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# PRESERVING EDUCATIONAL FAIR USE IN THE TWENTY-FIRST CENTURY

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*When the ordinary user decides that [a licensing fee] is too high, and forgoes use of the work, only the individual is the loser. When the scholar forgoes the use of a prior work . . . the public is deprived of his contribution to knowledge.<sup>1</sup>*

## I. INTRODUCTION

Fair use is an affirmative defense to copyright violation and remains “one of the most unsettled areas of [copyright] law.”<sup>2</sup> Fair use allows authors, educators, and individuals to borrow from otherwise copyrighted materials without the permission of the copyright holder. Students and educators frequently rely upon it in their academic careers. Instructors photocopy excerpts from articles and newspapers or quote passages from novels, textbooks, or commentaries in their lectures and writings. Increasingly, they copy portions of books or articles to supplement and update antiquated or insufficient texts. Students also photocopy passages while researching and preparing for class and quote passages when writing.

In the past ten years, publishers, court decisions, and technology have modified the fair use landscape. Publishers have extracted greater profits by developing licensing markets for all copyrighted works. The Copyright

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1. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477–78 (1984) (Blackmun, J., dissenting).

2. Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996).

Clearance Center has evolved to facilitate the copyright approval process. In response to more extensive licensing, courts place great weight on the availability of licensing when analyzing fair use without adapting their analysis to changes in technology. While technology increases the potential for copyright infringement, it also enables publishers conveniently to license materials as well as place restrictions on their use. Together, licensing and technology consistently have reduced the scope of fair use in the educational setting. This Note predicts that the current trends in fair use will eventually eliminate fair use for schools, colleges, and universities.

Some commentators believe that education represents a fundamental fair use exception to copyright, as materials are used for noncommercial, scholarly purposes.<sup>3</sup> Others fear that allowing an expansive right for educational use or for other research would undermine copyright protection and deter individuals from exploring creative expressions.<sup>4</sup> This Note, however, proposes that eliminating educational fair use would negatively impact dissemination of information, instructor flexibility, and quality of education as well as increase the cost of education.

Part II explores the purposes of copyright law and how fair use is an integral part of copyright law. Even though the judicial doctrine of fair use has existed in the United States since 1839,<sup>5</sup> the equitable nature of that doctrine continues to trouble the courts. Because copyright involves both economic and noneconomic factors, courts struggle to balance protecting a copyright holder's limited monopoly, which spurs individual creativity, against the societal need for access to information for further creative purposes.<sup>6</sup> Courts have increasingly favored copyright holders' rights, relying on economic models and potential licensing opportunities.

Part III examines fair use in the arena of education. Both fair use and education promote the dissemination of information and foster creative academic expression. This Part also considers congressional guidelines creating safe harbors for educators<sup>7</sup> and criticism of these guidelines as being overly restrictive. Part IV examines new technologies, including the

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3. *E.g., id.* at 1393–94 (Martin, J., dissenting).

4. *See id.* at 1392. *See also* H.R. REP. No. 94-1476, at 67 (1976), *reprinted in* 1976 U.S.C.A.N. 5659, 5689 [hereinafter 1976 HOUSE REPORT].

5. *See* *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901); *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5728).

6. *See Sony Corp. of Am.*, 464 U.S. at 432; *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

7. *See* 1976 HOUSE REPORT, *supra* note 4, at 67.

Internet, software enhancements, and automated rights-management systems and how these new technologies both threaten and strengthen copyright.

In conclusion, this Note proposes that courts take a less restrictive view of fair use in the field of education. Courts place too much emphasis on market failure without adequately recognizing that protecting a limited educational fair use would maintain incentives for creation and better fulfill the primary goals of copyright. Courts should not focus solely on the availability of licensing opportunities, but consider several additional factors: the transformative nature of education, the extent to which instructors rely on fair use, and the reasonableness of the alleged available license. Technological control and expanding derivative and international markets should more than offset any losses.

## II. COPYRIGHT LAW: FUNCTION AND FAIR USE

Copyright law and fair use complement one another in promoting the dissemination of information and ideas to society. The following section traces the development of fair use, examines the economic and non-economic influences on fair use, and reviews cases applying fair use in the educational environment.

### A. HISTORICAL DEVELOPMENT OF COPYRIGHT AND FAIR USE

Copyright first emerged in England as a response to the printing press. The English Crown granted a monopoly to the Stationer's Company, which then controlled the dissemination of materials and censored information offensive to the Crown.<sup>8</sup> When the grant expired, Parliament enacted the Statute of Anne, which enhanced public welfare by encouraging the distribution of information through the limited protection of authors' works.<sup>9</sup>

In the United States, promoting public welfare by protecting creative efforts emerged with the Constitution.<sup>10</sup> The constitutionally created copyright monopoly is a rare exception to the general prohibition against personal monopolies. The drafters of the Constitution foresaw the need for

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8. WILLIAM F. PATRY, *COPYRIGHT LAW & PRACTICE* 10 (1994).

9. *See id.*; MARSHALL A. LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 1-2 (2d ed. 1995).

10. The Constitution states that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art I, § 8, cl. 8.

this limited monopoly to encourage creative efforts.<sup>11</sup> That limited monopoly is constrained by the scope of copyright privilege,<sup>12</sup> the first sale doctrine,<sup>13</sup> the limited duration of the copyright,<sup>14</sup> and the fair use doctrine.<sup>15</sup>

Fair use is a defense to copyright infringement when the defendant's use is reasonable. It originally emerged from common law. In the United States, Justice Story first articulated the fair use doctrine in *Folsom v. Marsh*.<sup>16</sup> The Court acknowledged that a person could borrow significant parts of an original work if that use was "fair and reasonable."<sup>17</sup> Justice Story balanced the value of the copyright holder's creative efforts against the public value of the defendant's work.<sup>18</sup>

## B. THE NATURE OF THE COPYRIGHT PRIVILEGE

Copyright law balances the societal benefit of public access to information and ideas against the need to provide creators with incentives to produce.<sup>19</sup> As copyright has developed judicially, commentators have debated whether the creator or the public should be the primary beneficiary of the law. This decision is important because courts act conservatively when taking away recognized rights. Natural rights theorists support the

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11. *See id.*

12. The exclusive rights of copyright holders are limited to reproduction, distribution, preparation of derivative works, public performance, public displays, and public performance of audio works. 17 U.S.C. § 106 (1994 & Supp. IV 1999).

13. The first sale doctrine allows a person who has legally acquired a copyrighted work to use that work so long as that person does not violate any exclusive rights of the copyright holder. This doctrine allows individuals to share or resell novels and enables libraries to loan books to the public. *See* 17 U.S.C. § 109 (1994).

14. *See* 17 U.S.C. § 302(a) (Supp. IV 1999). The copyright term was extended in 1998 from fifty years after the death of the author to seventy years. *See infra* notes 142–45 and accompanying text.

15. *See* 17 U.S.C. § 107 (1994).

16. *Folsom*, 9 F. Cas. at 349 (holding appropriation of 300 pages from an original twelve-volume set was not fair use). Although Justice Story's opinion is one of the first American articulations of fair use, he relied upon English statutes and common law. *See id.* at 346.

17. *Id.* at 344. Justice Story explained the potential factors for deciding fair use: "In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Id.* at 348. These factors were eventually incorporated into the 1976 Copyright Act. *See infra* Part II.E.

18. *See Folsom*, 9 F. Cas. at 348–49.

19. Throughout this Note, I use the term creator, author, or artist to indicate someone who creates a work. The term copyright holder refers to an individual or entity that holds the exclusive copyright. Increasingly, authors have sold many of these rights to publishers.

creator as the primary beneficiary, while constitutional theorists support the public.

Natural rights theorists view intellectual property like any other property right. Creators of works are entitled to the full economic rewards of their efforts, which the natural rights theorists label “just deserts.” Copyright law unjustly limits creators’ rights for the public benefit.<sup>20</sup> While some supporters of natural rights focus on authors’ rights to be the primary beneficiaries of copyright law,<sup>21</sup> others stress maximizing incentives for creators as the best way to fulfill the goals of copyright.<sup>22</sup>

Constitutional theorists of copyright law view public welfare as the primary goal. The Constitution and Congress have provided copyright holders with limited rights in order to promote knowledge and to provide greater access to works, not to maximize profit or production.<sup>23</sup> The Supreme Court has stated that copyright is a privilege, wherein reward to the owners of copyrights is secondary to public need.<sup>24</sup>

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts. The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.<sup>25</sup>

By granting a limited monopoly, copyright protection is broad enough to provide the necessary incentives for creation<sup>26</sup> without rewarding copyright holders with the maximum value of their efforts.<sup>27</sup> Therefore, fair use acts as a shield against the monopoly of copyright and functions to further public access and the dissemination of information.<sup>28</sup>

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20. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1651 (1982).

21. See *id.*

22. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

23. Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 24 (1997).

24. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). See also 17 U.S.C. § 106 (1994 & Supp. IV 1999) (enumerating the few exclusive rights of copyright holders).

25. *Aiken*, 422 U.S. at 156.

26. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589–90 & n.13 (1985) (Brennan, J., dissenting).

27. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

28. See *id.* at 432–33.

## C. ECONOMIC MODEL APPLIED TO COPYRIGHT

Although courts apply fair use on an ad hoc, case-by-case basis,<sup>29</sup> economists claim that copyright law and fair use follow rational economic models.<sup>30</sup> The copyright clause of the Constitution indicates that its purpose is to balance public access against private incentives. In a perfect market, voluntary transfers efficiently allocate resources. Control of a given resource will go to the person who values it the most.<sup>31</sup> Thus, authors will create works as long as the marginal return of creation exceeds the marginal cost.<sup>32</sup> If individuals other than the author can avoid the expense of creation by making inexpensive copies, then the author's return on his or her work declines.

Absent copyright protections, intellectual property suffers from the problem of being "public goods." Creators of public goods cannot recapture the full value of the goods they produce, because public goods are virtually inexhaustible once produced and people can enjoy their benefit without paying for them.<sup>33</sup> Thus, creators' incentives diminish unless legal mechanisms prevent this market abuse.<sup>34</sup>

While copyright law shelters authors' incentive to create, this protection does not come without costs. Most forms of expression build upon other people's ideas and words.<sup>35</sup> By increasing protection of copyright holders, copyright law increases costs of future expression. In turn, increased costs reduce the number of creative works produced in the future. Thus, the fair use doctrine acts as a mechanism to counteract overextensive copyrights.

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29. See *infra* Part II.E. See also Leval, *supra* note 22, at 1107 (stating that no judicial consensus seems to exist, as evidenced by split decisions and reversals).

