

FAIR USE AND EDUCATION: THE WAY FORWARD

Peter Jaszi*

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

When you read these words, federal Senior District Judge Orinda Evans of the Northern District of Georgia presumably will have rendered a decision in a publishers’ copyright challenge to Georgia State University’s electronic reserves policy – a lawsuit liberally underwritten by the Copyright Clearance Center (the rightsholders’ licensing clearinghouse tasked with extracting rents from the education “market”).¹ Although the portents are too murky to read with any certainty, some of Judge Evans’ comments during the Summer 2011 trial seem well calculated to rattle education and library professionals. One trial observer reported, for example, hearing the judge say this:

Law & Literature, Vol. 24 No. 3 (Fall 2012) © 2011 by The Cardozo School of Law of Yeshiva University. All rights reserved. Please direct all requests for permission to photocopy or reproduce article content through the University of California Press’s Rights and Per-missions website, at <http://www.ucpressjournals.com/reprintinfo.asp>. DOI: 10.1525/lal.2011.23.1.224

It seems to me in a university setting like we have here, you rarely are going to have a transformative use. ... We are talking about electronic distribution of copied materials for students to read ... it is material being used in a way the author intended for it to be.²

I'll return in a moment to the merits – or demerits – of the apparently implied analysis. But whatever Judge Evans decides (or has decided) will be only the opening act of a long and complicated show. As I'll suggest below, the courts have given us little, if any, specific guidance on how to think about fair use and education, and it seems unlikely that one district judge's opinion will be the last word. In fact, this essay suggests that – whatever the result in the Georgia State case – the education community has some urgent work to do if we really care about explaining why we sometimes should be allowed to “use” copyrighted material without getting permission or paying license fees.

But first things first: Why after all, should we care? Educational institutions do have licensing budgets, and an extraordinarily wide range of material currently is available under license, and more is (presumably) on the way. Two answers occur to me, one of which was poignantly suggested some years ago during a conversation about copyright and the classroom with K-9 teachers from a number of Philadelphia-area schools. When asked what difficulties they would foresee if they wanted video about the 60's civil rights movement for classroom use, teachers from Main Line schools responded (with quiet self-satisfaction) that they could imagine none: “We'd ask one of our school librarians, and he would pull a selection of appropriate clips from one of several licensed video databases.” Then an inner-city elementary teacher raised her hand and spoke from a place of both anger and resignation: “In my school we have no database licenses, no librarian; and – for that matter – no library. If I can't bring video I've purchased or recorded off-air into the classroom, then my kids will have to do without.” It's simple to see that licensing solutions for access to content assume the means to pay, and that assumption frequently may not be borne out in fact.

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

In any event, one thing should be clear: Educators who want to go on making their own decisions about what materials to teach (whether from or to), and who care about their students having a similar range of choices, have work to do in developing an account of how their current practices fit into the grid of legal analysis which the congress and the courts have provided us. I'll argue below, more specifically, that the courts have done fair use communities (including education) a tremendous favor by reimagining the law of fair use in terms of the "transformativeness" standard;³ that educators need to reciprocate by describing their socially and culturally valuable activities that relate affirmatively to that standard; and that this isn't, in fact, very difficult work for anyone who has ever written a syllabus or a lesson plan.

It's important to acknowledge that the Copyright Act includes exceptions other than fair use, including some specifically (and rather narrowly) designed to address the needs of education itself, and others that speak to the ability of academic and school libraries to support education. One possible response to the challenge that copyright poses for educational practice would be to ask Congress for more of the same, inviting lawmakers to carry out new, robust exceptions for things like on-line course reserves, or the appropriation of text and video in classroom remix projects, or the incorporation of content into the footnotes (or other apparatus) of term papers, theses and dissertations – all activities that (like many others) receive no specific warrant under U.S. law. This approach, I'd humbly suggest, is a non-starter. There is absolutely no indication that educators could lobby Congress to expand their specified use rights under copyright (let alone those of their students), especially in an environment where rightsholders in general appears to have taken a pledge not to support any new exceptions to copyright, no matter how well justified.⁴

