Id.

\(^{35}\) Id. Section 504(c)(2) reads, in relevant part, that “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 who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords….”

\(^{36}\) See House Report at 66 (“The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.”).
(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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.37

The text of the statute is insufficient on its own to guide courts, practitioners, and policymakers looking to identify which uses are fair. This is clear from the text itself, which instructs courts to consider a non-exclusive list of four factors without telling them what, exactly, the consideration of those factors is meant to discover, other than perhaps fairness in some general sense.38 As Wendy Gordon has observed, “It is not clear how much weight should be given to any one of the four factors, what additional factors should be considered, or whether any one of the factors is a sine qua non for a finding of fair use.”39 The House Report expresses a legislative intent merely to “endorse” the common law doctrine as it had developed in the courts, and disclaims any intent to “freeze” it.40

Courts have followed the legislature in warning that fair use cannot be contained or reduced to any simple formula or rule of thumb. Commercial uses are not per se unfair,41 nor are uses of entire works.42 The four factors are not exhaustive.43 The uses listed in the preamble are examples of uses that may be fair, but not every use of those kinds will be fair.44 The good or bad “faith” of the user is not decisive,45 nor is the unpublished status of the work used.46 The factors

38 For an argument that this is as it should be, see Lloyd Weinreb, Fair’s Fair: A Comment on the Fair Use Doctrine, 103 Harv. L Rev. 1137 (1990).
39 Wendy Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 Columbia L. Rev. 1600, 1604 (1982). See also David Nimmer, “Fairest of Them All” and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 287 (2003)(“[i]n the end, reliance on the . . . factors to reach fair use decisions often seems naught but a fairy tale.”); Michael Madison, A Pattern-Oriented Approach to Fair Use, 45 WM. & MARY L. REV. 1525, 1564 (2004)(“[T]he facial emptiness of the statutory language means that alone, it is almost entirely useless analytically, except to the extent that it structures the collection of evidence that a court might think relevant to its decision.”).
40 House Report at 66.
44 Id. at 561.
45 Folsom, 9 F. Cas. at 349 (explaining that the defendant’s use cannot be found fair simply because it is morally laudable); Simon Frankel and Matt Kellogg, Bad Faith and Fair Use, 60 J. COPYRIGHT SOC’Y 1 (2013).
are not to be viewed in isolation, weighed equally, or tallied mathematically. In sum, courts have largely resisted efforts to contain or define the fair use doctrine in ways that might (in their view) unduly constrain judicial discretion to deploy the doctrine flexibly based on the facts of future cases. These declarations of judicial independence, together with the facial indeterminacy of the statute, have led several commentators to lament the uncertainty that seems to surround the doctrine.

B. How transformative use saved fair use.

Recent scholarship answers skepticism about whether fair use can be described or understood theoretically, and belies judges’ protestations against cabining their common law powers. Examined in the aggregate, case law reveals patterns and paradigms that help make sense of fair use decisions. The most recent empirical look at the doctrine, Neil Netanel’s Making Sense of Fair Use, provides a narrative account of the development of fair use jurisprudence since 1978 that explains not only the currently dominant judicial interpretation of the doctrine, but also its seeming incoherence at earlier stages of development. Netanel contends that the development of fair use case law over the last three decades sees the rise and fall of what he calls the “market-centered paradigm,” and the ultimate triumph of the transformative use paradigm.

The market-centered paradigm is defended most trenchantly and compellingly in Wendy Gordon’s 1982 article Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors. In it, Gordon argues that “Fair use should be awarded to the defendant in a copyright infringement action when (1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner.” This view seemingly creates a strong presumption against fair use: “[a]n economic justification for depriving a

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47 Campbell, 510 U.S. at 578 (“All are to be explored, and the results weighed together, in light of the purposes of copyright.”).
48 See, e.g., Leval, supra n.18 at 1105 (“throughout the development of fair use doctrine, courts have failed to fashion a set of governing principles or values”); Nimmer, supra n. 39; Lawrence Lessig, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004)(fair use is “the right to hire a lawyer”); Madison, supra n. 86; Paul Goldstein, Fair Use in Context, 31 COLUM. J.L. & ARTS 433 (2007)(fair use “endlessly fascinates us even as it defeats our every attempt to subdue it”); Michael W. Carroll, Fixing Fair Use, 85 N.C. L. REV. 1087, 1106 (2007) (“[L]eads courts and commentators generally acknowledge that the four-factor test as interpreted provides very little guidance for predicting whether a particular use will be deemed fair.”); Jessica Litman, Billowing White Goo, 31 COLUM. J.L. & ARTS 587, 596 (2008).
49 Netanel, supra n. 18.
50 Id.
51 Gordon, supra n. 39.
52 Id. at 1614.
copyright owner of his market entitlement exists only when the possibility of consensual bargain has broken down in some way.”

Elsewhere in the article, and in subsequent writing, Gordon is at pains to point out that “market failure” is a broad concept that encompasses more than failure to reach a deal due to prohibitive transaction costs. Courts nevertheless gravitated to a simplified version of Gordon’s view: if a would-be fair user could seek permission, and a copyright holder would grant permission, then the user must seek permission. This version of Gordon’s argument was cited by the dissent in Sony v. Universal, and by the majority in Harper & Row v. Nation, and became a dominant framework in fair use case law for more than a decade.

The market-centered approach manifests itself in another important aspect of the fair use case law that developed after the 1976 Copyright Act: the idea that commercial uses are presumptively unfair. The Supreme Court endorsed this presumption in back-to-back fair use opinions in the 1980s. This double blessing was enough to move some courts to apply the presumption even after the Supreme Court itself largely abandoned the idea in Campbell.

Like any dominant paradigm, the market-centered approach was subjected to extensive scholarly comment. Critics warned of a dystopian future where all transaction costs are reduced to near-zero, every interaction with copyrighted content is metered and paid for, and fair use

51 Id. at 1615.
53 The other two forms of market failure that Gordon highlights are cases where a transaction creates positive externalities that cannot be internalized in a bargained-for exchange, and situations where non-monetizable interests that are not factored into the bargain by the parties are at stake. Gordon, supra n. 54 at 151; Loren, supra n. 54 at 6. Loren argues persuasively that cases where positive externalities would not be realized in a market exchange are “more central to the purpose of fair use and the constitutional purpose of copyright” than the high transaction cost scenario. Id.
54 See, e.g., Princeton Univ. Press, 99 F.3d at 1387 (finding that existence of a licensing market for a given use is sufficient to “negate fair use.”). Such a presumption can be a deathblow to defendants in copyright infringement lawsuits, who are in a dispute with a known rights holder plaintiff who is in court objecting to uncompensated use. In such circumstances, what court could think that a defendant is somehow unable to seek permission from the rights holder? Furthermore, if the defendant’s only objection is to price, the logic of the market-centered approach dictates that the use must not be that valuable, after all, and fair use does not apply.
55 Sony, 464 U.S. at 478 (Blackmun, J., dissenting).
56 Harper & Row 471 U.S. at 566 n.9.
57 Netanel, supra n. 18 at 734 (“The market-centered paradigm reigned supreme for some two decades following its adoption in Harper & Row in 1985”).
58 See Sony, 464 U.S. at 451 (“[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”); Harper & Row, 471 U.S. at 562.
59 Campbell, 510 U.S. at 594 (“It was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew’s parody of “Oh, Pretty Woman” rendered it presumptively unfair.”).
ceases to exist. Other suggested the market failure approach is too restrictive of fair use because it ignores important differences between copyrighted works and ordinary physical property. Many pointed out that a simple market centered approach led to circular arguments of the following form with regard to the fourth factor: “Finding this use to be fair would permit unlicensed use. Unlicensed use causes a copyright holder financial harm. Any use that causes financial harm cannot be fair use. Therefore, the court cannot find this use to be fair.” In the realm of education, critics warned that a narrow market-centered approach gives too little credit to the social value of education and that reliance on markets would warp teaching practices and exacerbate the gap between rich and poor institutions and students.

The courts’ application of fair use has shifted dramatically away from this preoccupation with markets, due in large part to the Supreme Court’s decision in Campbell v. Acuff Rose. In Campbell, the court found that “Pretty Woman,” a rap song by the group 2 Live Crew which borrowed heavily from the music of Roy Orbison’s “Oh Pretty Woman,” was a fair use. The decision was hailed as rescuing the doctrine from a dangerous detour. In addition to its careful correction of the Sony dictum that commercial uses are presumptively unfair, Campbell’s most enduring contribution to fair use jurisprudence has been its emphatic embrace of the “transformative use” paradigm.

Judge Pierre N. Leval, then a federal district judge for the Southern District of New York, first described the concept of transformative use in his pathbreaking article Toward a Fair Use Standard. In it, Leval proposed a theory grounded in the utilitarian philosophy of copyright expressed in the Constitution and in various Supreme Court decisions, that copyright’s objective is to “stimulate activity and progress in the arts for the intellectual enrichment of the public.” Judge Leval reasoned that fair use should apply when “excessively broad protection would stifle,

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62 See Loren, supra n. 54 at 46 (“Acceptance of the ‘lost’ permission fees argument permits copyright owners to eliminate all fair uses, because fair use will be relegated to only those uses for which the copyright owner declines to charge.”); Glynn S. Lunney, Fair Use and Market Failure: Sony Revisited, 82 B.U. L. REV. 975, 991 (2002)(“More generally, as copyrighted works have moved increasingly toward interactive digital distribution, the market failure approach argues for an increasingly reduced role for fair use.”). Others agreed that this is a natural consequence of the theory and found it to be a feature, not a bug. See Tom W. Bell, Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine, 76 N. CAROLINA L. REV. 557 (1998).

63 Lunney, supra n. 62 at 993-995.


65 Loren, supra n. 54 at 33.

66 Deborah Gerhardt & Madelyn Wessel, Fair Use and Fairness on Campus, 11 NORTH CAROLINA J. L. TECH. 461 (2010).


69 Campbell, 510 U.S. at 583-585.

70 Leval, supra n.18.

71 Id. at 1107.
rather than advance, [that] objective.” Copyright can exhibit this self-defeating quality for two reasons: all intellectual creation has a more-or-less derivative character, and some very important intellectual activities (Leval gives philosophy, history, and science as examples) are “explicitly referential.”

Leval argues that factor one, the purpose and character of the use, is the key to the fair use inquiry because it reveals whether and to what extent a use is justified. The Constitution’s utilitarian vision of copyright tells us which types of uses will be justified: those that contribute to the intellectual enterprise by using existing material for a new purpose, adding value, creating “new information, new aesthetics, new insights and understandings.” Leval calls such uses “transformative.” A transformative justification is not absolute or infinite; the use must be appropriately tailored to the justificatory purpose. “Factor one,” Leval writes, “is the soul of fair use.” The remaining factors are then weighed against the justificatory force of factor one. Where there is no transformative justification for the use, where the planned use simply reproduces and exploits existing works, adding nothing in the process, Leval suggests further inquiry may be beside the point.

In discussing the first factor (purpose and character of the use) in Campbell, Justice Souter writes that when evaluating use of an existing work to create a new work, judges ask whether the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message...in other words, whether and to what extent the new work is ‘transformative.’” More importantly, Justice Souter adopts Leval’s view that transformative uses “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright” and that therefore “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.” So, even though 2 Live Crew’s use was commercial, and even though licenses are commonly paid for reuse of existing music in rap songs (2 Live Crew had even explored the option of obtaining such a license), the use was fair due to its transformative nature as parody, which quotes characteristic passages from a work in order to criticize and lampoon it, a valuable new contribution to the culture.

Some scholars were skeptical of transformative use as applied by the courts in the years immediately following Campbell. Lower courts’ dutiful shift in rhetoric notwithstanding, it was not clear at first that there was any real substantive effect on the application of the law. Some suggested that the word was applied post hoc to whatever uses judges decided (for their own

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72 Id. at 1109.
73 Id.
74 Id. at 1111.
75 Id.
76 Id. at 1111-12.
77 Id. at 1116.
78 Id.
79 Campbell, 510 U.S. at 579, citing Leval, supra n.18 at 1111.
80 Id.
equitable reasons) should be found fair, with no consistent meaning across uses. In his groundbreaking empirical study of fair use case law from 1978-2005, Barton Beebe suggested that *Campbell* had caused a brief period of judicial focus on the user’s purpose, but that over time courts drifted again toward a focus on market harm.

