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Teaching Without Infringement: A New Model for Educational Fair Use

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Cover Page Footnote

Special thanks to Eric Goldman and Harold Krent for their thoughtful comments and suggestions. Thanks also to the comments and suggestions from the participants at the 7th Annual Works in Progress Intellectual Property Conference of 2009, specifically Rebecca Tushnet, William McGeeveran, Deborah Gerhardt, David Levine, Glynn Lunney, Sharon Sandeen, and Yvette Liebesman. My appreciation also goes to Justin Hughes, Jennifer Rothman, and Jason Mazzone for their comments.

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* Adjunct Professor, Concordia University Chicago; Judicial Law Clerk to the Hon. Martin C. Ashman, United States District Court for the Northern District of Illinois. Special thanks to Eric Goldman and Harold Krent for their thoughtful comments and suggestions. Thanks also to the comments and suggestions from the participants at the 7th Annual Works in Progress Intellectual Property Conference of 2009, specifically Rebecca Tushnet, William McGeeveran, Deborah Gerhardt, David Levine, Glynn Lunney, Sharon Sandeen, and Yvette Liebesman. My appreciation also goes to Justin Hughes, Jennifer Rothman, and Jason Mazzone for their comments. The views expressed in this Article are solely the author's and should not be attributed to any other individual, entity, or institution.

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Although fair use is an intentionally vague doctrine, its application to education has been described as only one of two categories where outcomes remain “quite difficult to predict.” To combat this uncertainty, courts have looked to negotiated educational guidelines, which Congress included in its House of Representatives Report accompanying the Copyright Act of 1976. Courts’ use of the guidelines has had two unintended and destructive consequences. First, it erroneously gave the guidelines the appearance of law under § 107’s fair use analysis, sometimes inadvertently characterizing them as setting maximum limits on permissible copying. Second, it forced educational institutions to

rely on the guidelines as the law, improperly crafting their own copyright policies to reflect the guidelines' contours. Educational institutions began using the guidelines as maximum limits on allowable copying under their policies, constraining their instructors' ability to teach effectively.

To remedy these problems, this Article proposes a new model for evaluating educational fair use: the administrative agency. Although previous scholars have delineated new approaches to copyright infringement and fair use, few deal explicitly with fair use in education. That is exactly what this Article does. Building off of a previous scholar's suggestion that Congress create an agency to administer fair use, this Article takes an additional step by creating a model that develops and enforces regulations specific to educational fair use. This new agency is likely to reduce uncertainty for educators, slenderize educators' risk of litigation—thereby simultaneously decreasing educational expenses and increasing the amount of time and money spent on educational advancement—and substantially ameliorate, if not eliminate, the guidelines' negative effects on education.

INTRODUCTION

As a devoted teacher, you constantly seek new and innovative ways to educate your students. This often requires using copyrighted materials. After reading a fascinating book, for example, you may want to use two of its chapters, which include photographs, in your class on modern contemporary art. Or maybe it was the first, fourth, and last chapters of the book you just finished on modern African tribal warfare that you wanted to copy for your African history class. Perhaps it was a twelve-minute clip (or two six-minute clips or four three-minute clips) from *Seinfeld* that you thought would illustrate several important points in your annually-taught freshman class, *Heidegger, Kierkegaard, and Sartre*. Because you do not know whether these uses are legal, you guess at where you might find the answer: maybe your school has a copyright or copying policy.

You *think* that it probably does, but you do not know for sure, and, if it does, you are unaware of its contents. But you are

conscientious and want to comply with the law (never mind that the school policy is not the law). So you search for it. Once you find the copying policy, you read something about “Classroom Guidelines endorsed by Congress” and something else about “brevity” and lots of terms you do not fully comprehend.¹ Even if you do understand these “Guidelines,” though, you notice that these are the maximum amounts of allowable copying under your copyright policy.² If you want to make copies outside these “Guidelines,” you have to go to the “General Counsel,” which you take to mean the school’s “main lawyer,” even though you have never met her.³

This means that all of the above uses are technically impermissible under your school’s policy unless you seek the permission of the school’s lawyer, who may deny your request. Even if your request is likely to be granted—a likelihood you have no way of ascertaining—contacting the school’s lawyer seems intimidating. You also think that constantly asking administrators and lawyers for permission to use certain portions of works in class makes you appear meddlesome and officious. After all, you are up for tenure in the spring, and why risk ruffling the administrative feathers for a helpful text? Instead, you forgo the use(s) and choose to skip that segment in your class. As a result, the students, as well as society, do not receive their benefit—and maybe the authors and copyright owners lose some publicity as well.

Scenarios like those just described happen in practice—and they happen repeatedly over the course of many semesters and school years: that makes the effect of the restrictive guidelines, in terms of deterrence and educational benefits, even more pronounced.⁴ And, despite educational institutions’ use of

¹ For a more complete description of how these policies function, see *infra* Part I.C.

² While the Educational Guidelines state that they are the minimum permissible copying, see H.R. REP. NO. 94-1476, at 68 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681–82, schools—and some courts—apply them as the maximum limit on copying. See *infra* Part I.

³ This is a popular component of copying policies at universities. See, e.g., *infra* text accompanying note 134.

⁴ This scenario is reminiscent of the Supreme Court’s statement in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), that,

restrictive policies to protect themselves from liability, there are no hard-and-fast rules in fair use. Indeed, these examples illustrate how the mystery of copyright law scares educators and educational institutions into thinking that they need permission to use or copy almost any segment, however small, of copyrighted works.