Another approach would be for educators to try, once again, to negotiate guidelines around acceptable educational uses of copyrighted materials with publishers, movie studios, music publishers, recording companies, professional photographers, and all the other communities of rightsholders who assert copyright control over material of educational value. Perhaps the best that can be said for this approach is that it has been tried, and the results have not been pretty. Negotiated guidelines tend (when they can be agreed upon at all) to be strict, narrow and more focused on metrics than on the nature of the educational enterprise; worse still, rightsholders have shown an irrepressible tendency to interpret guidelines that were designed to create "safe harbors" for users as outer limits on permissible use.⁵

So, in the end, educators don't have any good choices here – except to try to make the fair use doctrine as it stands work better for teachers and students today and tomorrow. That said, there are different approaches to accomplishing this, one of which might be dubbed "educational exceptionalism" – the notion, that teaching and learning are so special, and so highly favored in copyright policy and fair use law, that it ought to be possible to get courts to cut education some special slack, beyond that which they extend to uses of third-party copyright material by filmmakers or musicians or publishers.⁶ After all, advocates of the exceptionalist approach to educational fair use remind us,

mainstream education is, along with all its other sympathetic characteristics, a quintessentially noncommercial activity (undertaken without a profit motive and generally operating in the red). That, too, counts for something in fair use analysis – or should.

But there's the rub. There's little if any evidence for the proposition that education actually enjoys (as distinct from being morally entitled to enjoy) a preferential position in the array of positive human activities that, from time to time, may lay claim to special treatment under copyright law. True enough, the very first case decided under the legal rubric of fair use, back in 1841, was (in a loose sense) education-related – a conflict between dueling biographies of George Washington -- but what's sometimes lost is that although in *Folsom v. Marsh*, Justice Joseph Story announced and applied the new doctrine, he concluded that later-coming popularizer had no defense against a claim of infringement by an earlier and more long-winded biographer.⁷ Even so, *Folsom* could have been the beginning of a string of fair use cases investigating the application of the doctrine to education and cognate practices. As things turned out, it was not – a circumstance the reasons for which I will speculate upon a bit further along in this essay.

Notably, educational use does not even figure as a privileged use category in Alan Latman's comprehensive review of the case law up to 1960.⁸ In fact, the closer twentieth century United States copyright case law got to general educational practice (though it never has gotten all that close), the less encouraging the results appear to be. In 1914, a court considered *Macmillan Co. v. King*,⁹ involving an economics tutor who had prepared study sheets that borrowed content from a popular college textbook. Although there had been no showing of economic harm to the author, the court declined to excuse the activity because it was "educational" in nature:

I am unable to believe that the defendant's use of the outlines is any less the infringement because he is a teacher, because he uses them in teaching the contents of the book, because he might lecture upon the contents of the book without infringing, or because his pupils might have taken their own notes of his lectures without infringing.¹⁰

In other words, some educational activities may be non-infringing uses, but educators don't necessarily get a general pass. The point is underlined in a more recent case, *Encyclopedia Britannica v. Crooks*, where a public school system had created a cooperative project to record educational TV programs off the air and make a library of them available to instructors. The court ruled, that this was not a clearly a fair use:

I find that the substantiality of the copying and the possible impact on the market for education films tip the balance in favor of the plaintiffs, outweighing [the school system's] noncommercial, educational purpose in copying the films.¹¹

Neither of these decisions addressed what we might think of as “core” educational use – that is, the use of copyrighted material in or around the classroom, or (as it is these days) on class-related websites.¹² But here the trail goes cold; these decisions are about all the authority there is, where directly relevant case law is concerned.

