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Transformative Teaching and Educational Fair Use after Georgia State

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Transformative Teaching and Educational Fair Use After Georgia State

BRANDON BUTLER

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the last judicial word on the subject for years to come, and I argue that its import is primarily in its rejection of outdated guidelines and case law, rather than any affirmative vision of fair use, which the court studiously avoids.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

ARTICLE CONTENTS

I. INTRODUCTION	475
II. THE RISE OF THE TRANSFORMATIVE USE PARADIGM	480
A. FAIR USE GENERALLY	480
B. HOW TRANSFORMATIVE USE SAVED FAIR USE.....	484
C. RECENT DECISIONS SHOW TRANSFORMATIVE USE’S POTENTIAL POWER AND SCOPE FOR EDUCATORS.....	493
III. EDUCATION LEFT BEHIND?	497
A. EDUCATIONAL GUIDELINES GROUNDED IN THE MARKET- CENTERED PARADIGM	497
B. “STRAIGHT REPRODUCTION” IN CAMPBELL FOOTNOTE ELEVEN	501
C. THE COURSEPACK CASES AND THE PUBLISHERS’ EFFORTS TO ENFORCE THE GUIDELINES	503
D. GEORGIA STATE AND THE END OF THE GUIDELINES/ COURSEPACKS ERA.....	509
IV. VARIETIES OF TRANSFORMATIVE TEACHING.....	515
A. ORTHOGONAL TEACHING.....	516
B. PRODUCTIVE TEACHING.....	521
V. NON-TRANSFORMATIVE EDUCATIONAL FAIR USE.....	524
VI. CONCLUSION.....	529



Transformative Teaching and Educational Fair Use After Georgia State

BRANDON BUTLER*

I. INTRODUCTION

The 11th Circuit’s opinion in *Cambridge University Press v. Patton*¹ is a landmark: the first application of the fair use doctrine to educational uses in the Internet era. Indeed, the opinion is the first application of the doctrine by a circuit court to a dispute between publishers and educators² (as distinct from suits against a scholar³ or third-party copy shops⁴) since the passage of the Copyright Act of 1976. The case involves Georgia State University (GSU), which, like many universities, has a policy allowing teachers to share digitized excerpts of copyrighted books and journal articles from the GSU library with students via a secure course website.⁵ No license fees are paid nor permissions sought; GSU relies on fair use.⁶ With funding from the licensing body Copyright Clearance Center (CCC) and the trade group Association of American Publishers (AAP), three university presses sued GSU in 2008 alleging widespread copyright infringement.⁷ After a lengthy trial, the district court largely vindicated

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¹ 769 F.3d 1232 (11th Cir. 2014) (*Cambridge II*).

² See *Marcus v. Rowley*, 695 F.2d 1171, 1171 (9th Cir. 1983) (involving a dispute between public school teachers regarding alleged copyright infringement through inclusion of portions of a cake decorating guide in a “learning activity package”).

³ See *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 208 (4th Cir. 1998) (holding that the defendant’s “use[s] of the original manuscript of *Blood of My Blood* were permissible under the ‘fair use’ exception to copyright infringement”).

⁴ See *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1383 (6th Cir. 1996) (holding that third-party copy shop’s “exploitation of the copyrighted materials did not constitute fair use”); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991) (involving major publishing houses suing third-party copy shop, Kinko’s, over alleged copyright infringement).

⁵ *Cambridge II*, 769 F.3d at 1237.

⁶ *Id.* at 1238.

⁷ *Id.* at 1237.

GSU's practices, applying a mechanical fair use analysis that favored GSU.⁸ The publishers appealed.

I attended oral argument.⁹ From the very beginning the judges on the appellate panel raised the issue of "transformative use." At least since the Supreme Court's opinion in *Campbell v. Acuff-Rose*,¹⁰ which characterized transformative uses as "at the heart of the fair use doctrine,"¹¹ courts have shown deference to uses successfully characterized as "transformative," but skepticism about most others.¹² GSU counsel conceded at oral argument that none of their uses were transformative. Judge Vinson then asked whether the uses were, therefore, market substitutes for licensed use in the same way that printed "coursepacks" had been found to be substitutional in a pair of cases in the 1990s.¹³ GSU's response, that the electronic copies lacked a table of contents and a binding, and that the uses were more like a library's reserve desk than like a copy shop, did not seem to persuade anyone on the panel. Again and again the judges returned to coursepacks, and to market effect. Observers were not optimistic for GSU.¹⁴

⁸ See, e.g., *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1225 (N.D. Ga. 2012) (*Cambridge I*) (holding that "the facts of the case so clearly meet the criteria of (1) the preamble of the fair use factor one, (2) factor one itself, and because (3) GSU is a non-profit educational institution, factor one strongly favors Defendants"), *rev'd*, *Cambridge II*, 769 F.3d 1232. Judge Evans also held that the second factor would favor GSU whenever the work was primarily factual, which was the case for the majority of the uses at issue. *Id.* at 1227. GSU started each fair use evaluation with the first two factors already in its column. The third factor often favored GSU, as well, because Judge Evans held that any use below a certain quantitative threshold would be favored, and most GSU uses met her criterion. *Id.* at 1243 ("Excerpts which fall within these limits are decidedly small, and allowable as such under factor three."). Only factor four was likely to strongly favor the publishers in a significant number of cases. See *id.* ("[W]here permissions are readily available [for use of excerpts in electronic format] . . . and permissions are not paid, factor four weighs heavily in Plaintiffs' favor.").

⁹ Oral Argument, *Cambridge II*, 769 F.3d 1232 (notes on file with author).

¹⁰ 510 U.S. 569 (1994).

¹¹ *Id.* at 579.

¹² The rise and dominance of the transformative use paradigm is discussed in detail in Part II, *infra*. For a recent, rare dissent from the transformative approach, see *Kienitz v. Sconnie Nation, LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (characterizing the Supreme Court's adoption of the transformative use concept in *Campbell* as a "suggestion" to courts, which Judge Easterbrook declined to follow).

¹³ See *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1383 (6th Cir. 1996) (holding that a third-party copy shop's copying of scholarship and selling it as coursepacks "did not constitute fair use"); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991) (finding that Kinko's violated the Copyright Act when it sold for-profit coursepacks, which included excerpts of books, to college students). Judge Vinson's line of questioning foreshadowed a blistering "concurrence" that argued all of GSU's uses should be found unfair because a copy shop would have paid a license to compile the excerpts into a printed compilation for sale. *Cambridge II*, 769 F.3d at 1291 (Vinson, J., concurring).

¹⁴ See, e.g., Kevin Smith, *A Discouraging Day in Court for GSU*, SCHOLARLY COMM. @ DUKE (Nov. 20, 2013), <http://blogs.library.duke.edu/scholcomm/2013/11/20/a-discouraging-day-in-court-for-gsu/> [<http://perma.cc/2KPU-K8S4>] (stating that the oral argument went in a "discouraging direction for GSU" and noting "that storm clouds might be developing in the area of academic copyright").

When the appellate court finally issued its opinion eleven months later, it was not as hard on GSU as those of us who attended oral arguments had feared it might be.¹⁵ The majority agreed with the trial court that despite being non-transformative, the non-profit, educational character of GSU's uses should favor fair use.¹⁶ They also mostly ignored the Classroom Guidelines and the so-called "coursepack cases" that the publishers had proposed as fair use yardsticks.¹⁷ These pro-education aspects of the opinion were offset, however, by the court's finding that because GSU's uses were not transformative,¹⁸ the market harm of GSU's uses should be given "additional weight."¹⁹

The appellate court did not rule on the fairness of the uses at issue in the case. Rather, after objecting to the mechanical nature of the district court's fair use analysis, specifically, Judge Evans' arithmetic adding of the four statutory factors, as well as her application of a hard quantitative limit for the third factor (ten percent or one chapter, depending on the length of the book from which the excerpt was taken) and her use of a binary factual/fictional standard to determine the nature of the work used, the appellate panel remanded for a more flexible application of the doctrine in light of the appellate court's various findings.²⁰ What that application will look like is anyone's guess. The factors are in apparent equipoise, with favored educational purpose squaring off against potentially weighty market harm. As the University of Minnesota's Copyright Program Librarian Nancy Sims observed, "NOTHING HERE WILL HELP EVEN ONE TEACHER MAKE FAIR USE CALLS."²¹ Nor, one might add, is the decision likely to help even one judge. Somehow Judge Evans will have to weigh the favored nature of the use against potentially substantial market harm to find the right outcome for each individual use.²²

Most fair use determinations come down to a competition between those two considerations, the user's laudable purpose and the copyright

¹⁵ Judge Vinson's concurrence gave a glimpse of how bad things could have been. While he concurred in the decision to reverse and remand, Judge Vinson argued that the proper fair use analysis would rely heavily on the coursepack cases and the Classroom Guidelines, just as the publishers had argued, and would find that all of GSU's uses were per se infringement because analogous uses by copy shops routinely involve paying for permission. *Cambridge II*, 769 F.3d at 1284-91.

¹⁶ *Id.* at 1283.

¹⁷ *Id.* at 1261 (limiting the effect of the coursepack cases); *id.* at 1274 (rejecting the Guidelines as controlling the analysis under third statutory factor). For more about these phenomena and their place in educational fair use history, see Part III, *infra*.

¹⁸ *Cambridge II*, 769 F.3d at 1262.

¹⁹ *Id.* at 1281.

²⁰ *Id.* at 1237.

²¹ Nancy Sims (@CopyrightLibn), TWITTER (Oct. 17, 2014, 5:57 PM), <https://twitter.com/copyrightlibn/status/523276713514774528> [<https://perma.cc/6LE2-3B54>].

²² As of this writing, the appellate court has denied the publishers' motion for rehearing en banc, so the remaining paths forward are an appeal to the Supreme Court or else a new trial court opinion on remand.

holder's market prerogative.²³ Breaking the tie in a principled way involves recourse to a conception of the purposes and values of fair use and copyright. Part II of this Article tells the story of how, over the last two decades, the focus of most fair use decision-making in courts has shifted from a presumption that the market should trump, to a focus on the user's justifying purposes, and finally to courts strongly favoring uses that are "transformative,"²⁴ which broadly connotes use for a new, productive purpose. With a transformative use story in hand, even billion dollar companies can disdain license demands;²⁵ without one, however, the market prerogative reasserts itself and even core fair use beneficiaries (scholars, teachers, non-profit educational institutions) face the same uncertainty that GSU must now face in the wake of the circuit court's reversal.

Notably, some education-related uses have already been blessed as transformative. For example, a group of universities was recently vindicated in its claim that digitizing millions of in-copyright books for a variety of education-related purposes constituted fair use. In *Authors Guild, Inc. v. HathiTrust*,²⁶ the Second Circuit found that digitizing and reproducing books to allow "users to 'word search'—that is, to locate where specific words or phrases appear in the digitized books[,]""²⁷ and to conduct text mining research was transformative and not a market substitute for the books.²⁸ The *HathiTrust* court decisively rejected Authors Guild's claims regarding lost profits, explaining that such claims are irrelevant where transformative uses are concerned.²⁹ In another case

²³ A copyright holder's non-pecuniary interests have occasionally played a role in fair use outcomes, but moral objections to a defendant's use have a censorious aspect that can as easily favor as disfavor fair use. *Compare* *Salinger v. Random House*, 811 F.2d 90, 100 (1987) (giving weight to estate's wishes regarding unpublished letters), *with* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994) (explaining that "being denied permission to use a work does not weigh against fair use" and holding that "[p]arody, like other comment and criticism, may claim fair use").

²⁴ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1991) (defining "transformative"); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 734 (2011) (explaining the shift from the market-centered to the transformative use approach).

²⁵ See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (determining that search engines are transformative fair use and can copy and use millions of images from the internet without a license).

²⁶ 755 F.3d 87, 101, 103 (2d Cir. 2014).

²⁷ *Id.* at 97, 100.

²⁸ The court also found that providing digitized texts to print-disabled library users was fair use, though not transformative. *Id.* at 102–03. This holding is also revealing. For more on the continuing relevance of non-transformative fair uses, see Part V, *infra*. For an overview of the scholarly value of computer analysis of texts, see Kathryn Schulz, *Distant Reading*, N.Y. TIMES, June 26, 2011, at BR14.

²⁹ See *HathiTrust*, 755 F.3d at 99 ("[A]ny economic 'harm' caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work."). This analytical move—the result of a series of decisions in the Second Circuit—is a major contribution of

involving digitization and indexing, *A.V. ex rel. Vanderheye v. iParadigms LLC*,³⁰ the Fourth Circuit held that large-scale, systematic copying of student papers to power a plagiarism detection tool was a transformative fair use.³¹ The successes in *HathiTrust* and *iParadigms* illustrate the potential power of the transformative use framework in the educational context. The GSU case does not harness that power, but it begins to close the door on a historically deformed application of the doctrine.

That deformation has an origin story, which has been told before³² but bears a little revisiting in Part III. From the inception of the 1976 Copyright Act, educational photocopying and its technological descendants have been a source of anxiety among educational publishers, who rely on schools and students as the core market for their prepackaged materials. While part of this anxiety seems to be a concern about substitutional copying of textbooks, workbooks, and the like, publishers and their licensing agents have also sought to suppress “competition” in the form of teachers making their own teaching resources using materials that may not have been originally designed for teaching use.³³ By a systematic campaign of litigation, threats of litigation, and copyright “education,” commercial interests have promulgated a vision of fair use that hinges first and foremost on alleged lost revenue.³⁴ This vision, which views all teaching uses as “coursepacks” and all coursepacks as subject to the strictures of the Classroom Guidelines, is dramatically out of step with contemporary fair use case law, particularly the concept of transformative use.

The Eleventh Circuit’s opinion in the GSU case is a half-measure in the right direction. It marks the end of the Guidelines-coursepack paradigm, but it does not offer a useful substitute. Indeed, while the GSU decisions have both recognized the value of education, and minimized the Classroom Guidelines and the coursepack cases, they have also joined other courts in finding that absent a transformative use argument, the availability of a license for the use could still be decisive against a fair use claim.³⁵ The GSU opinions have taken educators out of the frying pan, but

the transformative use approach, and it is discussed at greater length later in this Article. *See infra* Part II.B.

³⁰ 562 F.3d 630 (4th Cir. 2009).

³¹ *Id.* at 640.

³² *See* Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 151–52 (1998) (explaining the decline of fair use protection for educators).

³³ *See* Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1384 (6th Cir. 1996) (addressing an infringement challenge by publishers to the creation of teacher-required coursepacks).

³⁴ *See* Bartow, *supra* note 32, at 151–52.

³⁵ *See Cambridge II*, 769 F.3d 1232, 1276–77 (11th Cir. 2014) (citing *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1994)) (finding that the availability of a license makes a use less likely to be fair); *id.* at 1281 (concluding that the non-transformative nature of the use makes “the threat

they may well throw them into the fire. Only a compelling transformative use argument can free teachers from license demands and the uncertainty of weighing their favored purpose against the publishers' alleged market harm.

In Part IV of this Article, I echo Peter Jaszi in suggesting that teachers can and should “catch a ride on the train that is already moving”³⁶—transformative use—and I give examples of how some common teaching uses should be understood in terms of that paradigm, rather than the market-subordinate vision applied to allegedly non-transformative uses in the GSU case. While these kinds of arguments have been made in amicus briefs and best practices documents, this is the first scholarly article to argue with specificity that teachers make a wide variety of clearly transformative uses.

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

II. THE RISE OF THE TRANSFORMATIVE USE PARADIGM

A. *Fair Use Generally*

Fair use is an equitable, common law doctrine created by judges to ensure that an author's exclusive rights do not frustrate socially beneficial uses (particularly, uses that advance the goals of copyright law). Its modern history in the United States is often traced to Judge Joseph Story's opinion in *Folsom v. Marsh*,³⁷ the first opinion to describe what have become the four statutory factors that courts consider in deciding whether a use is fair.³⁸ The doctrine has roots in English common law.³⁹

Fair use was first codified in U.S. law as part of the Copyright Act of 1976.⁴⁰ The process that led to its codification was famously contentious

of market substitution . . . [more] serious,” which requires courts to give the fourth factor “additional weight in its overall fair use calculus”).

³⁶ Peter Jaszi, *Fair Use and Education: The Way Forward*, 25 LAW & LIT. 33, 40 (2013).

³⁷ 9 F. Cas. 342, 348 (D. Mass. 1841) (No. 4901).

³⁸ See *id.* at 348 (“[L]ook 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.”).

³⁹ See Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1373 (2011).

⁴⁰ Pub. L. No. 94-553, § 107, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 107 (2012)).

and dominated by the question of educational photocopying.⁴¹ A committee of educational associations advocated a blanket exemption for all non-profit educational copying, while publishers insisted on a case-by-case determination.⁴² Educators wanted certainty, while publishers were concerned a blanket exception could cannibalize revenues for textbook, reference book, and scientific publishing.⁴³

Congress ultimately split the difference, preserving case-by-case adjudication rather than a blanket exemption, while assuring educators “that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for members of a class.”⁴⁴ Congress also included non-profit, educational use as a favored purpose in the statute.⁴⁵ Finally, Congress added a provision at 17 U.S.C. § 504(c)(2) “to provide innocent teachers and other non-profit users of copyrighted material with broad insulation against unwarranted liability for infringement.”⁴⁶ Congress thus reassured educational users that their uses were among those that would be found fair under appropriate circumstances, but did little to assure them as to what exactly those circumstances would be. Instead, courts were instructed to continue to develop the doctrine in a common law mode.⁴⁷

The text of 17 U.S.C. § 107, the fair use provision of the Copyright Act of 1976, reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

⁴¹ H.R. REP. NO. 94-1476, at 66 (1976) (“[M]ost of the discussion of [17 U.S.C. §] 107 has centered around questions of classroom reproduction, particularly photocopying.”); see Robert Kasunic, *Fair Use and the Educator’s Right to Photocopy Copyrighted Material for Classroom Use*, 19 J.C. & U.L. 271, 277–80 (1993) (describing the legislative history of § 107 centered around photocopying for educational use).

⁴² See H.R. REP. NO. 90-83, at 30–31 (1967).

⁴³ *Id.* at 30.