In the educational milieu, copyright law is misunderstood and maligned. Many educators have little or no understanding of copyright law, its basic principles, or its application to their classrooms. This lack of understanding can have serious consequences for teachers, school districts, universities, and students.

Teachers without a solid understanding of copyright law's demands and requirements create a liability risk for themselves and their schools: teachers will either blithely violate the law or drastically limit their use of copyrighted materials to avoid doing so. Either of these reactions renders a school district's fair use policy irrelevant; that, in turn, means that the school may become liable as a result of risk-taking teachers. Or, perhaps worse, teachers' risk aversion will reduce the educational benefits students receive. Because the copyright policy of an institution is one indication of good faith, violation of this policy could defeat the "innocent infringer" defense, escalating statutory damages to astronomical amounts.⁵

Furthermore, students who are instructed by teachers with an inadequate understanding of copyright law learn either that copyright law should not be taken seriously, or that it should be taken so seriously that it may limit student learning. The latter lesson—where the law "chills" students' or teachers' uses of copyrighted materials—may erroneously teach students that the

even if [an individual's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

In other words, if a practice, even a "small" and "local" one, becomes widespread, it can have large-scale effects.

⁵ See Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 205–06 (1998).

law's boundaries, whether in copyright or elsewhere, are narrower than they actually are.

These problems result from copyright law itself. Prior to 1976, teachers had almost no guidance on how to determine whether their uses of copyrighted materials were "fair."⁶ At that point, "fair use" was a common law doctrine—made and elucidated by judges.⁷ Some clarity came when Congress enacted the Copyright Act of 1976⁸ ("Copyright Act" or "Act"), codifying the doctrine of fair use.⁹ Although this doctrine is somewhat amorphous, the House of Representatives Report ("House Report") accompanying the Act did note that a committee had convened and created fair use guidelines that applied to non-profit educational institutions.¹⁰

Courts have misapplied and misused these guidelines, mostly at the behest of copyright owners.¹¹ These judicial errors have created unworkable and faulty standards that restricted fair use in the educational environment,¹² which demands a more expansive view of this doctrine. The limitations imposed upon teachers have hampered their ability to use copyrighted material to prepare for or teach a class, thereby undermining the mission of teachers seeking to effectively and legally educate their students.

Although numerous scholars have suggested alterations or modifications to fair use,¹³ little scholarship or legislative activity has been directed toward assisting teachers to determine what uses are fair. To that end, this Article explores a new model for evaluating educational fair use. To do this, the courts' use of the guidelines appearing in the House Report to assess educational uses of copyright is examined. Then, this Article analyzes how this treatment has affected the conduct of educational institutions,

⁶ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990).

⁷ See Robert Kasunic, *Fair Use and the Educator's Right to Photocopy Copyrighted Material for Classroom Use*, 19 J.C. & U.L. 271, 281–84 (1993).

⁸ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

⁹ See H.R. REP. NO. 94-1476, at 65–66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5678–79.

¹⁰ *Id.* at 68.

¹¹ See *infra* note 80 and accompanying text; *infra* Part I.B.

¹² See *infra* Part I.C.

¹³ See *infra* Part II.

showing that the effects largely are negative. Because the adoption of these guidelines has not benefited educators or students, this Article reviews the current proposals to modify fair use and then proposes the development of a new administrative agency—designed specifically for defining and regulating educational fair uses of copyrighted material—that sets standards and rules by which teachers can assess their uses of copyrighted material.

Part I reviews the basics of fair use and how the doctrine applies to educators. It also inspects the 1976 Act’s language and legislative history, including the fair use educational guidelines¹⁴ developed for educators as stated in the House Reports. It further assesses and criticizes these guidelines, beginning by reviewing and examining how courts have analyzed and used them in determining fair use. This analysis demonstrates that court decisions have pressed educational institutions to accept the guidelines as law, which, in turn, has distorted and deformed their purpose, implementation, and use.

After this analysis, Part II evaluates the possible approaches taken to modify the current state of the law. It examines both modifications to the infringement analysis as well as fair use. Focusing on infringement, adding new elements to the infringement cause of action is explored. As to fair use, a variety of approaches are reviewed, including adding a burden-shifting component; modifying the fair use factors and their application; developing a code of best practices; and creating a new entity to resolve fair use disputes. The problems with each of these approaches as applied to educational fair use are explored vis-à-vis the problems of educational fair use outlined in Part I.

Part III proposes a solution to the problems of educational fair use. Building off a recent scholar’s suggestion that Congress create an executive agency to “administer fair use,”¹⁵ a fuller

¹⁴ These guidelines are discussed in more detail *infra* Part I.

¹⁵ Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 415 (2009). Others also have argued, to varying degrees, for a siphoning off particular “sectors” of fair uses and providing a modified framework for them. *See, e.g.*, Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1535389> (abstract) (arguing that current fair use law is ill-equipped to deal with new technologies and proposing that the four fair use factors be

account of how Congress and this new agency might address educational fair use is developed. Focusing on the use of positive law, this Part proposes that Congress enact a specific fair use law that, among other things, creates a specific agency to administer educational fair uses of copyrighted materials. This model is designed to provide teachers with more guidance when using copyrighted materials in conjunction with educational activities. It also seeks to dispel the mysticism surrounding, and the misunderstanding that many educators and educational administrators have about, copyright law and fair use. In sum, this model is designed to enhance education through certainty and practicality.