Nor does Latman’s survey of historical attempts at copyright revision reveal any congressional interest (sustained or otherwise) in the topic. A look at the prodigious legislative history of the 1976 Act doesn’t suggest that Congress had educational fair use on its mind at that time – with the singular exception being that educational photocopying was presented as a threat to publishers’ interests; indeed, it was this concern that was primarily responsible for the codification of the fair use doctrine, in its present form, in Sec. 107 of that Act. This helps explain why the only direct reference to education in the statute reads as follows: “[T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, *teaching (including multiple copies for classroom use)*, scholarship or research, is not an infringement of copyright.”¹³

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

If the cultural premises of educational exceptionalism are shaky, so are its economic foundations. The fact that a use is for “non-profit educational” purposes does carry some weight in fair use analysis; indeed, Sec. 107(1) says as much – although courts have not told us much about exactly why or how this works. We do know that, in general, “non-commercial” uses are treated with special solicitude, but just because educational activities may be conducted without a profit motive, they are not necessarily “non-commercial.” As that term is employed in copyright discourse, the “distinction [between commercial and non-commercial] is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹⁴ Self-evidently, private schools and most institutions of higher education charge tuition and fees – to say nothing of selling course materials. Perhaps even more to the point, all schools are a “market” for ever-increasing kinds and numbers of firms trading in knowledge goods. Educators’ choices about what to buy or license, and what to

use without payment, obviously can affect the bottom line of these businesses.¹⁵ This problem is only likely to increase as new business models for selling copyrighted material to schools proliferate.¹⁶

The challenge that these developments present for conventional fair use analysis is well illustrated by a case from outside the domain of education, *American Geophysical Union v. Texaco, Inc.*,¹⁷ from 1995. The big oil company had made a practice of photocopying articles from academic journals to which it subscribed when requested by any of its 400 to 500 staff scientists, and when a publisher objected the Second Circuit Court of Appeals ultimately found that the practice was not fair use. Two considerations helped to produce this decision. One was that the practice was deemed not to be meaningfully transformative: “Texaco’s photocopying merely transforms the material object embodying the intangible article that is the copyrighted original work.” The other was the existence of a “workable market” system for licensing the rights to make such photocopies (through the Copyright Clearance Center). In the absence of a finding of transformativeness, the fourth factor in fair use analysis – which looks to potential market harm from the use – dominated the court’s analysis and dictated its result. The problem this poses for educators is obvious. If educational institutions are subject to the same analysis, the proliferation of business models for licensing content to the education community will make fair use arguments for unlicensed use more and more difficult to sustain.

So what is to be done? One possibility is to persuade the courts (including, given the importance of the issue, the Supreme Court) to take educational exceptionalism seriously, making clear that serious teaching and learning enterprises deserve a special presumption of validity all their own in fair use analysis.¹⁸ Taking a risk on this kind of doctrinal innovation, I’d suggest, is a long shot at best: Not only are “test cases” in copyright law difficult to frame but – in general – they ultimately are decided using novel applications of clear *existing* law. Educators’ best chance, then, is to catch a ride on the train that is already moving – the clear trend toward transformativeness analysis.

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

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

In recent decisions, moreover, federal courts (up to and including the Supreme Court) have indicated that a critical consideration in evaluating most (if not all) of these factors, is whether the use can be considered “transformative” – whether it “adds something new, with a further¹⁹ purpose or different character....” If that is the case, the first factor can weigh in favor of fair use even if the use is “commercial” in character. Self-evidently, the second factor tends to favor transformative uses as well, precisely because they add value to the preexisting material rather than merely repeating it for its original purpose. Moreover, if the use is transformative, courts will approve the use of a greater proportion of the protected material in connection with the third factor. Finally, and crucially, if a use is a transformative one, it is likely to satisfy the fourth factor as well, because (as the federal Second Circuit Court of Appeals recently has recognized) copyright owners are not entitled to control the “transformative markets” for their works.

For an introduction to how fair use works today, it is instructive to examine the exceptionally detailed 2006 Second Circuit ruling in *Bill Graham Archives v. Dorling Kindersley Ltd.*²⁰ In that case, the defendant, Dorling Kindersley (DK) published what the court described as:

a 480-page coffee table book [that] tells the story of the Grateful Dead along a timeline running continuously through the book, chronologically combining over 2000 images representing dates in the Grateful Dead's history with explanatory text. A typical page of the book features a collage of images, text, and graphic art designed to simultaneously capture the eye and inform the reader.”²¹

The plaintiff owned the copyrights to posters and other graphic materials associated with the musical group’s historic appearances at the Fillmore Auditorium and other Bay area venues. After a negotiation to establish licensing terms for the use of these materials in the book broke down, the publisher proceeded to use seven of them without authorization, and the lawsuit followed.