30. William A. Landes & Richard M. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 327 (1989).

31. Gordon, *supra* note 20, at 1604–06. Professor Gordon argues that copyright law tries to balance the market to provide an efficient allocation of resources. Overutilizing fair use will decrease the author's incentive to create. *Id.*

32. See Landes & Posner, *supra* note 30. In their article, Posner and Landes hypothesize that the cost of creation, which the authors refer to as the cost of expression, includes the author's time and effort, and the publisher's costs for editing, soliciting customers, printing, and distribution. Authors will create if expected revenues exceed the cost of expression. *Id.* at 327.

33. The classic example of a public good is national defense. It is difficult to exclude people who did not pay for national defense from receiving its benefit. Gordon, *supra* note 20, at 1610–11.

34. See *id.*

35. "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see further than the giant himself.'" Zechariah Chaffee Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945).

Most economists who study fair use believe it should be reserved for times when the market fails, based on the assumption that such failure should not preclude everyone from using a resource.<sup>36</sup> These economists claim that absent market failure, fair use results in an inefficient allocation of resources because creators have no incentive to produce at an economically efficient level.<sup>37</sup> Market failure occurs for a number of reasons; the most-cited reason in the copyright market is high transactional costs.

#### D. FLAWS IN THE ECONOMIC ANALYSIS

##### 1. *Perfect Markets*

Theoretical economic models presume perfect markets, which implies four conditions: (1) fully internalized costs and benefits, (2) perfect knowledge, (3) zero transaction costs, and (4) lack of anti-dissemination motives.<sup>38</sup>

To internalize costs and benefits fully, the parties within a transaction must bear all of the costs and realize all of the benefits of the exchange. When parties cannot internalize all the benefits of a transaction, they value the exchange less.<sup>39</sup> In copyright, the public benefit from distributing information is not typically included in an individual buyer's valuation of a work. Although society greatly benefits from distributing the work, the buyer is only willing to pay the value personally received.

A perfect market also assumes perfect knowledge, such that consumers are aware of competing products, as well as the price, value, location, and availability of those competing products. Additionally, perfect knowledge assumes the buyer can perfectly assess the marginal

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36. See Mary R. Barry, *Multiple Photocopying by Educators and the Fair Use Doctrine: The Court's Role in Reducing Transaction Costs*, 1994 U. ILL. L. REV. 387, 414 (arguing that fair use should only be utilized when transaction costs prohibit licensing); Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 DAYTON L. REV. 853 (1992); Landes & Posner, *supra* note 30, at 357 (stating that fair use should be construed narrowly and is justified when high transaction costs prevent one individual from gaining benefit from the use of another individual's work, provided no harm is caused). For purposes of copyright, a market failure occurs when the "public receives less creative work than it really would be willing to pay for." Gordon, *supra*, at 854. See also Gordon, *supra* note 20, at 1618. If market failure resulted in a copyright owner not receiving any compensation, then at least the public should receive the benefit of access to the information and expression. See *id.*

37. See Gordon, *supra* note 20, at 1618–21.

38. See *id.* at 1607–08, 1633–36.

39. *Id.* at 1607.

value and offer the optimum price to promote efficient transfer of resources. In real life, consumers cannot obtain perfect knowledge about copyrighted works due to the uniqueness of each work and individual preferences; the comparative value of two sonnets is impossible to determine.

Quantifying the creation process and its benefits to society is also impossible, as the worth of public knowledge is beyond monetary valuation. Furthermore, creative works not only are used for educational and political purposes, but they allow for criticism and provide inspiration for future works. Hence, copyright aims to encourage creativity, not mere economic efficiency.<sup>40</sup>

Economic theory further assumes zero transaction costs. When transaction costs exceed the net benefits of a transaction, they inhibit the transfer of resources. Finding the appropriate copyright holder (tracing) and negotiating a usage price involves high costs. Centralizing permission-gathering proves difficult because not every work is used in the same manner. If these costs exceed the value of the transfer, then the unregulated market would prohibit the sale.<sup>41</sup>

A perfect market also assumes that the consumer and seller do not possess antidissemation motives. However, there are often times when sellers or buyers decide that no amount of money will cause them to transfer the resource. Often sellers refuse to permit disagreeable or offensive uses. In the context of fair use, copyright holders often refuse permissions for parody and criticism.<sup>42</sup>

## 2. *Divergence from Copyright Law*

Moreover, pure economic theory deviates from copyright law in relying on assumptions that diverge from the basic missions supported by the Copyright Clause of the Constitution: increasing public welfare by promoting access to information, disseminating ideas, and creating

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40. Beginning with Justice Story's articulation of fair use later incorporated into 17 U.S.C. § 107, there has been a recognition that copyright protection is not always appropriate or economically feasible. See William F. Patry and Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 692 (1993). Patry and Perlmutter contend that placing too much emphasis on economics actually reduces the efficacy of the Copyright Clause. See *id.*

41. See Landes & Posner, *supra* note 30, at 357.

42. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). In *Campbell*, the defendants offered to pay the plaintiffs the standard licensing fee for use of a song. However, the plaintiff did not approve of the defendant's use of the song, which was a rap parody. The Supreme Court indicated that this type of market flaw is exactly why fair use exists. See *id.*

incentives for creation.<sup>43</sup> Economists stress the second mission of the Copyright Clause,<sup>44</sup> emphasizing that without proper incentives, access to information would not occur.

Economists following the natural rights doctrine believe that authors should not only receive a return equal to the marginal cost of creation, but all of their “just deserts.”<sup>45</sup> These economists contend that maximizing profits will maximize production, yet they do not address whether authors’ merely receiving their marginal returns on creation will dramatically decrease distribution.<sup>46</sup> Increasing the monopoly of copyright will decrease production as authors attempt to increase prices and maximize profits. Additionally, even if maximum profit leads to increased production, increased production does not necessarily result in maximum distribution as increased production at a higher cost decreases overall access and secondary uses. Thus, overprotection leads to the same type of economic inefficiency that legal economists claim copyright law prevents.

Consequently, the minimum incentives necessary to promote creation should dictate the quantum of copyright protection offered by the law.<sup>47</sup> Judge Posner has articulated that at a minimum, an author only needs to recover the costs of expression and distribution.<sup>48</sup> If an author received less than that amount, the incentive to create would diminish, whereas if an author received more than that amount, the incentive to create would also diminish. Both scenarios lead to lower supplies and increased prices, another economically inefficient outcome.<sup>49</sup> Therefore, copyright protection should only be as broad as necessary to prevent the destruction of incentives. Fair use should counteract overbroad copyright protections and promote public access to information and ideas.

### 3. *Incentives*

Although providing a limited economic monopoly to a creator is one type of incentive, the current economic model ignores other incentives for

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43. See U.S. CONST. art. I, § 8, cl. 8.

44. See generally Gordon, *supra* note 36; Gordon, *supra* note 20; Landes & Posner, *supra* note 30.

45. See Gordon, *supra* note 20, at 1651.

46. See *id.*

47. “The sole interest of the United States and the primary object in conferring th[is] monopoly lie in the general benefits derived by the public from the labors of authors.” Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

48. See Landes & Posner, *supra* note 30, at 327; Loren, *supra* note 23, at 23.

49. Landes & Posner, *supra* note 30, at 339.

creation. Fame, recognition of peers, and a desire to disseminate divergent views often motivate authors to create.<sup>50</sup> In academia, authors, professors, and educators publish as a way to increase their reputation and obtain tenure. Artistic endeavors also provide personal rewards and promote confidence.<sup>51</sup>

Even though authors have numerous incentives for creation other than money, publishers, being more financially focused, may not have noneconomic incentives. Publishers therefore may have less incentive to invest in publishing, resulting in a net loss of creative works. Publishers will continue to publish, however, provided that they receive a marginal return equal to or exceeding their investment. The reliance on publishers as the sole distributors of works, especially in academia, has diminished as new technologies allow creators to publish with little up-front investment.

Scholars have proposed a market analysis to define the parameters of fair use, provide predictability, and promote economic efficiency. Limiting fair use to instances of market failure alone, however, does not effectively consider all of the nuances and technicalities of fair use. Foreclosing fair use absent market failure would make it an overly narrow exception to copyright protection and would prevent the Constitution from succeeding in its mission to increase public welfare by promoting access to information and disseminating ideas.

#### E. THE CURRENT APPLICATION OF FAIR USE

Over 120 years after the first articulation of fair use, the common law doctrine was legislatively recognized as § 107 of the Copyright Act of 1976.<sup>52</sup> The statute lists four, nonexhaustive factors to analyze fair use: (1) the purpose and character of the defendant's "secondary" use, (2) the nature of the copyrighted work, (3) the amount or substantiality of the

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50. Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1574. The article offers numerous reasons for an author to create works other than financial incentive. Although every person may be motivated by money to some extent, greater ideals of perpetuating one's ideas also motivate creation. Professor Lacey also indicates that many artists produce works because artistic endeavor comprises an important part of their person, not because of monetary gain. *Id.* at 1572-74.

51. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1747-53 (1988). Although money may provide one incentive, artistic work provides reward in itself as it engages and emotionally moves people. Introducing nonmonetary incentives may alter the economic model. Instead of having to receive a return of all costs of expression, an author may produce the economically efficient amount of work despite receiving less monetary compensation, because the author is also receiving other rewards. *Id.*

52. 17 U.S.C. § 107 (1994).

portion used, and (4) the effect on the plaintiff's potential market.<sup>53</sup> Section 107 was not intended to expand or limit the common law doctrine of fair use, nor were the factors intended to be the sole determinants, as fair use should be considered "an equitable rule of reason."<sup>54</sup> Despite the stated congressional intent, the statute did modify common law fair use by requiring courts to evaluate all four factors,<sup>55</sup> though it clearly states that the four factors are illustrative, not exhaustive.<sup>56</sup> Therefore, the four factors represent the minimum, not the maximum, of a court's potential analysis.<sup>57</sup>

The Copyright Act does not state the weight or considerations given to each factor. The Supreme Court disfavors a strict interpretation of the statute.<sup>58</sup> The Court has articulated that fair use permits and requires "courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designated to foster."<sup>59</sup> Therefore, the four factors within the Copyright Act of 1976 should be viewed as general guidelines, not bright-line rules.<sup>60</sup>

#### 1. *Factor One: The Purpose and Nature of the Use*

Courts must first determine the nature of the secondary use, including whether the use was commercial. The 1976 Copyright Act House Report stated that "the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in a fair use decision."<sup>61</sup> The inquiry focuses on the type of

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53. *Id.*

54. *See* Sony Corp. of Am. v. Universal Studios Corp., 464 U.S. 417, 448 (1984); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 931 (2d Cir. 1994).