Finally, Part IV raises and responds to possible objections. These include the increased cost of creating a new agency; the need for an agency specific to education; the rigid nature of fair use rules; and the complexity that may result from promulgating rules on educational fair use. After each objection is addressed, the Article concludes that these are not sufficient reasons to discard the model proposed in Part III, which will enhance education by promoting fair use.

I. UNDERSTANDING THE PROBLEM: FAIR USE, JUDICIAL TREATMENT OF THE CLASSROOM GUIDELINES, AND THE EDUCATIONAL RESPONSE

Fair use in the educational context is in danger, and this Part outlines why. That explanation requires a brief introduction to fair use and the educational guidelines—which the House of Representatives included in its report accompanying the Copyright Act—that govern fair use. After explaining the educational guidelines' origins, this section examines how courts have treated them. This analysis shows that courts have continually reinforced the idea that the guidelines are law. This, in turn, has caused educational institutions to limit their uses of copyrighted materials,

tailored to address these technologies); David A. Simon, *Reasonable Perception and Parody in Copyright Law* (forthcoming 2010), available at <http://ssrn.com/abstract=1516378> (abstract) (arguing that parody should be its own category of fair use and proposing a new test for parody that discards the four fair use factors).

which inhibits teachers' ability to effectively instruct their students and jeopardizes the educational mission.

A. *A Brief Primer: Fair Use and the Educational Guidelines*

Although Congress passed the first Copyright Act in 1790,¹⁶ and the doctrine of fair use had been recognized in England under the Statute of Anne,¹⁷ it was not until 1841 that any United States court applied the doctrine.¹⁸ Since its application in *Folsom v. Marsh*, however, fair use has changed, if not in substance then in form.¹⁹ In 1976, Congress amended the Copyright Act, codifying the common-law doctrine of fair use.²⁰ Under current law, the Copyright Act defines fair use this way:

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

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

¹⁶ Copyright Act of 1790, ch. 15, 1 Stat. 24 (repealed 1831); *see also* U.S. COPYRIGHT OFFICE, CIRCULAR 1A: A BRIEF INTRODUCTION AND HISTORY (2009), <http://www.copyright.gov/circs/circ1a.html> (“Congress enacted the first federal copyright law in May 1790, and the first work was registered within two weeks.”).

¹⁷ *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994); Leval, *supra* note 6, at 1112 (quoting *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489 (P.C.)).

¹⁸ *See* *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841); Leval, *supra* note 6, at 1105.

¹⁹ *See* Leval, *supra* note 6, at 1105–12.

²⁰ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codifying fair use, *inter alia*, at 17 U.S.C. § 107 (2006)).

(4) the effect of the use upon the potential market for or value of the copyrighted work.²¹

While the fair use provision provided a framework for courts to assess whether the educational use of a copyrighted work was infringing, Congress did specifically exempt some educational uses of copyrighted works in § 110(1) and 110(2).²²

Section 110(1) exempts the performance or display of images used in teaching.²³ Section 110(2) also exempted certain uses,²⁴ and “was enacted in 1976 on the basis of a policy determination that certain performances and displays of copyrighted works in connection with systematic instruction using then-known forms of distance education should be permitted without a need to obtain a license or rely on fair use.”²⁵ As the Senate Report notes, this was a policy choice, grounded in neither case law nor substantive legal doctrine. Congress later made an additional policy choice when it decided educational institutions needed further protection, and, in 2002, expanded § 110(2) to cover unanticipated technologies.²⁶

²¹ 17 U.S.C. § 107 (emphasis added).

²² *Id.* § 110(1)–(2).

²³ *Id.* § 110(1) (exempting from infringement “[the] performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made”).

²⁴ *Id.* § 110(2).

²⁵ S. REP. NO. 107-031, at 4 (2001).

²⁶ This amendment was titled, Technology, Education, and Copyright Harmonization Act (TEACH Act), Pub. L. No. 107-273, 116 Stat. 1910 (2002) (amending 17 U.S.C. § 110(2)). It was designed to “facilitate the growth and development of digital distance education” by “updat[ing] the distance education provisions of the Copyright Act for the 21st century.” S. REP. NO. 107-031, at 3–4. Congress sought to achieve this objective by “expand[ing] the exempted copyright rights, the types of transmissions, and the categories of works that the exemption covers beyond those that are covered by the existing exemption for performances and displays of certain copyrighted works in the course of instructional transmissions.” *Id.* at 4.

Section 110(2) also exempts, under certain conditions, “the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission.” 17 U.S.C. § 110(2). For this exception to apply, the performance or display of the work must be

The Copyright Act, therefore, explicitly provides an exemption for the use of copyrighted materials for teachers performing or displaying a copyrighted work in their class.²⁷ The specific exemption provided by § 110(2), however, covers a limited situation: where the teacher performs or displays a work;²⁸ it fails to cover other more prevalent situations, such as the creating multiple copies of articles or book chapters for classroom use.