The court’s analysis began with the “purpose and character” of the use, emphasizing the “transformative” way in which the publisher deployed the images; the judges agreed with the trial court that the “use of images placed in chronological order on a timeline is transformatively different from the mere expressive use of images on concert posters or tickets. Because the works are displayed to commemorate historic events, arranged in a creative fashion, and displayed in significantly reduced form, . . . the first fair use factor weighs heavily in favor of DK.”²² In other words, the recontextualization and repurposing of the quoted material made all the difference.

The “nature of the copyrighted work,” which often favors copyright plaintiffs, was judged here to be inconclusive; while the posters were creative works, the use focused on their value as historical artifacts. The “amount and substantiality” of the part used also was deemed a toss-up, since to accomplish

its transformative purpose, “DK displayed reduced versions of the original images and intermingled these visuals with text and original graphic art. As a consequence, even though the copyrighted images are copied in their entirety, the visual impact of their artistic expression is significantly limited because of their reduced size.”²³

The result was sealed by the fact that a consideration of the “effect ... upon the market” tilted conclusively for the defendant. How, it is reasonable to ask, could that have been the case when licensing the use of the images in question (and others like them) was an established part of the plaintiff’s core business? The answer : “DK’s use of BGA’s images is transformatively different from their original expressive purpose [and] [i]n a case such as this, a copyright holder cannot prevent others from entering fair use markets merely ‘by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work... [C]opyright owners may not preempt exploitation of transformative markets’ ”.²⁴ In other words, transformativeness trumped the obvious evidence of economic harm in the form of lost licensing fees.²⁵

In considering how this general analytic approach might be localized to the educational context, several observations are in order. To begin, it is clear that the transformative use rationale applies with full force to uses which repurpose copyrighted material without creating new protected works. Sec. 107 exists to promote socially beneficial uses of protected content, but benefit can come in many forms, and in fair use analysis courts value the “highly transformative” contributions represented by new indexing tools²⁶ and research databases²⁷ as much as those from parodies or scholarly commentaries. Thus, a teacher who provides students with excerpts from copyrighted material to illustrate a lesson or provoke class discussion has fair use rights coextensive with those of a textbook author (or academic critic.)

That said, not all fair use claims based in transformativeness are necessarily of the same weight or value. Just as courts recognize some uses as “highly” transformative, they label others as “less” so.²⁸ In such situations, economic considerations such as the user’s profit motive or the owner’s lost licensing revenues may loom larger than would otherwise be the case.²⁹ It would be irresponsible to suggest that the case law so far points clearly to the emergence of a “sliding scale,” as such, in transformativeness analysis. But just as there is “no bright line” between transformative and non-transformative secondary uses,³⁰ there is no obvious demarcation dividing more and less transformative ones. It follows that the educators must be prepared to give not just a good account of their activities, but the best account possible.

Clearly, courts engaged in determining how transformative a use may be are moved by the stories that users tell about their goal and purposes. So, for example, in 2006, the Second Circuit Court of Appeals decided *Blanch v. Koons*,² which concerned the artist/defendant’s incorporation of a portion of an image known as “Silk Sandals,” which had earned the fashion photographer/plaintiff a \$750 commissioning fee, into “Niagara,” a painting in the widely exhibited \$2

million, seven-painting series. Judge Sacks' opinion quotes Jeff Koons's explanation of his creative rationale for the use at length,³¹ and then defers broadly to this account of the artist's creative process:

Although it seems clear enough to us that Koons's use of a slick fashion photograph enables him to satirize life as it appears when seen through the prism of slick fashion photography, we need not depend on our own poorly honed artistic sensibilities.³²