55. *See* 17 U.S.C. § 107 (1994); WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 424-26 (2d ed. 1995).

56. *See* § 107.

57. In many fair use cases, the copyright holder seeks to enjoin the defendant from future use of the work. *See* Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1392 (6th Cir. 1996). Although the court held that the defendant's use was not fair use, the defendant did not act willfully. The court overturned the trial court's finding of willfulness and the accompanying monetary damages. *See id.* at 1393. Part V *infra* proposes that when considering fair use in education, other factors beyond the four required factors must be considered.

58. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

59. *Id.* (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)). In *Campbell*, the Supreme Court overruled the Ninth Circuit, criticizing the court for rigidly interpreting the statute. *Id.* at 584.

60. *See id.* at 577.

61. 1976 HOUSE REPORT, *supra* note 4, at 66. Although various courts have held that commercial uses are presumptively unfair exploitations of copyrighted materials, the Supreme Court validated the House Report, indicating that a commercial use is only one factor to consider when determining fair use. *See* *Campbell*, 510 U.S. at 578 (holding that a rap group's use of Roy Orbison's song "Pretty Woman" was a fair use even though the parody served a commercial purpose).

use being made, not the type of entity making it. Additionally, mere commercial gain is not necessarily enough to foreclose fair use.

A commercial use can be tempered by a transformative use.<sup>62</sup> Transformation implies that the new work has a different purpose from the original work and makes some new “contribution of . . . intellectual value.”<sup>63</sup> The preamble to § 107 of the Copyright Act of 1976 states that valid purposes of fair use include “criticism, comment, news reporting, teaching, . . . scholarship or research.”<sup>64</sup> Overall, the greater the transformation, the less any commercial purpose influences the analysis of fair use.<sup>65</sup>

## 2. *Factor Two: The Nature of the Copyrighted Work*

This second factor examines whether the original work is factually based or creative in nature and whether it was published.<sup>66</sup> Since copyright protects expression rather than facts or ideas, creative works receive more substantial copyright protection.<sup>67</sup> Facts receive less copyright protection because rewarding the mere acquisition of facts would frustrate the intent of a copyright monopoly to distribute ideas by retarding the disclosure of facts and thoughts.<sup>68</sup>

## 3. *Factor Three: The Amount and the Substantiality of the Portion Used*

The amount and importance of the borrowed portion from the original work must also be considered. Usually the greater the quantity used, the more likely this third factor will weigh against the defendant.<sup>69</sup> A party copying all of a work will have difficulty prevailing on this factor.

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62. See *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 920 (2d Cir. 1994). The Supreme Court, however, has indicated that shifting the burden of factors should not occur when considering reproductions for classroom use. See *Campbell*, 510 U.S. at 579 n.11.

63. *Am. Geophysical Union*, 60 F.3d at 923.

64. 17 U.S.C. § 107 (1994). Transformation can occur if the original work is changed into a different format. See *Am. Geophysical Union*, 37 F.3d at 891.

65. See *Campbell*, 510 U.S. at 579.

66. The legislative history indicates that this factor should be more important when determining whether classroom reproductions constitute fair use. See S. REP. 94-473, at 64 (1975).

67. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05(A)(2)(a), at 13-170 (49th ed. 1999).

68. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563-64 (1985).

69. See *Am. Geophysical Union*, 37 F.3d at 894. The general exception to this rule involves classroom copies that comply with the Educational Guidelines as explicated in the House Report. 1976 HOUSE REPORT, *supra* note 4, at 67. See also *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) (holding that photocopying complete medical journal articles was fair use).

However, the Supreme Court has upheld full copying of an original work as fair use.<sup>70</sup> Beyond looking at sheer volume, courts analyze the portion used in the context of the nature and purpose of the secondary work, questioning whether the extent of the use is consistent with or exceeds the necessary amount to fulfill its purpose.<sup>71</sup>

This third factor can weigh against a defendant even if the new work only uses a small percentage of the original work. Using the essential aspects of an original work—the parts from which the original derives its unique economic value—can weight the third factor in favor of the copyright holder, even though the second use is quantitatively small.<sup>72</sup> The qualitative analysis often becomes intertwined with the fourth factor, the effect on the plaintiff's potential market, as using important segments of a work may have a greater effect on the potential market.

#### 4. *Factor Four: The Effect on the Plaintiff's Potential Market*

The fourth factor considers the potential harm to a copyright holder's potential market.<sup>73</sup> A showing of actual harm or the certainty of harm is unnecessary. It is sufficient to show by a preponderance of the evidence that some meaningful likelihood of future harm exists.<sup>74</sup>

Additionally, the alleged harm can transcend any particular infringement action. Courts inquire whether the activity, if widespread, would adversely effect the entire market for an author's work. In *Campbell v. Acuff-Rose Music, Inc.*, the rap group 2 Live Crew created a parody of Roy Orbison's song "Pretty Woman."<sup>75</sup> Based on the factual record, the Court did not believe that widespread parody in the rap music market would affect the value of renditions of "Pretty Woman" in the "easy-listening" market.<sup>76</sup> The Court had difficulty foreseeing market harm

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70. See *Sony Corp. of Am. v. Universal Studios Corp.*, 464 U.S. 417, 417 (1984); *Williams & Wilkins Co.*, 487 F.2d at 1345.

71. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994). The defendants in this action used a substantial quantity of the original work. However, the defendants did not lose on the third factor because the nature and purpose of their work, parody, depended upon the public being able to recognize the original work. *Id.* at 587.

72. See *Harper & Row*, 471 U.S. at 565 (finding that defendant's utilizing less than 400 words from the copyright holder's work was not fair use because the segments were the "heart" of the original work). "No plagiarist can excuse the wrong by showing how much of his work he didn't pirate." *Id.*

73. See *Sony Corp. of Am.*, 464 U.S. at 450. See also *Rubin v. Brooks/Cole Publ'g Co.*, 836 F. Supp. 909, 920 (D. Mass. 1993) (holding that plaintiff's work had been published previously numerous times without any harm to the market and therefore a similar use would have little effect on the market).

74. *Sony Corp. of Am.*, 463 U.S. at 451. See also *Campbell*, 510 U.S. at 593.

75. *Campbell*, 510 U.S. at 572.

76. *Id.* at 591.

because the parody was a transformative use of the original, decreasing the likelihood that the new work would fulfill a similar purpose. Therefore, the greater the transformative nature of the work, the less likely it will act as a substitute for the original work.<sup>77</sup>

Courts also consider the potential harm to derivative markets. Today's markets have expanded along with developments in computers, video games, toys, and other technologies. The scope of copyright extends to those derivative markets the creators would develop themselves directly or via licensing.<sup>78</sup> Copyright protection also extends to markets that creators affirmatively choose not to enter. A copyright holder who declines to operate in a particular market has made a conscious decision instead of neglecting to fulfill a market niche.<sup>79</sup>

Furthermore, copyright infringement must directly cause the alleged market harm. The Copyright Act does not provide protection against harms caused by criticism<sup>80</sup> or reviews of the original work.<sup>81</sup> Instead, other areas of law such as slander and defamation provide potential remedies.

The extent and weight of the potential for market harm must be carefully considered, or else the fourth factor will always favor the copyright holder. Copyright holders will argue that any infringement reduces the potential market because fair use reduces the copyright holder's ability to collect licensing fees. Courts would then have to consider the extent of the harm from lost licensing fees. The potential success of the secondary use would determine whether it qualifies as fair use.<sup>82</sup> A successful secondary use would hypothetically result in a greater loss of licensing fees than an unsuccessful use.

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77. *See id.*

78. *See id.* at 593.

79. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 145–46 (2d Cir. 1998). “Artists express themselves not merely by deciding what to create from their original work, but by deciding what not to create as well.” *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 955 F. Supp. 260, 272 (S.D.N.Y. 1997). *See also* NIMMER & NIMMER, *supra* note 67, § 13.05(a)4, at 13-179. This factor will favor the defendant in the sense that the defendant is filling a market niche the plaintiff is not pursuing. *Id.*

80. 17 U.S.C. § 106 (1994).

81. *See Campbell*, 510 U.S. at 591–93. A court must distinguish between those harms caused by the defendant's product becoming a substitute in the same or derivative market for the original works and those harms that result from criticisms of the original work. *See id.*

82. *See Am. Geophysical Union v. Texaco Inc.*, 37 F.3d 881, 897–99 (2d Cir. 1994).

F. CASES: MULTIPLE COPYING FOR EDUCATIONAL OR RESEARCH PURPOSES

In an educational setting, fair use has rarely been tested in court as an affirmative defense. The following three cases apply the fair use factors in research and educational settings. These decisions demonstrate a pattern of expanding protection for copyright holders and narrowing permissible fair use.

1. *Williams & Wilkins Co. v. United States*<sup>83</sup>

In *Williams & Wilkins Co. v. United States*, the National Institute of Health and the National Library of Medicine were charged with copyright infringement.<sup>84</sup> The institutions made photocopies of medical journals for staff members.<sup>85</sup> The *Williams* court held, and the Supreme Court affirmed without opinion, that the libraries' photocopying was within fair use. Although full articles were copied, the nonprofit nature of medical research outweighed any potential harm. The court stated, "There is, in short, no inflexible rule excluding an entire copyrighted work from the area of fair use."<sup>86</sup> The court found that the nonprofit nature of the library and the absence of any intent to reduplicate for sale or general distribution weighed in the libraries' favor.<sup>87</sup> Additionally, the court was not swayed by the plaintiffs' argument that it suffered harm from the loss of licensing fees:

It is wrong to measure the detriment to plaintiff by loss of presumed royalty income—a standard which necessarily assumes that plaintiff had a right to issue licenses. . . . In determining whether the company has been sufficiently hurt to cause these practices to become "unfair," one cannot assume at the start the merit of the plaintiff's position, i.e., that plaintiff had the right to license. That conclusion results only if it is first determined that the photocopying is "unfair."<sup>88</sup>

The decision was strongly influenced by the court's concern that finding infringement would harm medical research.

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83. 172 U.S.P.Q. (BNA) 670 (1972), *rev'd*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) (per curiam).

84. *Williams & Wilkins Co.*, 487 F.2d at 1346. Although the case was decided under the 1909 Copyright Act, the court applied the same factors later prescribed by the 1976 Copyright Act.

85. *Id.* at 1347–48.

86. *Id.* at 1353.

87. *See id.* at 1354.

88. *Id.* at 1357 n.19.