Each of these concerns has been addressed, and transformative use vindicated, by more recent empirical studies of fair use case law. R. Anthony Reese has shown that transformative use is primarily about new purposes, not literal alteration of underlying works, a distinction which defuses arguments that transformative use vitiates the derivative works right. Reese’s argument should also give comfort to scholars who worry that important uses that do not involve literal alteration of the original work are undervalued by the dominance of the transformative use paradigm. Matthew Sag has shown that transformative use can be used to predict likely outcomes of fair use cases *ex ante*, refuting the alleged unpredictability of the doctrine. Michael Madison has argued, based on his own exhaustive reading of the case law from 1978 to 2003, that fair use is “an analytical tool that focuses on social and cultural patterns,” that courts can use these patterns to understand when a use is transformative, and that social patterns organized around uncompensated uses should not be disfavored under the fourth factor. Finally, in *Making Sense of Fair Use*, Netanel has described the development, and emerging coherence, of the fair use doctrine from a chronological perspective, showing that transformative use has come to define the doctrine more and more in recent years, even when courts do not invoke the doctrine by name.

These studies have a cumulative, refining, and mutually reinforcing quality, and together they provide would-be fair users with powerful insights into the doctrine. Most important is Netanel’s conclusion that transformative use has decisively replaced inquiry into market harm as

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83 R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J. L. & ARTS 101, 119 (2008)(“In assessing transformativeness, the courts generally emphasize the transformativeness of the defendant’s use in the underlying work, rather than any transformation (or lack thereof) by the defendant of the content of the underlying work.”).
84 Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537 (2004) (arguing the focus on transformative use, which she defines as speech that is “critical and creative” is “critically incomplete, leaving unchallenged much of copyright's scope, despite the large number of non-transformative copying activities that are also instances of free speech.”)
87 *Id.* at 1670
88 *Id.* at 1668-69. While Madison does not characterize his theory in this way, it seems more than fair to say that in arguing that courts are primarily interested in a defendant’s legitimate claim to be engaged in a recognized social pattern, Madison is arguing that courts are looking primarily at the user’s purpose, rather than the alleged market harm, to determine fairness.
the dominant paradigm in fair use jurisprudence. Netanel demonstrates that when judges find the use of a copyrighted work to be transformative, they almost always find it to be fair.\(^90\) Using fresher data, finer-grained coding, and a chronological lens, Netanel rebuts some of the skeptical conclusions of Beebe’s earlier empirical analysis, showing that courts in fact paid more and more attention to transformative use after \textit{Campbell}.\(^91\) Netanel’s study also confirms Reese’s conclusion that transformative use does not require literal alteration of the underlying work.\(^92\) Indeed, Netanel finds that literal alteration is neither necessary nor sufficient for a finding of fair use. Most fair use cases did not involve alteration of the underlying work, and of the cases involving alteration, fair use was found only where the use was for a new purpose.\(^93\)

In addition to explaining the courts’ turn from factor four to factor one as the key to the fair use inquiry, these scholarly surveys have unearthed a series of kinds of uses that courts seem consistently to find transformative and, therefore, fair. Pamela Samuelson’s “Unbundling Fair Uses”\(^94\) teases out a series of “policy-related clusters” of related uses from the case law. Transformative use plays a significant role in several of these clusters, and Samuelson’s work adds a helpful nomenclature for subclasses of transformative uses, dividing them into three types: literally transformative uses,\(^95\) productive uses,\(^96\) and orthogonal uses. In Samuelson’s typology, literally transformative uses are those that alter or recast the underlying creative work (literally transforming it) in order to create a new expressive work.\(^97\) The parody in \textit{Campbell} is

\begin{itemize}
\item \(^{90}\) \textit{id.}
\item \(^{91}\) \textit{Id.} at 737-38
\item \(^{92}\) Netanel, supra n. 18 at 747 (“In case after case decided since Campbell, courts have made clear that what matters for determining whether a use is transformative is whether the use is for a different purpose than that for which the copyrighted work was created.”)
\item \(^{93}\) \textit{Id.}
\item \(^{94}\) \textit{77 Fordham L.Rev.} 2537 (2008).
\item \(^{95}\) Samuelson does not use the phrase “literally transformative.” Instead, she argues that only parodies and other literal alterations that result in creation of a new work are “truly transformative,” and that other uses are better described using her concepts of “orthogonal” and “productive” uses. Samuelson, supra n. 94 at 2544 n.40. This insistence on “true transformativeness,” however, is inconsistent with judicial use of the term, which has mostly followed Leval in applying the term when a use is made for a new purpose, even when no literal change is made to the work. \textit{See} Leval, supra n.18 at 1111 (a transformative use “must employ the quoted matter in a different manner or for a different purpose from the original.”)(emphasis added). Indeed, as Netanel points out, courts are much more likely to treat “orthogonal” and “productive” uses as transformative than they are to treat literally transformative uses as such. Netanel, supra n. 18 at 747. I will use “literally transformative” to describe the subclass of uses that Samuelson calls “transformative,” such as the parody in \textit{Campbell}, which recast or transform an existing work in much the same way a derivative work might do. I will continue to use “transformative use” in the broader way Leval and subsequent courts have done.
\item \(^{96}\) “Productive use” is a term with a history in fair use case law. \textit{see Sony}, 464 U.S. at 478 (Blackmun, J., dissenting) (arguing that each of the uses in the preamble of Section 107 is “a productive use, resulting in some added benefit to the public beyond that produced by the first author's work”), and Samuelson’s term seems to play somewhat on that history, without being entirely bound by it.
\item \(^{97}\) Samuelson, supra n. 94 at 2548-49.
\end{itemize}
an example of a transformative use in this sense. *The Wind Done Gone* retelling *Gone with the Wind* from the point of view of the non-white characters is another example.  

Productive uses (in Samuelson’s sense) do not involve alteration of the original work; rather, the original work (or a protectable portion of that work) is copied *without alteration* in the context of criticism or commentary about the work.  

Samuelson gives as an example of this kind of fair use the scathing biography at issue in New Era Publications International v. Carol Publishing Group, which quoted extensively from L. Ron Hubbard’s published books in order to subject the books, and their author, to criticism.

Finally, orthogonal uses involve literal copying from an existing work for an entirely new purpose. Some orthogonal uses involve speech-related purposes, such as reproducing substantial portions of copyrighted works as evidence to support charges of bigotry, or distributing the entirety of an allegedly offensive work to help raise funds for a libel lawsuit against the work’s publisher. Other orthogonal uses include use in litigation and for other government purposes, and use to facilitate technological access to information (with search engines as a paradigm case).

Matthew Sag has also contributed two useful sub-categories to the family of uses that courts have considered transformative. In Predicting Fair Use, Sag deploys a category he calls “creativity shift” as a heuristic to isolate uses that most exemplify the general concept transformativeness. In coding the cases he examined, Sag attached the variable ‘creativity shift’ “in cases where the plaintiff’s work is creative and the defendant’s is informational, or vice versa.” Sag explains that “This shift in category should almost always entail a fundamental change in purpose, which is the hallmark of transformative use.” Sag’s empirical analysis reveals a strong correlation between creativity shift and a finding of fairness.

Sag’s second contribution is the category of “non-expressive uses,” which he says are characteristic of “copy-reliant technologies” such as search engines, electronic archives, and plagiarism detection software. Sag acknowledges that the concept of non-expressive use is itself ambiguous. Early in the paper, he argues that “acts of copying, which by their very

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99 *Id.* at 2555-56.
100 904 F.2d 152 (2d Cir. 1990).
101 Samuelson, *supra* n. 94 at 2557 ff.
103 *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).
104 Samuelson, *supra* n. 94 at 2592 ff.
105 *Id.* at 2610 ff.
106 Sag, *supra* n. 85 at 58.
107 *Id.*
108 *Id.*
109 *Id.* at 76. Sag finds that cases involving a creativity shift have a 2/3 chance of being found fair, regardless of other facts.
111 *Id.* at 1640.
nature cannot communicate the author’s original expression to the public” should not constitute infringement. Elsewhere in the piece, however, Sag characterizes Field v. Google, which involved Google’s full display of cached copies of websites (which constitutes communication of expressive content to the public), as a case of non-expressive use. There he emphasizes the non-expressive purposes of Google’s displays—to monitor changes to websites over time, and to assess a search result’s relevance to the user’s query—and how different these purposes are from the purposes served by the original web pages in isolation. The second, purpose-focused characterization is more consistent with Reese and Netanel’s findings about the centrality of purpose in determinations of transformativeness. In any event, cases involving these technologies have indeed resulted consistently in findings of fair use. Sag describes several such cases that predate his article, and subsequent cases consistent with this principle are described below. Like creativity shift, non-expressive use of the kind Sag describes has become a powerful predictor that a use will be found transformative and, therefore, fair.

Madison identifies a series of social and professional groups whose patterns of practice have been recognized by courts as deserving fair use recognition. Journalism, parody and satire, education and research, and comparative advertising are examples. Where courts find that a defendant’s claim to be engaged in one of these patterns is credible, they have typically found the uses to be fair; where the claim is found wanting, fair use is withheld. Peter Jaszi and Patricia Aufderheide have operationalized this insight, working with a series of communities of practice to sharpen and define mission-based norms that describe when uncompensated use of copyrighted works is legitimate. These documents define favored uses in terms of legitimate mission-centered purposes, which are often further justified with reference to their transformative nature.

112 Id. at 1626.
114 Sag, supra n. 110 at 1618.
115 Id.
116 Professor Sag has participated in some of these cases as counsel for amici curiae. See, e.g., Matthew L. Jockers, Matthew Sag, and Jason Schultz, Brief of Digital Humanities and Law Scholars as Amici Curiae in Authors Guild v. Google (August 3, 2012). Available at SSRN: http://ssrn.com/abstract=2102542 or http://dx.doi.org/10.2139/ssrn.2102542.
117 It is worth pointing out an irony, here. Some commentators have insisted for years that fair use should only protect authors who must use existing works in the creation of their own expressive works, and they have decried the decisions vindicating search engines and other technological uses that do not result in a new work of authorship. See, e.g., Sanford G. Thatcher, From the University Presses—What Is Educational Fair Use?, 20 AGAINST THE GRAIN 62 (2008) (arguing that fair use “traditionally” has functioned to protect “the creativity of others who wish to build on past work, adding value to it by embedding it in new work in the context of comment and criticism.”) The irony is that, in fact, search engines have become perhaps the most solidly favored fair uses of all precisely because their purpose is radically non-expressive.
118 PATRICIA AUFDERHEIDE AND PETER JASZI, RECLAIMING FAIR USE (2010).
119 See, e.g., ASSOCIATION OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 13 (“For example, works intended for consumption as popular entertainment present a case for transformative repurposing when an instructor uses them (or excerpts from them) as the objects of commentary and criticism, or for purposes of illustration.”).
In sum, scholarly examination of the fair use case law has surfaced the following broad features of the doctrine as it has developed since 1978:

1. The courts have shifted their focus from the fourth factor to the first factor as the key to the fair use inquiry. After a series of doctrinal false starts, including a presumption of unfairness for commercial uses and a circular concern with lost licensing revenue, the doctrine has settled on an approach that is grounded primarily in the justificatory power of the user’s purpose, rather than the alleged market harm to the copyright holder.

2. The crucial first factor inquiry is heavily influenced by Judge Leval’s concept of “transformative use,” which he describes as use that advances copyright’s Constitutional objective of promoting progress by using existing works “in a different manner or for a different purpose,” “as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings.”

3. Although the “transformative use” concept was misconstrued in some early cases, courts have since settled decisively on an approach that inquires into whether the purpose of the new use is distinct from the purpose of the original author.

4. The class of transformative uses is diverse, but some useful subclasses have been identified. They include: Samuelson’s literally transformative, productive, and orthogonal uses; Sag’s “creativity shift” and non-expressive uses; and Madison’s social patterns. Madison’s social patterns idea has, in turn, led to the development of even more fine-grained best practices statements delineating uncompensated uses that practice communities have identified as fair.

C. Recent decisions show transformative use’s potential power and scope for educators.

Courts have not been idle in the few years since Netanel’s survey of case law, and their work reinforces and even strengthens the conclusion that transformative use is the new dominant paradigm. Here are some of the consequences of courts’ embrace of transformative use, with examples from recent decisions.