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

Shifting to the K-12 environment, consider a teacher who wants to introduce his students to the ways in which mass media manipulate audience responses, and chooses to launch this lesson by providing the class with DVD copies of selected video. The purpose for which this material is being used is not to sell alcohol or personal care products but to illuminate the invisible processes by which commercial tastes. Without the class component, students might or might not make the connections; without the illustrations, however, they would be less likely to benefit from the lesson. Or, to bring the discussion full circle, imagine an electronic reserves system on which, at the request of the instructor in a course on Trends in Central European Political History, a college library posted articles and book chapters illustrating historiographical trends in writing about the fall of the Austro-Hungarian Empire. These are scholarly writings, being used in an academic setting, but whereas they were originally produced to provide authoritative specialist accounts of various features of the Dual Monarchy, they are being employed here for another, independently valuable educational purpose: to display the ways in which thinking and writing about the subject has changed over time.³³

These illustrations may neither be the best examples nor the best explanations of them. Ultimately, educators themselves will be the best narrators of their own practices and motives. But one thing is certain: The characterization of educational practices for fair use purposes is too important a topic to be left to judges alone. Nor should the question of how and why educational practices

constitute fair use be left until the moment of litigation. Educators should recognize that (1) they must rely on fair use for the accomplishment of their missions; (2) they cannot depend on educational exceptionalism; and (3) the turn of copyright doctrine toward transformativeness analysis presents them with an exceptional opportunity. Who better than educators themselves to describe how instructional uses of copyrighted materials add value to and repurpose copyrighted materials? It is time we started telling those stories.

* Peter Jaszi teaches copyright law at American University Law School, and writes about copyright history and theory. In 1994, Prof. Jaszi was a member of the Librarian of Congress' Advisory Commission on Copyright Registration and Deposit, and in 1995 he helped organize the Digital Future Coalition. He is a Trustee of the Copyright Society of the U.S.A., and serves on the editorial board of its journal. Since 2005, he has worked with Prof. Patricia Aufderheide of the American University's Center for Social Media on projects promoting better understanding of fair use by creators. Their book, *Reclaiming Fair Use*, was published last year by Chicago.

¹ See *Oxford U. Press. v. Becker*, No. 1.08-CV-1425-ODE (N.D. Ga.), "Order" dated Sept. 10, 2010, fn.2 ("The CCC is financing 50 % of this copyright litigation.").

² R. Robin McDonald, "Copyright Suit Over University's Online Reading Room Could Set Academic Use Standards," (June 9, 2011), http://www.law.com/jsp/article.jsp?id=1202496783799&Copyright_Suit_Over_University_Online_Reading_Room_Could_Set_Academic_Standards&slreturn=1&hbxlogin=1

³ For more about transformativeness, see Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009); Michael J. Madison, *A Pattern-oriented Approach to Fair Use*, 45 *WM. & MARY L. REV.* 1525 (2004); see also *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 576-577 (1994) (in which the United States Supreme adopted this analytic approach).

⁴ The so-called TEACH Act of 2002, codified in Sec. 110(2) of the Copyright Act, illustrates the problem. This attempted to update the Sec. 110 exemption for classroom teaching to reach distance education, but was ultimately so burdened with exceptions and qualifications to be of dubious utility to its intended beneficiaries. See Kenneth D. Crews, "Copyright Law and Distance Education: Overview of the TEACH Act" (Aug. 17 2010), <http://copyright.columbia.edu/copyright/files/2010/08/teach-act-summary-by-kenneth-crews.pdf>. Efforts to update the library exemptions of Sec. 108 to take account of (among other things) changes in information technology have been unsuccessful to date. See "The Section 108 Study Group Report: An Independent Report sponsored by the United States Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress" (2008), www.section108.gov/docs/Sec108StudyGroupReport.pdf. Legislative efforts to bring about a compromise solution to the problem of "orphan works" (i.e. those presumptively protected by copyright but lacking identifiable owners) have been snagged on hidden obstructions in political waters; the furthest progress such legislation has made, to date, was the passage (by the Senate only) of the Shawn Bentley Orphan Works Act of 2008. And so it goes.