That is where the doctrine of fair use, codified by § 107, operates to protect teachers.²⁹ As noted above, § 107 specifically mentions “teaching” as a favored use that may be considered “fair” and, therefore, not infringing.³⁰ That, however, does not mean that all educational uses are non-infringing. The statute provides that every use must be assessed using the factors articulated in § 107.³¹ Furthermore, the exempted use for “teaching (including multiple copies for classroom use)”³² is vague. It does not define teaching, state how much of a copyrighted work may be copied, or explain how many copies are permissible.

made by an instructor as part of the curriculum under 17 U.S.C. § 110(2)(A), and must be “directly related and of material assistance to the teaching content of the transmission.” *Id.* § 110(2)(B). Additionally, the transmission of this material must be made and received by students enrolled in the course for which it is being shown. *Id.* § 110(2)(C) (“[T]he transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—(i) students officially enrolled in the course for which the transmission is made; or (ii) officers or employees of governmental bodies as a part of their official duties or employment . . .”). The institution transmitting the material must have adequate copyright policies in place and inform its “faculty, students and relevant staff” of its policies and how to comply with copyright law. *Id.* § 110(2)(D). There also are additional technological measures that an educational institution must take to prevent subsequent retention of and infringing uses of the copyrighted material. *See id.*

²⁷ 17 U.S.C. § 110(1).

²⁸ *Id.* § 110(2).

²⁹ *Id.* § 107.

³⁰ *See, e.g.,* *Stewart v. Abend*, 495 U.S. 207, 236–37 (1990) (explaining the specific examples of fair use provided by Congress in § 107); Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2580 (2009) (“Teaching, scholarship, and research are three of the six favored uses in the preamble to § 107.” (footnote omitted)).

³¹ 17 U.S.C. § 107 (stating that “[i]n determining whether the use made of a work in any particular case is a fair use[,] the factors to be considered *shall include*” and enumerating the four fair use factors (emphasis added)).

³² *Id.*

1. The Ad Hoc Committee

The ambiguity inherent in the fair use provision did not go unnoticed during the drafting of the Copyright Act, and section 110(2)(A)'s guiding principle—a specific exemption provided to teachers by law³³—was not lost on the educational community. Educators clamored for specific fair use provisions that permitted copying, which author and publisher groups opposed.³⁴ Although the House Report rejected “a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control,” it recognized that teachers needed guidance when it came to fair use.³⁵ The Senate Report, written a year prior to the House Report, also noted that “there are few if any judicial guidelines” for “copying by teachers.”³⁶ To that end, Congress urged educators and members of the media industry to meet and devise a potential compromise that accommodated all interests.³⁷ Of course, neither Houses of Congress participated in the negotiations; instead, various individuals from education and media convened to form the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision (“The Ad Hoc Committee”).³⁸

³³ *Id.* § 110(2)(A).

³⁴ Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 615 n.62 (2001).

³⁵ H.R. REP. NO. 94-1476, at 66–67 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

³⁶ S. REP. NO. 94-473, at 62 (1975). The Copyright Office has noted that “[t]he House Report was written later than the Senate Report, and in many cases it adopted the language of the Senate Report, updating it and conforming it to the version of the bill that [Congress] enacted into law.” U.S. COPYRIGHT OFFICE, CIRCULAR 21: REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS 4 (2009), <http://www.copyright.gov/circs/circ21.pdf>.

³⁷ H.R. REP. NO. 94-1476, at 67; *see* Crews, *supra* note 34, at 614–19.

³⁸ H.R. REP. NO. 94-1476, at 67. The Ad Hoc Committee's history began in 1955, when Congress commenced its efforts to reform copyright law. HARRY N. ROSENFELD, MAJOR PROBLEMS OF COPYRIGHT LAW AS VIEWED BY THE AD HOC COMMITTEE ON COPYRIGHT LAW REVISION 1 (1970) (on file with the author), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/3/3/74/6f.pdf. That effort resulted in several reports, conferences, and draft bills—and, in 1963, the National Education Association called an exploratory Conference on Copyright Law Revision, which “fifty-two individuals representing forty-seven national educational organizations attended.” *Id.* at 1–2; *see id.* at ex.1 (listing participating organizations). The participants discussed how copyright could best accommodate educators. One

From 1963 until 1976, the Ad Hoc Committee convened several times and consulted with numerous interest groups, including trade and textbook publishers; music publishers; film producers; librarians; and authors.³⁹ The Ad Hoc Committee noted that educators face special problems with respect to fair use, in part, because “good teaching practice may not always be legal copyright practice,”⁴⁰ and, in part, because “it is legally risky for teachers to rely wholly on fair use.”⁴¹ The primary issue, according to the Ad Hoc Committee, was “the need to legitimize current and developing reasonable educational practices so that teachers will not be forced either to drop them or to continue them ‘under the table.’”⁴²

Originally, the Ad Hoc Committee pushed for a broad fair use exemption for educational uses.⁴³ In the minds of educators, the flexibility of the fair use provisions was a liability, not a benefit—in a broad exemption they sought safety.⁴⁴ Ultimately, they were rebuffed; authors wanted a case-by-case review and the establishment of a “Copyright Royalty Tribunal” (“CRT”).⁴⁵ To create the certainty that educators sought, the Committee eventually agreed on a set of educational guidelines.⁴⁶ Despite this

representative suggested the establishment of the Ad Hoc Committee, which convened for its first meeting on September 5, 1963. *Id.* at 3.

³⁹ ROSENFELD, *supra* note 38, at 4.

⁴⁰ *Id.* at 6.

⁴¹ *Id.* at 51.

⁴² *Id.* at 7.

⁴³ Kasunic, *supra* note 7, at 279–80.