⁴⁴ Kasunic, *supra* note 41, at 280 (quoting H.R. REP. NO. 94-1476, at 66).

⁴⁵ H.R. REP. NO. 94-1476, at 66.

⁴⁶ Kasunic, *supra* note 41, at 280 (quoting H.R. REP. NO. 94-1476, at 67).

⁴⁷ See H.R. REP. NO. 94-1476, at 66.

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁴⁸

The text of the statute is insufficient on its own to guide courts, practitioners, and policymakers looking to identify which uses are fair. This is clear from the text itself, which instructs courts to consider a non-exclusive list of four factors without telling them what, exactly, the consideration of those factors is meant to discover, other than perhaps fairness in some general sense.⁴⁹ On this point, Wendy Gordon and Judge Leval agree. Gordon has observed, “[i]t is not clear how much weight should be given to any one of the four factors, what additional factors should be considered, or whether any one of the factors is a sine qua non for a finding of fair use.”⁵⁰ Judge Leval wrote in his opinion in *Authors Guild v. Google, Inc.*,⁵¹

The statute’s wording . . . does not furnish standards for recognition of fair use. Its instruction to consider the “purpose and character” of the secondary use and the “nature” of the copyrighted work does not explain what types of “purpose and character” or “nature” favor a finding of fair use and which do not.⁵²

The House Report expresses a legislative intent merely to “endorse” the common law doctrine as it had developed in the courts, and disclaims any intent to “freeze” it.⁵³

⁴⁸ 17 U.S.C. § 107 (2012).

⁴⁹ For an argument that this is as it should be, see Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138 (1990) (“What is fair is as fact-specific and resistant to generalization . . .”).

⁵⁰ 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, 1604 (1982); see also Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1564 (2004) (“[T]he facial emptiness of the statutory language means that alone, it is almost entirely useless analytically, except to the extent that it structures the collection of evidence that a court might think relevant to its decision.”); David Nimmer, “*Fairest of Them All*” and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 287 (2003) (“In the end, reliance on the . . . factors to reach fair use decisions often seems naught but a fairy tale.”).

⁵¹ 804 F.3d 202 (2d Cir. 2015).

⁵² *Id.* at 213 (footnote omitted).

⁵³ H.R. REP. NO. 94-1476, at 66 (1976).

Courts have followed the legislature in warning that fair use cannot be contained or reduced to any simple formula or rule of thumb. Commercial uses are not per se unfair,⁵⁴ nor are uses of entire works.⁵⁵ The four factors are not exhaustive.⁵⁶ The uses listed in the preamble are examples of uses that *may* be fair, but not every use of those kinds *will* be fair.⁵⁷ The good or bad “faith” of the user is not decisive,⁵⁸ nor is the unpublished status of the work used.⁵⁹ The factors are not to be viewed in isolation, weighed equally, or tallied mathematically.⁶⁰ In sum, courts have largely resisted efforts to contain or define the fair use doctrine in ways that might, in their view, unduly constrain judicial discretion to deploy the doctrine flexibly based on the facts of future cases. These declarations of judicial independence, together with the facial indeterminacy of the statute, have led several commentators to lament the uncertainty that seems to surround the doctrine.⁶¹

⁵⁴ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (“Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”).

⁵⁵ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984) (“[T]he fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use.”).

⁵⁶ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

⁵⁷ See *id.* at 561 (explaining the need for a case-by-case analysis).

⁵⁸ See *Folsom v. Marsh*, 9 F. Cas. 342, 349 (D. Mass. 1841) (explaining that the defendant’s use cannot be found fair simply because it is morally laudable); Simon J. Frankel & Matt Kellogg, *Bad Faith and Fair Use*, 60 J. COPYRIGHT SOC’Y U.S.A. 1, 3 (2012) (“The defendant’s lack of virtue does not tell courts anything about the value of the defendant’s use or its effect on the market, and thus should be immaterial to copyright’s overall goal of maintaining the desired balance between the author’s economic interests and the interests of society.”).

⁵⁹ See 17 U.S.C. § 107 (2012).

⁶⁰ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (“All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

⁶¹ See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2004) (stating that fair use is “the right to hire a lawyer”); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1106 (2007) (“[L]eading courts and commentators generally acknowledge that the four-factor test as interpreted provides very little guidance for predicting whether a particular use will be deemed fair.”); Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 433 (2008) (stating that fair use “endlessly fascinates us even as it defeats our every attempt to subdue it”); Leval, *supra* note 24, at 1105 (“[T]hroughout the development of fair use doctrine, courts [have] failed to fashion a set of governing principles or values.”); Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008) (“[O]ur understanding of copyright is evolving into the view that any use of a copyrighted work that is not authorized by the copyright owner or the statute is infringement.”); Madison, *supra* note 50, at 1551 (“It is clear that the statutory text offers far less than it appears to.”); Nimmer, *supra* note 50, at 266–68 (“Other problems continue to bedevil even those who have done their homework completely.”).

B. *How Transformative Use Saved Fair Use*

Recent scholarship answers skepticism about whether fair use can be described or understood theoretically and belies judges' protestations against cabinining their common law powers. Examined in the aggregate, case law reveals patterns and paradigms that help make sense of fair use decisions. The most recent empirical look at the doctrine, Neil Netanel's *Making Sense of Fair Use*,⁶² provides a narrative account of the development of fair use jurisprudence since 1978 that explains not only the currently dominant judicial interpretation of the doctrine, but also its seeming incoherence at earlier stages of development. Netanel contends that the development of fair use case law over the last three decades sees the rise and fall of what he calls the "market-centered paradigm," and the ultimate triumph of the transformative use paradigm.⁶³

The market-centered paradigm is defended most trenchantly and compellingly in Wendy Gordon's 1982 article *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*.⁶⁴ In it, Gordon argues that "[f]air use should be awarded to the defendant in a copyright infringement action when (1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner."⁶⁵ This view seemingly creates a strong presumption against fair use: "[a]n economic justification for depriving a copyright owner of his market entitlement exists only when the possibility of consensual bargain has broken down in some way."⁶⁶

Elsewhere in the article, and in subsequent writing,⁶⁷ Gordon is at pains to point out that "market failure" is a broad concept that encompasses more than failure to reach a deal due to prohibitive transaction costs.⁶⁸

⁶² Netanel, *supra* note 24.

⁶³ *Id.* at 768.

⁶⁴ Gordon, *supra* note 50.

⁶⁵ *Id.* at 1614.

⁶⁶ *Id.* at 1615.

⁶⁷ See Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149, 150–51 (2002) (clarifying the author's approach to the concept of market failure); see also Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 58 (1997) ("[C]ourts must be willing to recognize the most important kind of market failure relevant to fair use: the inability to internalize the external benefits of certain kinds of use.").

⁶⁸ The other two forms of market failure that Gordon highlights are cases where a transaction creates positive externalities that cannot be internalized in a bargained-for exchange and situations where non-monetizable interests that are not factored into the bargain by the parties are at stake. See Gordon, *supra* note 50, at 1631 (suggesting courts could "investigate whether the social costs of relying on the market are unacceptably high"); see also Loren, *supra* note 67, at 6 (discussing courts' differing interpretations of market failure). Loren argues persuasively that cases, where positive externalities

Courts nevertheless gravitated to a simplified version of Gordon's view: if a would-be fair user could seek permission, and a copyright holder would grant permission, then the user *must* seek permission.⁶⁹ This version of Gordon's argument was cited by the dissent in *Sony v. Universal*⁷⁰ and by the majority in *Harper & Row v. Nation*,⁷¹ and became a dominant framework in fair use case law for more than a decade.⁷²

The market-centered approach manifests itself in another important aspect of the fair use case law that developed after the 1976 Copyright Act: the idea that commercial uses are presumptively unfair. The Supreme Court endorsed this presumption in back-to-back fair use opinions in the 1980s.⁷³ This double blessing was enough to move some courts to apply the presumption even after the Supreme Court itself largely abandoned the idea in *Campbell*.⁷⁴

Like any dominant paradigm, the market-centered approach was subjected to extensive scholarly comment. Critics warned of a dystopian future where all transaction costs are reduced to near-zero, every interaction with copyrighted content is metered and paid for, and fair use ceases to exist.⁷⁵ Others suggested the market failure approach is too

would not be realized in a market exchange, are "more central to the purpose of fair use and the constitutional purpose of copyright" than the high transaction cost scenario. *Id.*

⁶⁹ See, e.g., *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1387 (6th Cir. 1996) (finding that existence of a licensing market for a given use is sufficient to "negat[e] fair use"). Such a presumption can be a deathblow to defendants in copyright infringement lawsuits who are in a dispute with a known rights holder plaintiff who is in court objecting to uncompensated use. In such circumstances, what court could think that a defendant is somehow unable to seek permission from the rights holder? Furthermore, if the defendant's only objection is to price, the logic of the market-centered approach dictates that the use must not be that valuable, after all, and fair use does not apply.

⁷⁰ 464 U.S. 417, 478 (1984) (Blackmun, J., dissenting) (acknowledging that the fair use doctrine can act as a form of subsidy).

⁷¹ 471 U.S. 539, 566 n.9 (1984) (noting that "economists believe the fair use exception should come into play only when the market fails or the price the copyright holder would ask is near zero").

⁷² See Netanel, *supra* note 24, at 734 ("The market-centered paradigm reigned supreme for some two decades following its adoption in *Harper & Row* in 1985.").

⁷³ See *Sony*, 464 U.S. at 451 ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."); *Harper & Row*, 471 U.S. at 562 (citing *Sony*, 464 U.S. at 451).

⁷⁴ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) ("It was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew's parody of 'Oh, Pretty Woman' rendered it presumptively unfair.").

⁷⁵ See Loren, *supra* note 67, at 46 ("Acceptance of the 'lost' permission fees argument permits copyright owners to eliminate all fair uses, because fair use will be relegated to only those uses for which the copyright owner declines to charge."); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 991 (2002) ("More generally, as copyrighted works have moved increasingly toward interactive digital distribution, the market failure approach argues for an increasingly reduced role for fair use."). Others agreed that this is a natural consequence of the theory and found it to be a feature, not a bug. See Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 581 (1998) (arguing that allowing copyright owners and consumers to freely contract under a fared use system may reveal a system more beneficial than one preempted by federal copyright law).

restrictive of fair use because it ignores important differences between copyrighted works and ordinary physical property.⁷⁶ Many pointed out that an overly simple market centered approach led to circular arguments of the following form with regard to the fourth factor: finding this use to be fair would permit unlicensed use. Unlicensed use causes a copyright holder financial harm. Any use that causes financial harm cannot be fair use. Therefore, the court cannot find this use to be fair.⁷⁷ In the realm of education, critics warned that a narrow market-centered approach gives too little credit to the social value of education⁷⁸ and that reliance on markets would warp teaching practices and widen the gap between rich and poor institutions and students.⁷⁹

The courts' application of fair use has shifted dramatically away from this preoccupation with markets, due in large part to the Supreme Court's decision in *Campbell v. Acuff-Rose*.⁸⁰ In *Campbell*, the Court reversed a series of market-driven holdings that had led the appellate court to reject the musical group 2 Live Crew's fair use defense.⁸¹ Judge Leval himself hailed the decision as rescuing the doctrine from a dangerous detour.⁸² In addition to its careful correction of the *Sony* dictum that commercial uses are presumptively unfair,⁸³ *Campbell's* most enduring contribution to fair use jurisprudence has been its emphatic embrace of the "transformative use" paradigm.⁸⁴

Judge Pierre N. Leval, then a federal district judge for the Southern District of New York, first described the concept of transformative use in his groundbreaking article *Toward a Fair Use Standard*.⁸⁵ Leval proposed a theory, grounded in the utilitarian philosophy of copyright expressed in the Constitution and in various Supreme Court decisions, that copyright's objective is to "stimulate activity and progress in the arts for the intellectual enrichment of the public."⁸⁶ Judge Leval reasoned that fair use

⁷⁶ Lunney, *supra* note 75, at 993.

⁷⁷ See, e.g., James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 896 (2007) (noting the "danger of circularity" in court reasoning when dealing with market effect).

⁷⁸ See Loren, *supra* note 67, at 33 (noting the immense benefit of non-transformative uses of copyrighted materials in the context of education).

⁷⁹ See Deborah Gerhardt & Madelyn Wessel, *Fair Use and Fairness on Campus*, 11 N.C. J.L. & TECH. 461, 484, 489 (2010) (explaining that the lack of clarity in copyright law provides exceptional challenges, especially for institutions with fewer resources).

⁸⁰ 510 U.S. 569 (1994).

⁸¹ See *id.* at 594.

⁸² See, e.g., Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 19 (1994) (expressing relief that Justice Souter's opinion guided the fair use doctrine in the right direction).

⁸³ See *Campbell*, 510 U.S. at 583–85.

⁸⁴ See *id.* at 579 (stating that transformative works significantly further the goal of copyright).

⁸⁵ See Leval, *supra* note 24, at 1111.

⁸⁶ *Id.* at 1107.

should apply when “excessively broad protection would stifle, rather than advance, [that] objective.”⁸⁷ Copyright can exhibit this self-defeating quality for two reasons: all intellectual creation has a more or less derivative character, and some very important intellectual activities are “explicitly referential.”⁸⁸

Leval argues that factor one, the purpose and character of the use, is the key to the fair use inquiry because it reveals whether and to what extent a use is justified.⁸⁹ The Constitution’s utilitarian vision of copyright tells us those uses that contribute to the intellectual enterprise by using existing material for a new purpose; adding value; and creating “new information, new aesthetics, new insights and understandings” will be justified.⁹⁰ Leval calls such uses “transformative.”⁹¹ A transformative justification is not absolute or infinite; the use must be appropriately tailored to the justificatory purpose.⁹² “Factor One,” Leval writes, “is the soul of fair use.”⁹³ The remaining factors are then weighed against the justificatory force of factor one.⁹⁴ Where there is no transformative justification for the use and the planned use simply reproduces and exploits existing works, adding nothing in the process, Leval suggests further inquiry may be unnecessary.⁹⁵

In discussing the first factor in *Campbell*—the purpose and character of the use—Justice Souter writes that when evaluating use of an existing work to create a new work, judges ask whether the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; . . . in other words, whether and to what extent the new work is ‘transformative.’”⁹⁶ More importantly, the Court adopts Leval’s view that transformative uses “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright,” and that therefore “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁹⁷ So, even though 2 Live Crew’s use was commercial, and even though licenses are

⁸⁷ *Id.* at 1109.

⁸⁸ *Id.* (providing philosophy, history, and science as examples).

⁸⁹ *Id.* at 1111.

⁹⁰ *Id.*

⁹¹ *Id.* at 1112.

⁹² *Id.* at 1111; *see also id.* at 1112 (providing examples of “takings of protected expression without sufficient transformative justification”).

⁹³ *Id.* at 1116.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citing Leval, *supra* note 24, at 1111).

⁹⁷ *Id.*

commonly paid for reuse of existing music in rap songs,⁹⁸ the use could still be fair due to its transformative nature as parody, which quotes characteristic passages from a work in order to criticize and lampoon it, thus creating a valuable new contribution to the culture.

Some scholars were skeptical of transformative use as applied by the courts in the years immediately following *Campbell*. Lower courts' dutiful shift in rhetoric notwithstanding, it was not clear at first that there was any real substantive effect on the application of the law. Some suggested that the word was applied post hoc to whatever uses judges decided (for their own equitable reasons) should be found fair, with no consistent meaning across uses.⁹⁹ In his groundbreaking empirical study of fair use case law from 1978–2005, Barton Beebe suggested that *Campbell* had caused a brief period of judicial focus on the user's purpose but that, over time, courts drifted again toward a focus on market harm.¹⁰⁰

Each of these concerns has been addressed, and transformative use vindicated, by more recent empirical studies of fair use case law. R. Anthony Reese has shown that transformative use is primarily about new purposes, not literal alteration of underlying works,¹⁰¹ a distinction that defuses arguments that transformative use vitiates the derivative works right. Reese's argument should also give comfort to scholars who worry that important uses that do not involve literal alteration of the original work are undervalued by the dominance of the transformative use paradigm.¹⁰² Matthew Sag has shown that transformative use can be used to predict likely outcomes of fair use cases ex ante, refuting the alleged unpredictability of the doctrine.¹⁰³ Michael Madison has argued, based on his own exhaustive reading of the case law from 1978–2003, that fair use is an analytical tool that focuses on social and cultural patterns,¹⁰⁴ that courts can use these patterns to understand when a use is transformative,¹⁰⁵ and

⁹⁸ 2 Live Crew had even explored the option of obtaining such a license. *Id.* at 573.

⁹⁹ See, e.g., Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y U.S.A. 251, 259, 262 (1998).

¹⁰⁰ Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PENN. L. REV. 549, 588 (2007).

¹⁰¹ See R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008) ("In assessing transformativeness, the courts generally emphasize the transformativeness of the defendant's purpose in using the underlying work, rather than any transformation (or lack thereof) by the defendant of the content of the underlying work." (emphasis omitted)).

¹⁰² See, e.g., Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537 (2004) (arguing that the focus on transformative use, which the author defines as speech that is "critical and creative," is "critically incomplete, leaving unchallenged much of copyright's scope, despite the large number of nontransformative copying activities that are also instances of free speech").

¹⁰³ See Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 49, 51 (2012).

¹⁰⁴ See Madison, *supra* note 50, at 1646.