1. A new use need not criticize or comment on an existing work in order to be fair, if its purpose and audience are sufficiently novel. Because the Supreme Court’s most recent fair use decision involved a parody (and discussed at some length the difference between parody, which targets the work from which it borrows, and satire, whose target is distinct from its source material), some courts have mistakenly suggested that all transformative uses must be critical of the works they reuse. The Second Circuit rejected the requirement of criticism or commentary outright in Cariou v. Prince, ruling that the district court had erred in

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120 Leval, supra n.18 at 1111.
121 Campbell, 510 U.S. at 580-81 (“Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victims’ (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”).
requiring the defendant to have an intent to criticize or comment upon the works he used. 122 Appropriation artist Richard Prince had expressly denied any intent to comment upon or criticize photographer Patrick Cariou or his work, 123 but did express an intent to transform the photographs into completely different kinds of expression. 124 The novel aesthetic experience created by Prince’s works, together with the difference between audiences interested in Prince’s works and those interested in Cariou’s, were sufficient to render Prince’s use transformative. 125 The legal database and patent prosecution cases described below also involved uses with no “critical” purpose.

2. Activities that do not involve literal alteration of the work or addition of new substantive material within the four corners of the copy can be “added value” for purposes of transformative analysis. Judge Rakoff of the Southern District of New York took into account a variety of activities that did not involve literal alteration of the works, or literal addition of new content within the four corners of the works, in finding that the legal publishers West and Lexis had “added value” to the legal briefs they ingested into their databases. 126 Rather, the work involved in “reviewing, selecting, converting, coding, linking, and identifying…documents” 127 sufficed as evidence of added value.

3. Copying and distribution that is conducted systematically and at a large scale can be found fair where the use is for a new purpose. White v. West Pub. Corp., the legal database case described above, fits this description: the database publishers ingest thousands of legal briefs filed in federal cases in order to make them available to hundreds of thousands of paying subscribers. Systematic use is also involved in a pair of cases about copying and distribution of scientific journal articles in drafting and prosecuting patent applications. 128 In Authors Guild v. HathiTrust, the Second Circuit found fair the digitization, indexing, and even making available (for print-disabled patrons) millions of in-copyright books held in university libraries.

4. Making entire, unaltered works available for reading or viewing may be found fair where the users’ (and the readers’) purpose differs sufficiently from the original purpose of the work.

122 Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) (“The law imposes no requirement that a work comment on the original or its author in order to be considered transformative.”).
123 Id. at 707 (Prince said he “do[es]n’t have any…interest in [Cariou’s] original intent.”)
124 Id. (“what I do is I completely try to change it into something that’s completely different…. I’m trying to make a kind of fantastic, absolutely hip, up to date, contemporary take on the music scene.”).
125 Id. at 707-09.
127 Id. at *2.
128 American Inst. Physics v. Winstead, P.C., 2013 WL 7087045 (N.D. Tex. 2013)(“Defendants’ copying of [scientific journal articles] does not “supersede” the use of Plaintiffs’ original works, but has the different purpose of providing a background context for patent examiners in their analysis of patent applications”); American Inst. Physics v. Schwegman, Lundberg, and Woessner, P.A., 2013 WL 4666330 at *10 (D. Minn. 2013)(“there is no reasonable dispute that Schwegman did not use the Articles “for the same intrinsic purpose as [the Publishers.]”).
and the amount taken is justified by that novel purpose. In Swatch v. Bloomberg L.P.,129 for example, the Second Circuit Court of Appeals held that it was fair use for news organization Bloomberg to post the entirety of a recorded Swatch earnings call online as part of Bloomberg’s financial reporting on the company. Remarkably, the court’s initial opinion found that the use was fair use despite its “commercial, non-transformative nature.”130 The court issued an amended opinion months later removing that description and adding a new section explaining the differences between the purpose of Swatch’s original call and the purposes of Bloomberg’s subsequent publication and arguing that Bloomberg’s use was at least “arguably transformative” because of its novel purposes.131 Novel purposes also led to findings of fair use in the legal database and patent prosecution cases. In each of these cases the original work was published to a defined audience to serve a defined purpose, and fair use permitted subsequent copying and distribution of the entire work where both purpose and audience were different.

III. Education left behind?

The effects of these developments in the fair use case law have been felt by Internet companies, publishers, artists, and even research libraries, but teachers have so far been left behind. Three historical factors explain this: the existence of pseudo-authoritative guidelines for education grounded in the market-centered paradigm, a misreading of dicta in Campbell, and the publishers’ clever litigation strategy of initially suing copy shops rather than universities. In addition to these historical factors, two mistaken assumptions have distorted the law in this area: the assumption that transformative use requires literal alteration of the work used, and the assumption that educational uses always involve works made for educational purposes. This section explores each of these contributing causes, then shows how the Georgia State e-reserves case simultaneously marks the end of the Guidelines-coursepack era and exemplifies the continuing influence of the market-centered approach for non-transformative teaching uses.

A. Educational guidelines grounded in the market-centered paradigm.

Since the passage of the 1976 Copyright Act, a series of negotiated guidelines have purported to describe reasonable limits for educational fair use.132 The two such documents that have had the widest impact are the Classroom Guidelines and the Fair Use Guidelines for Educational Multimedia.133 They aim to provide educators with certainty by replacing the broad and flexible doctrine of fair use with a series of concrete rules dictating exactly how much may

130 Swatch Group Mgmt. Svces. Ltd. v. Bloomberg LP, 742 F.3d 17, 27 (2d Cir. 2014)
be safely copied from various kinds of works, whether copying may be repeated from semester to semester, and so on.

The Classroom Guidelines use the concepts of “brevity,” “spontaneity,” and “cumulative effect” as the criteria for fairness. Each of these terms is further defined to create a clear, quantitative, and decidedly conservative vision. For example, “brevity” in the context of prose works means “Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.” “Spontaneity” requires, among other things, that “[t]he inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.” The “cumulative effect” prong bars the use of multiple excerpts from the same author, as well as use of the same excerpts in more than one course in the school. Additional limitations bar any use “to create or to replace or substitute for anthologies, compilations or collective works,” as well as any use of the same excerpted material for more than one term. Even taken as a minimum safe harbor, which is what they purport to be, the guidelines are quite limiting. Taken as the outer limit of fair use, as the publishers urged educators to do, the guidelines suggest an intent with regard to fair use that resembles conservative activist Grover Norquist’s aspirations for government: “to reduce it to the size where I can drag it into the bathroom and drown it in the bathtub.” The guidelines have been roundly criticized for their misleading air of legal authority, and for their narrowness and ripeness for misuse and abuse.

Nevertheless, courts confronted with cases about educational use have turned to the guidelines as a source of information (and even of quasi-authority). Courts have looked to the Guidelines as a kind of legislative history, and even used them as a model for injunctive relief.

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134 See Classroom Guidelines, House Report at 68 (“The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use.”).


136 See generally Crews, supra n. 132. See also Kasunic, supra n. 30 at 281 (arguing that the widespread use of the Classroom Guidelines as maximum limits is inconsistent with legislative intent); Gilbert Busby, Fair Use and Educational Copying: A Reexamination of Princeton University Press v. Michigan Document Services, Inc., 86 KY. L.J. 675, 706-07 (1997)(arguing that reliance on the Guidelines as legislative history is inappropriate because Section 107 is not ambiguous); Cambridge Univ. Press v. Becker, 863 F.Supp.2d at 1229 (same).

137 Id.

138 See, e.g., Basic Books, Inc. v. Kinko’s Graphics Corp., 758 F.Supp. 1522, 1530 (1991)(“Because plaintiffs specifically allege violation of both, this court has the task of evaluating the copying under fair use doctrine and the ‘Agreement on Guidelines for Classroom Copying in Not–For–Profit Educational Institutions’ (‘Classroom Guidelines’)”) Judge Motley’s use of the Guidelines is quite complex, and perhaps confused. At first she seems to treat them as a separate source of law which the plaintiffs are entitled to invoke, but later she says Kinko’s is not subject to the Guidelines because of its for-profit status. She goes on to evaluate Kinko’s conduct according to the Guidelines, anyway, as a kind of hypothetical exercise, but stops short of finding that “violating the Guidelines” per se disqualifies Kinko’s conduct from fair use consideration.
Judicial interest in the Guidelines has waned dramatically in recent years, however. Most recently both the trial court and the appellate panel in the GSU case refused to consider the 1976 Guidelines as a limitation on educational copying. 139 Judge Evans of the district court characterized their restrictive limits as “undermin[ing] the educational objective favored by §107,” while Judge Tjoflat in the appellate court warned that “to treat the Classroom Guidelines as indicative of what is allowable would be to create the type of ‘hard evidentiary presumption’ that the Supreme Court has cautioned against.” 141

There is an additional reason to treat the various negotiated guidelines with suspicion: they reflect the now-disfavored market-centered approach to fair use. Several aspects of the guidelines reveal their market-centered orientation. As Wendy Gordon observes, “[T]he Guidelines for Educational Fair Use in the House Report single out for fair use treatment instances of classroom photocopying in which bargains are particularly unlikely to occur because the teacher’s use is spontaneous, individual and unsystematic.” 142 The guidelines suggest, in other words, that if a use is such that a license probably could be sought (because the use is planned, rather than “spontaneous”) or at a scale sufficient to demonstrate market demand (the same excerpt is used in multiple courses, the use is repeated from term to term, the use is “directed by higher authority”), or if excerpts are of a portion large enough that students could potentially be required to purchase an entire work, then a license must be sought. 143 Another indication of the guidelines’ market-centered orientation is their use of hard quantitative limits on amounts copied, which is inconsistent with the flexible approach required by transformative use. Judges applying the transformative paradigm ask whether the amount taken is appropriate to the purpose of the use, and have repeatedly blessed use of entire works; 144 only the market-centered paradigm disfavors a use in proportion to the amount taken, regardless of purpose.

In recent years, pushback against the guidelines has begun to move beyond the academic literature and into the front lines of educational practice. Perhaps most tellingly, the Consortium of College and University Media Centers, which was a key endorser and promoter of the 1996 multimedia guidelines, has withdrawn its endorsement citing evolving fair use doctrine. 145 CCUMC is the latest of many associations of educators and related groups to develop or endorse

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139 Cambridge, 863 F. Supp. 2d at 1227-29; Cambridge Remand at 88-89.
140 Cambridge, 863 F. Supp. 2d at 1234.
141 Cambridge Remand at 1273.
142 Gordon, supra n. 39 at 1628.
143 If you take the guidelines at their word when they purport to be minimum safe harbors rather than maximum limits, then perhaps the takeaway is, “At a minimum, when a license cannot be paid, then a license need not be paid.”
144 Which is not to say that transformative use consistently favors generous re-use; where a user takes more than is appropriate to its purpose, courts have found that the third factor does not favor fair use, even in transformative use cases. See, e.g., Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513, 548 (S.D.N.Y. 2008)(finding that the third factor weighs against fair use where author of a reference book “takes more than is reasonably necessary to create a reference guide”).
fair use best practices statements grounded in the transformative use paradigm as a replacement for the market-centered guidelines. Nevertheless, institutions trusted by some educators and institutions continue to promote the guidelines.

**B. “Straight Reproduction” in Footnote 11 of Campbell.**

In the midst of his embrace of the transformative use concept in *Campbell*, Justice Souter explains, in dicta, in a footnote, that not all fair uses must be transformative. He paraphrases the preamble of Section 107, saying “The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.” As Peter Jaszi has observed, Justice Souter’s formulation in footnote 11—“straight reproduction”—seems to suggest that the uses at issue are ones where the teacher does not add value. The formulation may also assume that the teacher’s use is not for a new purpose.

It is possible that Justice Souter assumed the materials being copied in “straight reproduction[s]…for classroom distribution” were themselves materials created and marketed primarily for classroom use, such as textbook or workbook illustrations and exercise pages. These may have been the kinds of uses that Congress had in mind when it added the parenthetical about “multiple copies for classroom use” to the statute late in the legislative process to reassure teachers that there would be latitude for uses of photocopied worksheets in ways that were common at the time. Unfortunately neither the footnote nor the relevant legislative history are sufficiently rich to confirm or falsify this possibility.