⁴⁴ *Id.*

⁴⁵ *Id.* The CRT was enacted by the 1976 Copyright Act. The Tribunal’s principal duty was to determine statutory royalty rates. U.S. COPYRIGHT OFFICE, CIRCULAR 92: CHAPTER 8 OF 1976 ACT: PROCEEDINGS BY COPYRIGHT ROYALTY JUDGES (1976), <http://www.copyright.gov/title17/92chap8.html>. In 1993, Congress replaced the CRT with the Copyright Arbitration and Royalty Panel (“CARP”). Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (amending, inter alia, ch. 8 of 17 U.S.C.). On November 30, 2004, Congress enacted the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341, replacing CARP “with a system of the Copyright Royalty Board (CRB), which determines rates and terms for the copyright statutory licenses and makes determinations on distribution of statutory license royalties collected by the Copyright Office.” U.S. Copyright Office, Copyright Arbitration Royalty Panels, <http://www.copyright.gov/carp/index.html#general> (last visited July 18, 2009).

⁴⁶ Crews, *supra* note 34, at 616–17.

apparent agreement, the agreed-upon “guidelines were negotiated with little participation by educators and no participation by students, and were adopted over the opposition of major universities and scholarly organizations, such as the American Association of Law Schools.”⁴⁷

2. The Educational Guidelines

The House Report accompanying the Copyright Act of 1976 included an agreed-upon recommendation from the Ad Hoc Committee’s meetings occurring between September 1975 and March 1976, which was entitled, Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions (“The Classroom Guidelines” or “The Guidelines”);⁴⁸ “it refer[red] only to copying from books and periodicals, and [was] not intended to apply to musical or audiovisual works.”⁴⁹ The House Report also contained guidelines for the educational use of music (“Music Guidelines”).⁵⁰ Additionally, a 1979 House Report

⁴⁷ Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1958 (2007).

⁴⁸ H.R. REP. NO. 94-1476, at 67–68 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681–82.

⁴⁹ *Id.* at 67.

⁵⁰ Like the Classroom Guidelines, *infra*, “[t]he purpose of the [Music] [G]uidelines is to state the minimum and not the maximum standards of educational fair use.” H.R. REP. NO. 94-1476, at 70. The Music Guidelines, like the Classroom Guidelines, divide uses into two categories. Instead of the single/multiple copy dichotomy used by the Classroom Guidelines, however, the Music Guidelines divide uses into “permissible uses” and “prohibitions.” *See id.* at 71–73. There are five types of permissible uses. *Id.* at 71. First, teachers may make an “emergency copy to replace a purchased copy” but must eventually replace that copy with a purchased one. *Id.* Second, teachers may, for “academic purposes other than performance,” make one copy per pupil of music excerpts, which may never exceed 10% of the total work. *Id.* The teacher may, for teaching or scholarship purposes, make one copy of an “entire performable unit (section, movement, aria, etc.) that is” out of print or available only in a larger work. *Id.* Third, teachers may edit or simplify “printed copies which have been purchased” so long as the edits do not distort the “fundamental character of the work.” *Id.* Fourth, teachers may make single copies of the recording of student performances “for evaluation or rehearsal purposes.” *Id.* The school can retain this copy. *Id.* Fifth, teachers may make, and the school or teacher may retain, a copy of sound recordings owned by the school or an individual teacher to “[construct] aural exercises or examinations.” *Id.* These guidelines address fair use as to the “copyright [in] the music itself,” but not the sound recording. *Id.* Compare 17 U.S.C. § 102(a)(2) (2006) (copyright exists in “musical works, including any accompanying words”), with *id.* § 102(a)(7) (copyright subsists in “sound recordings”),

articulated guidelines for off-air recording of broadcast programming for educational purposes (“Off-Air Guidelines”).⁵¹ This Article focuses mainly on the Classroom Guidelines⁵² because courts have discussed these most frequently,⁵³ and because educators photocopy works frequently as part of their teaching duties.

Prior to stating the terms of the Classroom Guidelines, the Ad Hoc Committee cautioned that the Guidelines “state[d] the minimum and not the maximum standards of educational fair use under Section 107.”⁵⁴ It also warned that the Classroom Guidelines did not proscribe any uses articulated by case law or those that may arise in the future, even if those uses fall outside the Classroom Guidelines.⁵⁵

and id. § 101 (“‘Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”).

⁵¹ The Off-Air Guidelines were developed after the Photocopying and Music Guidelines. Similar to those Guidelines, the Off-Air Guidelines were developed by “a Negotiating Committee consisting of representatives of education[al] organizations, copyright proprietors, and creative guilds and unions.” H.R. REP. NO. 97-495, at 8 (1982). Unlike the other two sets of Guidelines, however, the Off-Air Guidelines were not preceded by a cautionary statement that they represented the minimum standard of fair use. *See id.* at 3–9. Instead, the report stated that “[t]he purpose of establishing these guidelines,” which apply only to non-profit schools, “is to provide standards for both owners and users of copyrighted television programs.” *Id.* at 8.