¹⁰⁵ See *id.* at 1670.

that social patterns organized around uncompensated uses should not be disfavored under the fourth factor.¹⁰⁶ Finally, in *Making Sense of Fair Use*, Netanel has described the development and emerging coherence of the fair use doctrine from a chronological perspective, showing that transformative use has come to define the doctrine more and more in recent years, even when courts do not invoke the doctrine by name.¹⁰⁷

These studies have a cumulative, refining, and mutually reinforcing quality, and together they provide would-be fair users with powerful insights into the doctrine. Most important is Netanel's conclusion that transformative use has decisively replaced inquiry into market harm as the dominant paradigm in fair use jurisprudence.¹⁰⁸ Netanel demonstrates that when judges find the use of a copyrighted work to be transformative, they almost always find it to be fair.¹⁰⁹ Using fresher data, finer-grained coding, and a chronological lens, Netanel rebuts some of the skeptical conclusions of Beebe's earlier empirical analysis, showing that courts paid more and more attention to transformative use after *Campbell*.¹¹⁰ Netanel's study also confirms Reese's conclusion that transformative use does not require literal alteration of the underlying work.¹¹¹ Indeed, Netanel finds that literal alteration is neither necessary nor sufficient for a finding of fair use.¹¹² Most fair use cases did not involve alteration of the underlying work, and, in the cases involving alteration, fair use was found only where the use was for a new purpose.¹¹³

In addition to explaining the courts' turn from factor four to factor one as the key to the fair use inquiry, these scholarly surveys have unearthed a series of kinds of uses that courts seem consistently to find transformative and, therefore, fair. Pamela Samuelson's *Unbundling Fair Uses*¹¹⁴ teases out a series of "policy-relevant clusters" of related uses from the case law.¹¹⁵ Transformative use plays a significant role in several of these clusters, and Samuelson's work adds a helpful nomenclature for subclasses of transformative uses, dividing them into three types: literally

¹⁰⁶ While Madison does not characterize his theory in this way, it seems more than fair to say that in arguing that courts are primarily interested in a defendant's legitimate claim to be engaged in a recognized social pattern, Madison is arguing that courts are looking primarily at the user's purpose, rather than the alleged market harm, to determine fairness. *See id.* at 1668–69.

¹⁰⁷ *See* Netanel, *supra* note 24, at 719, 722–23.

¹⁰⁸ *Id.* at 742.

¹⁰⁹ *See id.* at 743, 745–46.

¹¹⁰ *Id.* at 737–38.

¹¹¹ *Id.* at 747.

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ Paula Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009).

¹¹⁵ *Id.* at 2541.

transformative uses,¹¹⁶ productive uses,¹¹⁷ and orthogonal uses. In Samuelson's typology, literally transformative uses are those that alter or recast the underlying creative work, literally transforming it, in order to create a new expressive work.¹¹⁸ The parody in *Campbell* is an example of a transformative use in this sense. *The Wind Done Gone*'s retelling of *Gone with the Wind* from the point of view of the non-white characters is another example.¹¹⁹

Productive uses, in Samuelson's sense, do not involve alteration of the original work; rather, the original work, or a protectable portion of that work, is copied *without alteration* in the context of criticism or commentary about the work.¹²⁰ Samuelson gives as an example of this kind of fair use the work at issue in *New Era Publications International v. Carol Publishing Group*,¹²¹ a scathing biography that quoted extensively from L. Ron Hubbard's published books in order to subject the books and their author to criticism.¹²²

Finally, orthogonal uses involve literal copying from an existing work for an entirely new purpose. Some orthogonal uses involve speech-related purposes,¹²³ such as reproducing substantial portions of copyrighted works as evidence to support charges of bigotry,¹²⁴ or distributing the entirety of

¹¹⁶ Samuelson does not use the phrase "literally transformative." Instead, she argues that only parodies and other literal alterations that result in creation of a new work are "truly transformative," and that other uses are better described using her concepts of "orthogonal" and "productive" uses. *Id.* at 2557–58. This insistence on "true transformativeness," however, is inconsistent with judicial use of the term, which has mostly followed Leval in applying the term when a use is made for a new purpose, even when no literal change is made to the work. *See* Leval, *supra* note 24, at 1111 (stating that a transformative use "must employ the quoted matter in a different manner *or for a different purpose* from the original" (emphasis added)). Indeed, as Netanel points out, courts are much more likely to treat "orthogonal" and "productive" uses as transformative than they are to treat literally transformative uses as such. Netanel, *supra* note 24, at 747. I will use "literally transformative" to describe the subclass of uses that Samuelson calls "transformative," such as the parody in *Campbell*, which recasts or transforms an existing work in much the same way a derivative work might do. I will continue to use "transformative use" in the broader way that Leval and subsequent courts have done.

¹¹⁷ "Productive use" is a term with a history in fair use case law, *see* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 478 (1984) (Blackmun, J., dissenting) (arguing that each of the uses in the preamble of § 107 is "a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work"), and Samuelson's term seems to play somewhat on that history, without being entirely bound by it.

¹¹⁸ *See* Samuelson, *supra* note 114, at 2548–49.

¹¹⁹ *See* *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270 (11th Cir. 2001) (observing that defendant's novel attempted to erase the romantic picture *Gone with the Wind* had painted of the South during and after the Civil War).

¹²⁰ Samuelson, *supra* note 114, at 2555–56.

¹²¹ 904 F.2d 152 (2d Cir. 1990).

¹²² *See id.* at 154.

¹²³ *See* Samuelson, *supra* note 114, at 2557.

¹²⁴ *See* *Savage v. Council on American-Islamic Relations*, No. C 07-6076 SI, 2008 WL 2951281, at *1, *8–9 (N.D. Cal. 2008) (determining that defendants' use of plaintiff's radio segment on website

an allegedly offensive work to help raise funds for a libel lawsuit against the work's publisher.¹²⁵ Other orthogonal uses include use in litigation and for other government purposes¹²⁶ and use to facilitate technological access to information (with search engines as a paradigm case).¹²⁷

Matthew Sag has also contributed two useful sub-categories to the family of uses that courts have considered transformative. In *Predicting Fair Use*, Sag deploys a category he calls "creativity shift" as a heuristic to isolate uses that most exemplify the general concept of transformativeness.¹²⁸ In coding the cases examined in his study of fair use, Sag attached the variable "creativity shift" "in cases where the plaintiff's work is creative and the defendant's is informational, or vice versa."¹²⁹ Sag explains, "[t]his shift in category should almost always entail a fundamental change in purpose, which is the hallmark of transformative use."¹³⁰ Sag's empirical analysis reveals a strong correlation between creativity shift and a finding of fairness.¹³¹

Sag's second contribution is the category of "non-expressive uses," which he says are characteristic of "copy-reliant technologies," such as search engines, electronic archives, and plagiarism detection software.¹³² Sag acknowledges that the concept of non-expressive use is itself ambiguous.¹³³ Early in the article, he argues that "acts of copying, which by their very nature cannot communicate the author's original expression to the public should not . . . constitute . . . infringement."¹³⁴ Elsewhere in the article, however, Sag characterizes *Field v. Google Inc.*,¹³⁵ which involved Google's full display of cached copies of websites (which constitutes communication of expressive content to the public), as a case of non-expressive use.¹³⁶ There he emphasizes the non-expressive purposes of Google's displays—to monitor changes to websites over time, and to assess a search result's relevance to the user's query—and how different these purposes are from the purposes served by the original web pages in

without plaintiff's permission, highlighting anti-Muslim remarks by the plaintiff radio host, was a fair use despite using an exact audio clip).

¹²⁵ See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150, 1156 (9th Cir. 1986) (upholding as fair use distribution of an entire magazine parody to over 750,000 individuals).

¹²⁶ See Samuelson, *supra* note 114, at 2592.

¹²⁷ See *id.* at 2610.

¹²⁸ Sag, *supra* note 103, at 58.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See *id.* at 76 (finding that cases involving a creativity shift have a sixty-two percent chance of being found fair, regardless of other facts).

¹³² Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1607–08 (2009).

¹³³ *Id.* at 1640.

¹³⁴ *Id.* at 1626.

¹³⁵ 412 F. Supp. 2d 1106 (D. Nev. 2006).

¹³⁶ Sag, *supra* note 132, at 1618.

isolation.¹³⁷ The second, purpose-focused characterization is more consistent with Reese and Netanel's findings about the centrality of purpose in determinations of transformativeness. In any event, cases involving these technologies have indeed resulted consistently in findings of fair use.¹³⁸ Sag describes several such cases that predate his article, and subsequent cases consistent with this principle are described below. Like creativity shift, non-expressive use of the kind Sag describes has become a powerful predictor that a use will be found transformative and, therefore, fair.¹³⁹

Madison identifies a series of social and professional groups whose patterns of practice have been recognized by courts as deserving fair use recognition.¹⁴⁰ Such examples include journalism, parody and satire, education and research, and comparative advertising. Where courts find that a defendant's claim to be engaged in one of these patterns is credible, they have typically found the uses to be fair; where the claim is found wanting, fair use is withheld.¹⁴¹ Peter Jaszi and Patricia Aufderheide have operationalized this insight, working with a series of communities of practice to sharpen and define mission-based norms that describe when uncompensated use of copyrighted works is legitimate.¹⁴² These documents define favored uses in terms of legitimate mission-centered purposes, which are often further justified with reference to their transformative nature.¹⁴³

¹³⁷ *Id.*

¹³⁸ Professor Sag has participated in some of these cases as counsel for amici curiae. *See, e.g.*, Brief of Digital Humanities and Law Scholars as *Amici Curiae* in Support of Defendants-Appellees and Affirmance, Authors Guild, Inc. v. Hathitrust, 755 F.3d 87 (2d Cir. 2014) (No. 12-4547-cv), 2013 WL 2702559.

¹³⁹ It is worth pointing out an irony here. Some commentators have insisted for years that fair use should only protect authors who must use existing works in the creation of their own expressive works, and they have decried the decisions vindicating search engines and other technological uses that do not result in a new work of authorship. *See, e.g.*, Sanford G. Thatcher, *From the University Presses—What Is Educational Fair Use?*, 20 AGAINST THE GRAIN 62, 63 (2008) (arguing that fair use “traditionally” has functioned to protect “the creativity of others who wish to build on past work, adding value to it by embedding it in new work in the context of comment and criticism”). The irony is that, in fact, search engines have become perhaps the most solidly favored fair uses of all, *precisely because* their purpose is radically non-expressive. *See* Authors Guild v. Google, Inc., 804 F.3d 202, 217 (2d Cir. 2015) (arguing that creation of a search index and display of text snippets is transformative because “the purpose of Google’s copying of the original copyrighted books is to make available significant information *about those books*” (emphasis in original)).

¹⁴⁰ *See* Madison, *supra* note 50, at 1646–47.

¹⁴¹ *See id.* at 1645–46.

¹⁴² *See* PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE 127 (2010).

¹⁴³ *See, e.g.*, ASS’N OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 13 (2012), <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf> [<http://perma.cc/3V7M-PP8U>] (“[W]orks intended for consumption as popular entertainment present a case for transformative repurposing when an instructor uses them (or excerpts from them) as the objects of commentary and criticism, or for purposes of illustration.”).

In sum, scholarly examination of the fair use case law has revealed the following broad features of the doctrine as it has developed since 1978:

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

2. The crucial first factor inquiry is heavily influenced by Judge Leval's concept of "transformative use," which he describes as use that advances copyright's Constitutional objective of promoting progress by using existing works "in a different manner or for a different purpose," "as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings."¹⁴⁴

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

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

C. Recent Decisions Show Transformative Use's Potential Power and Scope for Educators

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

1. *A new use need not criticize or comment on an existing work in order to be fair, if its purpose and audience are sufficiently novel.*

¹⁴⁴ Leval, *supra* note 24, at 1111.

Because the Supreme Court's most recent fair use decision involved a parody (and discussed at some length the difference between parody, which targets the work from which it borrows, and satire, which targets social phenomena distinct from its source material¹⁴⁵), some courts have mistakenly suggested that all transformative uses must be critical of the works they reuse. However, the Second Circuit rejected the requirement of criticism or commentary outright in *Cariou v. Prince*,¹⁴⁶ ruling that the district court had erred in requiring the defendant to have an intent to criticize or comment upon the works he used.¹⁴⁷ Appropriation artist Richard Prince had expressly denied any intent to comment upon or criticize photographer Patrick Cariou or his work,¹⁴⁸ but did express an intent to transform the photographs into completely different kinds of expression.¹⁴⁹ The novel aesthetic experience created by Prince's works, together with the difference between audiences interested in Prince's works and those interested in Cariou's, were sufficient to render Prince's use transformative.¹⁵⁰ The legal database and patent prosecution cases described below also involved uses without criticism or commentary. The courts' embrace of fair use in these contexts should be helpful in defending educational uses of primary materials where the purpose is not necessarily to criticize or comment on the materials themselves, but rather to use them for an orthogonal purpose, or as evidence of a historical or cultural phenomenon.¹⁵¹

2. *Activities that do not involve literal alteration of the work or addition of new substantive material within the four corners of the copy can be "added value" for purposes of transformative analysis.* In *White v. West Publishing Corporation*,¹⁵² Judge Rakoff, of the Southern District of New York, took into account a variety of

¹⁴⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994) ("Parody needs to mimic an original to make its point, and so [must] ha[ve] some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.").

¹⁴⁶ 714 F.3d 694 (2d Cir. 2013).

¹⁴⁷ *See id.* at 706–07 ("The law imposes no requirement that a work comment on the original or its author in order to be considered transformative. . . . [Defendant's] work could be transformative even without commenting on [Plaintiff's] work or culture, and even without [Defendant's] stated intention to do so.").

¹⁴⁸ *Id.* at 707.

¹⁴⁹ *See id.* ("[W]hat I do is I completely try to change it into something that's completely different. . . . I'm trying to make a kind of fantastic, absolutely hip, up to date, contemporary take on the music scene.").

¹⁵⁰ *See id.* at 706, 709 (stating that the "entirely different aesthetics" and the "sort of collector" to which the defendant's work appealed were fair use factors weighing in Prince's favor).

¹⁵¹ *See infra* Part IV.A.

¹⁵² 29 F. Supp. 3d 396 (S.D.N.Y. 2014).

activities that involved neither literal alteration nor literal addition of new content within the four corners of the works, in finding that legal publishers West and Lexis—defendants in the infringement suit—had “added value” to the legal briefs they ingested into their databases.¹⁵³ Specifically, their work involved in “reviewing, selecting, converting, coding, linking, and identifying . . . documents” sufficed as evidence of “added value.”¹⁵⁴ This added value, together with West’s novel purpose (supporting legal research), led the court to conclude West’s use was transformative. Educators who add value by placing copyrighted materials into context in their lectures or other educational exercises are arguably engaged in a similar transformative activity, provided that their purposes are also appropriately novel relative to the original purpose of the work.

3. *Copying and distribution that is conducted systematically and at a large scale can be found fair where the use is for a new purpose.* In *White*, the legal database case described above, the database publishers ingested thousands of legal briefs filed in federal cases in order to make them available to hundreds of thousands of paying subscribers.¹⁵⁵ Systematic and large-scale fair use was also involved in a pair of cases about copying and distribution of scientific journal articles in drafting and prosecuting patent applications.¹⁵⁶ Similarly, in *Authors Guild, Inc. v. HathiTrust*, the Second Circuit found the digitization, indexing, and even making available (for print-disabled patrons) of millions of in-copyright books held in university libraries, to be fair.¹⁵⁷ The court reached the same conclusion in the companion case *Authors Guild v. Google, Inc.*¹⁵⁸

¹⁵³ *Id.* at 399.

¹⁵⁴ *Id.*

¹⁵⁵ See *id.* at 398. Following *Campbell*, the court recognized that it was not fatal to the fair use claim that the “transformation was done for a commercial purpose.” *Id.* at 399.

¹⁵⁶ *Am. Inst. of Physics v. Winstead PC*, No. 3:12-CV-1230-M, 2013 WL 6242843, at *5 (N.D. Tex. Dec. 3, 2013) (finding fair use when “[d]efendants’ copying of [scientific journal articles] . . . d[id] not ‘supersede’ the use of Plaintiffs’ original works, but ha[d] the different purpose of providing a background context for patent examiners in their analysis of patent applications” (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994))); *Am. Inst. of Physics v. Schwegman, Lundberg, & Woessner, P.A.*, No. 12-528 (RHK/JJK), 2013 WL 4666330, at *10 (D. Minn. Aug. 30, 2013) (finding fair use largely because “there [wa]s no reasonable dispute that [Defendant] *did not* use the Articles ‘for the same intrinsic purpose as [the Publishers]’” (emphasis added) (quoting *Antioch Co. v. Scrapbook Borders, Inc.*, 291 F. Supp. 2d 980, 988 (D. Minn. 2003))).

¹⁵⁷ See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97, 101 (2d Cir. 2014).

¹⁵⁸ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 209 (2d Cir. 2015) (describing how the Google Books project resulted in the digital copying of “tens of millions” of in-copyright books).

4. *Making entire, unaltered works available for reading or viewing may be found fair where the users' (and the readers') purpose differs sufficiently from the original purpose of the work, and the amount taken is justified by that novel purpose.* In *Swatch Group Management Services Ltd. v. Bloomberg LP*,¹⁵⁹ for example, the Second Circuit held that it was fair use for the news organization Bloomberg to post the entirety of a recorded Swatch earnings call online as part of Bloomberg's financial reporting on the company.¹⁶⁰ Remarkably, the court's initial opinion found that the use was fair despite its "commercial, nontransformative nature."¹⁶¹ The court issued an amended opinion months later, removing that description, and adding a new section explaining the differences between the purpose of Swatch's original call and the purpose of Bloomberg's subsequent publication, and arguing that Bloomberg's use was "at least . . . arguably transformative" because of its novel purposes.¹⁶² Similarly, novel purposes also led to findings of fair use in *American Institute of Physics v. Winstead, P.C.* and *American Institute of Physics v. Schwegman, Lundberg, and Woessner, P.A.*¹⁶³ In each of these cases, the original work was published to a defined audience to serve a defined purpose, and fair use permitted subsequent copying and distribution of the entire work where both purpose and audience were different.

5. *Even where the purpose is transformative and the amount used is justified in light of that purpose, fair use may take into account the potential for unintended "market substitution."* In his opinion in *Authors Guild v. Google, Inc.*, Judge Leval considers not only whether Google's purpose in using the traditional scans was merely substitutional (and therefore non-transformative), but also whether Google's use might provide enough of the copyrighted works to the public *inadvertently* to "serve as an effectively competing substitute for the original,"¹⁶⁴ which "might therefore diminish the original rights holder's sales and profits."¹⁶⁵ While many courts have observed that a copyright holder cannot preempt transformative uses by establishing a

¹⁵⁹ 742 F.3d 17 (2d Cir.), *amended and superseded by* Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73 (2d Cir. 2014).

¹⁶⁰ *Id.* at 27.