What is clear, however, is the gap between Justice Souter’s footnote and some of its subsequent invocations. The footnote simply does not support the conclusion that all educational uses are *per se* not transformative, and yet courts have applied something very close to that presumption. In Princeton University Press v. Michigan Document Services, decided just two years after *Campbell*, the Sixth Circuit panel said of transformative use, citing the footnote: “that inquiry is not conducted at all in the case of multiple copies for classroom use.” In fact, the coursepacks at issue were neither “distributed” in class (as Justice Souter’s footnote envisions), nor were they necessarily “use[d]” in class (as described in the statutory parenthetical). The *MDS* court claimed the “transformative value of the coursepacks is slight,” and invoked the statutory text and *Campbell* footnote as a kind of savings clause. The value of this clause was limited, however, as all of *MDS*’s uses were found to be infringing.

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149 Jaszi, *supra* n. 27 at 38 n.15.
150 99 F.3d 1381 (6th Cir. 1996)(“MDS”).
151 *MDS* at 1400. Of course, if the transformative inquiry is not conducted, then a stark market-centered approach is a likely alternative, with the Classroom Guidelines as a standard. The outcome is predictable.
The GSU courts were somewhat more liberal in practice, but not in principle. Judge Orinda Evans cited the footnote in her opinion, accepting without question the publisher plaintiffs’ argument that posting assigned readings (“mirror images of parts of the books”) to an electronic course site is non-transformative per se. Just as in MDS, the court claimed that footnote 11 conferred a privileged status on educational photocopying, saving it from an unfavorable finding under the first factor, but the court’s finding that the uses were non-transformative had substantial negative consequences, reducing the amount of the underlying work that could be used fairly. The 11th Circuit’s opinion is similar, citing footnote 11 for the proposition that the first factor can favor non-transformative educational uses, then adding weight to the other side of the balance under factor four due to lack of transformative use. Footnote 11 seems to “save” educational uses from the transformative use test only to deliver them into a balancing test that could often disfavor them.

C. The Coursepack Cases and the Publishers’ Efforts to Enforce the Guidelines

As a result of the state of the law pre-Campbell, with fair use seemingly contingent on claims of lost licensing revenue, the publishers won a series of early litigation victories that effectively chilled educational fair use practice in the analog realm. In a thirty year litigation campaign, publishers have enforced the Classroom Guidelines as maximum limits on all educational copying. That effort may have met its end in the GSU case, but its effects will be difficult to erase.

The first wave of suits came shortly after the passage of the 1976 Copyright Act and yielded across-the-board wins for the publishers: all defendants agreed to settlements enshrining the Guidelines as the limit of fair use. The publishers initially targeted commercial copy shops then sued New York University (NYU) and several NYU professors shortly after the shops settled. NYU and its faculty members also settled, acceding to an agreement that required them to abide by the Classroom Guidelines, but with a proviso allowing NYU’s general counsel to permit uses that exceed the Guidelines if subsequent case law permits. The AAP publicized news of the settlement to other universities, who largely adopted the Guidelines as fair use maximums.
Nearly a decade later the publishers once again made the rounds to enforce the Guidelines, and again they approached commercial copy shops as initial defendants.\textsuperscript{157} This time two shops refused to settle, giving courts their first opportunity to consider educational fair use and the import of the guidelines. The copy shops lost big.

The publishers’ strategy of initially pursuing commercial copy shops succeeded wildly, as the courts focused on the shops’ commercial nature and their purely duplicative purpose, ignoring both professors and students, whose purposes were more complex and whose status was “non-profit, educational” under the first fair use factor.\textsuperscript{158} So, in \textit{Kinko’s}, Judge Constanza Baker Motley found that “the use in the hands of Kinko's employees is commercial,” saying Kinko’s effort to portray its use as educational “boggles the mind.”\textsuperscript{159} \textit{MDS} was decided after \textit{Campbell} had clearly done away with any “presumptive unfairness” associated with commercial use\textsuperscript{160} yet the court in \textit{MDS} still gave primacy to the market effect of the use, citing \textit{Harper & Row}.\textsuperscript{161}

Neither of the copy shops were found to be engaged in transformative use. Judge Motley found Kinko’s use was non-transformative because its coursepacks were “mere repackaging” of copyrighted works with “no literary effort made by Kinko’s.”\textsuperscript{162} Judge Motley’s opinion was,a

\textsuperscript{157} Basic Books, Inc. v. Kinko's Graphics Corp., 758 F.Supp. 1522 (S.D.N.Y. 1991) (“Kinko’s”); \textit{MDS}. 158 The courts declined in both cases to allow the copy shops to stand in the shoes of their professor clients, whose purposes were non-profit, educational, and arguably transformative. As a result, schools have asked, in other contexts, for express statutory permission to contract with outside vendors in the course of exercising their statutory rights. See The SECTION 108 STUDY GROUP REPORT iv (2008) (“Section 108 should be amended to allow a library or archives to authorize outside contractors to perform at least some activities permitted under section 108 on its behalf…”). Strikingly, publishers themselves have won many significant fair use victories by standing in the shoes of the authors whose works they reproduce and distribute for profit. See, e.g., \textit{Bill Graham Archives v. Dorling Kindersley Ltd.}, 448 F.3d 605 (2d Cir. 2006) (attributing to publisher Dorling Kindersley the fair use motives of its author(s)); \textit{New Era Publications}, 904 F.2d at 156 (attributing the author’s critical purpose for using excerpts to the publisher). More than a decade after \textit{MDS}, Judge Chin (then of the Southern District of New York) allowed Google to invoke the fairness of the libraries’ purposes when universities partnered with Google to digitize millions of in-copyright books from university library collections. Citing a separate opinion vindicating the libraries’ uses of their digitized copies as fair use, Judge Chin held that Google’s digitization on the libraries’ behalf was therefore also fair use. Authors Guild, Inc. v. Google Inc., 954 F.Supp.2d 282, 293-94 (S.D.N.Y. 2013) (“Google's actions in providing the libraries with the ability to engage in activities that advance the arts and sciences constitute fair use.”). It is far from clear, then, that the coursepack cases’ approach is the correct one.

\textsuperscript{159} Judge Motley also invoked the \textit{Sony} dictum about a presumption against fair use for commercial uses. 758 F.Supp. at 1530. The Supreme Court would later disavow the presumption in \textit{Campbell}. 510 U.S. at 583-84.

\textsuperscript{160} \textit{See Campbell}, 510 U.S. at 584-85 (“In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred….If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107….since these activities are generally conducted for profit in this country.”) (internal citations omitted).

\textsuperscript{161} 99 F.3d at 1385 (saying that the fourth factor is “is at least primus inter pares” and discussing that factor, rather than purpose and character, first).

\textsuperscript{162} 758 F.Supp. at 1530, \textit{citing} Leval, supra n.18 at 1111.
tentative first draft of the transformative use doctrine in the courts, coming less than a year after publication of Judge Leval’s article. The Sixth Circuit’s opinion in MDS, however, is harder to explain. Despite the benefit of years and several cases applying the concept, including Campbell, the MDS court similarly focused on the lack of literal alteration in the copies themselves in finding the use in MDS non-transformative,163 and compounded the error by finding that for such uses Campbell had left in place the presumption of unfairness in Sony.164 The Sixth Circuit panel also derived from footnote 11 of Campbell and the related statutory parenthetical a per se rule that transformative use analysis is irrelevant to educational uses.165 In reality, the ‘slight transformative value’ of the use led the court to leave in place the Sony presumption of unfairness, and abetted the court’s overall focus on the alleged market effects of the use.166 Together, these aspects of the analysis were fatal to MDS.

Although a different analysis might have applied if the copies were made by educational institutions themselves rather than for profit copy shops,167 the impact of the decisions on all educational copying was swift and dramatic. Indeed, the impact of Kinko’s was evident when the 6th Circuit decided MDS five years later, as the court noted the proprietor of MDS was an outlier in his belief that the case was wrongly decided, and repeatedly contrasted MDS’s practice with the majority of copy shops’ dutiful payment of royalties.168 In the wake of these cases, it became standard practice to seek and pay for permissions in connection with virtually all excerpts included in coursepacks, whether they were assembled by for-profit copy shops, on-campus copy centers, or libraries.169 Publishers and their partner licensing bodies have promoted this expansive application of the coursepack cases.170 Even some faculty members have internalized

163 99 F.3d at 1389.
164 Id. at 1386.
165 See supra nn. 150-52 and accompanying text.
166 Or, as Ann Bartow writes, “[T]he court effectively merged the § 107 four-part fair use test into one two part question: Was the use commercial, and if so, did it divert revenues from the copyright owner?” Bartow, supra n. 154 at 189. This is the mirror image of the two part question that embodies the transformative use inquiry: Is the use transformative, and if so, did the user take only as much as appropriate given her transformative purpose?
167 The Sixth Circuit recognized the distinction in MDS, although it cast doubt on whether it might make a difference. 99 F.3d at 1389 (“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.”) Judge Ryan, in one of three dissenting opinions, argued on the contrary that MDS had not “used” the copyrighted work at all for purposes of fair use and that the students’ use of the coursepacks was the appropriate subject of the fair use analysis. Id. at 1401. Ultimately, both the district court and the appellate court in the GSU case held that the distinction between copy shops and educators was crucial with respect to the first fair use factor.
168 MDS, 99 F.3d at 1384 (noting that after Kinko’s “many copyshops that had not previously requested permission from copyright holders began to obtain such permission.”).
169 David Hansen, A State Law Approach to Preserving Fair Use in Academic Libraries, 22 Fordham Intell. Prop. Media & Ent. LJ 1, 13 (“These ‘copyshop’ cases have uniformly failed to find fair use in the creation and sale of coursepacks, and have led libraries to adopt those rulings as fearsome precedent for their own practices.”).
170 See, e.g., Copyright Clearance Center, The Campus Guide to Copyright Compliance—Coursepacks, http://www.copyright.com/Services/copyrightoncampus/content/coursepacks.html (2005) (“It is now well
the maxim that all copy shop uses should be licensed (and so should any allegedly analogous use).\textsuperscript{171}

Copyright scholars have criticized the coursepack cases, but no one has suggested that the analysis of coursepacks and related uses might change appreciably if courts deployed transformative use as that concept is now understood. Instead, the few scholars who have written about these cases have (mis)applied transformative use in exactly the same way the courts had done, believing that it requires literal alteration of the materials used, or else assuming that works used for education are not sufficiently repurposed to count as transformative.

For example, Ann Bartow takes Judge Motley to task for insisting on literal transformation when works are “most pedagogically useful when unadulterated.”\textsuperscript{172} Gilbert Busby argues that coursepacks are transformative because they are unique compilations that embody the professors’ creativity in selecting and arranging excerpts,\textsuperscript{173} confusing the transformation involved in fair use with that involved in creation of derivative works.\textsuperscript{174} More recently, David Simon follows a similar line but comes closer in observing that “transformativeness can exist when portions of several works are copied and juxtaposed—that is the whole basis for teaching; teachers often (and rightly) use sometimes unrelated materials in conjunction with one another for pedagogical purposes,”\textsuperscript{175} but he later concludes that transformativeness has “little relevance, in [its] traditional sense, in educational use.”\textsuperscript{176} Simon

established that photocopying materials for academic coursepacks requires permission from the copyright holder or its agent.

\textsuperscript{171} John McCaskey, “Stop Pirating Copyrighted Course Readings,” http://www.johnmccaskey.com/joomla/index.php/blog/75-piracy (2014) (“The test is simple: If the official coursepack copy center that your bookstore uses would demand the purchase of reproduction rights, then any attempt to get around that—a local copy shop, emailing a PDF, handing out copies in class, uploading to a course web site, having the library upload to an online course reserves—is piracy.”). McCaskey’s blog post is strikingly similar to Judge Vinson’s concurrence in the GSU appellate decision, and to the publishers’ arguments regarding so-called “media neutrality.”

\textsuperscript{172} Bartow, supra n. 154 at 178. At the same time Bartow suggests that “Professors compiling course packets inevitably make editorial, if not transformative, choices when they excerpt works.” She does not pursue the argument any further, however.

\textsuperscript{173} Busby, supra n. 136 at 701 (“By extracting from various works, arranging them in a particular way, and adding his or her own commentary, a professor can produce a course pack that is a unique product with no adequate substitute.”)

\textsuperscript{174} See Reese, supra n.83 at 101 (“[A]ppellate courts do not view fair use transformativeness as connected with any transformation involved in preparing a derivative work, and…in evaluating transformativeness the courts focus more on the purpose of a defendant’s use than on any alteration the defendant has made to the content of the plaintiff’s work.”); Castle Rock Ent’n, Inc. v. Carol Publ’g Group, Inc., 150 F.3d 132, 143 (2d Cir. 1998)(“Although derivative works that are subject to the author’s copyright transform an original work into a new mode of presentation, such works—unlike works of fair use—take expression for purposes that are not ‘transformative.’”)