These Guidelines allow schools to record television programs, which must include a copyright notice, *id.* at 9, and retain a copy of them for forty-five consecutive days, after which time the copy must be destroyed. *Id.* at 8–9. Within the first ten days of copying, teachers may use these recordings once in a classroom or similar place, and once more “only when instructional reinforcement is necessary.” *Id.* at 9. After the first ten days of recording, schools can use the copy only to evaluate its necessity in the curriculum. *Id.* Schools cannot make off-air recordings at the request of anyone except a teacher, cannot regularly record programs “in anticipation of requests,” and cannot record the same program “more than once at the request of the same teacher.” *Id.* The Off-Air Guidelines also prohibit altering the copies or merging copies to “constitute teaching anthologies or compilations.” *Id.* Schools are expected to create further procedures to ensure compliance with the guidelines. *Id.*

⁵² All of these guidelines are referred to collectively as “the Educational Guidelines.” *See* H.R. REP. NO. 94-1476, at 68.

⁵³ *See, e.g., infra* Part I.B.

⁵⁴ H.R. REP. NO. 94-1476, at 70.

⁵⁵ *See id.* at 68 (“The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types

The Ad Hoc Committee divided the Classroom Guidelines for reproduction of books and periodicals into two groups: “single copying for teachers,” and “multiple copies for classroom use.”⁵⁶ The Classroom Guidelines permit teachers to make single copies of the following for scholarly research or use in preparing for or teaching a class:

A chapter from a book;

An article from a periodical or newspaper;

A short story, short essay or short poem, whether or not from a collective work;

A chart graph, diagram, drawing cartoon or picture from a book, periodical, or newspaper.⁵⁷

As to multiple copies, the Classroom Guidelines permit teachers to make not more than one copy per student for use in their class if three conditions are met.⁵⁸ The first condition requires that the use satisfy the tests of “spontaneity” and “brevity.”⁵⁹ The Classroom Guidelines state that spontaneity consists of two components.⁶⁰ First, “[t]he copying [must be] at the instance and inspiration of the individual teacher.”⁶¹ Second, “[t]he inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time

of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines. Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.”).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 69.

⁵⁹ *Id.* at 68. The Senate Report also contained comments suggesting that spontaneity should be a primary concern in determining fair use. It stated that “[t]he fair use doctrine in the case of classroom copying would apply primarily to the situation of a teacher who, acting individually and at his own volition, makes one or more copies for temporary use by himself or his pupils in the classroom.” S. REP. NO. 94-473, at 63 (1975).

⁶⁰ H.R. REP. NO. 94-1476, at 68.

⁶¹ *Id.*

that it would be unreasonable to expect a timely reply to a request for permission.”⁶²

The “brevity” requirement is more detailed and changes depending on the type of work used.⁶³ For poetry, the teacher may copy “(a) [a] complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.”⁶⁴ For prose, the teacher may copy “(a) [e]ither a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.”⁶⁵ Brevity for illustrations means a copy of “[o]ne chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.”⁶⁶ For so-called “special works,”—“[c]ertain work in poetry, prose or in ‘poetic prose’ which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience [that] fall short of 2,500 words in their entirety”—teachers “may not . . . reproduce[] [them] in their entirety.”⁶⁷ They may, “however, [make copies of] an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text.”⁶⁸

The second condition for multiple classroom copies requires the use to satisfy the “cumulative effect” test.⁶⁹ This test has three requirements. First, the teacher may make copies “for only one course in the school in which the copies are made.”⁷⁰ Second, the teacher cannot copy “more than one short poem, article, story, essay or two excerpts . . . from the same author, nor more than three from the same collective work or periodical volume during

⁶² *Id.*

⁶³ *Id.* at 68–69.

⁶⁴ *Id.* at 68.

⁶⁵ *Id.*

⁶⁶ *Id.* at 69.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 68–69.

⁷⁰ *Id.* at 69.

one class term.”⁷¹ Finally, the teacher cannot make multiple copies of works more than nine times for one course during one term.⁷² The Classroom Guidelines state that these latter two requirements of the cumulative effect test do not apply to current newspapers and periodicals.⁷³

The final condition requires each copy bear a notice of copyright.⁷⁴ In addition to these three conditions for making multiple copies, the Classroom Guidelines provide express prohibitions on particular uses of works.⁷⁵ Among these are prohibitions on copying designed to replace compilations or anthologies, “consumable workbooks,” or the purchase of books generally.⁷⁶ Under the Guidelines, students cannot be charged more than the cost of copying the work.⁷⁷

B. *Judicial Treatment of the Guidelines*

The Educational Guidelines discussed above have an allure—a certain mathematical character that makes their application seem mechanical and almost algebraic.⁷⁸ At least they seem that way compared to the fair use factors, which lend themselves to judicial decisions that employ post-hoc rationale.⁷⁹ Indeed, some courts endorse the certainty-enhancing characterization of the

⁷¹ *Id.*

⁷² *Id.* (“There shall not be more than nine instances of such multiple copying for one course during one class term.”).

⁷³ *Id.*

⁷⁴ *Id.* at 68.

⁷⁵ *Id.* at 69–70.

⁷⁶ *Id.* at 69.

⁷⁷ *Id.* at 70.

⁷⁸ Kate Irwin, Note, *Copyright Law—Librarians Who Teach: Expanding the Distance Education Rights of Libraries by Applying the Technology Education and Copyright Harmonization Act of 2002*, 29 W. NEW ENG. L. REV. 875, 894 (2007) (opining that “[t]he Classroom Guidelines provide a more mathematical and rigid scheme than the four-factor fair use test for determining whether a use of copyrighted material is justified”).