¹⁶¹ *Id.*

¹⁶² *Swatch Grp. Mgmt. Servs.*, 756 F.3d at 85.

¹⁶³ See cases cited *supra* note 156.

¹⁶⁴ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 221 (2d Cir. 2015).

¹⁶⁵ *Id.*

licensing market *for those uses*,¹⁶⁶ Judge Leval is concerned here about unintended harm to the non-transformative market as a result of transformative uses that provide wide access to large (or important) portions of the text. Despite the transformative intentions of the user, the public could, in such cases, use the supplied portions as an alternative to purchasing the original for ordinary consumption. To avoid running afoul of this aspect of the market harm inquiry, educational users will need to ensure that access to materials used transformatively for education is limited to audiences engaged in the transformative activity, and that those audiences are discouraged from repurposing the materials as market substitutions.¹⁶⁷

III. EDUCATION LEFT BEHIND?

The effects of these developments in the fair use case law have been felt by Internet companies, publishers, artists, and even research libraries, but teachers have, so far, been left behind. Three historical factors explain this: (1) the existence of pseudo-authoritative guidelines for education grounded in the market-centered paradigm; (2) a misreading of dicta in *Campbell*; and (3) the publishers' litigation strategy of initially suing copyshops rather than universities. In addition to these historical factors, two mistaken assumptions have distorted the law in this area: the assumption that transformative use requires literal alteration of the work used, and the assumption that educational uses always involve works made for educational purposes. This Part first explores each of these contributing causes, and then shows how *Cambridge II* simultaneously marks the end of the Guidelines-coursepack era and exemplifies the continuing influence of the market-centered approach for non-transformative teaching uses.

A. Educational Guidelines Grounded in the Market-Centered Paradigm

Since the passage of the Copyright Act of 1976, a series of negotiated guidelines have purported to describe reasonable limits for educational fair use.¹⁶⁸ The two such documents that have had the widest impact are the

¹⁶⁶ See, e.g., *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 614–15 (2d Cir. 2006) (citing cases distinguishing between traditional markets and “transformative markets,” and explaining that the fourth factor only recognizes harm to the former).

¹⁶⁷ In evaluating Google's provision of “snippets” from books as search results, Judge Leval writes that the third factor is concerned primarily with “the amount and substantiality of *what is thereby made accessible* to a public for which it may serve as a competing substitute.” *Authors Guild*, 2015 WL 6079426, at *30. Students are not “a public” in this regard insofar as they use the materials for transformative purposes, but if they reuse excerpts for non-transformative purposes, their uses may weigh against fair use according to Judge Leval's rationale.

¹⁶⁸ For a survey of the various guidelines, see Kenneth D. Crews, *The Law of Fair-Use and the Illusion of Fair Use Guidelines*, 62 OHIO ST. L.J. 599, 603 n.4 (2001).

Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals (“Classroom Guidelines”)¹⁶⁹ and the *Proposal for Fair Use Guidelines for Educational Multimedia* (“Multimedia Guidelines”).¹⁷⁰ They aim to provide educators with certainty by replacing the broad and flexible doctrine of fair use with a series of concrete rules dictating exactly how much material may be safely copied from various kinds of original works, whether copying may be repeated from semester to semester, and so on.

The Classroom Guidelines use the concepts of “brevity,” “spontaneity,” and “cumulative effect” as the criteria for fairness. Each of these terms is further defined to create a clear, quantitative, and decidedly conservative vision. For example, “brevity” in the context of prose works means “[e]ither a complete article, story or essay of less than 2,500 words, or . . . an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.”¹⁷¹ “Spontaneity” requires, among other things, that “[t]he inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.”¹⁷² The “cumulative effect” prong bars the use of multiple excerpts from the same author, as well as use of the same excerpts in more than one course in the school.¹⁷³ Additional limitations bar any use “to create or to replace or substitute for anthologies, compilations or collective works,”¹⁷⁴ as well as any use of the same excerpted material for more than one term.¹⁷⁵ Even taken as a minimum safe harbor, which is what they purport to be,¹⁷⁶ the Classroom Guidelines are quite limiting. On the other hand, taking them as the outer limit on fair use, as the publishers subsequently urged educators to do, the Guidelines suggest an intent with regard to fair use that resembles conservative activist Grover Norquist’s aspirations for government: “to reduce it to the size where I can drag it into the bathroom and drown it in the bathtub.”¹⁷⁷ The Guidelines have been roundly

¹⁶⁹ H.R. REP. NO. 94-1476, at 68–70 (1976).

¹⁷⁰ STAFF OF H. SUBCOMM. ON COURTS AND INTELLECTUAL PROP. OF THE H. COMM. ON THE JUDICIARY, 104TH CONG., FAIR USE GUIDELINES FOR EDUC. MULTIMEDIA (Comm. Print 1996).

¹⁷¹ H.R. REP. NO. 94-1476, at 68.

¹⁷² *Id.* at 69.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *See id.* at 68 (“The purpose of the following guidelines is to state the minimum standards of educational fair use under [§] 107 . . .”).

¹⁷⁷ John P. Avlon, *Republicans Wisely Break with Grover Norquist*, CNN (Nov. 28, 2012), <http://www.cnn.com/2012/11/26/opinion/avlon-grover-norquist/> [<http://perma.cc/D35V-WUS2>].

criticized for their misleading air of legal authority,¹⁷⁸ and for their limited utility as legislative history.¹⁷⁹

Nevertheless, courts confronted with cases about educational use have turned to the Classroom Guidelines as a source of information and even quasi-authority.¹⁸⁰ Courts have looked to the Guidelines as a kind of legislative history, and have even used them as a model for injunctive relief. Judicial interest in the Guidelines has waned dramatically in recent years, however. Most recently, both the district and appellate courts in *Cambridge I and Cambridge II* refused to consider the Classroom Guidelines as a limitation on educational copying.¹⁸¹ Judge Evans, of the district court, characterized their restrictive limits as “undermin[ing] the teaching objective favored by § 107,”¹⁸² while Judge Tjoflat, of the appellate court, warned that “to treat the Classroom Guidelines as indicative of what is allowable would be to create the type of ‘hard evidentiary presumption’ that the Supreme Court has cautioned against.”¹⁸³

There is an additional reason to treat the various negotiated guidelines with suspicion: they reflect the now-disfavored, market-centered approach to fair use. Several aspects of the Classroom Guidelines reveal their market-centered approach. For example, as Wendy Gordon observed, “the Guidelines for Educational Fair Use in the House Report single out for fair use treatment instances of classroom photocopying in which bargains are particularly unlikely to occur because the teacher’s use is spontaneous,

¹⁷⁸ See, e.g., Crews, *supra* note 168, at 649 (recognizing view among courts that the “Classroom Guidelines . . . are not law,” but rather “a compelling source of congressional insight on fair use”); Kasunic, *supra* note 41, at 281 (arguing that use of the Classroom Guidelines as limits on copyright fair use is inconsistent with legislative intent).

¹⁷⁹ See Gilbert Busby, Note, *Fair Use and Educational Copying: A Reexamination of Princeton University Press v. Michigan Document Services, Inc.*, 86 Ky. L.J. 675, 706–07 (1997) (arguing that reliance on Classroom Guidelines is inappropriate because 17 U.S.C. § 107 is facially unambiguous); see also, e.g., *Cambridge I*, 863 F. Supp. 2d 1190, 1229 (N.D. Ga. 2012) (recognizing that § 107 intentionally sets “very general standards for determining fair use” which are to be “flexibly applied,” rather than reduced to strict quantitative limits), *rev’d*, *Cambridge II*, 769 F.3d 1232 (11th Cir. 2014).

¹⁸⁰ See, e.g., *Basic Books, Inc. v. Kinko’s Graphic Corp.*, 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991). Judge Motley’s use of the Classroom Guidelines is quite complex, and perhaps confusing. At first, she seems to treat them as a separate source of law, which the plaintiffs are entitled to invoke, *id.*, but later, she says Kinko’s is not subject to the Guidelines because of its for-profit status, *id.* at 1535–36. She goes on to evaluate Kinko’s conduct according to the Guidelines, anyway, as a kind of hypothetical exercise, but stops short of finding that “violating the Guidelines” per se disqualifies Kinko’s conduct from fair use consideration. *Id.* at 1543.

¹⁸¹ See *Cambridge II*, 769 F.3d at 1273 (“[T]he Classroom Guidelines, although part of the legislative history of the Copyright Act, do not carry the force of law.”); *Cambridge I*, 863 F. Supp. 2d at 1228–29 (declining to apply the fair use standards as set out in the Classroom Guidelines over the statutory standards as outlined in 17 U.S.C. § 107).

¹⁸² *Cambridge I*, 863 F. Supp. 2d at 1234.

¹⁸³ *Cambridge II*, 769 F.3d at 1273 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)).

individual and unsystematic.”¹⁸⁴ The Classroom Guidelines suggest, in other words, that if a use is such that a license probably *could* be sought (because the use is planned, rather than “spontaneous”), is at a scale sufficient to demonstrate market demand (because the same excerpt is used in multiple courses, is repeated from term to term, or is “directed by higher authority”), or if excerpts are of a portion large enough that students could potentially be required to purchase an entire work, then a license must be sought.¹⁸⁵ Another indication of both guidelines’ market-centered approach is their use of hard quantitative limits on amounts copied, which is inconsistent with the flexible standard of transformative use. For example, in applying the transformative use paradigm, judges generally ask whether the amount taken is appropriate to the purpose of the use, and have repeatedly blessed use of entire works under this standard.¹⁸⁶ In contrast, the market-centered paradigm disfavors a use in proportion to the amount taken, regardless of purpose.

In recent years, pushback against the Classroom Guidelines’ market-oriented approach has begun to move beyond the academic literature and into the frontlines of educational practice. Perhaps most tellingly, the Consortium of College and University Media Centers (CCUMC), a key endorser and promoter of the Multimedia Guidelines, has withdrawn its endorsement, citing evolving fair use doctrine as its justification.¹⁸⁷ CCUMC is the latest of many associations of educators and related groups to develop or endorse fair use best-practices statements grounded in the transformative use paradigm as a replacement for the market-centered guidelines.¹⁸⁸ Nevertheless, other institutions trusted by some educators continue to promote the Classroom Guidelines approach.¹⁸⁹

¹⁸⁴ Gordon, *supra* note 50, at 1628.

¹⁸⁵ If you take the guidelines at their word when they purport to be minimum safe harbors rather than maximum limits, then perhaps the takeaway is, at a minimum, that when a license *cannot* be paid, then a license *need not* be paid.

¹⁸⁶ This is not to say that transformative use consistently favors generous reuse; indeed, where a user takes more than is appropriate for her purpose, courts have found that the third factor does not favor fair use, even in transformative use cases. *See, e.g., Warner Bros. Entm’t, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 548 (S.D.N.Y. 2008) (reasoning that the third factor weighed against fair use where defendant-author of reference book “[t]ook] more than [wa]s reasonably necessary to create a reference guide”).

¹⁸⁷ *CCUMC Adopts Code of Best Practices in Fair Use for Academic and Research Libraries*, CCUMC (Dec. 5, 2013), <http://www.ccumc.org/blogpost/1054055/174940/CCUMC-Adopts-Code-of-Best-Practices-in-Fair-Use-for-Academic-and-Research-Libraries> [<http://perma.cc/UQP7-4EAS>].

¹⁸⁸ *See* AUFDERHEIDE & JASZI, *supra* note 142, at 119–25 (recognizing the adoption of such codes by companies and organizations in several prominent industries, including online media, live performance, teaching and education, and software development); *Best Practices: Fair Use for the Visual Arts*, CTR. FOR MEDIA & SOC. IMPACT, <http://www.cmsimpact.org/fair-use/best-practices> [<http://perma.cc/5FHK-PXZP>] (last visited Aug. 8, 2014) (listing various codes of best practices).

¹⁸⁹ *See, e.g., Using Content: Photocopies*, COPYRIGHT CLEARANCE CTR., <http://www.copyright.com/Services/copyrightoncampus/content/index.html> [<http://perma.cc/EH2Z-9XJJ>] (last visited

B. “Straight Reproduction” in *Campbell Footnote Eleven*

In Footnote Eleven of *Campbell*, Justice Souter, in the midst of his embrace of the transformative use concept, explained in dicta that not all fair uses must be transformative.¹⁹⁰ He paraphrased the preamble of § 107, writing that “[t]he obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.”¹⁹¹ As Peter Jaszi has observed, Justice Souter’s formulation in Footnote Eleven—“straight reproduction”—seems to suggest that the uses at issue are ones where the teacher does not add value; the formulation may also assume that the teacher’s use is not for a new purpose.¹⁹² It is also possible that Justice Souter assumed the materials being copied in “straight reproduction[s] . . . for classroom distribution”¹⁹³ were created and marketed primarily for classroom use, such as textbook or workbook illustrations and exercise pages. Unfortunately, neither the footnote nor the relevant legislative history is sufficiently rich to confirm or falsify these possibilities.

What is clear, however, is that Justice Souter’s dictum laid the foundation for a false dichotomy between transformative uses on one hand and educational copying on the other in subsequent cases. In *Princeton University Press v. Michigan Document Services (MDS)*,¹⁹⁴ decided just two years after *Campbell*, the Sixth Circuit panel divided itself into two camps: the majority, which argued that making and selling coursepacks was both commercial and non-transformative and therefore was not fair use, and the dissents, who argued these uses were specially favored because they were educational. Two of the three dissents cited the statutory language cited in Footnote Eleven. Dissents by Chief Judge Boyce and Judge Merritt ignored transformative use completely, despite its centrality in *Campbell*, and argued instead that the “multiple copies for classroom use” language was a categorical blessing for all such uses.¹⁹⁵ Judge Ryan’s dissent conceded that the “transformative value of the coursepacks is

Sept. 21, 2015) (linking prominently to the Classroom Guidelines); *Reproduction of Copyrighted Works by Educators and Librarians*, U.S. COPYRIGHT OFF. (Aug. 2014), <http://copyright.gov/circs/circ21.pdf> [<http://perma.cc/2GGH-77M3>] (reprinting, for informational purposes, the full text of the Classroom Guidelines for use by educators and librarians).

¹⁹⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 n.11 (1994).

¹⁹¹ *Id.*; see also 17 U.S.C. § 107 (1988) (stating that “reproduction in copies . . . for purposes such as . . . teaching (including multiple copies for classroom use) . . . is not an infringement of copyright.”).

¹⁹² See Jaszi, *supra* note 36, at 46 n.15.

¹⁹³ *Campbell*, 510 U.S. at 579 n.11.

¹⁹⁴ 99 F.3d 1381 (6th Cir. 1996).

¹⁹⁵ See *id.* at 1393 (Boyce, J., dissenting) (arguing that fair use “requires unlimited public access to published works in educational settings”); *id.* at 1394 (Merritt, J., dissenting) (arguing that coursepack copying is “permissible under the plain language of the copyright statute that allows ‘multiple copies for classroom use’”).

slight,” but invoked the statutory text and the *Campbell* footnote as a kind of savings clause.¹⁹⁶ Unfortunately, none of the dissents had a satisfactory answer to the majority’s argument that uses for the preambular purposes, including “teaching,” were not categorically fair, but rather had to be further evaluated according to the four statutory factors.¹⁹⁷ Judge Ryan’s four factor analysis was much more robust than the other dissents, but it was still ultimately grounded in the notion that educational uses are special, regardless of transformativeness.¹⁹⁸ The dissents’ arguments from educational exceptionalism were unpersuasive, and all of MDS’s uses were found to be infringing.¹⁹⁹

The GSU courts were somewhat more liberal in practice, but not in principle. Judge Orinda Evans cited Footnote Eleven in her opinion, accepting without question the publisher plaintiffs’ argument that posting assigned readings (“mirror images of parts of the books”) to a course website is non-transformative per se.²⁰⁰ Like Judge Ryan in *MDS*, the court claimed that Footnote Eleven conferred a privileged status on educational photocopying, saving it from an unfavorable finding under the first factor, but the court’s finding that the uses were non-transformative had substantial negative consequences, reducing the amount of the underlying work that could be used fairly.²⁰¹ The Eleventh Circuit’s opinion is similar, citing Footnote Eleven for the proposition that the first factor can favor non-transformative educational uses, then adding weight to the other side of the balance under factor four due to lack of transformative use.²⁰² Footnote Eleven seems to “save” educational uses from the transformative use test only to deliver them into a balancing test that can often disfavor them.

¹⁹⁶ *Id.* at 1400 (Ryan, J., dissenting).

¹⁹⁷ *Id.* at 1385 n.1 (citing *Campbell*, 510 U.S. at 578 n.9 and S. REP. NO. 94-473, at 62 (1975)).

¹⁹⁸ *See id.* at 1404 (“The coursepacks fit within the exception to the ‘transformative’ quality requirement, and the predominant character of the use of excerpts in coursepacks is not commercial but ‘nonprofit educational.’”).

¹⁹⁹ *Id.* at 1397. The majority’s version of transformative use is relatively narrow compared to the doctrine as it is now applied: it compares the “mechanical” transformation involved in coursepacks unfavorably to the “creative metamorphosis accomplished by the parodists in the *Campbell* case.” *Id.* at 1389. Of course, neither literal alteration nor the production of a new creative work is required for transformative use. *See supra* Part II. The dissents might have raised this objection, but instead chose to abandon the transformative use paradigm altogether, tempted away by the false promise of Footnote Eleven.

²⁰⁰ *Cambridge I*, 863 F. Supp. 2d 1190, 1224 (N.D. Ga. 2012) (holding that the district court erred in giving the first fair use factor equal weight), *rev’d*, *Cambridge II*, 769 F.3d 1232 (11th Cir. 2014).

²⁰¹ *See id.* at 1224–25.

²⁰² *Cambridge II*, 769 F.3d at 1263.