2. American Geophysical Union v. Texaco Inc.<sup>89</sup>

*American Geophysical Union v. Texaco Inc.* involved Texaco scientists photocopying journal articles for research purposes.<sup>90</sup> Texaco's photocopying was outside fair use due to the commercial nature of the use and the availability of licensing. Although the journals were used for research, Texaco's goal was to use the research to develop profitable products; therefore, the court concluded that Texaco's use was commercial.<sup>91</sup> Texaco's use was nontransformative since the articles were photocopied without alterations. It had photocopied the complete text of the article, thus the third factor favored the copyright holder. Finally, the majority found that Texaco could simply have paid a licensing fee for photocopying the articles through the Center for Copyright Clearances, and therefore, the copyright holder was harmed by the loss of future licensing fees.<sup>92</sup>

3. Princeton University Press v. Michigan Document Services<sup>93</sup>

*Princeton University Press v. Michigan Document Services* is the most recent case addressing multiple copying for educational use.<sup>94</sup> Michigan Document Services (MDS) photocopied packets of course materials ("coursepacks") for professors and then sold them to students without obtaining the necessary copyright permissions.

The Sixth Circuit, sitting en banc, held that the copies made by MDS were not fair use.<sup>95</sup> Since MDS did not obtain copyright permission, it offered lower prices and obtained a competitive advantage over other copy services that did.<sup>96</sup> MDS also copied whole chapters or articles without

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89. 60 F.3d 913 (2d Cir. 1994).

90. *Id.* at 914.

91. *See id.* at 921–22.

92. *See id.* at 929. The dissent found this argument circular because the evidence did not show licensing fees would actually be collected. *See id.* at 940–41 (Jacobs, J., dissenting).

93. 99 F.3d 1381 (6th Cir. 1996).

94. A similar case raising similar issues is *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991). The district court held that Kinko's copying of information for coursepacks was a nontransformative commercial use that would supplant the market for the original publishers and cause harm to the publisher's market due to lost licensing fees. *See id.* at 1530–32. After this case, many universities adopted the position that the holding would be applicable to educational institutions as well. *See* Univ. of Tex. Office of the Gen. Counsel, *Rules of Thumb for Coursepacks*, at <http://www.utsystem.edu/OGC/intellectualproperty/copypol2.htm#reserve> (last modified Jan. 5, 1998). For a discussion of why ruling out fair use for educational institutions would overextend the holdings of *Kinko's* and *MDS*, see *infra* Part V.

95. *MDS*, 99 F.3d at 1383.

96. *Id.* at 1382.

alteration, making the use nontransformative.<sup>97</sup> Since MDS operated for profit, the use was commercial and nontransformative; thus, the first factor, the nature and purpose of the use, weighed against fair use.<sup>98</sup>

MDS also lost on the third and fourth factors: the amount used and the potential harm to the plaintiff's market. It copied complete chapters or entire articles, some excerpts greater than ninety-five pages in length,<sup>99</sup> thus exceeding the limits prescribed in the Educational Guidelines, which create a safe harbor for educational use.<sup>100</sup> The court also noted that a professor's decision to use specific excerpts from a work evidenced the qualitative value of the work.<sup>101</sup> Further, widespread actions like the defendant's would likely harm publishers by lowering potential licensing revenues.

The dissent by Judge Ryan focused upon the educational nature of the photocopies and the latitude necessary for educational institutions. Because students use coursepacks for educational purposes and neither the students nor the professor was attempting to exploit the material for financial gain, the use was noncommercial.<sup>102</sup> The educational setting also reduced the importance of any nontransformative nature of the copying.<sup>103</sup>

Judge Ryan's dissent suggests that when photocopying coursepacks, a presumption of fairness should favor the professor, not the copyright holder. A professor has no incentive to use more than what is fair and society benefits from professors exposing students to a broader range of information. Additionally, Judge Ryan asserted that always giving great weight to the loss of potential licensing fees invariably would resolve the fourth factor in favor of the copyright holder.<sup>104</sup>

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97. *Id.* at 1389.

98. *Id.* at 1389–90.

99. *See id.* at 1389. The court did not distinguish between a 95-page excerpt representing 30% of a work and a 17-page excerpt representing 5% of the work. The court ended its analysis after deciding the use did not fit within the Educational Guidelines. *See id.* at 1390. *Campbell* mandates that the amount should be looked at in the context of the purpose. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

100. *See MDS*, 99 F.3d at 1389. For an explanation of the Educational Guidelines, see *infra* Part III.C.

101. *Princeton Univ. Press*, 99 F.3d at 1389.

102. *Id.* at 1402–04.

103. *Id.* at 1404 (citing *Campbell*, 510 U.S. at 579 n.11). An exception to the transformative nature of a work would be copying for classroom use.

104. *See id.* “The more reasonable presumption is that society benefits from the additional circulation of ideas in the educational setting when those who direct the practice have no personal financial interests that would drive them to copy beyond the parameters of purely educational, and fair, use.” *Id.*

These recent cases addressing educational fair use relied on the commercial nontransformative nature of the copying and the availability of licensing to determine infringement. The courts have yet to address similar copying performed directly by nonprofit educational institutions, instructors, or students. Although publishers argue that the outcome should be the same, the courts will be forced to balance the public value of education against the potential economic loss to publishers from lost licensing fees.<sup>105</sup>

### III. FAIR USE IN THE REALM OF EDUCATION

The controversies raised by fair use seem particularly acute in the realm of education due to the equitable nature of fair use. Fair use promotes the goals of copyright by encouraging the dissemination of information for the enrichment of society.<sup>106</sup> Education promotes the cultivation of society, provides access to information, and encourages new creative works. Notwithstanding, completely eliminating copyright protections throughout education would undermine monetary incentives for creation. Although educational fair use should not be a blanket exception, the eradication of educational fair use would be equally detrimental.

#### A. EDUCATIONAL BENEFITS DERIVED FROM FAIR USE

Education provides the foundation of an informed citizenry by teaching reading, critical analysis, criticism, and problem-solving skills. All citizens, not just scholars, benefit from openly available information.<sup>107</sup> Therefore, education serves public welfare by broadly disseminating ideas and exposing many people to new concepts.<sup>108</sup>

Educational fair use has a beneficial effect upon further creative production, teaching proficiency, and student flexibility. In academia, students and instructors must constantly create new works. Without the protection of fair use, the costs of producing secondary works would increase.

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105. This Note asserts that a different outcome from *MDS* should result if the photocopying were done by students or instructors. See *infra* Part V.

106. See Lacey, *supra* note 50, at 1584.

107. See *id.*

108. A complete exemption for education would be over-expansive. This Note does not seek a broad right of fair use in education, but seeks to preserve a reasonable right of fair use in the educational realm. See *infra* Part V.

Fair use allows instructors to provide the most appropriate and cultivated education possible. Instructors are able to use newly discovered materials that increase student understanding. This also enables instructors to keep classes current, especially in rapidly changing fields.

Fair use keeps costs reasonable for students. Many students have limited educational budgets. Bearing the cost for every licensed use, especially without market protections, will discourage students from selecting classes requiring expensive materials. In many schools potential licensing fees of \$100 per class could exceed the cost of tuition. The additional costs result in a redistribution of funds from students to creators. It is doubtful whether this redistribution benefits society or the goals of copyright enough to justify discouraging education.

#### B. EXACERBATION OF FLAWS IN THE ECONOMIC MODEL

Flaws in the economic model are exacerbated in the educational arena, where the benefits of information distribution appear particularly high. When dealing with copies for classroom use, the ultimate consumer is the student, not the educational facility or the instructor. Yet, the instructor or the educational facility makes the purchasing decisions. Instructors making decisions usually focus on the higher goal of intellectual expansion, not economic efficiency. Thus, in the educational arena, the use of the economic model to explain the allocation of resources is less appropriate.

Educators rarely obtain or strive to obtain perfect market knowledge, because they focus on scholarship, not economics. The instructor will know that a particular item is available and its use would promote a particular point of scholarship. The instructor may know of alternative articles offering similar perspectives, but content and convenience, rather than price, often determine which article the instructor chooses. Additionally, locating alternative articles may be difficult. Any requirement to locate possible alternatives and their respective prices prohibitively raises the transaction costs to the instructor.

Transactional costs will further increase when a school lacks a centralized mechanism for obtaining copyright permissions. Although large universities may provide this service as a means to limit potential liability, smaller educational institutions cannot fund similar programs. Many junior colleges, primary, and secondary schools do not offer mechanisms to obtain copyright permissions. This results in individual instructors bearing the responsibility of acquiring necessary licenses. In some situations, instructors also must bear the licensing costs because the

educational institution does not provide budgets for copyright costs or instructors cannot easily pass the costs onto the students.

### C. EDUCATIONAL GUIDELINES—1976 COPYRIGHT ACT

Although the factors and analyses explained in Part II apply to all cases involving fair use, educational uses of copyrighted materials provide special challenges to courts and, thus, have received special attention from the legislature. Sections of the House Reports from the Copyright Act of 1976 specifically outline guidelines for educational uses.<sup>109</sup> The Committee on the Judiciary concluded that broad copyright exceptions need not be granted to nonprofit educational institutions but nevertheless included explicit guidelines to provide educators with some predictability.<sup>110</sup> Thus, the Educational Guidelines were created to provide a safe harbor for educational uses of copyrighted materials.

#### 1. *Guidelines for Classroom Use of Books and Periodicals*

The Educational Guidelines indicate specific instances when teachers may reproduce copyrighted works for research or classroom use without permission. The preamble to the guidelines, however, specifically states that some reproductions not included in the guidelines still may be fair use.<sup>111</sup> While the Educational Guidelines clearly allow educators to make single copies of portions of books for research or class preparation,<sup>112</sup> the real issues concern teachers creating multiple copies for classroom use. The Educational Guidelines allow teachers to make multiple copies if the use is brief, spontaneous, not cumulative, and includes appropriate copyright notices.<sup>113</sup>

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109. 1976 HOUSE REPORT, *supra* note 4, at 67. The "Educational Guidelines" are formally titled *The Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals*.

110. *See id.*

111. *See id.* at 68.