\textsuperscript{176} Id. at 507, citing Laura A. Heymann, Everything Is Transformative: Fair Use and Reader Response, 31 COLUM. J.L. & ARTS 445, 457 (2008). Simon argues that “numerous types of copying done by teachers” are non-transformative in the same way as time-shifting in Sony and archiving in Texaco. I do
tries to soften the blow by suggesting that the statutory parenthetical about “multiple copies for classroom use” could be enough to cover the “many times” that educational uses will not be transformative, but *MDS* shows how courts can turn that supposed safe harbor into a cage.177

New technology has created an opportunity for educators to take a less restrictive approach to use of copyrighted materials for teaching. Online course management systems and electronic reserves made it possible for professors and librarians to post materials directly to websites accessible only to students in a relevant class, without the costs or labor involved in creation and distribution of physical copies. With no literal paper “anthology,” no money changing hands (not even to cover labor or materials), no easy way for non-students to see how materials were being shared, and perhaps no obvious place to exercise centralized control or oversight of the activity, electronic distribution seemed to create a safe space for institutions to try new approaches to sharing material. Many colleges and universities took a more flexible approach, grounded in a fair use checklist developed by Kenneth W. Crews and Dwayne Buttler, which replaced strict quantitative limits with a less bounded instruction that teachers walk through various factors on a checklist and “consider the relative persuasive strength of the circumstances.”178

Not surprisingly, publishers soon began to approach universities with complaints about their practices with electronic course reserves, which publishers characterize as modern-day coursepacks. The Copyright Clearance Center has coined the term “e-coursepacks” to describe “online collections of journal, magazine or newspaper articles, book excerpts and other materials that a course instructor gathers as required or supplemental reading for students” and declares in its “Campus Guide to Copyright Compliance” that “[e]-coursepacks, like their paper-based counterparts, require copyright permission from the copyright holder or its agent.”179 At first, negotiations took place outside of the courtroom, though the possibility of litigation loomed in the background.

In 2006, Cornell University and the American Association of Publishers announced an agreement that had averted legal action, which seems mostly to have consisted in Cornell announcing that the same rules apply to electronic reserves as had applied to paper coursepacks.

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not disagree (see Section V re non-transformative teaching uses), but I am interested here in the many teaching uses that differ from Sony and Texaco in that they use existing materials for new purposes. Simon quotes Laura Heymann's suggestion that uses like Sony and Texaco should not be subject to transformativeness analysis because they “displac[e] the copy in which the work is instantiated,” which is fair as far as it goes. Heymann argues that literal copying without alteration can still be transformative “[i]f distinct discursive communities can be identified surrounding each copy.” Id. at 455. This is precisely what happens when teachers bring works into the classroom that were not intended to be the subject of classroom study, i.e., whose original discursive community is outside the educational realm.177 *Id.* at 508 (“Many times educational uses will not be transformative, strictly speaking—that is what § 107 recognizes when it states that making ‘multiple copies for classroom use’ is fair use.”).


D. Georgia State and the End of the Guidelines/Coursepacks Era

In December 2008 a group of academic publishers (with substantial help and financial backing from the Copyright Clearance Center and the Association of American Publishers) brought a lawsuit against various administrators and the Board of Regents at Georgia State University (GSU), alleging widespread copyright infringement on electronic course sites and the library electronic reserves platform that faculty use to share materials with their students. The effects of the guidelines, Campbell footnote 11, and the coursepack cases can all be felt in the Georgia State case. The lack of a strong transformative use analysis shaped the university’s policy and its litigation strategy, the publishers’ own litigation strategy, and the opinions of both the district and the appellate courts. The 11th Circuit’s opinion highlights the value of a transformative vision of teaching.

GSU’s official e-reserves policy, The Regent’s Guide to Understanding Copyright and Educational Fair Use, had been drafted with guidance from L. Ray Patterson, a respected

180 See Laura Rice, C.U. Changes E-Reserve Policy to Avoid Lawsuit, CORNELL DAILY SUN, Oct. 3, 2006, http://cornellsun.com/blog/2006/10/03/cu-changes-ereserve-policy-to-avoid-lawsuit/. Cornell’s current overall copyright guidance appears to be fairly standard and revolves around the use of a checklist, with no mention of an agreement with publishers. Cornell University Office of the Provost, A Faculty Guide to Copyright, http://copyright.cornell.edu/policies/docs/Brochure_FG.pdf, last visited August 12, 2014. However, a separate document dealing specifically with the use of electronic course content is consistent with the press accounts of the AAP-Cornell agreement in that it stipulates that electronic materials should follow the same norms as paper coursepacks. Metadata for the PDF file online indicates that it was created in September 2006, around the time of the agreement. Cornell Electronic Course Content Copyright Guidelines, http://copyright.cornell.edu/policies/docs/Copyright_Guidelines.pdf, last visited August 12, 2014 (“Any use of copyrighted electronic course content that would require permission from the copyright owner if the materials were part of a printed coursepack likewise requires the copyright owner’s permission when made available in electronic format.”)


182 Association of American University Presses, “University Presses Welcome New Cornell Guidelines on Use of Digital Course Content,” September 20, 2006, http://www.aapnet.org/news-a-publications/323-cornell-guidelines#sthash.IehFTnVx.dpuf, last visited Nov. 24, 2014 (“As for the guidelines themselves, they're built on a brilliantly simple principle: if you would have had to clear permission to use copyrighted work in the world of printed coursepacks, you need to clear permission to use it in the new world of electronic reserves and course management systems.”).
copyright scholar, and it unequivocally rejected the Guidelines as a source of authority as to what constitutes fair use. The relatively broad and flexible vision of educational fair use in the Regent’s Guide may have been what attracted the AAP and CCC to GSU as a defendant. If so, they won a small victory almost immediately: the University System of Georgia abandoned the Regent’s Guide shortly after the publishers sued and adopted a new approach that mirrored the policies at many other universities, which involved providing faculty with a fair use checklist and some general information about the fair use factors and how to weigh them, and instructing faculty to use the checklist to determine for themselves whether their uses were fair. A fair use training session was held, but was not widely attended.

The publishers pressed the same basic case they had been arguing since the NYU case in the 1980s: professors who distribute materials to their students without paying licensing fees are “violating the Guidelines” and causing cognizable market harm to the publishers. They cited the coursepack cases and argued that GSU’s e-reserves were really just e-coursepacks. In a nod to the new dominant paradigm, the publishers also argued that the uses were non-transformative, and therefore were not fair. They met intense skepticism in both the district and the appellate court.

In a 350-page opinion, federal district Judge Orinda D. Evans developed a rubric for assessing fair use of scholarly monographs (the only type of publication at issue in the case) and applied it to an agreed-upon sample of faculty-posted excerpts governed by the new policy. The opinion was hailed as a victory by many in the education community (including me), due in large part to Judge Evans’ refusal to follow the coursepack cases, her conclusion that the first

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183 L. Ray Patterson, Regents Guide to Understanding Copyright and Educational Fair Use, 5 J. INTELL. PROP. L. 243, 245 (1997) (describing and reprinting the full Regent’s Guide). Ironically, even though Professor Patterson’s views of fair use are almost prophetic in their emphasis on legitimate purpose and users’ rights, the Regent’s Guide still retains a bit of the market-centered approach to the doctrine, saying “The location of the line between fair use and infringing use is determined by the market factor, that is, the extent to which the copy becomes a substitute for the purchase of the work.” Id. at 258. This question of substitution can be turned in favor of the user, however, and has been most recently in the HathiTrust case. Indeed, the Second Circuit made ‘non-substitution’ its touchstone for transformative use, and found resoundingly in favor of the universities.

184 Another irritant that may have drawn the AAP and CCC to GSU is Georgia’s attorney general’s decision to issue an unofficial opinion repudiating the Kinko’s decision. Id. at 281.

185 See Cambridge Univ. Press, 863 F. Supp.2d at 1204 (“Over half of [the professors who testified at trial] testified that they had not attended the training sessions Georgia State had held for professors concerning implementation of the 2009 Copyright Policy.”)


187 Cambridge Univ. Press, 863 F. Supp.2d at 1224 (“Because Georgia State is a purely nonprofit, educational institution and the excerpts at issue were used for purely nonprofit, educational purposes, this case is distinguishable from Kinko’s, Michigan Document Services, and Texaco.”)
factor “strongly favors” fair use for non-profit, educational uses,\textsuperscript{188} her highly critical treatment of the Classroom Guidelines,\textsuperscript{189} and the overall favorable outcome for GSU. Of 99 alleged infringements, Judge Evans found only five were infringing. Due in part to this lopsided finding, Judge Evans designated GSU as the prevailing party and awarded the university substantial costs and attorney’s fees.\textsuperscript{190}

On reflection, however, Judge Evans’ opinion leaves much to be desired, despite the favorable outcome for GSU. Most importantly, her reasoning (and the appellate court’s reasoning, in turn) was dramatically skewed by her hasty conclusion that because the uses involved “mirror-image” copying, none of GSU’s uses were transformative.\textsuperscript{191} Judge Evans also found, based on her own examination of the books, that students were among the “target market” for all of the works at issue in the litigation.\textsuperscript{192} While the consequences may not have been as stark as in the coursepack cases, this finding led to Judge Evans’ requirement that the amounts used be “decidedly small” in order to be favored under the third statutory factor.\textsuperscript{193} Judge Evans

\textsuperscript{188} \textit{Id.} at 1225 (“Because the facts of this case so clearly meet the criteria of (1) the preamble to fair use factor one, (2) factor one itself, and because (3) Georgia State is a nonprofit educational institution, factor one strongly favors Defendants.”)

\textsuperscript{189} See, e.g., \textit{id.} at 1229 (“[T]he Guidelines’ absolute cap, which would preclude a use from falling within the safe harbor solely on the basis of the number of words copied, is not compatible with the language and intent of § 107.”); \textit{id.} at 1234 (finding the Guidelines’ approach “so restrictive [that it] undermines the teaching objective favored by § 107.”); \textit{id.} at 1234-35 (“(the Guidelines’) idea that professors be prohibited from unlicensed use of the same chapter from one academic term to the next is an impractical, unnecessary limitation.”).

\textsuperscript{190} See 17 U.S.C. § 505 (“In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party…. Except as otherwise provided by this title, the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”)

\textsuperscript{191} Judge Evans never actually grapples with the question of whether GSU’s uses are transformative, but simply asserts in two places that the uses are non-transformative. See Cambridge Univ. Press, 863 F. Supp.2d at 1224 (“the non-transformative nature of the excerpts (mirror images of parts of the books)”); \textit{id.} at 1232 (“this case involves only mirror-image, non transformative uses”). Judge Evans was never presented with arguments from GSU about the potential transformativeness of the contested uses, at least in part because the GSU defendants’ use of a fair use checklist had placed them in an awkward position. The checklist includes a checkbox for teachers to indicate whether they believed their uses are “transformative.” People familiar with the litigation have informed me that a clear majority (if not all) of the checklists completed for uses at issue in the case indicated that teachers did not believe their uses were transformative, which created a paper trail that the GSU defense team decided not to contradict. Footnote 11 of Campbell and the statutory reference to “multiple copies for classroom use” also played a role in encouraging GSU to pursue a non-transformative defense. Given the limited training they received, it is possible that the teachers who filled out the checklist did not understand what “transformative” means in the copyright context; without further guidance (or with limited guidance), they may have assumed it meant literal alteration of the original. In any event, the defense team decided not to press the transformative use question.

\textsuperscript{192} \textit{Id.} at 1211.

\textsuperscript{193} \textit{Id.} at 1232 (“Taking into account the fact that this case involves only mirror-image, nontransformative uses, the amount used must be decidedly small to qualify as fair use.”) Judge Evans did not, in fact, require that every use be “decidedly small” in order to qualify as fair; rather, she weighed the third factor against GSU in cases where the amount exceeded her quantitative limits. Several ‘excessive’ uses were
also gave substantial weight to publishers’ allegations of lost revenue under the fourth factor, though she conducted a much more searching inquiry into the question of market harm than any of the coursepack cases had done.\(^\text{194}\) In the end, because GSU’s uses had been relatively modest and the publishers had not in fact developed robust licensing options for many of the works at issue, GSU prevailed. Not surprisingly, the publishers appealed.