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

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

The first wave of lawsuits came shortly after the passage of the 1976 Copyright Act and yielded across-the-board wins for the publishers: all defendants agreed to settlements enshrining the Guidelines as the limit of fair use.²⁰³ In these cases, the publishers initially targeted commercial copy shops,²⁰⁴ then sued New York University (NYU) and several NYU professors shortly after the shops settled.²⁰⁵ NYU and its faculty members also settled, acceding to an agreement that required them to abide by the Classroom Guidelines, but with a proviso allowing NYU's general counsel to permit uses that exceed the Guidelines if subsequent case law permits.²⁰⁶ The AAP publicized news of the settlement to other universities, who largely adopted the Guidelines as fair use maximums.²⁰⁷

Nearly a decade later the publishers once again made the rounds to enforce the Classroom Guidelines, and again they pursued commercial copy shops as initial defendants.²⁰⁸ This time two shops refused to settle, giving courts their first opportunity to consider educational fair use and the import of the guidelines. The copy shops lost big.

The publishers' strategy of initially pursuing commercial copy shops succeeded wildly, as the courts focused on the shops' commercial nature and their purely duplicative purpose, ignoring both professors and students, whose purposes were more complex and whose status was "non-profit, educational" under the first fair use factor.²⁰⁹ So, in *Basic Books, Inc. v.*

²⁰³ See, e.g., Sheldon Elliot Steinbach, *Photocopying Copyrighted Course Materials: Doesn't Anyone Remember the NYU Case?*, 50 EDUC. L. REP. 317, 322–25 (1989) (reprinting the NYU settlement agreement).

²⁰⁴ See *Harper & Row, Publishers, Inc. v. Tycos Copy Servs., Inc.*, Copyright L. Dec. (CCH) ¶ 25,230 (D. Conn. 1981); *Basic Books, Inc. v. Gnomon Corp.*, Copyright L. Dec. (CCH) ¶ 25,145 (D. Conn. 1980).

²⁰⁵ Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 169–70 (1998).

²⁰⁶ See Steinbach, *supra* note 203, at 322–27. Steinbach was counsel to the ad hoc committee of educational groups that negotiated the Classroom Guidelines.

²⁰⁷ See Bartow, *supra* note 205, at 170.

²⁰⁸ E.g., *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1383 (6th Cir. 1996); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991).

²⁰⁹ The courts declined in both cases to allow the copy shops to stand in the shoes of their professor clients, whose purposes were non-profit, educational, and arguably transformative. As a

Kinko's Graphics Corp., Judge Constance Baker Motley found that “the use in the hands of Kinko’s employees is commercial,” stating that Kinko’s effort to portray its use as educational “boggles the mind.”²¹⁰ *MDS* was decided after *Campbell* had clearly done away with any “presumptive unfairness” associated with commercial use,²¹¹ yet the court in *MDS* still gave primacy to the market effect of the use, citing *Harper & Row*.²¹²

Neither of the copy shops were found to be engaged in transformative use. Judge Motley found Kinko’s use was non-transformative because its coursepacks were “mere repackaging” of copyrighted works with “no literary effort made by Kinko’s.”²¹³ Judge Motley’s opinion was a tentative first draft of the transformative use doctrine in the courts, coming less than a year after publication of Judge Leval’s article. The Sixth Circuit’s opinion in *MDS*, however, is harder to explain. Despite the benefit of years and several cases applying the concept, including *Campbell*, the *MDS* court similarly focused on the lack of literal alteration in the copies themselves

result, schools have asked, in other contexts, for express statutory permission to contract with outside vendors in the course of exercising their statutory rights. See U.S. COPYRIGHT OFFICE & LIBRARY OF CONG., THE SECTION 108 STUDY GROUP REPORT iv (2008), <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf> [<http://perma.cc/2NHV-6UXG>] (“[17 U.S.C. §] 108 should be amended to allow a library or archives to authorize outside contractors to perform at least some activities permitted under [§] 108 on its behalf . . .”). Strikingly, publishers themselves have won many significant fair use victories by standing in the shoes of the authors whose works they reproduce and distribute for profit. See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (attributing to publisher Dorling Kindersley the fair use motives of its author(s)); *New Era Publ’ns Int’l v. Carol Publ’g Grp.*, 904 F.2d 152, 156 (2d Cir. 1990) (attributing biography author’s use of written excerpts to the publisher). More than a decade after *MDS*, Judge Chin (then of the Southern District of New York) allowed Google to invoke the fairness of the libraries’ purposes when universities partnered with Google to digitize millions of in-copyright books from university library collections. Citing a separate opinion vindicating the libraries’ uses of their digitized copies as fair use, Judge Chin held that Google’s digitization on the libraries’ behalf was therefore also fair use. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 293–94 (S.D.N.Y. 2013). Judge Leval reached the same conclusion on appeal. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015) (“If the library had created its own digital copy to enable its provision of fair use digital searches, the making of the digital copy would not have been infringement. Nor does it become an infringement because, instead of making its own digital copy, the library contracted with Google that Google would use its expertise and resources to make the digital conversion for the library’s benefit.”). It is far from clear, then, that the coursepack cases’ approach is the correct one.

²¹⁰ *Kinko’s*, 758 F. Supp. at 1531–32. Judge Motley also invoked the *Sony* dictum about a presumption against fair use for commercial uses. *Id.* at 1530. The Supreme Court would later disavow the presumption in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583–84 (1991).

²¹¹ See *Campbell*, 510 U.S. at 584 (“In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred. . . . If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of 17 U.S.C. § 107 . . . since these activities are generally conducted for profit in this country.” (internal citations omitted)).

²¹² *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1385 (6th Cir. 1996) (stating that the fourth factor “is at least *primus inter pares*,” or first among equals, and discussing that factor, rather than purpose and character, first).

²¹³ *Kinko’s*, 758 F. Supp. at 1530 (citing Leval, *supra* note 24, at 1111).

in finding the use in *MDS* non-transformative,²¹⁴ and compounded the error by finding that for such uses *Campbell* had left in place the presumption of unfairness in *Sony*.²¹⁵ The Sixth Circuit panel also derived from Footnote Eleven of *Campbell* and the related statutory parenthetical, a per se rule that transformative use analysis is irrelevant to educational uses.²¹⁶ In reality, the “slight transformative value” of the use led the court to leave in place the *Sony* presumption of unfairness and abetted the court’s overall focus on the alleged market effects of the use.²¹⁷ Together, these aspects of the analysis were fatal to *MDS*.

Although a different analysis might have applied if the copies were made by educational institutions themselves rather than for-profit copy shops,²¹⁸ the impact of the decisions on all educational copying was swift and dramatic. Indeed, the impact of *Kinko’s* was evident when the Sixth Circuit decided *MDS* five years later, as the court noted the proprietor of *MDS* was an outlier in his belief that the case was wrongly decided, and repeatedly contrasted *MDS*’s practice with the majority of copy shops’ dutiful payment of royalties.²¹⁹ In the wake of these cases, it became standard practice to seek and pay for permissions in connection with virtually all excerpts included in coursepacks, whether they were assembled by for-profit copy shops, on-campus copy centers, or even libraries.²²⁰ Publishers and their partner licensing bodies have promoted

²¹⁴ *Princeton Univ. Press*, 99 F.3d at 1389.

²¹⁵ *Id.* at 1386.

²¹⁶ See *supra* text accompanying notes 194–200.

²¹⁷ Or, as Ann Bartow writes, “the court effectively merged the § 107 four-part fair use test into one two part question: Was the use commercial, and if so, did it divert revenues from the copyright owner?” Bartow, *supra* note 205, at 189. This is the mirror image of the two-part question that embodies the transformative use inquiry: is the use transformative, and if so, did the user take only as much as appropriate given her transformative purpose?

²¹⁸ The Sixth Circuit recognized the distinction in *MDS*, although it cast doubt on whether it might make a difference. *Princeton Univ. Press*, 99 F.3d at 1389 (“As to the proposition that it would be fair use for the students or professors to make their own copies, the issue is by no means free from doubt. We need not decide this question, however, for the fact is that the copying complained of here was performed on a profit-making basis by a commercial enterprise.”). Judge Ryan, in one of three dissenting opinions, argued to the contrary that *MDS* had not “used” the copyrighted work at all for purposes of fair use and that the students’ use of the coursepacks was the appropriate subject of the fair use analysis. *Id.* at 1401 (Ryan, J., dissenting). Ultimately, both the district court and the appellate court in the *GSU* case held that the distinction between copy shops and educators was crucial with respect to the first fair use factor.

²¹⁹ *Id.* at 1384 (“After *Kinko’s* . . . many copyshops that had not previously requested permission from copyright holders began to obtain such permission.”).

²²⁰ See David R. Hansen, *A State Law Approach to Preserving Fair Use in Academic Libraries*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1, 13 (2011) (“These ‘copyshop’ cases have uniformly failed to find fair use in the creation and sale of coursepacks, and have led libraries to adopt those rulings as fearsome precedent for their own practices.” (footnote omitted)).

this expansive application of the coursepack cases.²²¹ Even some faculty members have internalized the maxim that all copy shop uses should be licensed—as well as any allegedly analogous use.²²²

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

For example, Ann Bartow takes Judge Motley to task for insisting on literal transformation when works are “most pedagogically useful when unadulterated.”²²³ Gilbert Busby argues that coursepacks are transformative because they are unique compilations that embody the professors’ creativity in selecting and arranging excerpts,²²⁴ confusing the transformation involved in fair use with that involved in creation of derivative works.²²⁵ More recently, David Simon follows a similar line but comes closer in observing that “transformativeness *can* exist when portions of several works are copied and juxtaposed—that is the whole basis for teaching; teachers often (and rightly) use sometimes unrelated materials in

²²¹ See, e.g., *Using Content: Photocopies*, *supra* note 189 (“It is now well established that photocopying materials for academic coursepacks requires permission from the copyright holder or its agent.”).

²²² See, e.g., *Stop Pirating Copyrighted Course Readings*, JOHN P. MCCASKEY, <http://www.johnmccaskey.com/joomla/index.php/blog/75-piracy> [<http://perma.cc/AQB3-EV56>] (“The test is simple: If the official coursepacks copy center that your bookstore uses would demand the purchase of reproduction rights, then any attempt to get around that—a local copy shop, emailing a PDF, handing out copies in class, uploading to a course web site, having the library upload to an online course reserves—is piracy.”). McCaskey’s blog post is strikingly similar to Judge Vinson’s concurrence in the GSU appellate decision, and to the publishers’ arguments regarding so-called “media neutrality.” *Cambridge II*, 767 F.3d 1232, 1287 (11th Cir. 2014) (Vinson, J., concurring).

²²³ Bartow, *supra* note 205, at 178. At the same time Bartow suggests that “[p]rofessors compiling course packets inevitably make editorial, if not transformative, choices when they excerpt works.” *Id.* She does not pursue the argument any further, however.

²²⁴ Busby, *supra* note 179, at 701 (“By extracting from various works, arranging them in a particular way, and adding his or her own commentary, a professor can produce a course pack that is a unique product with no adequate substitute.”).

²²⁵ See *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 143 (2d Cir. 1998) (“Although derivative works that are subject to the author’s copyright transform an original work into a new mode of presentation, such works unlike works of fair use take expression for purposes that are not transformative.”); Reese, *supra* note 101, at 467 (“[A]ppellate courts do not view fair use transformativeness as connected with any transformation involved in preparing a derivative work, and . . . in evaluating transformativeness the courts focus more on the purpose of a defendant’s use than on any alteration the defendant has made to the content of the plaintiff’s work.”).

conjunction with one another for pedagogical purposes,”²²⁶ but he later concludes that transformativeness has “little relevance, in [its] traditional sense, in educational fair use.”²²⁷ Simon tries to soften the blow by suggesting that the statutory parenthetical about “multiple copies for classroom use” could be enough to cover the “many times” that educational uses will not be transformative, but *MDS* shows how courts can turn that supposed safe harbor into a cage.²²⁸

New technology has created an opportunity for educators to take a less restrictive approach to use of copyrighted materials for teaching. Online course management systems and electronic reserves make it possible for professors and librarians to post materials directly to websites accessible only to students in a relevant class, without the costs or labor involved in creation and distribution of physical copies. With no literal paper “anthology,” no money changing hands (not even to cover labor or materials), no easy way for non-students to see how materials were being shared, and perhaps no obvious place to exercise centralized control or oversight of the activity, electronic distribution seemed to create a safe space for institutions to try new approaches to sharing material. Many colleges and universities took a more flexible approach, grounded in a fair use checklist developed by Kenneth W. Crews and Dwayne Buttlar, which replaced strict quantitative limits with a less bounded instruction in which teachers walk through various factors on a checklist and “consider the relative persuasive strength of the circumstances.”²²⁹

Not surprisingly, publishers soon began to approach universities with complaints about their practices with electronic course reserves, which publishers characterize as modern-day coursepacks. The Copyright Clearance Center has coined the term “e-coursepacks” to describe online

²²⁶ David A. Simon, *Teaching Without Infringement: A New Model for Educational Fair Use*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 453, 501 n.261 (2009).

²²⁷ *Id.* at 507. Simon argues that “numerous types of copying done by teachers” are non-transformative in the same way as time-shifting in *Sony* and archiving in *Texaco*. *Id.* at 509. I do not disagree (see Part V, *infra*, regarding non-transformative teaching uses), but I am interested here in the many teaching uses that differ from *Sony* and *Texaco* in that they use existing materials for new purposes. Simon quotes Laura Heymann’s suggestion that uses like in *Sony* and *Texaco* should not be subject to transformativeness analysis because they “displac[e] the copy in which the work is instantiated,” *id.*, which is fair as far as it goes. Heymann argues that literal copying without alteration can still be transformative “[i]f distinct discursive communities can be identified surrounding each copy.” Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 455 (2008). This is precisely what happens when teachers bring works into the classroom that were not intended to be the subject of classroom study, i.e., whose original discursive community is outside the educational realm.

²²⁸ Simon, *supra* note 226, at 508 (“Many times educational uses will not be transformative, strictly speaking—that is what § 107 recognizes when it states that making ‘multiple copies for classroom use’ is fair use.”).

²²⁹ *Fair Use Checklist*, COLUM. UNIV. LIBR., <http://copyright.columbia.edu/basics/fair-use/fair-use-checklist.html> [<https://perma.cc/S3AS-3HQM>] (last visited Sept. 10, 2015).

“collection[s] of journal, magazine, or newspaper articles, book excerpts, and other materials selected by a course instructor for distribution to students as required or supplemental reading” and declares in its “Campus Guide to Copyright Compliance” that “[e]-coursepacks, like their paper-based counterparts, require copyright permission from the copyright holder or its agent.”²³⁰ At first, negotiations took place outside of the courtroom, though the possibility of litigation loomed in the background.

In 2006, Cornell University and the American Association of Publishers (AAP) announced an agreement that had averted legal action, which seems mostly to have consisted of Cornell’s announcing that the same rules apply to electronic reserves as had applied to paper coursepacks (leaving the import of that equivalence open to interpretation).²³¹ Three more institutions eventually announced essentially identical “agreements” with the AAP (a policy statement that electronic materials should be treated like coursepacks), all under threat of litigation.²³² The AAP understood this equivalence to mean use of electronic materials must be brought into line with the deformed, guidelines-based practices that had come about as a result of their litigation in the coursepack realm.²³³ In any case, other universities did not engage the AAP’s threats, and one university’s policies became the subject of the first test case for electronic sharing of materials in an educational setting.

²³⁰ *Using Content: Photocopies*, *supra* note 189.

²³¹ See Laura Rice, *C.U. Changes E-Reserve Policy to Avoid Lawsuit*, CORNELL DAILY SUN (Oct. 3, 2006, 1:43 AM), <http://cornellsun.com/blog/2006/10/03/cu-changes-ereserve-policy-to-avoid-law-suit/>. Cornell’s current overall copyright guidance appears to be fairly standard and revolves around the use of a checklist, with no mention of an agreement with publishers. CORNELL UNIV. OFFICE OF THE PROVOST, A FACULTY GUIDE TO COPYRIGHT (2009), <https://web.archive.org/web/20110906103507/http://cornellsun.com/node/18733> [<https://perma.cc/A6UU-Q372>]. However, a separate document dealing specifically with the use of electronic course content is consistent with the press accounts of the AAP-Cornell agreement in that it stipulates that electronic materials should follow the same norms as paper coursepacks. CORNELL UNIV., ELECTRONIC COURSE CONTENT COPYRIGHT GUIDELINES, http://copyright.cornell.edu/policies/docs/Copyright_Guidelines.pdf [<http://perma.cc/2CE8-ZW8D>] (“Any use of copyrighted electronic course content that would require permission from the copyright owner if the materials were part of a printed coursepack likewise requires the copyright owner’s permission when made available in electronic format.”).

²³² Andrew Albanese, *E-Reserve Reached Under Duress?*, 133 LIBR. J. 20, 21 (2008) (describing agreements announced by Syracuse, Hofstra, and Marquette).

²³³ *University Presses Welcome New Cornell Guidelines on Use of Digital Course Content*, AAUP (Sept. 20, 2006), <http://www.aaupnet.org/news-a-publications/323-cornell-guidelines> [<http://perma.cc/CM4X-28EA>] (“As for the guidelines themselves, they’re built on a brilliantly simple principle: if you would have had to clear permission to use copyrighted work in the world of printed coursepacks, you need to clear permission to use it in the new world of electronic reserves and course management systems.”).

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

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

GSU's official e-reserves policy, *The Regent's Guide to Understanding Copyright and Educational Fair Use*, had been drafted with guidance from L. Ray Patterson, a respected copyright scholar, and it unequivocally rejected the Classroom Guidelines as a source of authority as to what constitutes fair use.²³⁴ The relatively broad and flexible vision of educational fair use in the *Regent's Guide* may have been what attracted the AAP and CCC to GSU as a defendant.²³⁵ If so, they won a small victory almost immediately: shortly after the publishers sued, the University System of Georgia abandoned the *Regent's Guide* and adopted a new approach that mirrored the policies at many other universities. This approach involved providing faculty with a fair use checklist and some general information about the fair use factors and how to weigh them, and instructing faculty to use the checklist to determine for themselves whether

²³⁴ L. Ray Patterson, *Regents Guide to Understanding Copyright and Educational Fair Use*, 5 J. INTELL. PROP. L. 243, 245 (1997). Ironically, even though Professor Patterson's views of fair use are almost prophetic in their emphasis on legitimate purpose and users' rights, the *Regent's Guide* still retains a bit of the market-centered approach to the doctrine, stating that "[t]he location of the line between fair use and infringing use is determined by the market factor, that is, the extent to which the copy becomes a substitute for the purchase of the work." *Id.* at 258 n.17. This question of substitution can be turned in favor of the user, however, and has been most recently in the *HathiTrust* case. Indeed, the Second Circuit made "non-substitution" its touchstone for transformative use, and found resoundingly in favor of the universities. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014). Judge Leval also discusses substitution throughout his opinion in *Authors Guild v. Google, Inc.*, 804 F.3d 202, 218 (2d Cir. 2015) (observing that transformative use favors a finding of fair use "unless the value of its transformative purpose is overcome by its providing text in a manner that offers a competing substitute for Plaintiffs' books").