⁵ See Kenneth D. Crews, “The Law of Fair Use and the Illusion of Fair Use Guidelines,” 62 Ohio St. L. J. 599 (2001), a magisterial study that remains as valid and valuable today as it was a decade ago.

⁶ It is one of the not-so-well-hidden features of the fair use landscape that, when they choose (or need) to do so, publishers can be among the most tenacious – and successful – advocates of broad fair use interpretation. And a good thing, too, since we owe it to their tenacity for many of the most promising dimensions of fair use case law. See the discussion of *Bill Graham Archives, Inc. v. Dorling Kindersley Ltd.*, 448 F.3d 605, 607-615 (2006), *infra*.

⁷ *Folsom v Marsh*, 9 F. Cas. 342, 349 (C.C. D. Mass. 1841).

⁸ Latman, “Copyright Office Study No. 14, Fair Use of Copyrighted Works,” *Studies Pursuant to Senate Resolution 240*, 86th Cong., 2d Sess. (Comm. Print) (1960)

⁹ 223 F. 862 (D. Mass. 1914)

¹⁰ *Id.* at 866; an extensive discussion of the case and its implications appears in L. Ashley Aull, *The Costs of Privilege: Defining Price In The Market For Educational Copyright Use*, 9 MINN. J.L. SCI. & TECH. 573 (2008).

¹¹ *Encyc. Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1152, (W.D.N.Y. 1982).

¹² A lawsuit is pending against UCLA for providing “live streaming” of purchased DVD’s in connection with university classes. After having been dismissed on grounds relating to sovereign immunity and associational standing, see *AIME et al. v. Regents of Univ. of Cal.*, No. CV 10-9378 (C.D. Cal. Oct. 3, 2011), the complaint was refiled with modifications, and remains pending.

¹³ Emphasis added. Even to the extent that the final version of the preamble may express some congressional concern for the importance of education generally, it would be a mistake to conclude that liberates educators from the necessity of showing how their uses transform assimilated content. At the very best,

There is a strong presumption that the use of a copyrighted work is transformative when the allegedly infringing work falls within one of several categories described in § 107, “criticism, comment, news reporting, teaching. . . , scholarship or research.”

Hofheinz v. Discovery Commc’ns., Inc., 2001 U.S. Dist. LEXIS 14752, at *11 (S.D.N.Y. 2001) (*citing* *New Era Publications Int’l ApS v. Carol Pub. Group*, 904 F.2d 152, 155 (2d Cir. 1990)).

¹⁴ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1984); see 4-13 Nimmer on Copyright Sec. 13.05 (“Commercial uses” is extremely broad.”). For an unusual example in which the non-commercial nature of a scholarly use *did* figure prominently in fair use analysis, see *Sundeman v. Seejay Soc’y, Inc.*, 142 F.3d 194 (4th Cir. 1998).

¹⁵ *Oxford U. Press. v. Becker*, No. 1.08-CV-1425-ODE (N.D. Ga.), “Order” dated Sept. 10, 2010, fn.2 (“The CCC is financing 50 % of this copyright litigation.”).

¹⁶ It should go without saying that, for reasons to be addressed below, a school or teacher couldn’t claim fair use for copying an in-print textbook or workbook and distributing it to students. Today, however, vendors are selling other kinds of education related products

as well: academic libraries buy licenses to databases and serials, schools are presented with opportunities to pay for access to streaming video of a wide range of audiovisual works, and publishers encourage educators to pay for the right to include excerpts from non-educational materials in class materials.

¹⁷ 60 F.3d 913 (2d. Cir. 1995).

¹⁸ In this connection, Professor Neil Weinstock Netanel has noted that

[W]hile transformative purpose is almost universally a sufficient condition for fair use, at least assuming that the defendant has not copied more than reasonably needed for the purpose, courts have repeatedly stated, citing *Campbell* and *Sony*, that transformative use is not a necessary requirement for a finding of fair use.¹⁷ In stating that transformative use is not required, *Campbell* gave as an example the making of multiple copies for classroom use, which is included among the favored uses in the introductory clause of section 107... [*Citing* 510 U.S. 579 n., 11]. In short, the judicial embrace of the transformative use paradigm does not exclude other possible categories of fair use that fall outside the parameters of transformative uses.