Although the 11th Circuit reversed and remanded the decision for other reasons,\(^\text{195}\) its opinion approved key aspects of Judge Evans’ fair use analysis. In particular, the majority agreed that neither the coursepack cases nor the Classroom Guidelines should be given much weight, if any, in deciding cases involving non-profit educational uses like GSU’s. The coursepack cases had been about for-profit copy shops, not non-profit educators, and the court found that fact to be decisive.\(^\text{196}\) Like Judge Evans, the 11th Circuit found that the first factor should favor fair use for all of GSU’s uses due to their non-profit, educational nature.\(^\text{197}\) As for the Classroom Guidelines, Judge Tjoflat found several reasons to limit their influence: “they (1) were drafted by partisan groups, (2) ‘state the minimum and not the maximum standards of educational fair use under Section 107’, and (3) adopt the type of ‘hard evidentiary presumption[s]’ with regard to which types of use may be fair that the Supreme Court has since repeatedly warned against.’\(^\text{198}\) The court also approved Judge Evans’ searching exploration of the fourth factor, including placing the initial burden of production on the publishers as to the likelihood of cognizable market harm.\(^\text{199}\)

The 11th Circuit also affirmed the least salutary aspect of Judge Evans’ opinion, finding that GSU’s uses were not transformative. The court declined to reverse Judge Evans’ holding that GSU’s use of the excerpts was for one of the original intended purposes of the underlying works, as “reading material for students in university courses.”\(^\text{200}\) Judge Tjoflat relied on this factual finding in holding that GSU’s uses were not transformative, and that therefore “the threat of market substitution is significant.”\(^\text{201}\) The appellate court also agreed with Judge Evans that

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found to be fair use due to the countervailing weight of the other factors favoring the university. See, e.g., id. at 1263–64 (finding use of two chapters fair due to minimal harm to Plaintiffs’ market).

\(^{194}\) Id. at 1239 (holding “factor four weighs heavily in Plaintiffs’ favor when permissions for digital excerpts are readily available.”).

\(^{195}\) The court strongly disagreed with the “mechanical” nature of Judge Evans’ approach to the four factors, including her use of a simple binary rule for the second factor (use of “non-fiction” works favors fair use), a quantitative threshold for the third factor (10% or 1 chapter, depending on the length of the book), and her seemingly “arithmetic” approach to weighing the factors together, which awarded victory to whichever side was favored by more factors. The court also held that Judge Evans should have given the fourth factor more weight in light of the non-transformative nature of GSU’s uses.

\(^{196}\) Cambridge Remand at 1264 (noting that the coursepack cases had been brought against for-profit copy shops, not educators themselves); id. at 1267 (“Defendants’ use is not fairly characterized as “commercial exploitation.”); id. at 1275 (holding that the district court “properly declined to tie its analysis under the third factor to the Classroom Guidelines or to the coursepack cases”).

\(^{197}\) Cambridge Remand at 1267.

\(^{198}\) Id. at 1245, n. 12 (quoting the Classroom Guidelines and Campbell, 510 U.S. at 584).

\(^{199}\) Id. at 1281.

\(^{200}\) Id. at 1263.

\(^{201}\) Cambridge Remand at 1267.
the lack of literal alteration should be held against GSU in the transformative use analysis, although the 11th Circuit acknowledges that such alteration is not required for a finding of transformativeness.

The future of non-transformative educational fair use after the GSU decision seems quite uncertain. The 11th Circuit’s vision of a fair use balancing test has a strikingly schizophrenic quality. While educators may take solace that the first factor will consistently favor non-profit, educational uses, from there things get considerably less predictable. The second factor, the nature of the work used, which the district court had held would consistently favor fair use of non-fiction works, should instead be neutral or even weigh against fair use for works that “contain[] evaluative, analytical, or subjectively descriptive material that surpasses the bare facts, or derive from the author's own experiences or opinions.” The most alarming aspect of the analysis is that where uses are non-transformative the fourth factor “looms large” and should be “afford[ed] relatively great weight” in the overall analysis. On the other hand, the fourth factor should recede in cases where no licensing market yet exists, but could presumably surge forward again if such a market is developed.

The 11th Circuit’s analysis of the third statutory factor, “the amount and substantiality of the portion used,” simply acts as an amplifier of either the first factor or the fourth factor, depending on the availability of a license. The court explains that a use will be favored under the third factor if “the amount taken is reasonable in light of the purpose of the use and the likelihood of market substitution.” For transformative uses, this inquiry will yield a single coherent result, as any use that is appropriate to a transformative purpose is by definition non-substitutional. For non-transformative uses, however, there is room for conflict. For uses where a licensing market for educational use of excerpts is readily available, the use will clearly be substitutional, even if (or perhaps especially if) the use is appropriate to the educational purpose. It is unclear what a court is to make of the third factor in such circumstances, which are likely to be increasingly common as licenses for electronic use become available. The ambiguity within each factor, the equipoise across factors, and the court’s insistence that the final weighing of the factors must be “holistic,” “carefully balanced,” and not “mechanical,” combine to leave educators in a deeply uncertain position. The safe response may well be to forego fair use whenever there is a license available, and to tread very carefully indeed even when there is not.

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202 *Id.* at 1262 (“The excerpts of Plaintiffs' works posted on GSU's electronic reserve system are verbatim copies of portions of the original books which have merely been converted into a digital format.”).
203 *Id.* ("Even verbatim copying ‘may be transformative so long as the copy serves a different function than the original work.’") (quoting *Perfect 10*, 508 F.3d at 1165 (9th Cir. 2007)).
204 *Id.* at 1283. At the same time, like all courts, the 11th Circuit gives the second factor “comparatively little weight.” *Id.*
205 *Id.* at 1275.
206 *Id.* at 1279.
207 *Id.* at 1271, quoting Peter Letterese And Associates, Inc. v. World Inst. Of Scientology Enterprises, 533 F.3d 1287, 1314 (11th Cir. 2008)(emphasis added).
208 See, e.g., *Authors Guild v. HathiTrust*, 755 F.3d at 99 (“[U]nder Factor Four, any economic ‘harm’ caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work.”).
Several amici who filed on the transformative use issue prompted the 11th Circuit majority to expressly disclaim any intent to prejudge future transformative uses. In footnote 21, Judge Tjoflat issues the following acknowledgment: “Amici point out that excerpts in an electronic reserve system—like the ones at GSU—could be used for a different function than the original…. We need not rule on whether such uses could ever be transformative, because the question is not before us.” Footnote 21 leaves the door open for a kind of fair use argument that could afford educators far greater flexibility, predictability, and scope in exercising their fair use rights.

IV. Varieties of transformative teaching

Use of copyrighted materials for teaching can be transformative in precisely the ways described by scholars and favored by courts. This section describes several categories of teaching uses that courts should bless as transformative. The typology of teaching uses presented here is by no means exhaustive, nor will it always be perfectly clear which category best describes any particular use. Film and literature courses that explore thematic trends may also have a heavy theory component, for example, making the distinction between Section IV.A.3. and Section IV.B.2. less clear. The categories below are only meant to be illustrative, both of the number and variety of teaching uses that can be characterized as transformative and of the ways of supporting and defending that characterization. As in every area of law, the facts of any particular case will be vital and the case theory must follow where they lead. More examples of transformative

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209 The issue was raised most clearly and forcefully in a brief prepared by David Hansen, Peter Jaszi, Pamela Samuelson, Jason Schultz, and Rebecca Tushnet, which argued that GSU’s uses were transformative because they present the materials for new purposes. Br. of Academic Authors and Legal Scholars as amici curiae, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2259697. The Library Copyright Alliance made a similar argument as part of its brief, which I helped to draft. Br. amici curiae of Amer. Library Assoc. et al. at 11-15, available at http://www.librarycopyrightalliance.org/bm-doc/gsu-amicus-brief-25apr13.pdf. A brief prepared by Jack Lerner and students from the Intellectual Property and Technology Law Clinic at the University of Southern California made the related point that even if GSU’s uses are not transformative, other educational uses surely are and the court should not prejudge those cases. Br. of AAUP et al. as amici curiae, available at, http://iptlc.usc.edu/wp-content/uploads/2013/04/GSU-Amicus-Brief-AAUP-et-al.pdf. The court’s holding seems to follow most clearly from this last brief, though it is not cited.

210 Cambridge Remand at 1263, n. 21. Notably, the court cites the amicus briefs of the Library Copyright Alliance and of the Association of Southeastern Research Libraries for examples of future uses that could turn out to qualify for transformative treatment. Both briefs also cite the Code of Best Practices in Fair Use for Academic and Research Libraries, which includes a principle describing fair use in sharing resources online, grounded in part in a transformative use rationale. Association of Research Libraries, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 13 (2012) (“Most of the information objects made available to students, in whatever format, are not originally intended for educational use.”). Obviously the ARL Code assumes a factual predicate that the court rejected in the GSU case: that teachers use works in ways they were not originally intended.
teaching practices can be found in the best practices statements published by a variety of educator communities.\(^{211}\)

One caveat applies to each of these example uses, which is that the amount of the work used should be appropriate to the transformative purpose. Both Samuelson and Netanel have shown that a valid transformative purpose can be undermined by use of an excessive amount of the original work.\(^{212}\) “Appropriate amount” is an imprecise standard, but it indicates a flexible space where courts are likely to defer to a fair user with a compelling transformative purpose. The amount can be more than is strictly necessary,\(^{213}\) but at a certain point the purpose no longer justifies the taking. Indeed, as Judge Leval argues, courts may look to the amount taken as an additional indicator of whether the use truly is transformative; taking too much supports an inference that the use is in fact merely substitutional or otherwise illegitimate.\(^{214}\)


\(^{212}\) See Samuelson, supra n. 94 at 2259 (describing uses for news reporting that ‘systematically took too much’ of the original works); Netanel, supra n. 18 at 745 (the question under the third factor is “whether the defendant used more than what was reasonable in light of the expressive purpose driving the transformative use.”).

\(^{213}\) See, e.g., Campbell, 510 U.S. at 588 (fair user “must be able to ‘conjure up’ at least enough” to achieve transformative purpose); Cariou, 714 F.3d at 710 (“In any event, the law does not require that the secondary artist may take no more than is necessary.”).

\(^{214}\) See, e.g., Warner Bros. Entertainment, Inc. and J. K. Rowling v. RDR Books, 575 F.Supp.2d 513 (S.D.N.Y. 2008) (finding some reproduction of passages from the Harry Potter novels in a follow-on “lexicon” were too lengthy to serve an explanatory purpose, and were likely used instead for their entertainment value); Leval, supra n.18 at 1123.
A. Orthogonal teaching

Although Netanel and Reese have shown that all transformative use involves use for new purposes, Samuelson’s distinction between “orthogonal” and “productive” uses is a helpful one. For one thing, orthogonal transformative uses can easily withstand challenges based on amount taken and market harm, as completely novel purposes often require use of entire works and such uses are by definition far outside the markets that rights holders “would in general develop or license others to develop.”215 Productive uses, on the other hand, are often made for purposes similar to the purposes of the original works and must be more carefully tailored to avoid claims of excessive taking and market harm.216

Many teaching uses of copyrighted material are for starkly different purposes from the authors’ or publishers’ original intended purposes. Many such uses also involve creativity shifts (use of creative works for informative purposes and vice versa), which Sag has shown to be highly predictive of a finding of fair use.217 A few orthogonal teaching uses can also be characterized as non-expressive, a category of transformative use that has consistently prevailed in fair use challenges.

1. Using media about current events as problems or illustrations.

Connecting the themes or concepts of a class to current events can be a powerful pedagogical tool. When historical political rivalries are revived on the contemporary world stage,218 a controversy over planned alterations to a classic television show raises the specter of moral rights,219 or an extreme weather event reveals the potential consequences of ongoing environmental change,220 teachers of history, copyright law, and climate science, respectively, have an opportunity to bring their lessons to life. Whether teachers make the connection themselves as part of a lecture, task their students with identifying the connection as an exercise, or simply email a news story with a subject line explaining in brief the relevance to class, the news becomes subservient to the broader concepts of the classroom. Importing the news of the day into the classroom is therefore an orthogonal use. The stories are repurposed and recontextualized, made into exemplars or problems rather than read for entertainment, and

215 Campbell, 510 U.S. at 592.
216 Samuelson, supra n. 94 at 2569 (“The overwhelming majority of the productive use cases turn on whether the subsequent author took too much from a first author's work or invaded a core licensing market.”).
217 Sag, supra n. 85.
consumed in a distinct and specialized discursive community\textsuperscript{221} rather than as part of the general consuming public. In this context, use of an entire news story will often be appropriate to fully convey the lesson.