²³⁵ Another irritant that may have drawn the AAP and CCC to GSU is the Georgia Attorney General's decision to issue an unofficial opinion repudiating the *Kinko's* decision. Patterson, *supra* note 234, at 281.

their uses were fair. A fair use training session was held, but was not widely attended.²³⁶

The publishers pressed the same basic case they had been arguing since the NYU case in the 1980s: professors who distribute materials to their students without paying licensing fees are violating the Classroom Guidelines and causing cognizable market harm to the publishers.²³⁷ They cited the coursepack cases and argued that GSU's e-reserves were really just e-coursepacks. In a nod to the now dominant paradigm, the publishers also argued that the uses were non-transformative, and therefore were not fair.²³⁸ They met intense skepticism in both the district and the appellate court.

In a 350-page opinion, U.S. District Judge Orinda D. Evans developed a rubric for assessing fair use of scholarly monographs (the only type of publication at issue in the case) and applied it to an agreed-upon sample of faculty-posted excerpts governed by the new policy.²³⁹ The opinion was hailed as a victory by many in the education community (including me),²⁴⁰ due in large part to Judge Evans' refusal to follow the coursepack cases,²⁴¹ her conclusion that the first factor "strongly favors" fair use for non-profit, educational uses,²⁴² her highly critical treatment of the Classroom Guidelines,²⁴³ and the overall favorable outcome for GSU. Of ninety-nine alleged infringements, Judge Evans found only five were infringing. Due in part to this lopsided finding, Judge Evans designated GSU as the

²³⁶ See *Cambridge I*, 863 F. Supp. 2d 1190, 1204 (N.D. Ga. 2012) ("Over half of [the professors] testified that they had not attended the training sessions GSU had held for professors concerning implementation of the 2009 Copyright Policy."), *rev'd*, *Cambridge II*, 769 F.3d 1232 (11th Cir. 2014).

²³⁷ *Id.* at 1235–36.

²³⁸ *Id.* at 1224.

²³⁹ See *id.* at 1210–11.

²⁴⁰ See, e.g., BRANDON BUTLER, ASS'N OF RESEARCH LIBR., GSU FAIR USE DECISION RECAP AND IMPLICATIONS 1 (2012), <http://www.arl.org/storage/documents/publications/issue-brief-gsu-decision-15may12.pdf> [<http://perma.cc/VE7X-KHRX>]; Jennifer Howard, *Long-Awaited Ruling in Copyright Case Mostly Favors Georgia State U.*, CHRON. HIGHER EDUC. (May 13, 2012), <http://chronicle.com/article/Long-Awaited-Ruling-in/131859/> [<http://perma.cc/3UHP-MD7N>].

²⁴¹ *Cambridge I*, 863 F. Supp. 2d at 1224 ("Because [GSU] is a purely nonprofit, educational institution and the excerpts at issue were used for purely nonprofit, educational purposes, this case is distinguishable from *Kinko's*, *Michigan Document Services*, and *Texaco*.").

²⁴² *Id.* at 1225.

²⁴³ See, e.g., *id.* at 1229 ("[T]he Guidelines' absolute cap, which would preclude a use from falling within the safe harbor solely on the basis of the number of words copied, is not compatible with the language and intent of § 107."); *id.* at 1234 (finding the Guidelines' approach "so restrictive [that it] undermines the teaching objective favored by § 107."); *id.* at 1234–35 ("[T]he Guidelines'[] idea that professors be prohibited from unlicensed use of the same chapter from one academic term to the next is an impractical, unnecessary limitation.").

prevailing party and awarded the university substantial costs and attorney's fees.²⁴⁴

On reflection, however, Judge Evans' opinion leaves much to be desired, despite the favorable outcome for GSU. Most importantly, her reasoning (and the appellate court's reasoning, in turn) was dramatically skewed by her hasty conclusion that because the uses involved "mirror-image" copying, none of GSU's uses were transformative.²⁴⁵ Judge Evans also found, based on her own examination of the books, that students were among the "target market" for all of the works at issue in the litigation.²⁴⁶ While the consequences may not have been as stark as in the coursepack cases, this finding led to Judge Evans' requirement that the amounts used be "decidedly small" in order to be favored under the third statutory factor.²⁴⁷ Judge Evans also gave substantial weight to publishers' allegations of lost revenue under the fourth factor, though she conducted a much more searching inquiry into the question of market harm than any of the coursepack cases had done.²⁴⁸ In the end, because GSU's uses had been relatively modest and the publishers had not in fact developed robust

²⁴⁴ See 17 U.S.C. § 505 (2012) ("In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.").

²⁴⁵ Judge Evans never actually grapples with the question of whether GSU's uses are transformative, but simply asserts in two places that the uses are non-transformative. See *Cambridge I*, 863 F. Supp. 2d at 1224, 1232. Judge Evans was never presented with arguments from GSU about the potential transformiveness of the contested uses, at least in part because the GSU defendants' use of a fair use checklist had placed them in an awkward position. The checklist includes a checkbox for teachers to indicate whether they believed their uses are "transformative." People familiar with the litigation have informed me that a clear majority (if not all) of the checklists completed for uses at issue in the case indicated that teachers did not believe their uses were transformative, which created a paper trail that the GSU defense team decided not to contradict. Footnote Eleven of *Campbell* and the statutory reference to "multiple copies for classroom use" also played a role in encouraging GSU to pursue a non-transformative defense. *Id.* at 1223. Given the limited training they received, it is possible that the teachers who filled out the checklist did not understand what "transformative" means in the copyright context; without further guidance (or with limited guidance), they may have assumed it meant literal alteration of the original. In any event, the defense team decided not to press the transformative use question.

²⁴⁶ *Id.* at 1211.

²⁴⁷ *Id.* at 1232 ("Taking into account the fact that this case involves only mirror-image, nontransformative uses, the amount used must be decidedly small to qualify as fair use."). Judge Evans did not, in fact, require that every use be "decidedly small" in order to qualify as fair; rather, she weighed the third factor against GSU in cases where the amount exceeded her quantitative limits. *Id.* at 1254–55. Several "excessive" uses were found to be fair use due to the countervailing weight of the other factors favoring the university. See, e.g., *id.* at 1263–64 (finding use of two chapters fair due to minimal harm to plaintiffs' market).

²⁴⁸ *Id.* at 1239 (holding that "factor four weighs heavily in Plaintiffs' favor when permissions for digital excerpts are readily available").

licensing options for many of the works at issue, GSU prevailed.²⁴⁹ Not surprisingly, the publishers appealed.

Although the Eleventh Circuit reversed and remanded the decision for other reasons,²⁵⁰ its opinion approved key aspects of Judge Evans' fair use analysis. In particular, the majority agreed that neither the coursepack cases nor the Classroom Guidelines should be given much weight, if any, in deciding cases involving non-profit educational uses like GSU's. The coursepack cases had been about for-profit copy shops, not non-profit educators, and the court found that fact to be decisive.²⁵¹ Like Judge Evans, the Eleventh Circuit found that the first factor should favor fair use for all of GSU's uses due to their non-profit, educational nature.²⁵² As for the Classroom Guidelines, Judge Tjoflat found several reasons to limit their influence: "they (1) were drafted by partisan groups, (2) 'state the minimum and not the maximum standards of educational fair use under [§] 107', and (3) adopt the type of 'hard evidentiary presumption[s]' regarding which types of use may be fair that the Supreme Court has since repeatedly warned against."²⁵³ The court also approved Judge Evans' searching exploration of the fourth factor, including placing the initial burden of production on the publishers as to the likelihood of cognizable market harm.²⁵⁴

The Eleventh Circuit also affirmed the least salutary aspect of Judge Evans' opinion, finding that GSU's uses were not transformative. The court declined to reverse Judge Evans' holding that GSU's use of the excerpts was for one of the original intended purposes of the underlying works, as "reading material for students in university courses."²⁵⁵ Judge Tjoflat relied on this factual finding in holding that GSU's uses were not transformative, and that therefore "the threat of market substitution is significant."²⁵⁶ The appellate court also agreed with Judge Evans that the

²⁴⁹ *Id.* at 1363–64 (indicating that GSU prevailed on ninety-four of the ninety-nine infringement claims).

²⁵⁰ The court strongly disagreed with the "mechanical" nature of Judge Evans' approach to the four factors, including her use of a simple binary rule for the second factor (use of "non-fiction" works favors fair use), a quantitative threshold for the third factor (ten percent or one chapter, depending on the length of the book), and her seemingly "arithmetic" approach to weighing the factors together, which awarded victory to whichever side was favored by more factors. *Cambridge II*, 769 F.3d 1232, 1260 (11th Cir. 2014). The court also held that Judge Evans should have given the fourth factor more weight in light of the non-transformative nature of GSU's uses. *Id.* at 1281.

²⁵¹ *See id.* at 1264 (noting that the coursepack cases had been brought against for-profit copy shops, not educators themselves); *id.* at 1267 ("Defendants' use is not fairly characterized as 'commercial exploitation.'"); *id.* at 1275 (holding that the district court "properly declined to tie its analysis under the third factor to the Classroom Guidelines or to the coursepack cases").

²⁵² *Id.* at 1267.

²⁵³ *Id.* at 1246 n.12.

²⁵⁴ *Id.* at 1281.

²⁵⁵ *Id.* at 1263.

²⁵⁶ *Id.* at 1267.

lack of literal alteration should be held against GSU in the transformative use analysis,²⁵⁷ although the Eleventh Circuit acknowledges that such alteration is not required for a finding of transformativeness.²⁵⁸

The future of non-transformative educational fair use after the GSU decision seems quite uncertain. The Eleventh Circuit's vision of a fair use balancing test has a strikingly schizophrenic quality. While educators may take solace that the first factor will consistently favor non-profit, educational uses, things get considerably less predictable from there. The second factor, the nature of the work used, which the district court had held would consistently favor fair use of non-fiction works, should instead be neutral or even weigh against fair use for works that "contain[] evaluative, analytical, or subjectively descriptive material that surpasses the bare facts, or derive from the author's own experiences or opinions."²⁵⁹ The most alarming aspect of the analysis is that, where uses are non-transformative, the fourth factor "looms large" and should be "afford[ed] relatively great weight" in the overall analysis.²⁶⁰ On the other hand, the fourth factor should recede in cases where no licensing market yet exists,²⁶¹ but could presumably surge forward again if such a market is developed.

The Eleventh Circuit's analysis of the third statutory factor, "the amount and substantiality of the portion used,"²⁶² simply acts as an amplifier of either the first factor or the fourth factor, depending on the availability of a license. The court explains that a use will be favored under the third factor if "the amount taken is reasonable in light of the purpose of the use *and* the likelihood of market substitution."²⁶³ For transformative uses, this inquiry will yield a single coherent result, as any use that is appropriate to a transformative purpose is by definition non-substitutional.²⁶⁴ For non-transformative uses, however, there is room for conflict. For uses where a licensing market for educational use of excerpts is readily available, the use will clearly be substitutional, even if (or perhaps especially if) the use is appropriate to the educational purpose. It is

²⁵⁷ *Id.* at 1262.

²⁵⁸ *See id.* ("Even verbatim copying 'may be transformative so long as the copy serves a different function than the original work.'" (quoting *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1446, 1165 (9th Cir. 2007))).

²⁵⁹ *Id.* at 1283. At the same time, like all courts, the Eleventh Circuit gives the second factor "comparatively little weight." *Id.*

²⁶⁰ *Id.* at 1275, 1276 n.31.

²⁶¹ *See id.* at 1279 (agreeing with the trial court's position that the availability of licensing information should be taken into account when assigning weight to the fourth fair use factor).

²⁶² 17 U.S.C. § 107(3) (2012).

²⁶³ *Cambridge II*, 769 F.3d at 1271 (emphasis added) (quoting *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1314 n.30 (11th Cir. 2008)).

²⁶⁴ *See, e.g.,* *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014) ("[U]nder Factor Four, any economic 'harm' caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work.").

unclear what a court is to make of the third factor in such circumstances, which are likely to be increasingly common as licenses for electronic use become available. The ambiguity within each factor, the equipoise across factors, and the court's insistence that the final weighing of the factors must be a "holistic" and "carefully balanced" analysis, as opposed to being treated "mechanistically,"²⁶⁵ combine to leave educators in a deeply uncertain position. The safe response may well be to forego fair use whenever there is a license available, and to tread very carefully indeed even when there is not.

Several amici who filed on the transformative use issue²⁶⁶ prompted the Eleventh Circuit majority to expressly disclaim any intent to prejudge future transformative uses. In footnote twenty-one, Judge Tjoflat issues the following acknowledgment: "Amici point out that excerpts in an electronic reserve system—like the ones at GSU—could be used for a different function than the original. . . . We need not rule on whether such uses could ever be transformative, because the question is not before us."²⁶⁷ Footnote twenty-one leaves the door open for a kind of fair use argument that could afford educators far greater flexibility, predictability, and scope in exercising their fair use rights.

²⁶⁵ *Cambridge II*, 769 F.3d at 1283.

²⁶⁶ The issue was raised most clearly and forcefully in a brief prepared by David Hansen, Peter Jaszi, Pamela Samuelson, Jason Schultz, and Rebecca Tushnet, who argued that GSU's uses were transformative because they present the materials for new purposes. Brief of *Amicus Curiae* Academic Authors and Legal Scholars in Support of Defendants-Appellees and Affirmance at 2–3, *Cambridge II*, 769 F.3d 1232 (Nos. 12-14676-FF & 12-15147-FF), 2013 WL 1869775. The Library Copyright Alliance made a similar argument as part of its brief, which I helped to draft. Brief of *Amici Curiae* Am. Library Ass'n et al. in Support of Affirmance at 11–15, *Cambridge II*, 769 F.3d 1232 (Nos. 12-14676-FF & 12-15147-FF), 2013 WL 1869773. A brief prepared by Jack I. Lerner and students from the Intellectual Property and Technology Law Clinic at the University of Southern California made the related point that even if GSU's uses are not transformative, other educational uses surely are, and the court should not prejudge those cases. See Brief of *Amicus Curiae* Am. Ass'n of Univ. Professors et al. in Support of Appellees at 2, *Cambridge II*, 769 F.3d 1232 (Nos. 12-14676-FF & 12-15147-FF), 2013 WL 1869771 (opining that the district court's analysis did not fully account for the myriad classroom uses traditional to higher education and indispensable in classroom teaching). The court's holding seems to follow most clearly from this last brief, though it is not cited.

²⁶⁷ *Cambridge II*, 769 F.3d at 1263 n.21. Notably, the court cites the amicus briefs of the Library Copyright Alliance and of the Association of Southeastern Research Libraries for examples of future uses that could turn out to qualify for transformative treatment. See *id.* The former brief cites the *Code of Best Practices in Fair Use for Academic and Research Libraries*, Brief of *Amici Curiae* Am. Library Ass'n et al., *supra* note 266, at 6, which includes a principle describing fair use in sharing resources online, grounded in part in a transformative use rationale, see ASS'N OF RESEARCH LIBRARIES, *supra* note 143, at 13 ("Most of the information objects made available to students, in whatever format, are not originally intended for educational use."). Obviously, these sources assume a factual predicate that the trial court rejected in the GSU case: that teachers use works in ways they were not originally intended.