⁷⁹ See Scott M. Martin, *Photocopying and the Doctrine of Fair Use: The Duplication of Error*, 39 J. COPYRIGHT SOC’Y U.S.A. 345, 352–54 (1992) (describing Professor David Nimmer’s criticism of the fair use test as a method for courts to engage in post-hoc rationalization and arguing that this is exactly the kind of fluidity that the fair use test facilitates and encourages).

Guidelines.⁸⁰ This mechanical appearance has influenced the courts' use of the Classroom Guidelines in their analysis of cases involving educational fair uses.⁸¹ That treatment affects the way educational institutions view and use the Guidelines. This subpart first explores the cases in which the Classroom Guidelines have been discussed, delineating three categories of uses the courts have carved out. This analysis sets up the discussion in the next section, which describes how this treatment has influenced educators' use (or lack thereof) of copyrighted works for teaching purposes.

1. The Guidelines as Pseudo Law

Several courts have used the Classroom Guidelines in one form or another, as discussed below. Regardless of how the courts applied them, the courts are *using* the Guidelines. Prior to examining them, however, courts disclaim the Guidelines' status as positive law.⁸² Nevertheless, that disclaimer does not change the practical effect of the courts' discussion: they are legitimatizing the Guidelines as pseudo law.⁸³

In *Marcus v. Rowley*,⁸⁴ for example, the Ninth Circuit analyzed whether the defendant, a teacher, had made "fair use" of the plaintiff's booklet.⁸⁵ To do this, the court walked through each of the fair use factors, eventually finding that the defendant did not

⁸⁰ See, e.g., *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983) ("The guidelines were designed to give teachers direction as to the extent of permissible copying and to eliminate some of the doubt which had previously existed in this area of copyright . . .").

⁸¹ See *infra* Part I.B.2.

⁸² See *Rowley*, 695 F.2d at 1178 ("Thus, while [the Guidelines] are not controlling on the court, they are instructive on the issue of fair use in the context of this case.").

⁸³ See *id.*

⁸⁴ 695 F.2d 1171 (9th Cir. 1983).

⁸⁵ In *Rowley*, the plaintiff was a public school teacher who had published, and owned the registered copyright in, a booklet on cake decorating. *Id.* at 1173. The defendant also was a schoolteacher, though she previously had been a student of the plaintiff. *Id.* In addition to taking the plaintiff's course and purchasing the plaintiff's booklet, the defendant used the plaintiff's booklet to compile a packet for the food service careers class that she taught. *Id.* The booklet she made was "twenty-four pages and was designed to be used by students who wished to study an optional section of her course devoted to cake decorating." *Id.* The defendant made fifteen copies of her work, which used about 50% of the plaintiff's booklet, and placed them on file for her students. *Id.* She used these packets for three consecutive years. *Id.*

engage in fair use.⁸⁶ After explaining each factor, the court, in a separate section entitled, “The Congressional Guidelines,” applied the Classroom Guidelines.⁸⁷ Prior to this application, the court explained that Congressional concern over educational use was so great that “it approved a set of guidelines with respect to [this use].”⁸⁸ The court stated that, “while [the Guidelines] are not controlling on the court, they are instructive on the issue of fair use in the context of this case.”⁸⁹ Before proceeding to its analysis, the court correctly noted that “[t]he [Classroom] [G]uidelines were intended to represent minimum standards of fair use,” and “were designed to give teachers direction as to the extent of permissible copying and to eliminate some of the doubt which had previously existed in this area of copyright law[.]”⁹⁰

So, while the court noted that the Guidelines were not the law, it touted their benefits and analyzed them anyway.⁹¹ In so doing, it considered the Guidelines’ strictures as per se limits on the “fairness” of a use, noting that “copying is permissible if three tests are met”: brevity and spontaneity; cumulative effect; and notice.⁹² It found that “[the defendant’s] copying would not be permissible under either” the test for brevity or spontaneity.⁹³ Then, classifying the defendant’s book as a “special work,” the court found it still failed the brevity, spontaneity, and cumulative effect tests.⁹⁴ “In conclusion,” the court stated, “it appears that [the

⁸⁶ See *id.* at 1175–78.

⁸⁷ See *id.* at 1178–79.

⁸⁸ *Id.* at 1178.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *id.* at 1178–79.

⁹² *Id.* at 1178.

⁹³ *Id.*

⁹⁴ *Id.* Rather than cease its inquiry, the court attempted to find an alternative basis upon which these tests could be satisfied by classifying the plaintiff’s booklet as a “special work.” *Id.* (As explained *supra* Part.I.A.2, “special works” are those that combine images and text, and are intended for children or a general audience, an impossibly vague standard.) It then tested the special work for brevity, finding that “[the defendant’s] copying would not be permissible under this test.” *Id.* Moving to spontaneity, the court found that the “[d]efendant compiled her [work] during the summer of 1975 and first used it in her classes during the 1975–76 school year. She also used [her work] for the following two school years.” *Id.* As a result, her “copying [did] not meet this requirement.” *Id.* Next it assessed the “cumulative effect” test. *Id.* The