112. The Educational Guidelines indicate that for research or preparation, a teacher may make a single copy of (a) a chapter of a book; (b) an article from a periodical or newspaper; (c) a short story, essay, or poem; or (d) a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper. *See id.*

113. *See id.* The brevity factor limits the amount that an educator can reproduce to a maximum amount of 1,000 words or 10% of a work or 250 words of a poem. *Id.* The spontaneity factor requires that only educators who are unable to obtain the appropriate approvals due to time constraints may make multiple copies. This factor states that teachers must need the work at that time for the "maximum teaching effectiveness," and that therefore, it "would be unreasonable to expect a timely reply to a request for permission." *Id.* at 69. The cumulative effect test mandates that any copies shall only be used for only one course in the school, that no more than nine instances of multiple copying can

Even if an educator meets those initial qualifications for multiple classroom copies, the Educational Guidelines provide further limitations. Educators may not make multiple copies to create or replace an anthology. Items may not be photocopied from term to term, and no charge may be made to students above the copying costs.<sup>114</sup> Furthermore, the Educational Guidelines do not apply to consumables.<sup>115</sup>

## 2. Criticisms of the Educational Guidelines

Although the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision and members of the Authors League of America, Inc., and the Association of American Publishers, Inc., who proposed the Book Guidelines, represented the interests of authors and publishers, educators did not concur with the committee's findings.<sup>116</sup> The American Association of University Professors and the Association of American Law Schools wrote the Judicial Committee and criticized the Educational Guidelines. The criticisms focused on the standards for multiple copying.<sup>117</sup>

The first criticism is that the Guidelines chill academic endeavors and create further confusion over permissible secondary uses. Although the preamble to the Educational Guidelines states that the guidelines represent the minimum permissible uses and that other uses could still be considered fair, academic institutions are relatively conservative and would adopt the Guidelines to avoid litigation expenses.<sup>118</sup> Consequently, adopting the

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occur for one course during one term and that "not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term." *Id.*

114. *Id.* at 70. While the Educational Guidelines were being developed, Guidelines for the Educational Use of Music ("Music Guidelines") were also being developed, allowing multiple copies for classroom use provided the excerpts are brief, are nonconsumable, include an appropriate copyright notice, and only one copy per student is made. *See id.* at 71. The Copyright Act of 1976 also granted limited reproduction rights to libraries and archives. Section 108 allows libraries and archives to create at least one copy of a work if it is done without the intent of direct or indirect commercial advantage, the library is open to the public, and the reproduction includes the appropriate copyright notice. *Id.* at 74. *See* 17 U.S.C. § 108 (1994).

115. The Educational Guidelines exemplify consumables as workbooks, standardized tests, and answer sheets. *Id.* at 69.

116. The three individuals who endorsed the Educational Guidelines represented the Authors League of America, the Association of American Publishers, Inc., and the House of Representatives Copyright Committee. Notably absent were the representatives from educational institutions. *See id.* at 68.

117. *See id.* at 72.

118. *See* Gregory Klingsporn, *The Conference on Fair Use (CONFU) and the Future of Fair Use Guidelines*, 23 COLUM.-VLA J.L. & ARTS 101, 108 (1999).

guidelines would inadvertently narrow the customary and actual applications of fair use in education.<sup>119</sup> The courts have adopted the same conservative view, looking at them as requirements instead of guidelines.<sup>120</sup>

Second, the spontaneity, brevity, and cumulativeness requirements are overly restrictive.<sup>121</sup> Moreover, the spontaneity requirement provides little guidance for educators. The Educational Guidelines imply that an educator could meet this requirement if the instructor did not have enough time to obtain an approval and using the work was necessary. The time for approvals would vary from publisher to publisher. Although currently the Copyright Clearance Center promotes its website to process copyright requests quickly,<sup>122</sup> the time that it takes publishers to process requests represents only one aspect of the problem. An educator must know about the service, be able to obtain necessary funding for copyright fees, and receive approval from an authorized representative of the educational institution.

Another difficulty arises when an educator decides a work is necessary for effective teaching and the educator lacks spontaneity, but is unwilling or unable to pay the fee required from the publisher. Publishers would argue that an educator unwilling to pay the fee does not value the work at an economically efficient rate. The validity of this argument depends upon the assumption that educational institutions or students have unlimited resources to acquire copyright materials for instruction. Only if resources were unlimited might the amount the educator was willing to pay correspond to its importance for "maximum teaching effectiveness." However, most educational institutions operate under financial constraints. Although some educational institutions could raise tuition for each student

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119. See Stephana I. Cobert & Oren R. Griffin, *The Impact of Fair Use in Higher Education: A Necessary Exception?*, 62 ALB. L. REV. 437, 440 (1998). In fact, this has happened. Many schools have adopted the guidelines as de facto policy. See, e.g., Northwestern Univ. Library, *Copyright and the Electronic Reserve System*, at <http://www.library.northwestern.edu/reserve/faculty.html#copyright> (last modified Sept. 17, 2000); Trs. of Cal. State Univ., *University Guidelines for Intellectual Property*, at <http://www.cetus.org/fair3.html> (last modified Apr. 25, 1996); University of Texas Office of the General Counsel, *Fair Use of Copyrighted Materials*, at <http://www.utsystem.edu/OGC/intellectualproperty/copypol2.htm> (last modified Jan. 5, 1998). If or to what degree these policies are followed by instructors is unclear.

120. See *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1389-91 (6th Cir. 1996).

121. For a summary of these requirements, see *supra* note 113.

122. The Copyright Clearance Center still recommends four to six weeks to obtain and process licenses. See Copyright Clearance Ctr., Home Page, at <http://www.copyright.com> (last visited Jan. 23, 2001) [hereinafter CCC Home Page].

or charge a fee for the use of a particular resource, this would only increase costs for students.

Third, confusion exists as to the legal persuasiveness of the Educational Guidelines. Although they are not part of the Copyright Act of 1976, some courts have found them persuasive.<sup>123</sup> However, unlike most legislative history, the Educational Guidelines do little to reveal congressional intent. They were created after negotiations by interested coalitions, including book publishers and educators. Although the Judicial Committee accepted the guidelines, it is unclear how the guidelines represent public policy and what role the congressional committee members played in drafting the guidelines. The Educational Guidelines could hardly represent congressional intent if members of Congress failed to influence the creation of the guidelines other than by forcing a consensus.<sup>124</sup> The strength of this proposal is also undermined because Congress specifically decided to exclude the Guidelines from § 107 of the Copyright Act.

#### D. CONFERENCE ON FAIR USE

Since the infusion of technology, Congress, the White House, educators, and creators have realized that the Guidelines set out in 1976 are outdated and do not easily adapt to the digital educational environment. In 1994, the Conference on Fair Use (CONFU) set out to replace the 1976 guidelines without resorting to legislative amendment.<sup>125</sup> CONFU involved constituents from education, libraries, and publishers, many of whom feared that the White House Administration Task Force on Information Infrastructure's insistence on narrowing the scope of fair use would lead to its elimination.<sup>126</sup> After four years, CONFU accomplished little as too many diverse interests were present to create consensus.<sup>127</sup> Publishers wanted strict burdens placed on educators who used copyrighted

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123. See *MDS*, 99 F.3d at 1390. Justice Scalia would agree that the meaning of the statute can only be determined by the words comprising the statute itself. See, e.g., Klingsporn, *supra* note 118, at 107–08.

124. *Id.* at 110–12.

125. *Id.* at 114.

126. See *id.*; *supra* Part III.A. See also INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 1 (1995) [hereinafter WHITE PAPER].

127. See Klingsporn, *supra* note 118, at 115.

works in the digital realm.<sup>128</sup> Educators advocated that guidelines should provide guidance, not be shackles.<sup>129</sup> Although proposals were written for digital images, distance learning, and educational multimedia, the final report met great opposition.<sup>130</sup> Although CONFU failed to produce guidelines, the process demonstrates the divergent views on fair use, the failure of consensus, and the need for legislative solutions.<sup>131</sup>

#### IV. NEW TECHNOLOGY

The historical, economic, and legal background as well as the educational conflicts surrounding fair use in copyright law highlight the conflict between maintaining creative incentives and promoting public accessibility. Technological advances magnify this conflict. New technology lowers transaction costs but allows for greater ease of infringement. As technology advances, copyright holders advocate expanding copyright protection, which reduces public access to information for individual and educational purposes. Much of the debate about educational fair use centers on these technological advances and their effects on intellectual property rights. This Part explores how developing technologies have led to the expansion of copyright protection in the United States and how future advances threaten educational fair use.

##### A. EXPANSION OF COPYRIGHTS IN RESPONSE TO TECHNOLOGY

In the past fifty years, new inventions have brought about changes in copyright law. The Copyright Act of 1976 and the legislation that followed it endowed copyright holders with additional intellectual property rights to offset the increased threat of infringement brought about by technological advances such as the copy machine.

The Copyright Act of 1976 dramatically enlarged the rights of copyright holders to include all fixed, original works. This new protection was automatic, as neither a copyright notice nor registration was necessary for protection. It extended the duration of copyright protection from a

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128. See CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE, available at <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf> (last modified Nov. 24, 1998) [hereinafter CONFU FINAL REPORT].

129. Am. Ass'n of State Colls. & Univs., *AASCU Withholds Endorsement of Fair Use Guidelines*, at <http://www.aascu.org/news/memo/archive/9705aascuwithholds.htm> (May 1997).

130. For responses to the *CONFU Final Report*, see NINCH, *Fair Use in Education: Responses to "Final" CONFU Meeting*, [http://www-ninch.cni.org/ISSUES/COPYRIGHT/FAIR\\_USE\\_EDUCATION/FAIR\\_USE\\_EDUCATION.html#responses](http://www-ninch.cni.org/ISSUES/COPYRIGHT/FAIR_USE_EDUCATION/FAIR_USE_EDUCATION.html#responses) (May 19, 1997).

131. See Klingsporn, *supra* note 118, at 112–20.

maximum of fifty-six years to fifty years after the death of the creator. Thus, new technologies forced copyright law to adapt in order to provide adequate protections and incentives to produce.

Concerns about copy machines eventually gave way to apprehension concerning digital technology. The Clinton Administration envisioned the Internet as a conduit for increased distribution and communications, both nationally and internationally.<sup>132</sup> The White House Administration created the Information Infrastructure Task Force (IITF) to research implementation of digital networks, such as the Internet, and the effects of those structures on intellectual property rights.<sup>133</sup> The IITF created the Working Group on Intellectual Property Rights to investigate the feasibility of a global communications network. The resulting product was *The Report of the Working Group on Intellectual Property Rights* (“*White Paper*”).<sup>134</sup>

The *White Paper* aimed to establish a policy protecting copyright holders’ works.<sup>135</sup> The *White Paper* claimed not to alter fair use, but the proposed terms actually constricted it.<sup>136</sup> It proposed that digital transmissions of copyrighted works on the Internet should be the exclusive right of copyright holders. However, granting this exclusive right to the copyright holder would eliminate the first sale doctrine<sup>137</sup> and limit people’s ability to share legally acquired works. It promoted copyright management information for digital copies<sup>138</sup> and denied fair use in any situation where licenses were available.<sup>139</sup> These provisions would significantly increase a copyright holder’s ability to control works, enforce copyrights, and would effectively destroy the modern fair use doctrine. Critics, including educators, librarians, and researchers, condemned the *White Paper* for creating bright-line rules that strongly favored

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132. See WHITE PAPER, *supra* note 126.