IV. VARIETIES OF TRANSFORMATIVE TEACHING

Use of copyrighted materials for teaching can be transformative in precisely the ways described by scholars and favored by courts. This Part describes several categories of teaching uses that courts should bless as transformative. The typology of teaching uses presented here is by no means exhaustive, nor will it always be perfectly clear which category best describes any particular use. Film and literature courses that explore thematic trends may also have a heavy theory component, for example, making the distinction between Part IV.A.3 and Part IV.B.2 less clear. The categories below are only meant to be illustrative, both of the number and variety of teaching uses that can be characterized as transformative and of the ways of supporting and defending that characterization. As in every area of law, the facts of any particular case will be vital and the case theory must follow where they lead. More examples of transformative teaching practices can be found in the best practices statements published by a variety of educator communities.²⁶⁸

Two caveats apply to each of these categories of use. First, the amount of the work used should be appropriate to the transformative purpose. Both Samuelson and Netanel have posited that a valid transformative purpose

²⁶⁸ See, e.g., VISUAL RES. ASS'N, STATEMENT ON THE FAIR USE OF IMAGES FOR TEACHING, RESEARCH, AND STUDY 7–12 (2013), http://www.membership.vraweb.org/organization/pdf/VRA_Fair_Use_Statement_Pages_Links.pdf [<http://perma.cc/85W3-6BFJ>] (advising on the fair use of images through preservation, in teaching, on course websites, in adaptations for teaching and classroom work, when shared, and when reproduced in theses and dissertations); CTR. FOR SOC. MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR POETRY 9–15 (2011), http://www.cmsimpact.org/sites/default/files/documents/pages/fairusepoetrybooklet_singlepg_3.pdf [<http://perma.cc/35VV-JP9K>] (setting forth fair use principles for the use of poetry in parody and satire, new works, criticism, epigraphs, on the internet, and in literary performance); CTR. FOR SOC. MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR OPENCOURSEWARE 10–13 (2009), <http://www.cmsimpact.org/sites/default/files/10-305-OCW-Oct29.pdf> [<http://perma.cc/5Z3Z-PUQF>] (recommending standards for the fair use of online lectures in incidental use, use in critique and analysis, use for illustration, and use for demonstration or explanation); CTR. FOR SOC. MED., SOC'Y FOR CINEMA AND MEDIA STUDIES' STATEMENT OF FAIR USE BEST PRACTICES FOR MEDIA STUDIES PUBLISHING 3–5 (2009), <https://c.yimcdn.com/sites/cmstudies.site-ym.com/resource/resmgr/docs/scmsbestpractices4fairuseinp.pdf> [<http://perma.cc/7K3F-PZD6>] (discussing the fair use of copyrighted works within media studies publishing, in categories illustrating historical, theoretical, or aesthetic arguments, as used to stimulate discussion, in multimedia scholarship, and when bundled with scholarship and teaching materials); CTR. FOR SOC. MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION 10–14 (2008) [hereinafter CTR. FOR SOC. MEDIA, MEDIA LITERACY EDUCATION] http://www.mediaeducationlab.com/sites/mediaeducationlab.com/files/CodeofBestPracticesinFairUse_0.pdf [<http://perma.cc/CRA9-93X4>] (providing advice on educational use in media literacy lessons, preparing curriculum materials, sharing curriculum materials, by students, and in developing audiences for student work); *The Society for Cinema and Media Studies' Statement of Best Practices for Fair Use in Teaching for Film and Media Educators*, 47 CINEMA J. 155, 157–62 (2008) (setting forth principles to guide media uses in classroom screenings, broadcast recordings, derivative works, including creation of clip collections, online distance education, and in the public domain).

can be undermined by use of an excessive amount of the original work.²⁶⁹ “Appropriate amount” is an imprecise standard, but it indicates a flexible space where courts are likely to defer to a fair user with a compelling transformative purpose. The amount can be more than is strictly necessary,²⁷⁰ but at a certain point the purpose no longer justifies the taking. Indeed, as Judge Leval argues, courts may look to the amount taken as an additional indicator of whether the use truly is transformative; taking too much supports an inference that the use is in fact merely substitutional or otherwise illegitimate.²⁷¹

Second, access to materials used for transformative purposes should be restricted to students enrolled in the class, and the students’ access should be terminated once they have completed the course. This requirement is embodied in Principle One of the *Code of Best Practices in Fair Use for Academic and Research Libraries*,²⁷² and follows, in part, from the non-substitution requirement described most recently in *Authors Guild v. Google, Inc.* Judge Leval explains in that case that even where a use has a transformative purpose and justification, its fairness may be undercut if the user makes available to the public an amount of the original work sufficient to serve as a market substitute.²⁷³ Limiting access to enrolled students ensures that the general public does not gain access to a substituting copy.

A. *Orthogonal Teaching*

Although Netanel and Reese have shown that all transformative use involves use for new purposes,²⁷⁴ Samuelson’s distinction between “orthogonal” and “productive” uses²⁷⁵ is a helpful one. For one thing, orthogonal transformative uses can easily withstand challenges based on

²⁶⁹ See Netanel, *supra* note 24, at 745; Samuelson, *supra* note 114, at 2259–60.

²⁷⁰ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1993) (stating that a fair user “must be able to ‘conjure up’ at least enough of [an] original” to achieve a desired transformative purpose); *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013) (noting that, “[i]n any event, the law does not require that the secondary artist may take no more than is necessary”).

²⁷¹ See, e.g., *Warner Bros. Entm’t v. RDR Books*, 575 F. Supp. 2d 513, 544–45 (S.D.N.Y. 2008) (finding that some passages from the *Harry Potter* novels reproduced in a follow-on “lexicon” were too lengthy to serve an explanatory purpose, and were likely used instead for their entertainment value); Leval, *supra* note 24, at 1123 (positing that the qualitative aspect of the amount of the original work taken may be more important under the third test than the quantitative amount of the original work appropriated).

²⁷² ASS’N OF RESEARCH LIBRARIES, *supra* note 143, at 14 (“Only eligible students and other qualified persons . . . should have access to materials The availability of materials should be coextensive with the duration of the course”).

²⁷³ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 218 (2d Cir. 2015).

²⁷⁴ Netanel, *supra* note 24, at 747; Reese, *supra* note 101, at 485.

²⁷⁵ See Samuelson, *supra* note 114, at 2555–57 (positing that copyright law will be “more comprehensible and coherent” if orthogonal purposes are distinguished from productive purposes).

the amount taken and market harm, as completely novel purposes often require use of entire works, and such uses are by definition far outside the markets that rights holders “would in general develop or license others to develop.”²⁷⁶ Productive uses, on the other hand, are often made for purposes similar to the purposes of the original works, and must be more carefully tailored to avoid claims of excessive taking and market harm.²⁷⁷

Many teaching uses of copyrighted material are for starkly different purposes than the authors’ or publishers’ originally intended purposes. Many such uses also involve creativity shifts (use of creative works for informative purposes and vice-versa), which Sag has shown to be highly predictive of a finding of fair use.²⁷⁸ A few orthogonal teaching uses can also be characterized as non-expressive, a category of transformative use that has consistently prevailed in fair use challenges.

1. *Using Media About Current Events as Problems or Illustrations*

Connecting the themes or concepts of a class to current events can be a powerful pedagogical tool. When historical political rivalries are revived on the contemporary world stage,²⁷⁹ a controversy over planned alterations to a classic television show raises the specter of moral rights,²⁸⁰ or an extreme weather event reveals the potential consequences of ongoing environmental change,²⁸¹ teachers of history, copyright law, and climate science, respectively, have an opportunity to bring their lessons to life. Whether teachers make the connection themselves as part of a lecture, task their students with identifying the connection as an exercise, or simply email a news story with a subject line explaining in brief the relevance to class, the news becomes subservient to the broader concepts of the classroom. Importing the news of the day into the classroom is therefore an orthogonal use. The stories are repurposed and recontextualized, made into

²⁷⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1993).

²⁷⁷ Samuelson, *supra* note 114, at 2569 (“The overwhelming majority of the productive use cases turn on whether the subsequent author took too much from a first author’s work or invaded a core licensing market.”).

²⁷⁸ Sag, *supra* note 103, at 51.

²⁷⁹ See, e.g., Alan Cowell & Stephen Castle, *After Losing Scottish Independence Vote, Alex Salmond Will Resign*, N.Y. TIMES (Sept. 19, 2014), http://www.nytimes.com/2014/09/20/world/europe/scotland-independence-vote-no.html?_r=0 (reporting on the resignation of the Scottish Minister after a contentious referendum for state sovereignty on which he had focused his political ambitions failed).

²⁸⁰ See, e.g., Jason Kottke, *The Wire, Remastered in HD*, KOTTKE.ORG (Sept. 2, 2014), <http://www.kottke.org/14/09/the-wire-remastered-in-hd> [<http://perma.cc/MV4U-7UH8>] (discussing whether the adoption of a different aspect ratio in the remastered, high-definition version of a television show than that used in the original broadcasting interfered with the creator’s artistic intent).

²⁸¹ See, e.g., James Barron, *After the Devastation, a Daunting Recovery*, N.Y. TIMES (Oct. 30, 2012), <http://www.nytimes.com/2012/10/31/us/hurricane-sandy-barrels-region-leaving-battered-path.html?pagewanted=all> (relating the extent of damage to the New York-metro area in the wake of Hurricane Sandy, which flooded beachfront communities and left Lower Manhattan and ninety percent of Long Island without electricity).

exemplars or problems rather than read for entertainment, and consumed in a distinct and specialized discursive community²⁸² rather than as part of the general consuming public. In this context, use of an entire news story will often be appropriate to fully convey the lesson.

2. *Teaching History with Primary Materials*

Teaching history and related subjects with primary historical documents, such as newspaper and magazine articles, advertisements, manifestoes, and even popular entertainment, is an orthogonal use of those materials and should be considered transformative. Use of entire works will often be appropriate here, as works will often need to be encountered in their entirety to convey a full understanding of a historical period. Analogies to case law abound. For example, just as the Council on American-Islamic Relations reproduced radio programs by Michael Savage as evidence of their claim that the program was bigoted,²⁸³ a professor of European history might share copies of F.T. Marinetti's *Futurist Manifesto* (first published in the Italian newspaper *Le Figaro*) with students as evidence of the embrace of violence among certain parts of the Italian artistic and cultural scene in the years preceding the rise of fascism. Similarly, a course on the history of the American South might assign readings from contemporary news coverage of lynchings. In this context, materials are not encountered for aesthetic enjoyment, entertainment, information about the news of the day, or otherwise for their own sake, but rather as evidence or artifacts of the spirit of a different time.

3. *Using Expressive Works to Teach Theories and Methods of Critical Thought and Analysis*

While some courses in film or literary studies take the works themselves as their primary subjects with the goal of acquainting students with classics or masterpieces in a given medium or movement,²⁸⁴ others aim primarily to teach critical theories and methods. These courses equip students to encounter new works with effective analytical tools relied on by professionals in their chosen field. Classes in theory will often take a

²⁸² See Heymann, *supra* note 227, at 449 (using the concept of distinct discursive communities to help define transformative use).

²⁸³ *Savage v. Council on American-Islamic Relations*, No. C 07-6076 SI, 2008 WL 2951281, at *1-2 (N.D. Cal. July 25, 2008).

²⁸⁴ So-called "great books" curricula sometimes take this approach. See, e.g., *Curriculum*, HARRISON MIDDLETON UNIV., <http://www.hmu.edu/curriculum/> [<http://perma.cc/J6N8-L4UA>] (last visited Sept. 8, 2015) ("Students acquire knowledge from the wisdom of thirty centuries contained in the works by world famous authors in imaginative literature, natural science, philosophy and religion, and social science."). A similar, but distinguishable, category of uses is described in Part IV.B.2., *infra*. Unlike the pure "great books" approach, productive uses take existing works as a starting point for discussion of larger themes, and are not necessarily committed to any judgment of the overall merit or social value of the works studied.

“text” as the raw material and subject it to analysis through the lens of several schools of thought or critical methods. Students learn facility with critical perspectives and modes of analysis by practicing their application to expressive works. When a teacher makes a work available to students so that it can be the subject of such an analysis, that use is orthogonal to the subject work’s original purposes, which are typically to entertain, inform, persuade, and so on. Such a use is arguably a “creativity shift” in Matthew Sag’s terminology,²⁸⁵ as the texts studied are often creative, while the analysis (orally in lecture and discussion, and in written assignments) is factual.

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

4. *Teaching with Archival Materials*

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

5. *Teaching Skills and Methods with Exemplars of Good and Bad Practice*

One effective way to teach a craft or skill is to use an existing work as an example of good or bad practice, or as raw material for critical assessment of the work’s relative strengths and weaknesses. Persuasive writing, news reporting, cinematography, documentary filmmaking, and graphic design are all examples of subjects that could be taught at least in

²⁸⁵ Sag defines a “creativity shift” as any use “where the plaintiff’s work is creative and the defendant’s is informational, or vice versa,” explaining that “[t]his shift in category should almost always entail a fundamental change in purpose, which is the hallmark of transformative use.” Sag, *supra* note 103, at 58.

part by critical examination of exemplary works. In these cases, the works will have been created for orthogonal expressive purposes (to persuade, entertain, and so forth), so their use as models for teaching will be transformative. A creative writing class that attends to the inventive structure of a short story is not consuming the story for its original aesthetic purpose, but rather is using the story as a model of excellence (or of mediocrity or failure). A persuasive writing class that dissects an op-ed column to identify logical fallacies is not consuming the column as originally intended (one hopes), but is focused instead on aspects of the work the author likely hopes will evade his audience's attention. Such uses are therefore very likely to be transformative and fair.

6. *Teaching Technological Tools and Content Manipulation Skills Using Raw Material from Existing Works.*

The work of many creative disciplines involves assembling, editing, and manipulating existing expressive material to create a new finished product. Video editing, graphic design, music composition, web design, journalism, and visual art are all disciplines where students may need to learn methods and theories, technological tools, and other skills for creating new works built from existing materials. In the professional context, such uses may typically be licensed or made collaboratively with authors, e.g., a film editor employed by a film studio produces a final product from raw footage with the studio's permission. The educational context may not afford students an opportunity to work in collaboration with the kinds of authors or rights-holding companies that will be part of the professional setting.²⁸⁶ In these cases, students may practice their skills using raw material available in the mass market. When students use existing creative works as inputs for learning these skills, they are engaging in an orthogonal transformative use, so long as the purpose is to learn methods and tools in the classroom, and the resulting work is used only in an educational context. Use of such works beyond the educational context may no longer constitute fair use.²⁸⁷

²⁸⁶ Some educators teach fair use and copyright as part of their courses on professional skills and insist that any work their students do should be publishable as a professional work product, i.e., that all class work should be done as if it were going to be published professionally, up to and including obtaining any permissions that a professional would have to obtain. *See, e.g.,* CTR. FOR SOC. MEDIA, MEDIA LITERACY EDUCATION, *supra* note 268, at 13 (discussing the importance of teaching students to make proper attributions of copyrighted materials and to make their own determinations of fair use). While this is a valid choice in many contexts, there are certainly teaching contexts where expecting students to meet such standards is too costly or otherwise impractical, and learning should not be impeded.

²⁸⁷ This is not to say that any publication of works created in this way will cease to be fair use. Publication of class projects in online portfolios to show student skill and achievement in a given class or course of study, for example, is a legitimate extension of the classroom exercise and is itself an orthogonal use—its purpose is to advertise the student to would-be employers, graduate programs, and

B. *Productive Teaching*

Samuelson argues that courts consistently favor “productive” uses of existing works (or, more often, parts of works) to facilitate critical analysis or commentary by a subsequent author in a subsequent work of authorship, so long as the amount taken is appropriate and the use does not intrude on a relevant licensing market.²⁸⁸ Netanel and Reese have shown that creation of a new work is neither necessary nor sufficient for finding transformative use,²⁸⁹ so it makes sense to broaden the “productive use” category to include any use in which the primary purpose is criticism or commentary about the work itself, regardless of whether it results in the creation of a new work. This broadening is consistent with Leval’s original characterization of transformative uses as ones that involve “creation of new information, new aesthetics, new insights and understandings,”²⁹⁰ none of which require the literal creation of a new work.²⁹¹

Productive teaching can be distinguished from orthogonal teaching because productive uses involve teaching that is primarily *about* the works themselves, rather than using the works to teach about some other subject. While the works themselves may be the subjects of study, productive teaching uses the works to create new information, insights, and aesthetics, Leval’s hallmarks of transformative use.

1. *Teaching Lectures with Third-Party Media*

Teachers add extensively to the expressive value of the materials they use in their lectures: they provide conceptual scaffolding so that students can better understand new material; they give social, historical, political, and artistic context that illuminates the objects of study; they bring their own critical perspectives to bear; and more. A good lecture is a carefully planned performance that weaves together disparate materials to serve a

the like, as well as to integrate learning. See, e.g., *Scholarship*, AUBURN UNIV. OFF. UNIV. WRITING, <http://wp.auburn.edu/writing/eportfolio-project/faculty-support/scholarships/> [<http://perma.cc/EQ5B-JMUA>] (last visited Sept. 8, 2015).

²⁸⁸ Samuelson, *supra* note 114, at 2555–56 (discussing cases where the use of an original work to create a scholarly secondary work that does not harm the market for the original work has been held to be a fair use).

²⁸⁹ See Netanel, *supra* note 24, at 748 (explaining that the “vast majority of courts adhere to the rule that new expressive content, even a fundamental reworking of the original, is generally insufficient for the use to be transformative absent a different expressive purpose” and that a “startling number of recent cases have held that the use was transformative when the defendant copied the plaintiff’s work in its entirety without modification, but for a different expressive purpose”); Reese, *supra* note 101, at 494 (noting that the creation of a derivative work does not necessarily constitute fair use, and that a secondary work does not have to alter the first work to be considered transformative).

²⁹⁰ Leval, *supra* note 24, at 1111.

²⁹¹ That said, some productive teaching uses do involve the creation of new works of authorship, such as PowerPoint slides, video lectures, and the like; such uses will perhaps be even more likely to benefit from the generally favorable treatment of scholarly secondary works that Samuelson describes.

variety of learning goals, adding at least as much value to incorporated third-party material as any critical essay would, and warrants the same deferential treatment.²⁹² Lectures that borrow from creative, fictional works in service of a factual presentation will constitute “creativity shifts.”

This is one area where there is case law directly on point. In *Sundeman v. Seajay Society*²⁹³ the Fourth Circuit ruled that a scholar’s use of portions of an unpublished manuscript in the context of a lecture presentation was transformative.²⁹⁴ The scholar, Dr. Anne Blythe, had written a critical essay and given an oral presentation on a manuscript of an unpublished work called *Blood of My Blood*.²⁹⁵ The court reasoned that,

A reading of Blythe’s paper clearly indicates that she attempted to shed light on Rawlings’ development as a young author, review the quality of *Blood of My Blood*, and comment on the relationship between Rawlings and her mother. The “further purpose” and “different character” of Blythe’s work make it transformative, rather than an attempt to merely supersede *Blood of My Blood*.²⁹⁶

The Copyright Office has also recognized that use of film clips for educational purposes constitutes a fair use.²⁹⁷ It did so in the context of its triennial inquiry into what sorts of uses might be unduly burdened by the Digital Millennium Copyright Act’s ban on circumvention of technical protection measures. DVDs are protected by a form of encryption that must be circumvented by teachers who wish to copy the digital video files to create a clip compilation for class. Because this circumvention would otherwise trigger DMCA liability, teachers have sought and received an exemption in several successive Copyright Office proceedings.²⁹⁸ The

²⁹² Section 110 of the Copyright Act, 17 U.S.C. § 110 (2012), permits performance and display of copyrighted works in the context of classroom teaching, but its protection is far from complete. For example, the creation of a compilation of film clips for teaching may itself be an act of infringement independent of the permitted in-class performance. Similarly, a set of PowerPoint slides reproducing entire works of fine art for use in an art history lecture could be an infringing derivative work. Also, the scope of § 110’s protection for teaching online and in other less traditional contexts is uncertain. Luckily, these uses should fall squarely within the category of productive transformative use.

²⁹³ 142 F.3d 194 (4th Cir. 1998).

²⁹⁴ *Id.* at 202–03.

²⁹⁵ *Id.* at 199.

²⁹⁶ *Id.* at 202.