2. **Teaching history with primary materials.**

Teaching history and related subjects with primary historical documents such as newspaper and magazine articles, advertisements, manifestoes, and even popular entertainment is an orthogonal use of those materials and should be considered transformative use. Use of entire works will often be appropriate, here, as works will often need to be encountered in their entirety to convey a full understanding of the historical period. Analogies to case law abound. For example, just as the Council on American Islamic Relations reproduced radio programs by Michael Savage as evidence of their claim that the program was bigoted,\textsuperscript{222} a professor of European history might share with students copies of F.T. Marinetti’s *Futurist Manifesto* (first published in the Italian newspaper *Le Figaro*) as evidence of the embrace of violence among certain parts of the Italian artistic and cultural scene in the years preceding the rise of fascism. Similarly, a course on the history of the American South might assign readings from contemporary news coverage of lynchings.\textsuperscript{223} In this context, materials are not encountered for aesthetic enjoyment, entertainment, information about the news of the day, or otherwise for their own sake, but rather as evidence or artifacts of the spirit of a different time.

3. **Using expressive works to teach theories and methods of critical thought and analysis.**

While some courses in film or literary studies take the works themselves as their primary subject, with the goal of acquainting students with classics or masterpieces in a given medium or movement\textsuperscript{224} others aim primarily to teach critical theories and methods. These courses equip students to encounter new works with effective analytical tools relied on by professionals in their chosen field. Classes in theory will often take a “text” as the raw material and subject it to analysis through the lens of several schools of thought or critical methods. Students learn facility with critical perspectives and modes of analysis by practicing their application to expressive works. When a teacher makes a work available to students so that it can be the subject of such an

\textsuperscript{221} See Heymann, *supra* n. 176 (using the concept of distinct discursive communities to help define transformative use).

\textsuperscript{222} Savage, 2008 WL 2951281 (N.D. Cal. 2008).


\textsuperscript{224} So-called “great books” curricula sometimes take this approach. See, e.g., Harrison Middleton University Curriculum, http://www.hmu.edu/curriculum/ (“Students acquire knowledge from the wisdom of thirty centuries contained in the works by world famous authors in imaginative literature, natural science, philosophy and religion, and social science.”)(last visited Sept. 20, 2014). A similar, but distinguishable, category of uses is described in Section IV.B.2. below. Unlike the pure “great books” approach, productive uses take existing works as a starting point for discussion of larger themes, and are not necessarily committed to any judgment of the overall merit or social value of the works studied.
analysis, that use is orthogonal to the subject work’s original purposes, which are typically to entertain, inform, persuade, and so on. Such a use is arguably a “creativity shift” in Matthew Sag’s terminology, as the texts studied are often creative, while the analysis (orally in lecture and discussion and in written assignments) is factual.

Note that the works of critics or scholars describing the relevant methods or theories would not be used orthogonally when assigned as reading in this context. Reading Jacques Derrida in a class on literary theory, for example, will not be orthogonal to the original purpose of Derrida’s work. Rather such works would be read for precisely the reason they were written, to facilitate comprehension of the theory or method at issue.

4. Teaching with archival materials.

Archives, which collect the artifacts of the daily lives of individuals, families, and institutions, are a rich source of raw material for teaching. From corporate records to family photos, archival materials tell stories that can enhance the teaching of any subject, from history to cultural anthropology to corporate law. While the materials in archives are created for a wide variety of purposes, none of them are created with the purpose of future use in teaching. Indeed, archival materials are generally not created with any commercial or expressive purpose of the kind copyright is meant to protect. Thus, use of these materials for teaching purposes will be susceptible to a strong transformative use rationale. More and more archives seek to make their collections available to the public, or at least to educational users, to facilitate such uses.

5. Teaching skills and methods with exemplars of good and bad practice.

One effective way to teach a craft or skill is to use an existing work as an example of good or bad practice, or as raw material for critical assessment of the work’s relative strengths and weaknesses. Persuasive writing, news reporting, cinematography, documentary filmmaking, and graphic design are all examples of subjects that could be taught at least in part by critical examination of exemplary works. In these cases the works will have been created for orthogonal expressive purposes (to persuade, entertain, and so forth), so their use as models for teaching will be transformative. A creative writing class that attends to the inventive structure of a short story is not consuming the story for its original aesthetic purpose, but rather is using the story as a model of excellence (or of mediocrity or failure). A persuasive writing class that dissects an op-ed column to identify logical fallacies is not consuming the column as originally intended (one hopes), but is focused instead on aspects of the work the author likely hopes will evade his audience’s attention. Such uses are therefore very likely to be transformative and fair.

6. Teaching technological tools and content manipulation skills using raw material from existing works.

The work of many creative disciplines involves assembling, editing, and manipulating existing expressive material to create a new finished product. Video editing, graphic design, music composition, web design, journalism, and visual art are all disciplines where students may need to learn methods and theories, technological tools, and other skills for creating new works
built from existing materials. In the professional context such uses may typically be licensed or made collaboratively with authors, e.g., a film editor employed by a film studio produces a final product from raw footage with the studio’s permission. The educational context may not afford students an opportunity to work in collaboration with the kinds of authors or rights holding companies that will be part of the professional setting. In these cases, students may practice their skills using raw material available in the mass market. When students use existing creative works as inputs for learning these skills, they are engaging in an orthogonal transformative use, so long as the purpose is to learn methods and tools in the classroom and the resulting work is used only in an educational context. Use of such works beyond the educational context may no longer constitute fair use.

B. Productive teaching

Samuelson argues that courts consistently favor “productive” uses of existing works (or, more often, parts of works) to facilitate critical analysis or commentary by a subsequent author in a subsequent work of authorship, so long as the amount taken is appropriate and the use doesn’t intrude on a relevant licensing market. Netanel and Reese have shown that creation of a new work is neither necessary nor sufficient for finding transformative use, so it makes sense to broaden the “productive use” category to include any use whose primary purpose is criticism or commentary about the work itself, regardless of whether it results in the creation of a new work. This broadening is consistent with Leval’s original characterization of transformative uses as ones that involve “creation of new information, new aesthetics, new insights and understandings,” none of which require the literal creation of a new work.

Productive teaching can be distinguished from orthogonal teaching because productive uses involve teaching that is primarily about the works themselves, rather than using the works to teach about some other subject. While the works themselves may be the subjects of study,

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225 Some educators teach fair use and copyright as part of their courses on professional skills and insist that any work their students do should be publishable as a professional work product, i.e., that all class work should be done as if it were going to be published professionally, up to and including obtaining any permissions that a professional would have to obtain. See, e.g., CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION, http://www.cmsimpact.org/fair-use/best-practices/code-best-practices-fair-use-media-literacy-education#five. While this is a valid choice in many contexts, there are certainly teaching contexts where expecting students to meet such standards is too costly or otherwise impractical, and learning should not be impeded.

226 This is not to say that any publication of works created in this way will cease to be fair use. Publication of class projects in online portfolios to show student skill and achievement in a given class or course of study, for example, is a legitimate extension of the classroom exercise and is itself an orthogonal use—its purpose is to advertise the student to would-be employers, graduate programs, and the like, as well as to integrate learning. See, e.g., Auburn University Office of University Writing, Scholarship on ePortfolios, https://fp.auburn.edu/writing/eportfolio-project/eportfolio-research/ (last visited July 29, 2014).

227 Samuelson, supra n. 94 at 2555 ff.

228 Leval, supra n.18 at 1111.

229 That said, some productive teaching uses do involve the creation of new works of authorship, such as PowerPoint slides, video lectures, and the like; such uses will perhaps be even more likely to benefit from the generally favorable treatment that Samuelson describes.
productive teaching uses the works to create new information, insights, and aesthetics, Leval’s hallmarks of transformative use.

1. Teaching lectures with third party media.

Teachers add extensively to the expressive value of the materials they use in their lectures: they provide conceptual scaffolding so that students can better understand new material; they give social, historical, political, and artistic context that illuminates the objects of study; they bring their own critical perspectives to bear; and more. A good lecture is a carefully planned performance that weaves together disparate materials to serve a variety of learning goals, adding at least as much value to incorporated third-party material as any critical essay would, and warrants the same deferential treatment. Lectures that borrow from creative, fictional works in service of a factual presentation will constitute “creativity shifts.”

This is one area where there is case law directly on point. In Sundeman v. Seajay Soc’y, Inc., the Fourth Circuit ruled that a scholar’s use of portions of an unpublished manuscript in the context of a lecture presentation was transformative. The scholar, Dr. Anne Blythe, had written a critical essay and given an oral presentation on a manuscript of an unpublished work called Blood of My Blood. The court reasoned that, “A reading of Blythe's paper clearly indicates that she attempted to shed light on Rawlings’ development as a young author, review the quality of Blood of My Blood, and comment on the relationship between Rawlings and her mother. The ‘further purpose’ and ‘different character’ of Blythe's work make it transformative, rather than an attempt to merely supersede Blood of My Blood.”

The Copyright Office has also recognized that use of film clips for educational purposes constitutes a fair use. It did so in the context of its triennial inquiry into what sorts of uses might be unduly burdened by the Digital Millennium Copyright Act’s ban on circumvention of technical protection measures. DVDs are protected by a form of encryption that must be circumvented by teachers who wish to copy the digital video files to create a clip compilation for class. Because this circumvention would otherwise trigger DMCA liability, teachers have sought and received an exemption in several successive Copyright Office proceedings. The grant of an exemption from DMCA liability requires finding that the contemplated use is non-infringing.

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230 Section 110 of the Copyright Act permits performance and display of copyrighted works in the context of classroom teaching, but its protection is far from complete. For example, the creation of a compilation of film clips for teaching may itself be an act of infringement independent of the permitted in-class performance. Similarly, a set of PowerPoint slides reproducing entire works of fine art for use in an art history lecture could be an infringing derivative work. Also, the scope of Section 110’s protection for teaching online and in other less traditional contexts is uncertain. Luckily, these uses should fall squarely within the category of productive transformative use.

231 142 F.3d 194, 202 (4th Cir. 1998).

232 Id.

2. **Teaching themes, genres, or stylistic movements in music, film, or literature by assigning outside reading of exemplary works.**

Courses about music, film, or literature are often organized around themes, genres, or stylistic movements. The particular works studied in such courses are not necessarily as important as the characteristics they share, the trend they collectively illustrate, and so on. Teachers choose works for study in these courses for a variety of reasons, many of which will have little to do with the original intentions of the works’ creators or publishers.

For example, one professor of comparative film might have his students stream the library’s copy of the 1933 film *King Kong* as part of a comparative film class about the depiction of Africa in American cinema, while another professor might assign the same film for a class on special effects, and a third for comparison and contrast with subsequent remakes. In each case the film is no longer consumed for its entertainment value (the original purpose of its creators), but is instead recontextualized, used by the teacher as evidence or illustration of a broader theme, style, or genre. A student’s purpose in watching the film, and therefore her experience of the film, will be different in each case, as she will attend to certain aspects of the film and ignore others as appropriate to the learning goals of the class. The film will in turn shape the way she understands the concepts and vocabulary she learns in class. The use will, accordingly, be highly productive, and highly transformative.

Similarly, a professor of comparative literature might post the full text of Leroi Jones’ 1964 one-act play “Dutchman” to a course website for students in a course on black nationalism in American literature, or she might post the play for a course on symbolism in 20th Century drama, or she might use it to show the import and influence of Richard Wagner’s opera *The Flying Dutchman*, from which the play takes its name. Again, in each case the work is not read for its own sake, for entertainment, or for the dramatic provocation that its author intended, but rather as part of a broader construct chosen by the teacher. That construct will inform the student’s experience of the work, as the work will inform the student’s learning of the construct. Again, the use is highly productive and transformative.