133. S. REP. NO. 104-315, at 3 n.3 (1996) [hereinafter 1996 SENATE REPORT].

134. WHITE PAPER, *supra* note 126.

135. See Fred H. Cate, *The Technological Transformation of Copyright Law*, 81 IOWA L. REV. 1395, 1436–38 (1996).

136. See Kevin Davis, *Fair Use on the Internet: A Fine Line Between Fair and Foul*, 34 U.S.F. L. REV. 129, 165 (1999).

137. Currently, the first sale doctrine permits consumers to use a legally obtained copyrighted work in any manner, provided that the use does not violate an exclusive copyright. See *supra* note 13.

138. Copyright management systems allow copyright holders to use software to monitor the use of any work. See Davis, *supra* note 136, at 165; *infra* Part III.B.2.

139. Although some of the courts have implicitly favored this approach, there are problems with relying solely on licensing opportunities, including free speech and public policy concerns. See *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 940 (2d Cir. 1994); Part V *infra*.

publishers.<sup>140</sup> All of the proposed modifications enlarged copyrights at the expense of public access. Although Congress rejected legislation stemming from the *White Paper*, some of its provisions were incorporated into the Sony Bono Copyright Extension Act and the Digital Millennium Copyright Act.<sup>141</sup>

The Sony Bono Copyright Extension Act lengthened the copyright term by twenty years.<sup>142</sup> Congress believed this extension was important to expand international intellectual property markets.<sup>143</sup> Prior to the Act, international law provided greater protection than American copyright law.<sup>144</sup> Congress feared that American creators could not capitalize on international markets. Furthermore, Congress believed the extension of the copyright term would provide additional incentives for American creators. These incentives would keep the American international economy strong and also subsidize the creation of new works.<sup>145</sup> Nevertheless, extending the copyright term reduces the dissemination of information by decreasing the quantity of works in the public domain.

The most recent amendment to American copyright law is the Digital Millennium Copyright Act (DMCA).<sup>146</sup> Although the DMCA does not explicitly address fair use, its contents affect the fair use doctrine. The DMCA prohibits people from circumventing any technological protections used by publishers by imposing criminal sanctions. This allows publishers to protect works that are not under statutory copyright protection with encryption or other software.<sup>147</sup> The DMCA also protects Copyright Management Information systems, which allow copyright holders to track

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140. See Pamela Samuelson, *The Copyright Grab*, 29 UWLA L. REV. 165, 170 (1998).

141. See *infra* notes 142–48 and accompanying text.

142. 17 U.S.C. § 302(a) (Supp. IV 1999).

143. See 1996 SENATE REPORT, *supra* note 133, at 7.

144. In 1995, the Council of the European Communities extended the copyright to life plus seventy years. The Copyright Extension Act makes American law congruent with international law. See *id.* at 8.

145. The Senate strongly considered the fact that intellectual property is the United States' second-largest export. Such information was presented to the Senate by Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks. See *id.* at 10; *Hearings on S.483 Before the Senate Comm. on the Judiciary*, 104th Cong. 6 (1995). The Senate Reports also considered that allowing two generations of heirs to reap the rewards of the creator's works would increase incentives and produce additional works. 1996 SENATE REPORT, *supra* note 133, at 6. Although this seems to be justified under the natural rights view of copyright and fair use, this may create economic inefficiencies. See *supra* Part II.B–C.

146. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

147. For example, copyright only protects expression of ideas, not ideas or facts themselves. Therefore, a person has the potential to use these laws to restrict access to information that would not be protected.

and monitor uses of their work, providing copyright holders greater control over digital works, and enabling individuals independently to monitor and to enforce copyright protections.<sup>148</sup>

Providing additional copyright protections increases copyright holders' profits at the expense of public access. Lengthening the copyright term and providing additional rights to copyright holders raises costs to individuals and educational institutions and decreases the number of expressive works in the public domain.

#### B. NEW TECHNOLOGIES AND THE EFFECTS ON COPYRIGHT

Recent copyright laws give greater control to copyright holders at some expense to the public. Beyond new legislation, technology also gives copyright holders the ability to restrict use of their works without relying on the law.

##### 1. *Global Communications on the Internet*

The Internet is a network of computer facilities expediting access to information.<sup>149</sup> Although the Internet facilitates applications such as the World Wide Web, it also facilitates e-mail, newsgroups, electronic bulletin boards, and Telnet.<sup>150</sup> The Internet creates an enormous resource by locating and distributing information or ideas in text, video, audio, or photographic format.<sup>151</sup>

Computers and the Internet provide individuals with greater transfer and duplicating abilities than the simple copy machine. Advanced software, digital graphics, scanners, and other technology allow individuals to make copies of works in digital format and disseminate that information quickly, with minimal cost, and without any concern for geographical borders.

Use of the Internet also potentially violates many of the exclusive rights of copyright holders. In *Mai Systems Corp. v. Peak Computer, Inc.*,<sup>152</sup> the Ninth Circuit held that uploading copyrighted information into a

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148. 17 U.S.C. § 1202 (Supp. IV 1999). See also S. REP. NO. 105-190, at 16-17 (1998).

149. See Vincent J. Roccia, Note, *What's Fair Is (Not Always) Fair on the Internet*, 29 RUTGERS L.J. 155, 161-62 (1997).

150. See Jo Dale Carothers, Note, *Protection of Intellectual Property on the World Wide Web: Is the Digital Millennium Copyright Act Sufficient?*, 41 ARIZ. L. REV. 937, 939 (1999).

151. *Id.* at 940.

152. 991 F.2d 511 (9th Cir. 1993).

computer's random access memory (RAM)<sup>153</sup> violated the exclusive right to copy, even though the contents of RAM were discarded when the computer was turned off.<sup>154</sup> The court held that prior to their destruction the contents were in a fixed medium providing useful representation. Fixed meant the ability to be perceived, but that perception does not have to be made by the human eye.<sup>155</sup> Further, the length of time the program was on the computer was irrelevant, as long the work could be used. Public display and performance rights may also be implicated by the Internet. Although the courts have not faced this type of inquiry yet, projecting images or sounds from the Internet onto a screen and through speakers may violate copyright holders' right to public display and public performance.<sup>156</sup>

Copyright holders claim infringements in the digital realm destroy their "creative incentives."<sup>157</sup> The arguments divide into traditional categories: natural rights and economic efficiency. Natural rights supporters complain that without greater protections, creators will not receive their "just deserts."<sup>158</sup> Economists claim works in digital format require greater protection because as duplicating costs decrease, greater protections for the publisher are necessary to maintain incentives to create. Moreover, the Internet may decrease market failure by lowering transaction costs;<sup>159</sup> expanded protection would promote use of the Internet and digital technologies. Similarly, courts have reacted to the fear that fair use will diminish incentives for artists to produce new works.<sup>160</sup>

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153. Random access memory is a temporary storage device on a computer. Accessed web pages are immediately sent to a computer's RAM and infringe copyrights. FREE ON-LINE DICTIONARY OF COMPUTING, at <http://foldoc.doc.ic.ac.uk/foldoc/index.html> (last modified Jan. 19, 2001).

154. *Mai Sys. Corp.*, 991 F.2d at 518–520. Because documents in RAM can be copied onto a hard drive, a floppy disk, or a CD, having a copy in RAM is useful, even if placing the document in RAM was not an intentional act of the computer user but an indiscriminate act of the computer. *See id.* *See also* *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distrib.*, 983 F. Supp. 1167, 1175 (N.D. Ill. 1997).

155. *See Mai Sys. Corp.*, 991 F.2d at 518.

156. *See Cate*, *supra* note 135, at 1428.

157. This reference to creative incentives is in quotes because it is unclear what monetary awards are necessary to maintain production. *See infra* Part V for a discussion of how uses of technology will help bolster the ability of publication, not defeat it. These concerns were the driving force behind the *White Paper* and DMCA. *See supra* notes 102–16 and accompanying text.

158. *See* Dan Thi Phan, Note, *Will Fair Use Function on the Internet?*, 98 COLUM. L. REV. 169, 189–90 (1998).

159. Notice that this analysis defines market failure by high transactional costs. However, externalities, lack of perfect knowledge, and antidissemiation motives also cause market failure. *See supra* Part II.C.

160. *See* Stephen B. Thau, *Copyright, Privacy, and Fair Use*, 24 HOFSTRA L. REV. 179, 186–93 (1995).

## 2. *Technology Impeding the Dissemination of Information*

The Internet provides access to information and decreases copying and distribution costs. It and the surrounding technologies enable creators and copyright holders better to prepare and to monitor the use of their works. For example, Copyright Management Systems are software programs embedded in other documents or programs allowing copyright holders to monitor the accessibility and distribution of works, including which systems sent and received that work.<sup>161</sup> These systems also enable copyright holders to license fragments of their works, creating pricing schemes per word, sentence, or paragraph. Copyright holders could also charge according to the importance of a fragment to the whole work, extracting a higher price for fragments that are essential to a work.

Copyright holders can also use technology to control the flow of information and ideas, as well as to monitor and to prosecute infringement. Encryption,<sup>162</sup> digital watermarks,<sup>163</sup> software metering,<sup>164</sup> and cryptolopes<sup>165</sup> all enable copyright holders to exert greater control over their works. These technologies increase the ability to prosecute in addition to preventing and deterring infringement. Copyright holders also have new legal protections, since circumventing any of these technologies violates the DMCA and may lead to civil or criminal sanctions.<sup>166</sup> These technologies provide the copyright holder with the ability to control what works will be distributed when, where, in what manner, and at what price.

As technology has expanded, so have copyrights. However, Congress will no longer have to expand copyrights as copyright holders can use technology to protect their works and to enforce their rights. When copyright holders begin using technology to appropriate more rights than

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161. See Phan, *supra* note 158, at 192 n.168.

162. Encryption encodes information so that only users with an authorized decoder can access the document, software, or information. See DANIEL P. DERN, *THE INTERNET GUIDE FOR NEW USERS* 324 (1994); Phan, *supra* note 158, at 193 n.166.

163. A digital watermark is an irremovable identifier embedded in a document. Although it does not alter the original document, if the user attempts to print or disseminate the document, a message will appear that conceals the original document and states that the use is unauthorized. See Phan, *supra* note 158, at 193 n.167.