²⁹⁷ U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: FIFTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION 126–27, 129 (2012), http://www.copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf [<http://perma.cc/DD6A-9NRW>].

²⁹⁸ See generally *Section 1201 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works*, U.S. COPYRIGHT OFFICE, <http://copyright.gov/1201/> [<http://perma.cc/2QZD-5HHU>] (last visited Dec. 2, 2015) (collecting current and previous exemptions granted by the Copyright Office).

grant of an exemption from DMCA liability requires finding that the contemplated use is non-infringing.²⁹⁹

2. *Teaching Themes, Genres, or Stylistic Movements in Music, Film, or Literature by Assigning Outside Reading of Exemplary Works*

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

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

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

Such uses are productive because the teacher adds new insights and new meaning to each work, placing them into the new context created by

²⁹⁹ See *id.* at 102–03 (discussing DVD encryption technology and efforts to create an exemption from DMCA liability for teachers who copy DVD video files for educational purposes).

the unifying structure of the course. She can do so by placing the work into conversation with other works, with critics, with students, and with the teacher herself. She can also create conceptual scaffolding for students to use to surface meanings or qualities that are not apparent on the surface of the work, as appropriate to the course. Finally, a teacher can assign her students to make additional productive uses of the works by drawing their own critical conclusions, and perhaps embodying those conclusions in an essay, research paper, or other expressive work. Taken together, these kinds of activities are at the heart of what Leval describes as activities that serve the very purposes of copyright.³⁰⁰

3. *Assembling Galleries, Playlists, and Other Large Collections of Representative Works to Facilitate Student Exposure to Genres, Movements, Styles, and Other Shared Characteristics of Expressive Works*

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

V. NON-TRANSFORMATIVE EDUCATIONAL FAIR USE

It is tempting to see transformative use as not only the heart of the fair use doctrine, but the whole of it. While the tendency in the first two decades after 1976 was to over-emphasize market effect for teaching

³⁰⁰ See Leval, *supra* note 24, at 1107–10 for an elaborated discussion.

uses,³⁰¹ the total elimination of market effect as a consideration in fair use decision-making would curtail valuable uses, including many educational ones. It is quite possible that Judge Evans got things basically right as regards GSU's uses, i.e., that many of the excerpts at issue in the GSU case were not used in a transformative way, but were still used fairly given the importance of education and the negligible market value of access to electronic excerpts.³⁰² Because the issue of transformative use was not litigated, we may never know. In any event, in reviving transformative use for education, teachers need not abandon market-centered arguments that may still be available to them. This is especially true given the courts' more nuanced and balanced approach to market inquiry in the GSU case.

The difference between a transformative use argument and a market-centered argument could be characterized as the difference between "justification" and "excuse."³⁰³ This is a point on which Wendy Gordon and Pierre Leval might agree. Judge Leval argues that "the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*."³⁰⁴ Transformative uses are justified because they serve the goals of copyright. Gordon argues that when uses are justified, we want others to emulate them; therefore, it is *normatively right* that such uses be conducted without payment or permission.³⁰⁵ When uses are excused, however, there is a sense of "if only"—if only circumstances were different, there would be no need for fair use.³⁰⁶ In excused cases, we might prefer that the ordinary system of seeking and paying for permission could operate, but we acknowledge that, for now, they cannot.³⁰⁷ *HathiTrust* and the GSU case show both the potential strengths and weaknesses of the market-centered, "excused" incarnation of fair use.

Although the appellate decision in *HathiTrust* is a near-total endorsement of District Judge Baer's ultimate conclusions about the

³⁰¹ See *id.* at 1124 (discussing the tendency of the Supreme Court to over-emphasize the market effect).

³⁰² See *Cambridge I*, 863 F. Supp. 2d 1190, 1238–39 (N.D. Ga. 2012) (holding that GSU's uses of copyrighted materials falls within the fair use exception), *rev'd*, *Cambridge II*, 769 F.3d 1232 (11th Cir. 2012).

³⁰³ See Gordon, *supra* note 67, at 152–55 (characterizing various fair use exception arguments as being either justifications or excuses).

³⁰⁴ Leval, *supra* note 24, at 1111.

³⁰⁵ Gordon, *supra* note 67, at 160 ("[A] judge might well decide that a defendant could be *justified* in proceeding without consent or compensation: that even if market conditions were perfect, it would be normatively appropriate to proceed outside the market's ordinary process of consent and payment.").

³⁰⁶ See *id.* at 152. ("'Excuse' connotes 'if only'—*if only* some discrete fact were different, we could apply the law as written. In instances of 'market malfunction' . . . we would *prefer* the market to govern if only the market could function well, but when it fails to do so . . . a court may *excuse* a participant from adhering to the usual market rules.").

³⁰⁷ *Id.*

fairness of the uses at issue, it makes some important analytic distinctions that push back on the district court opinion. In particular, Judge Parker throws cold water on Judge Baer's declaration that "I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants' [mass-digitization project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA."³⁰⁸ Although Judge Baer did not say that the value of the HathiTrust's use is sufficient to make the use transformative, Judge Parker cautions that "[a]dded value or utility is not the test."³⁰⁹ As described in Part II.C. above, Judge Parker goes on to apply the correct test for transformative use—did the use "serve[] a new and different function from the original work"³¹⁰—and finds most of the HathiTrust's uses to be transformative.³¹¹

For one of the HathiTrust's uses, however, the court finds that the use is non-transformative—but still fair.³¹² Some university members of the HathiTrust provide print-disabled patrons access to digitized versions of books from their collections,³¹³ a revolutionary development that makes literally millions of works available for the first time to people that have endured a "book famine"³¹⁴ for centuries due in part to publishers' unwillingness to make books available in accessible formats. Judge Baer interpreted this widespread and systematic exclusion to mean that "the intended use of the original work" for purposes of transformative use

³⁰⁸ Authors Guild v. HathiTrust, 902 F. Supp. 2d 446, 464 (S.D.N.Y. 2012), *aff'd in part, vacated in part*, 755 F.3d 87 (2d Cir. 2014).

³⁰⁹ *HathiTrust*, 755 F.3d at 96.

³¹⁰ *Id.*

³¹¹ *See id.* at 97.

³¹² *See id.* at 101–02.

³¹³ *See Accessibility*, HATHITRUST DIGITAL LIBR., <http://www.hathitrust.org/accessibility> [<http://perma.cc/PN6Z-QVZD>] (last visited Sept. 14, 2015). At the time of the decision only the University of Michigan was providing this kind of access, but more HathiTrust partners are likely to do so now that the program has survived judicial scrutiny on appeal.

³¹⁴ *See* Jim Fruchterman, *HathiTrust Victory Advances Accessibility*, BOOKSHARE BLOG (July 31, 2014), <http://bookshareblog.wpengine.com/2014/07/haititrust-fairusevictory/> [<http://perma.cc/8972-X7B4>] (predicting that the *HathiTrust* ruling would lead to greater access to books and text for the blind and print-disabled); Kartik Sawhney, *Perspective: End the 'Book Famine' with Better Technology, Attitudes and Copyright Law*, in STATE OF THE WORLD'S CHILDREN 2013: CHILDREN WITH DISABILITIES 82 (Abid Aslam ed., 2013), http://www.unicef.org/sowc2013/files/SWCR2013_ENG_Lo_res_24_Apr_2013.pdf [<http://perma.cc/Z4K4-R7QX>] (discussing the prevalence of "book famine[s]" throughout the developing world); Meredith Schwartz, *HathiTrust Verdict Could Transform University Access for the Blind*, LIBRARY J. (Nov. 7, 2012), http://lj.libraryjournal.com/2012/11/copyright/hathitrust-verdict-could-transform-university-access-for-the-blind/#_ [<http://perma.cc/9GKE-LF4V>] (discussing the impact of the *HathiTrust* case on university services for the blind and print-disabled).

analysis was “enjoyment and use by sighted persons.”³¹⁵ Relative to that purpose, creating new formats that make the works accessible to an unintended audience is transformative, and Judge Baer so held.

Judge Parker took a more expansive view of the purpose of the works, taking the plaintiffs at their word that they “write books to be read (or listened to),” without regard to audience.³¹⁶ Because making accessible copies available to the general university community merely facilitates reading the books *for any general purpose*, the HathiTrust “appears, at first glance, to be creating derivative works over which the author ordinarily maintains control.”³¹⁷ This is not a transformative use. In the ordinary case, the market should function so that authors (and their assignees) control and profit from the creation of derivative works that serve the same basic function as the protected work. Indeed, groups representing the print-disabled have said repeatedly and in many contexts that they would prefer to be served by the ordinary market rather than rely on “charity” in the form of special programs that provide free services.³¹⁸

However, the court observes that providing accessible copies to the print-disabled is strongly favored by public policy, citing Supreme Court precedent, legislative history of the 1976 Copyright Act, and the variety of other laws favoring accommodation for the disabled.³¹⁹ Accordingly, the

³¹⁵ Authors Guild v. HathiTrust, 902 F. Supp. 2d 446, 461 (S.D.N.Y. 2012), *aff’d in part, vacated in part*, 755 F.3d 87 (2d Cir. 2014).

³¹⁶ *HathiTrust*, 755 F.3d at 101. Not coincidentally, such an expansive definition of purpose threatens to shrink substantially the domain of transformative use. Even an excerpt reprinted in a book review is “read,” after all. In reality, it is the breadth of the HathiTrust’s purpose that was decisive here. Courts generally ask more probing questions about the secondary user’s purpose relative to the original intended purpose, but in this case the secondary use is intentionally broad: full text access for any purpose a print-disabled user might have, from scholarship to leisure, just as printed books are made available for any purpose to sighted library patrons. When courts do invoke new audiences in finding transformative use (in *Swatch* and *Cariou*, for example), it is generally as evidence for a novel purpose (objective financial reporting and high-end appropriation art, respectively). *Swatch Grp. Mgmt. Servs. v. Bloomberg L.P.*, 756 F.3d 73, 85–86 (2014); *Cariou v. Prince*, 714 F.3d 694, 698–99 (2013). In the absence of a genuinely novel purpose, it makes more sense to frame the fair use inquiry in terms of market failure.

³¹⁷ *Id.*

³¹⁸ See, e.g., Marc Maurer, *The Shoeshine, Blindness, and the NFB*, BRAILLE MONITOR (Dec. 1985), <https://nfb.org/Images/nfb/Publications/bm/bm85/bm8512/bm851213.htm> [<https://perma.cc/6CHP-U5Q2>] (“I am sure that we will find a way for people to realize that blindness does not require free shoeshines and that equality requires the individual to pay for service given.”); Zach Shore, *Free Rides for the Blind Cost Us Too Much*, 33 BRAILLE MONITOR 30, 31 (1990), <https://nfb.org/Images/nfb/Publications/bm/bm90/brlm9003.htm> [<https://perma.cc/7W7G-GKP6>] (“We can never hope to gain equal status in society if we are not willing to take on our financial obligations, and that means paying our fair share along with everybody else.”). Of course, libraries lend books for free to all patrons, so to exclude the print disabled based on market availability would not be equal treatment.

³¹⁹ See *HathiTrust*, 755 F.3d at 102 (listing Supreme Court affirmations of the court’s reasoning, and legislative history, supporting the notion that “making copies accessible ‘for the use of blind persons’ posed a ‘special instance illustrating the application of the fair use doctrine’” (quoting H.R. REP. NO. 94-1476, at 73 (1976))).

court finds that the purpose is a favored one.³²⁰ Notably, the legislative history and the Supreme Court both proclaim that providing accessible works to the blind is fair use without any explicit reference to the market as a limiting factor. Nevertheless, the court finds that the fourth factor also favors the use given the near-total failure of the market to serve this audience relative to the HathiTrust's ability to provide accessible copies of millions of books.³²¹ The court does not condition its finding of fairness on the absence of a market option, nor does it advise the HathiTrust or its partners that future conduct may cease to be fair if market options come online.³²²

Like Judge Parker, Judge Evans of the GSU case finds ample evidence that education is an activity strongly favored by public policy.³²³ Judge Evans relies primarily on the text of the fair use statute itself, but the legislative history,³²⁴ provisions elsewhere in the Copyright Act,³²⁵ case law, and related legislation all help to demonstrate the strong public policy of promoting access to education and educational materials. The amicus brief submitted by the American Council on Education and other higher education groups recounts at length the evidence that education is favored by policy.³²⁶ By itself, however, this finding would not be enough to justify a finding of fair use. Education is a major intended market for some authors and publishers; a blanket right to copy freely and distribute anything for educational purposes would cause that market to collapse, depriving teachers and students of useful resources created expressly for support of teaching.

Judge Evans takes a *vastly* more fine-grained approach to the question of market effect for allegedly non-transformative uses. Unlike Judge Parker, she does not simply observe that despite the promises of licensing

³²⁰ *Id.* at 103.

³²¹ *Id.* At the same time, the court's inquiry into the robustness of the market for accessible formats is cursory, barely more than a single paragraph of conclusory statements. *Id.* Judge Parker simply notes that authors often forego royalties from specialized formats and that relatively few books are available to lend in that format. See Marc Maurer, *Historic Chance to End the Book Famine Must Not Be Lost*, NAT'L FED'N BLIND (June 25, 2013, 8:35 PM), <https://nfb.org/blog/vonb-blog/historic-chance-end-book-famine-must-not-be-lost> [<https://perma.cc/PWG5-6MC7>] ("Even in the United States, only 5 percent of all printed materials are estimated to be accessible to the blind and print disabled.").

³²² The court does not explicitly condition its finding of fairness on the lack of a market option for the blind and print-disabled, although it does make reference to it. *HathiTrust*, 755 F.3d. at 103.

³²³ See *Cambridge I*, 863 F. Supp. 2d 1190, 1224–25 (N.D. Ga. 2012) (referencing Supreme Court opinions suggesting that there is an exception to the transformative use requirement when the use is for educational purposes), *rev'd*, *Cambridge II*, 769 F.3d 1232 (11th Cir. 2012).

³²⁴ See H.R. REP. NO. 94–1476, at 66–68 (1976).

³²⁵ See 17 U.S.C. § 107 (2012).

³²⁶ See generally Brief of Amici Curiae Am. Council on Educ. et al. in Support of Appellees Mark P. Becker, et al., and Affirmance, *Cambridge I*, 863 F. Supp. 2d 1190 (No. 08-cv-1425-ODE), 2013 WL 1869772.

agents like the CCC,³²⁷ and the warnings of copyright scholars,³²⁸ licenses for digital educational use are not readily available for huge swaths of relatively mainstream content,³²⁹ much less for ephemera or out-of-print works. Instead, she goes work-by-work to ask whether in each particular instance unlicensed use for a favored purpose nevertheless had encroached unacceptably far on the market for the work.³³⁰

Since we are now beyond the realm of transformative use, it is difficult to know on what basis we can say that Judge Evans' granular approach is more or less reasonable than Judge Parker's broad survey. The two activities—education and access for the disabled—do not have radically different bona fides as favored fair use purposes. If anything, teaching has the stronger claim given its presence in the preamble. In any event, the two cases show the unpredictability of a four-factor analysis featuring a strongly favored purpose that does not qualify as transformative. Whether the favored purpose will be given broad latitude or placed firmly at the mercy of the market may vary from judge to judge. Still, for many educational uses the market has indeed failed. Teachers and institutions should not be stymied by the dead ends they will often encounter when they look to license materials for non-transformative uses.

VI. CONCLUSION

Educators have labored too long in the combined shadow of the coursepack cases, the Classroom Guidelines, and of the false dichotomy of Footnote Eleven of *Campbell*. It is perverse that a group that has been, more than any other community, the intended beneficiary of copyright and fair use, has nevertheless relegated itself to second-class status as a result of the perceived weight of such slim authorities. The two key paradigms in

³²⁷ See *Annual Copyright License*, COPYRIGHT CLEARANCE CTR., <https://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions/annualLicenseAcademic.html> [http://perma.cc/G6KD-DWBS] (last visited Sept. 16, 2015) (“The Annual Copyright License provides the comprehensive coverage colleges and universities need to share information. With the Annual Copyright License, faculty, researchers and other staff members can collaborate freely, while respecting the intellectual property of others.”).

³²⁸ See *supra* notes 75–80 and accompanying text.

³²⁹ E.g., *Cambridge I*, 863 F. Supp. 2d 1190, 1212–16 (N.D. Ga. 2012), *rev'd*, *Cambridge II*, 769 F.3d 1232 (11th Cir. 2012). For example, only 12% of the works available for license as paper coursepacks through CCC were also available for license for electronic uses in 2008. *Id.* at 1213. Cambridge University Press withholds 40% of its catalog from CCC's licensing services, both print and electronic. *Id.* Of the 9 million titles allegedly included in CCC's blanket annual license program, only 17% allowed use of electronic excerpts. *Id.* at 1215. Cambridge does not participate in the blanket license, and Oxford University Press only includes its journals, not its monographs. *Id.* Librarians trying to assess the coverage of the CCC blanket license have been disappointed with the results. E.g., J. Christopher Holobar & Andrew Marshall, *E-Reserves Permissions and the Copyright Clearance Center: Process, Efficiency, and Cost*, 11 PORTAL: LIBR. & ACAD. 517, 518, 524, 527–29 (2011).

³³⁰ For Judge Evans' case-by-case analysis of each instance of unlicensed use, see *Cambridge I*, 863 F. Supp. 2d at 1244–1361.

fair use thinking—market-centered and transformative use—have been misapplied and written off, respectively, leaving teachers and educational institutions too often to the tender mercies of publishers and licensors.

I have tried to show some ways forward by revealing the forces behind this collective misapprehension and sketching the outlines of new ways of thinking about fair use in various educational contexts. The now-dominant paradigm of transformative use provides many exciting opportunities to unleash teaching from concerns about payment or permission. For uses that might not pass muster under the transformative use test, there remains substantial room to invoke market failure and favored purpose for a combined argument that can succeed just as the print-disabled community succeeded in *HathiTrust*. Teachers and educational institutions should make more and better use of these modes of thinking in support of their mission, and in support of the goal of the Copyright Clause of the Constitution: “to Promote the Progress of Science and the useful Arts.”³³¹

³³¹ U.S. CONST. art. I, § 8, cl. 8.