Such uses are productive because the teacher adds new insights and new meaning to each work, placing them into the new context created by the unifying structure of the course. She can do so by placing the work into conversation with other works, with critics, with students, and with the teacher herself. She can also create conceptual scaffolding for students to use to surface meanings or qualities that are not apparent on the surface of the work, as appropriate to the course. Finally, a teacher can assign her students to make additional productive uses of the works by drawing their own critical conclusions, and perhaps embodying those conclusions in an essay, research paper, or other expressive work. Taken together, these kinds of activities are at the heart of what Leval describes as activities that serve the very purposes of copyright.

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234 Almost everything in “Dutchman,” from the speeding subway train that is its setting, to the apple eaten by its female lead, is freighted with symbolic meaning. See Julian C. Rice, *Leroi Jones’ “Dutchman”: A Reading*, 12 Contemp. Lit. 42 (1971).
3. Assembling galleries, playlists, and other large collections of representative works to facilitate student exposure to genres, movements, styles, and other shared characteristics of expressive works.

Sometimes, in addition to assigning particular works or parts of works for students to read and discuss, teachers assign students to browse and sample from a more expansive list of works that share a given characteristic in order to give students the opportunity to see relevant commonalities and differences for themselves. Collections of images of art from a particular historical period, or streaming audio of musical compositions in a particular style or genre, for example, can provide students with the raw material for a unique learning experience that combines interactivity, open-ended exploration, and self-guided inquiry. Selecting and arranging these collections can involve substantial intellectual investment from the teacher (or the library curator), and the insights that emerge from free exploration of a sufficiently rich collection will quickly outstrip the value of any particular work in isolation. Universities are already using art image galleries and streaming music collections in this way, and the transformative rationale is compelling. Like the Bloomberg subscriber in Swatch or the Grateful Dead aficionado in Bill Graham Archives, the student who browses a gallery of this kind has a completely different purpose, and a different kind of intellectual and aesthetic experience, than the original intended audience.

V. Non-transformative educational fair use.

It is tempting to see transformative use as not only the heart of the fair use doctrine, but the whole of it. While the tendency in the first two decades after 1976 was to over-emphasize market effect for teaching uses, the total elimination of market effect as a consideration in fair use decision making would curtail valuable uses, including many educational ones. It is quite possible that Judge Evans got things basically right as regards GSU’s uses, i.e., that many of the excerpts at issue in the GSU case were not used in a transformative way, but were still used fairly given the importance of education and the anemic market for electronic excerpts. Because the issue of transformative use was not litigated, we may never know. In any event, in reviving transformative use for education, teachers need not abandon market-centered arguments that may still be available to them. This is especially true given the courts’ more nuanced and balanced approach to market inquiry in the GSU case.

The difference between a transformative use argument and a market-centered argument could be characterized as the difference between “justification” and “excuse.”235 This is a point on which Wendy Gordon and Pierre Leval might agree. Judge Leval argues that “the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative.”236 Transformative uses are justified because they serve the goals of copyright. Gordon argues that when uses are justified, we want others to emulate them. It is normatively right that such uses be conducted without payment or permission. When uses are excused, however, there is a sense of “if only”—if only circumstances were different, there would be no

235 Gordon, supra n. 54.
236 Leval, supra n.18 at 1111.
need for fair use. In excused cases, we might prefer that the ordinary system of seeking and paying for permission could operate, but we acknowledge that, for now, they cannot. The HathiTrust and GSU cases show both the potential strengths and weaknesses of the market-centered, “excused” incarnation of fair use.

Although the appellate decision in HathiTrust is a near-total endorsement of district court Judge Baer’s ultimate conclusions about the fairness of the uses at issue, it makes some important analytic distinctions that push back on the district court opinion. In particular, Judge Parker throws cold water on Judge Baer’s declaration that “I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants’ [mass-digitization project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA.”

Although Judge Baer did not say that the value of the HathiTrust’s use is sufficient to make the use transformative, Judge Parker cautions that “[a]dded value or utility is not the test.” As described in Section II.C. above, Judge Parker goes on to apply the correct test for transformative use—did the use “serve[] a new and different function from the original work”—and finds most of HathiTrust’s uses to be transformative.

For one of the HathiTrust’s uses, however, the court finds that the use is non-transformative—but still fair. Some university members of the HathiTrust provide print-disabled patrons access to digitized versions of books from their collections, a revolutionary development that makes literally millions of works available for the first time to people that have endured a “book famine” for centuries due in part to publishers’ unwillingness to make books available in accessible formats. Judge Baer interpreted this widespread and systematic exclusion to mean that “the intended use of the original work” for purposes of transformative use analysis was “enjoyment and use by sighted persons.” Relative to that purpose, creating new formats that make the works accessible to an unintended audience is transformative, and Judge Baer so held.

237 Gordon, supra n. 54 at 152.
238 Id.
239 HathiTrust, 902 F. Supp. 2d at 464.
241 Id.
242 See Accessibility | HathiTrust Digital Library, http://www.hathitrust.org/accessibility (last visited July 31, 2014). At the time of the decision only the University of Michigan was providing this kind of access, but more HathiTrust partners are likely to do so now that the program has survived judicial scrutiny on appeal.
244 HathiTrust, 902 F. Supp. 2d at 461.
Judge Parker took a more expansive view of the purpose of the works, taking the plaintiffs at their word that they “write books to be read (or listened to),” without regard to audience. Because making accessible copies available to the general university community merely facilitates reading the books for any general purpose, the HathiTrust “appears, at first glance, to be creating derivative works over which the author ordinarily maintains control.” This is not a transformative use. In the ordinary case, the market should function so that authors (and their assignees) control and profit from the creation of derivative works that serve the same basic function as the protected work. Indeed, groups representing the print-disabled have said repeatedly and in many contexts that they would prefer to be served by the ordinary market rather than rely on “charity” in the form of special programs that provide free services.

However, the court observes that providing accessible copies to the print-disabled is strongly favored by public policy, citing Supreme Court precedent, legislative history of the 1976 Copyright Act, and the variety of other laws favoring accommodation for the disabled. Accordingly, the court finds that the purpose is a favored one. Notably, the legislative history and the Supreme Court both proclaim that providing accessible works to the blind is fair use without any explicit reference to the market as a limiting factor. Nevertheless, the court finds that the fourth factor also favors the use given the near-total failure of the market to serve this audience relative to the HathiTrust’s ability to provide accessible copies of millions of books.

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245 HathiTrust, 755 F.3d at 101. Not coincidentally, such an expansive definition of purpose threatens to shrink substantially the domain of transformative use. Even an excerpt reprinted in a book review is “read,” after all. In reality, it is the breadth of the HathiTrust’s purpose that was decisive, here. Courts generally ask more probing questions about the secondary user’s purpose relative to the original intended purpose, but in this case the secondary use is intentionally broad: full text access for any purpose a print-disabled user might have, from scholarship to leisure, just as printed books are made available for any purpose to sighted library patrons. When courts do invoke new audiences in finding transformative use (in Swatch and Cariou, for example), it is generally as evidence for a novel purpose (objective financial reporting and high-end appropriation art, respectively). In the absence of a genuinely novel purpose, it makes more sense to frame the fair use inquiry in terms of market failure.

246 Id.

247 See, e.g., Marc Meurer, The Shoeshine, Blindness, and the NFB, THE BRAILLE SPECTATOR (Fall 1985), https://nfb.org/images/nfb/publications/bm/bm85/bm8512/bm851213.htm (“I am sure that we will find a way for people to realize that blindness does not require free shoeshines and that equality requires the individual to pay for service given.”); Zach Shore, Free Rides for the Blind Cost Us Too Much, THE BRAILLE MONITOR (March 1990), https://nfb.org/images/nfb/publications/fr/fr12/issue1/f120105.html (“We can never hope to gain equal status in society if we are not willing to take on our financial obligations, and that means paying our fair share along with everybody else.”). Of course, libraries lend books for free to all patrons, so to exclude the print disabled based on market availability would not be equal treatment. On the other hand, copies provided to the print disabled are often transferred completely, not loaned.

248 HathiTrust, 755 F.3d at 102.

249 Id. At the same time, the court’s inquiry into the robustness of the market for accessible formats is cursory, barely more than a single paragraph of conclusory statements. See HathiTrust 755 F.3d at 103. Judge Parker simply notes that authors often forego royalties from specialized formats and that a relatively few books are available to lend in that format. See also, Marc Meurer, Historic Chance to End the Book Famine Must Not Be Lost, June 25, 2013, https://nfb.org/blog/vonb-blog/historic-chance-end-
The court does not condition its finding of fairness on the absence of a market option, nor does it advise the HathiTrust or its partners that future conduct may cease to be fair if market options come online.

Like Judge Parker, Judge Evans of the GSU case finds ample evidence that education is an activity strongly favored by public policy. While Judge Evans relies on the text of the fair use statute itself, the legislative history, provisions elsewhere in the Copyright Act, case law, and related legislation all help to demonstrate the strong public policy of promoting access to education and educational materials. The amicus brief submitted by the American Council on Education and other higher education groups recounts at length the evidence that education is favored by policy. By itself, however, this finding would not be enough to justify a finding of fair use. Education is a major intended market for some authors and publishers; a blanket right to freely copy and distribute anything for educational purposes would cause that market to collapse, depriving teachers and students of useful resources created expressly for support of teaching.

Judge Evans takes a vastly more fine-grained approach to the question of market effect for allegedly non-transformative uses. Unlike Judge Parker, she does not simply observe that despite the promises of licensing agents like the CCC, and the warnings of copyright scholars, licenses for digital educational use are not readily available for huge swaths of relatively mainstream content, much less for ephemera or out-of-print works. Instead, she goes work-by-work to ask whether in each particular instance unlicensed use for a favored purpose nevertheless had encroached unacceptably far on the market for the work.

book-famine-must-not-be-lost (“Even in the United States, only 5 percent of all printed materials are estimated to be accessible to the blind and print disabled.”)
251 See supra nn. 30-36 and accompanying text.
252 Id.
253 See supra nn. 62-66 and accompanying text.
254 See e.g., Cambridge, 863 F. Supp.2d at 1212-16. For example, only twelve percent of the works available for license as paper coursepacks through CCC are also available for license for electronic uses. Cambridge University Press withholds 40% of its catalog from CCC’s electronic licensing service. Of the nine million titles allegedly included in CCC’s blanket annual license program, only seventeen percent allowed use of electronic excerpts. Cambridge does not participate in the blanket license, and Oxford University Press only includes its journals, not its monographs. Librarians trying to assess the coverage of the CCC blanket license have been disappointed with the results. See, e.g., J. Christopher Holobar and Andrew Marshall, E-Reserves Permissions and the Copyright Clearance Center: Process, Efficiency, and Cost, 11 PORTAL: LIBRARIES AND THE ACADEMY 517 (2011).
Since we are now beyond the realm of transformative use, it is difficult to know on what basis we can say that Judge Evans’ granular approach is more or less reasonable than Judge Parker’s broad survey. The two activities—education and access for the disabled—do not have radically different bona fides as favored fair use purposes. If anything, teaching has the stronger claim given its presence in the preamble. In any event, the two cases show the unpredictability of a four factor analysis featuring a strongly favored purpose that does not qualify as transformative. Whether the favored purpose will be given broad latitude or placed firmly at the mercy of the market may vary from judge to judge. Still, for many educational uses the market has indeed failed. Teachers and institutions should not be stymied by the dead ends they will often encounter when they look to license materials for non-transformative uses.

VI. Conclusion

Educators have labored too long in the combined shadow of the coursepack cases, the guidelines, and various misreadings of footnote 11 of Campbell. It is perverse that a group that has been, more than any other community, the intended beneficiary of copyright and fair use, has nevertheless relegated itself to second class status as a result of the perceived weight of such slim authorities. The two key paradigms in fair use thinking—market-centered and transformative use—have been misapplied and written off, respectively, leaving teachers and educational institutions too often to the tender mercies of publishers and licensors.

I have tried to show some ways forward by revealing the forces behind this collective misapprehension and sketching the outlines of new ways of thinking about fair use in various educational contexts. The now-dominant paradigm of transformative use provides many exciting opportunities to unleash teaching from concerns about payment or permission. For uses that might not pass muster under the transformative use test, there remains substantial room to invoke market failure and favored purpose for a combined argument that can succeed just as the print-disabled community succeeded in HathiTrust. Teachers and educational institutions should make more and better use of these modes of thinking in support of their mission, and in support of the goal of the copyright clause of the Constitution: “to Promote the Progress of Science and the useful Arts.”