164. Software metering requires that hardware be attached to a computer system. The hardware records and charges for each download or program used. See *id.* at 201.

165. A cryptolope is a program that allows a user to search documents for key terms, but charges a user for the encryption key to open the document and view the actual content. Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 *BUFF. L. REV.* 845, 891 (1997).

166. See *supra* Part II.

those granted by Congress, fair use will be necessary to provide protection to the public.

#### V. ADJUSTING FAIR USE FOR EDUCATION IN THE TWENTY-FIRST CENTURY

The previous sections have illustrated how technological advances increase the potential for access and the potential to prevent access. American law stands on the threshold of turning the “information superhighway” into an “information toll-road.”<sup>167</sup> Though the Internet may help create market efficiency, it may also create informational tyranny wherein people must pay for basic access to ideas and information.

Again, the educational arena intensifies the conflicts between private incentives and public access. No court has addressed whether an educational facility could successfully rely on fair use to defend classroom copying exceeding the Educational Guidelines. Publishers rarely sue educational facilities for copyright infringement. However, with the stakes and potential profits increasing, targeting educational institutions, instructors, and students for posting works on the Web, or downloading and printing them, may become profitable. Under current analysis, an instructor posting information on the Web without obtaining available licenses would violate copyright law and be unable to claim fair use. Although the Internet should not change the fair use analysis,<sup>168</sup> courts’ reliance on licensing has overly constricted fair use. In the future the courts should consider a more balanced application of § 107 in the educational realm.

The courts’ conclusions in past cases are based on five phenomena. First, the courts were heavily influenced by the commercial nature of retail stores such as Kinko’s or Michigan Document Services.<sup>169</sup> The courts considered these uses commercial because the copy centers profited from the copyright infringement even if students used the copies. Both Kinko’s and MDS were better able to compete against other retail copy stores who did obtain permissions. Because they had fewer costs, they could offer lower prices and undercut the competition. Additionally, the copy stores sold the packets above the cost of production, another commercial use. Although the Supreme Court has indicated that the distinction between

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167. Phan, *supra* note 158, at 191 & n.161.

168. Roccia, *supra* note 149, at 193.

169. See Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1387 (6th Cir. 1996); Basic Books, Inc. v. Kinko’s Graphics Corp., 758 F. Supp 1522 (S.D.N.Y. 1991).

commercial and noncommercial uses should not overly influence the fair use determination, appellate courts still give great weight to this distinction, as they are concerned that commercial uses will supplant a copyright holder's limited monopoly.<sup>170</sup>

Second, due to the commercial use, the courts have disregarded any transformative nature of the use. Although many courts have held that mere copying cannot be fair use, the Supreme Court upheld absolute copying as fair use in *Sony Corp. of America v. Universal City Studios*.<sup>171</sup> Furthermore, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court indicated that education is an exception to the necessity of transformation.<sup>172</sup> Additionally, courts should remember that the secondary work does not have to transform the original work to have a transformative purpose.<sup>173</sup>

The few cases addressing fair use in education never explored how the educational process transforms works through criticism, analysis, and juxtaposition. Most judicial analysis of copyrighted works examines the new work in isolation and does not include the context of the use. However, context is important in education because a transformative effect takes place in the classroom. Instructors use lectures or discussions to scrutinize, compare, and criticize works. If those same ideas or criticisms were articulated in an article, fair use would be less problematic. The article would be considered transformative because the new ideas would be intermingled with the original ideas in a fixed form. Presenting a lecture that analyzes and critiques a work, or publishing an article on the same subject requires a similar amount of research, planning, and effort. Although the lecture is not protected by copyright because it is not in a fixed medium, its transformative effect should still be considered.

Teaching also decreases the likelihood of cheap replacements of the original work. Although the actual reproduction of the original work may be inexpensive, instructors invest large quantities of time in order to

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170. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

171. 464 U.S. 417, 448 (1984) (holding that the recording of television programs with a videotape recorder was fair use). See also *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1346 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975). But see *Am. Geophysical Union v. Texaco Inc.*, 37 F.3d 881, 890 (2d Cir. 1994).

172. *Campbell*, 510 U.S. at 579 n.11. The Educational Guidelines do not indicate that any transformative purpose is necessary for copying. 1976 HOUSE REPORT, *supra* note 4, at 67. But see *Sony Corp. of Am.*, 464 U.S. at 481 (Blackmun, J., dissenting) (advising caution in expanding fair use "[e]ven in the context of highly productive educational uses").

173. See *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

transform original works into teaching resources. Consequently, the fear of a cheap secondary copy quickly supplanting the original should diminish.

If an educational facility or a student made the same copies as in *Michigan Document Services* or posted similar portions of articles on the Web, with password protection, then the first factor, the nature and purpose of the use, should weigh in favor of the educational facility, instructor, or student. First, no commercial use exists. Second, the educational process transforms copyrighted works. Should the court decline to accept the educational transformative theory, lack of transformation in an educational institution should not be weighed against the educational user.<sup>174</sup>

Although the first and fourth factors of § 107 usually dominate fair use inquiries, the courts often rely on quantity to deny fair use. However, quantity should not be considered in isolation. As the Supreme Court indicated in *Campbell*, the context is important to determine if only the necessary amount was used.<sup>175</sup> In education, using a greater amount of a work may be necessary for the instructor to present a coherent, understandable analysis to students who lack familiarity with and understanding of the subject matter.

Courts have also suggested that the selections of text instructors choose represent the “heart” of the original work.<sup>176</sup> Following this rationale would always resolve the third factor in favor of the copyright holder. Although instructors may copy excerpts they deem important, that in and of itself does not make the selection the most important part of the original work. A teacher may be trying to illustrate a point secondary to the original work. This logical flaw is exacerbated if the alleged “heart” of the matter is a fact, which should receive less copyright protection.<sup>177</sup>

Fourth, even though the Supreme Court has indicated that none of the factors is more important than any other,<sup>178</sup> lower courts consistently allow the fourth factor to dominate the analysis.<sup>179</sup> This domination has recently increased as more courts increasingly subscribe to the market theory of copyright and fair use, placing considerable persuasive weight on streamlined licensing systems and their ability to reduce transaction costs.

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174. See *Campbell*, 510 U.S. at 579 n.11.

175. *Id.* at 587–88.

176. *Princeton Univ. Press v. Universal City Studios, Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996).

177. 17 U.S.C. § 106 (1994). Copyright protects the expression of ideas, not the ideas themselves or mere facts.

178. See *Campbell*, 510 U.S. at 577–78.

179. See, e.g., *Princeton Univ. Press*, 99 F.3d at 1389–91; *Am. Geophysical Union v. Texaco Inc.*, 37 F.3d 881, 897–99 (2d Cir. 1994).

Cases have strongly suggested fair use will be denied if a defendant could have obtained a license.<sup>180</sup>

Sole reliance on licensing fails to justify its dominance in fair use analysis. First, following the market theory approach, a balanced limited monopoly and a perfect market would produce transfers at the economically efficient rate.<sup>181</sup> This approach, however, ignores the ability of new technology to increase the copyright holder's control over dissemination through technological advances. If the copyright holder obtains a virtually unlimited monopoly, then the market will fail to support efficient transfers. As copyright holders gain further control of their works and expand their monopolies, they have less incentive to maintain low and competitive prices.<sup>182</sup>

Analyzing the licensing fees also presents a circular argument.<sup>183</sup> Courts reason that if licensing was available, regardless of the cost, a license should have been bought. This reasoning inherently follows from the rationale that fair use should only be allowed when there is a market failure. Yet, if a use is fair, then users should not have to pay licensing fees.<sup>184</sup> Therefore, the courts assume damages that should not exist if the uses were fair, since copyright holders do not have any rights to collect fees.

Relying primarily on licensing fees also results in extending copyright holders' rights of control beyond what Congress conveyed to them.<sup>185</sup> After all, fair use only exists when someone decides not to charge a licensing fee and the use meets the four-factor analysis. Courts assume publishers always have the right to collect licensing fees.<sup>186</sup> However, this analysis fails to take into consideration that licenses may be pervasive, extending to works in the public domain or other uses not protected by copyright.<sup>187</sup> If publishers can convince enough users to license

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180. See *Princeton Univ. Press*, 99 F.3d at 1387–89; *Am. Geophysical Union*, 37 F.3d at 899.

181. The ability to increase prices and to reduce distribution is a reason the United States disapproves of monopolies. See *Landes & Posner*, *supra* note 30, at 335; *supra* Part II.

182. See *Cate*, *supra* note 135, at 1434.

183. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1357 n.19 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975).

184. “By definition, every fair use involves some loss of royalty . . .” *Leval*, *supra* note 22, at 1124.

185. See Michael G. Frey, *Unfairly Applying the Fair Use Doctrine*: Princeton University Press v. Michigan Document Services, 66 U. CIN. L. REV. 959, 990 n.234 (1998).

186. See *Loren*, *supra* note 23, at 39.

187. See Univ. of Tex. Office of the Gen. Counsel, *Coursepacks and Fair Use: Issues Raised by the Michigan Document Services Case*, at <http://www.utsystem.edu/ogc/intellectualproperty/michigan.htm> (last modified Mar. 4, 1997).

educational materials, then licensing becomes customary and destroys the balance between copyright law and fair use.

Additionally, publishers are often sophisticated business entities. The people with whom they bargain, especially at academic institutions, may not be such sophisticated market participants. The disparity in bargaining power may allow publishers to intimidate unsophisticated parties into purchasing unnecessary licenses.<sup>188</sup> An instructor receiving a cease and desist letter or a letter threatening litigation from a publisher will probably either purchase an unnecessary license or refrain from using the work due to economic restraints. Even if courts did a case-by-case analysis to determine when a license was appropriate, the presumption that licensing forecloses fair use means that in practice copyright holders can extort licenses from unsophisticated purchasers.

Additionally, courts relying on licensing allow copyright holders to gain the benefit of both contract and copyright protection. Using technology such as encryption, the copyright holder can define the terms of use. Copyright holders can create a fee structure for viewing, printing, or downloading items.<sup>189</sup> The Internet also allows for multiple revenue streams, including fees for subscriptions, advertising, connection charges, monthly fees, per-article fees, per-chapter fees, or even per-page fees.<sup>190</sup> By licensing instead of selling, the copyright holder can maintain control of the work.<sup>191</sup> For example, a license could prohibit an instructor from taking printed material and putting it into digital form. This would preclude the instructor from typing any part of the work into a computer, making a slideshow presentation, or posting the work on the Web, even with password protection. Licenses also capture additional value because they can prohibit the first sale doctrine, digital transmission, and even duplication rights.<sup>192</sup> Although licenses allow copyright holders to obtain

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188. See Loren, *supra* note 23, at 42.