Making Sense of Fair Use, 15 LEWIS & CLARK L. REV. 715, 771 (2012). Whether educators can take much comfort from this observation is another question.

¹⁹ *Campbell*, , 510 U.S.at 579.

²⁰ A more extensive version of this discussion appears in Peter Jaszi, *Copyright, Motion Pictures and Fair Use*, 2007 UTAH L. REV. 715.

²¹ *Bill Graham Archives*, 448 F.3d at 607.

²² *Id.* at 609.

²³ *Id.* at 613.

²⁴ *Id.* at 615 (quoting *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, 150 F.3d 132, 146 (2d Cir. 1998)).

²⁵ Would the result have been the same if the plaintiffs had taken 70 images rather than seven? Probably not – since in applying transformativeness analysis courts have adopted what might be called a standard of proportionality – that is, the amount of protected material used should be appropriate to the transformative purpose:

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

“*Making Sense of Fair Use*,” *supra* Note 18, at 768 (discussing the *Rowling v. RDR* [Harry Potter] litigation.)

²⁶ E.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (concluding that Google’s use of copyrighted images in thumbnail search index was “highly transformative” even though the images themselves were not altered, in that the use served a different function than the images served).

²⁷ E.g., *A.V. v. iParadigms L.L.C.*, 562 F.3d 630 (4th Cir. 2009). A case involving the detection of student plagiarism; the appellate panel noted with approval that the trial judge had found that iParadigms’ use of plaintiffs’ works was “‘highly transformative,’ . . . and ‘provides a substantial public benefit through the network of educational institutions using Turnitin.’” *Id.* at 638.

²⁸ See *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 940-942 (9th Cir. 2002); *Bill Graham Archives*, 448 F.3d at 615, n. 6 (“The licenses BGA sold to other publishers were for substantially less transformative uses of its posters.”)

²⁹ An example is *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 185 (D. Mass. 2007) (re-use of new photograph in new journalistic context is less transformative than some other instances, more transformative than others; the fair use defense is ultimately rejected). See also *Castle Rock Entertainment v. Carol Publ’g Group*, 150 F.3d 132, 144-147 (2nd Cir. 1998).

³⁰ *Fitzgerald*, 491 F. Supp. 2d at 185.

³¹ Koons’ statement was as follows:

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

Blanche v. Koons, 467 F.3d 244, 255 (2^d Cir. 2006). Most educators, I suspect, could do as well or better in describing their use of copyrighted material in teaching practice.

³² A more extensive discussion of the *Koons* decision appears in my chapter, “Is There Such a Thing as Postmodern Copyright?” in Biagioli, Jaszi & Woodmansee (eds.), *MAKING AND UNMAKING INTELLECTUAL PROPERTY: CREATIVE PRODUCTION IN LEGAL AND CULTURAL PERSPECTIVE*, 415, 418-20 (2011).

³³ A process by which communities of information users can develop shared narratives about the importance that fair use has to their shared missions is described in Patricia Aufderheide and Peter Jaszi, *RECLAIMING FAIR USE: HOW TO PUT THE BALANCE BACK*

IN COPYRIGHT (2011). One interesting and highly relevant recent instance is the Poetry Foundation's "Code of Best Practices in Fair Use for Poetry" (2010), at www.poetryfoundation.org/foundation/bestpractices, which specifically addresses the transformative use of copyright poetry in teaching in Principle 4. Another is the Visual Resource Association's December 2011 "Statement on the Fair Use of Images for Teaching, Research and Study," at www.vraweb.org/organization/pdf/VRAFairUseGuidelinesFinal.pdf (articulating rationales for the educational use of copyrighted images in and around art and art history classrooms). And by the time you read this, the Association for Research Libraries' "Code of Best Practices in Fair Use for Academic and Research Libraries" will be available at www.arl.org.