189. See Michael L. Siegal, *Online Information Provider Liability for Copyright Infringement: Potential Pitfalls and Solutions*, 4 VA. J.L. & TECH. 7, at ¶ 23 (1999), available at <http://www.vjolt.net/vol4/v4i2a7-siegel.html>.

190. Cate, *supra* note 135, at 1464.

191. Meurer, *supra* note 165, at 874 n.145.

192. Gemstar International has released an electronic device to read newspapers and books. Although versions of books and newspapers can be downloaded off of the Internet into the device, the published information cannot be exported out of the device. Gemstar-TV Guide Int'l, *eBook—Copyright Protection*, at <http://www.ebook-gemstar.com/publishers/copyright.asp> (last visited Jan. 23, 2001).

greater value for their works, this does not explain why fair use should be replaced by licensing requirements.<sup>193</sup>

The most important necessary changes focus on the fourth factor. Rewards are assuming too great a role in the copyright analysis, thus disregarding the need for public access.<sup>194</sup> Allowing publishers to determine what is fair use provides incentives for them to appropriate greater control while reducing public access. Publishers contend that loss of licensing revenues to educational institutions would impair markets.<sup>195</sup> Even if true, that does not necessarily result in a need to protect every loss from fair use. Although publishers could lose revenue from some educational facilities, provided that the publishers receive a marginal return on their efforts, they will still have the proper incentive to create.<sup>196</sup>

Software publishers made many of the same arguments when advocating expanding copyright protection. They contended that without extreme protection there would be no incentive to create additional software. Although most experts agree that the software industry has lost over \$13 billion from copyright violations,<sup>197</sup> even with this great loss, the software industry still flourished and a great abundance of software presently exists in the market for people to purchase, share, and download. Some of this loss, which resulted in greater knowledge and dissemination of ideas, also resulted in sales, which otherwise would not have occurred.

When defining losses, courts should not focus on the aggregate loss, but on comparative losses. A publisher losing \$10,000 in licensing when total income is \$100,000,000 has less of an impact on incentives than the same loss to a publisher's whose total income is \$100,000.<sup>198</sup> In either situation, looking at the dollar amount out of context misrepresents the impact on the copyright holder.

Last, the courts incorrectly rely on the Educational Guidelines as a definitive account of permitted classroom use. Instead of viewing the

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193. See generally Tom Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998).

194. Loren, *supra* note 23, at 47. See also *supra* Part II.B (arguing that the moral rights approach to intellectual property rights should not be followed).

195. Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1387–88 (6th Cir. 1996). See also Roccia, *supra* note 149, at 187.

196. See Landes & Posner, *supra* note 30; *supra* Part II.C.

197. Chuck Melvin, *Pirates of the Cyber Age: Software Buccaneers are Thriving—and You May be One, Too*, THE PLAIN DEALER (Cleveland), Jan. 20, 1997, at 5D.

198. See Jay Dratler, *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 330 (1988).

Educational Guidelines as a safe harbor,<sup>199</sup> courts place great importance on the defendant's violation. Reliance on the Guidelines as a bright-line test prejudices fair use analysis and misuses the Guidelines. They do not reflect the only acceptable standard, only one *possible* standard. Courts should not use failure to meet this standard as further evidence against fair use.<sup>200</sup>

Fair use analysis for educational copying should consider two additional factors: (a) use of other licensed texts, and (b) fair licenses. Opposition to educational fair use stems from a fear that copies for classrooms will completely replace regular textbooks and other licensed materials. Academic publishers would then lose all incentive to publish. An instructor who uses supplemental copies but also assigns licensed texts, however, fulfills the aims of the copyright law.<sup>201</sup> Publishers will receive some compensation and incentive to produce additional works while promoting dissemination to the public.

Focusing upon the proportion of licensed to unlicensed works used by an instructor is analogous to the third factor in the fair use inquiry, the amount and quality of the use. Examining the proportion allows courts to determine whether the amount used in the new work supplants the market for the original work. Similarly, the licensing proportion examines the amount of unlicensed work in proportion to the total licensed work used by an instructor in a particular class. Examining the licensing proportion allows courts to determine whether the amount of unlicensed work used by the instructor harms the general licensing market. The court can also use the licensing proportion to evaluate the extent to which publishers benefit from licenses versus the extent to which educational facilities, instructors, and students benefit from fair use.

This licensing proportion should favor fair use if the instructor uses at least sixty-six percent of licensed materials in a particular class. At sixty-six percent, publishers receive the majority of licensing fees. A minimum of sixty-six percent eliminates publishers' fear that photo or digital copying will replace original and licensed materials, while retaining instructor

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199. The purpose of the Guidelines was to provide a safe harbor for educators, not to set explicit standards. See 1976 HOUSE REPORT, *supra* note 4, at 67; *supra* Part III.C

200. The Educational Guidelines may not even properly reflect the concerns of Congress because they were written by publishers and other interested parties. See *supra* Part III.C. The decision not to include the Guidelines in the statute and the Prologue to § 107, however, does indicate congressional intent. See 1976 HOUSE REPORT, *supra* note 4, at 67.

201. The Senate's legislative history from the Copyright Act of 1976 states that filling in missing information or bringing a subject up to date are both legitimate teaching aims that justify classroom copying within the fair use doctrine. See S. REP. 94-5473, at 65 (1976).

flexibility and constraining rising education costs. Although publishers will argue the proportional amount should be higher, a higher level is unnecessary. While the licensing proportion factor may favor fair use at sixty-six percent, other factors still influence the aggregate fair use determination. Fair use may still be precluded if the instructor copied excessively large excerpts and caused substantial market harm to the copyright holder. Also, a showing of sixty-six percent may only slightly influence the finding of fair use, whereas a showing of ninety percent licensed work may strongly influence the determination of fair use. Similar to the third factor in the fair use analysis, the greater the amount of unlicensed work, the less the factor will weigh in the instructor's favor.

In addition to licensing proportions, licenses should be evaluated for basic fairness. The cases addressing fair use indicate that if a copyright holder made licensing available, the defendant should have purchased the license. The court assumes that these license agreements are fair and reflect current market and educational needs. However, if the Internet allows publishers to extend their monopoly and control licensing, publishers could determine their own terms or include grave restrictions. Licenses enlarge copyright monopolies, as the availability of licensing has no relationship to prices and terms that facilitate transfers. Broad monopolistic rights allow copyright holders to dictate the license terms. Therefore, licensing opportunities should not be considered in the copyright holder's favor if the license was unreasonable.

To determine the basic fairness or reasonableness of a license, courts should examine its terms, including restrictions and pricing. Generally, licenses should not be considered fair or reasonable if the terms contravene essential educational needs. Specifically, licenses prohibiting instructors from transforming works into digital format should be unreasonable provided that instructors secure any licensed works with password protection and remove the information at the end of the semester. Digital technology is significant to instructors who use presentation software, electronic tutorials, or otherwise incorporate computer technology into education. Prohibiting the use of digital technology undermines the quality of education and prohibits the instructor from maximizing educational opportunities.

Allowing digital use with overly burdensome restrictions should also be presumptively unfair. Currently, some publishers allow educators to digitize,<sup>202</sup> but require them to purchase two licenses. For example a

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202. See CCC Home Page, *supra* note 122.

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professor passing out a copy of a work in class and also making the same work available on the Internet must pay the licensing fee twice. Although putting works in different formats provides greater flexibility to the instructors and students, using both formats does not increase the distribution of a work or cause harm to the publisher's licensing market, provided that the Internet postings are secured by password access. Therefore, charging twice for electronic use should be presumptively unreasonable without further justification.

Additionally, requiring restrictive access through an institutional server is unreasonable absent contravening evidence. Protecting works on the Internet from widespread distribution is important to maintain their value. Yet requiring more than a protected site and timely removal is excessive. Forcing institutions to restrict access to institutional servers only defeats the purpose of electronically posting materials: student and teacher flexibility and convenient access for students to information for specific educational purposes.

The fairness or reasonability of a license should also be determined by its price. Individual publisher pricing prevents the formation of a uniform reasonable price. However, extrinsic evidence influencing price should include comparable substitutes, the qualities of the works, and average licensing prices. First, reasonable substitutes are relevant to the analysis. A showing of the availability of comparative works at materially lower costs should demonstrate unreasonableness absent evidence to the contrary. The type of work also should influence this determination. Older, out-of-print works should have lower licensing fees because the copyright holder no longer is exploiting the work for financial advantage. Additionally, hardcover books that are not widely distributed or financially exploited should also have lower licensing fees.

Although using the average prices of licenses would provide the court an objective standard of reasonableness, this factor should not be over-emphasized. Because the publishers control licensing prices, basing the fairness and reasonableness of a licensing fee on the average price would provide incentives to publishers collectively to increase licensing fees. Instead, the average licensing fee should be only one measure of the total extrinsic evidence. Like any other contractual reasonableness requirement, the courts should evaluate the terms in light of the general educational purposes of the educational institution, instructor, or student. Unreasonable or overly restrictive licenses should weigh in favor of fair use.

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The preceding analysis illustrates that courts should recognize educational fair use even if licensing opportunities are available. The balanced analysis will allow fair use to supplement materials, not completely replace them. This represents an optimal trade-off between the need to disseminate information and encourage scholarship and the need for individual incentives. Although this analysis better protects education and fair use, the legislature should also act to increase the predictability of educational actions.

## VI. CONCLUSION

With expanded technology, fair use in education should be narrowly expanded to maintain its viability in educational institutions. Although technology may alter how people receive information, it should not be allowed to limit access, especially to educators. As explained in this Note, courts need to expand their notion of fair use in the educational realm, not allow technology further to constrict it. This Note has put forth a scheme to allow fair use to remain in the educational realm without destroying creative incentives.

While the courts should adopt a less restrictive view of fair use, Congress should also replace the Educational Guidelines with a statute specifically addressing educational fair use. The current Educational Guidelines are outdated and inflexible.<sup>203</sup> Congress' ability to hold hearings and weigh public opinion makes it the most appropriate forum to resolve this issue.

The current copyright debate focuses on whether copyright can successfully adapt to the changes in technology or if laws directly addressing technology should replace current copyright laws. Courts seem to be waiting for congressional guidance before analyzing fair use in this new technological age. As yet, Congress has made no attempt to address the issue of educational fair use. Regardless of whether the courts or Congress modifies copyright law, any modifications should preserve educational fair use.

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203. See *supra* Part III.C–D.