defendant's] copying would not qualify as fair use under the [G]uidelines."⁹⁵

Other courts have taken a similar tack and treated the Guidelines as legislative history that constituted "persuasive authority."⁹⁶ The court in *Basic Books v. Kinko's Graphics Corp.*,⁹⁷ like the *Rowley* court, first examined the four fair use factors.⁹⁸ Then it stated that the Guidelines were part of the legislative history,⁹⁹ which demonstrated a "Congress[ional] [attempt to avoid] the maelstrom [of dispute over photocopying that was] beginning to churn and . . . to clarify, through a broad mandate, its intentions."¹⁰⁰ Like the *Rowley* court, the court in *Basic Books* proceeded to apply the Guidelines.¹⁰¹ Although the court properly noted that the Guidelines represented the minimum standard and were "more or less permissive,"¹⁰² it found that the defendant's uses violated all three tests—brevity and spontaneity,

court noted that, because the defendant copied only one piece of the plaintiff's work," the "[d]efendant's conduct . . . satisf[ie]d the second test under the [G]uidelines." *Id.* Finally, the court found that the "defendant's [work] did not acknowledge plaintiff's authorship or copyright and therefore [failed] . . . [the third] test." *Id.*

⁹⁵ *Id.* By treating any use that falls outside the Guidelines as militating against fair use, the court used the Guidelines as the maximum permissible limits of copying.

⁹⁶ *Princeton Univ. Press v. Mich. Document Servs., Inc. (MDS)*, 99 F.3d 1381, 1390 (6th Cir. 1996). *Blackwell Publishing, Inc. v. Excel Research Group, LLC*, 661 F. Supp. 2d 786 (E.D. Mich. 2009), is the most recent Sixth Circuit case that relies on *MDS*'s reasoning. The opinion, however, does not employ or even mention the Guidelines.

⁹⁷ 758 F. Supp. 1522 (S.D.N.Y. 1991). The defendant in *Basic Books* was a copy shop, which, at the behest of university professors for twenty years, made course "packets" by copying and then compiling excerpts of various copyrighted works without the copyright owners' consent. *Id.* at 1526. The defendant was a for-profit business that marketed its services to university professors. *Id.* at 1529.

⁹⁸ *See id.* at 1530–34. The deck appears to have been stacked against the defendant in *Basic Books*. The court, when examining the third fair use factor (amount and substantiality), stated that "the portions copied were critical parts of the books copied . . . since that is the likely reason the college professors used them in their classes." *Id.* at 1533. If there ever has been reasoning more circular than this, I have not seen it. By this logic, *every copied portion* of the work is the "heart" of the work merely by virtue of the professor selecting it.

⁹⁹ *Id.* at 1535 ("The Classroom Guidelines . . . are a part of the legislative history of the Copyright Act of 1976.").

¹⁰⁰ *Id.*

¹⁰¹ *See Marcus v. Rowley*, 695 F.2d 1171, 1178–79 (9th Cir. 1983); *Basic Books*, 758 F. Supp. at 1535–37.

¹⁰² *Basic Books*, 758 F. Supp. at 1536 (footnote omitted).

cumulative effect, and notice—but did not comment specifically on what effect, in terms of fair use, that finding had.¹⁰³

The court further declined to hold that the Classroom Guidelines’ “prohibitions” constituted rigid bars to certain uses.¹⁰⁴ Finally, when assessing whether the defendant was a willful infringer, it noted that the defendant’s handbook attempted to escape any application of fair use by claiming the Guidelines did not apply.¹⁰⁵ But a use “beyond the scope of the Guidelines” did not render the law a nullity: fair use law still applied.¹⁰⁶

The courts in *Encyclopedia Britannica v. Crooks*,¹⁰⁷ *American Geophysical Union v. Texaco, Inc.*,¹⁰⁸ and *Princeton University Press v. Michigan Document Services*,¹⁰⁹ also used the Guidelines

¹⁰³ *Id.* at 1537. Professor Ann Bartow has stated that courts, as I argue the courts interpreting the Guidelines repeatedly do, “simultaneously interpret[ed] the Guidelines as both the minimum and maximum scope of fair use.” Bartow, *supra* note 5, at 184. Generally, this type of interpretation starts with a disclaimer that the Guidelines represent the minimum standard of fair use. *See, e.g., Rowley*, 695 F.2d at 1178. The court then finds that the use is not fair because it falls outside the Guidelines’ limits. *See id.*

¹⁰⁴ *Basic Books*, 758 F. Supp. at 1537. The court was “convinced that . . . the more prudent path” was to consider the prohibitions in light of the fair use factors, rather “than [make] a bright line pronouncement . . . that all unconsented anthologies are prohibited without a fair use analysis.” *Id.*

¹⁰⁵ *Id.* at 1545.

¹⁰⁶ *Id.* When determining whether the defendant acted willfully, thus triggering higher statutory damages, the court looked to the “training [the defendant] provided its employees regarding fair use requirements.” *Id.* at 1544. It noted that the defendant’s handbook referenced the Classroom Guidelines and accurately stated that they represented the minimum amount of permissible copying. *Id.* at 1545. The handbook also stated that the Classroom Guidelines “[had] little application for the college and university classroom situations” because the copying would typically exceed them. *Id.* The court found this to be self-serving, stating that the defendant essentially “exempted itself from the purview of the Guidelines altogether.” *Id.* This implies that the defendant is *subject to* the Guidelines, which therefore have some legal effect. In other words, the Guidelines play some role in legal analysis, if only to determine good faith.

¹⁰⁷ 542 F. Supp. 1156 (W.D.N.Y. 1982). *Crooks* concerned multiple defendants—Board of Educational Services, First Supervisory District, Erie County, New York (“BOCES”) and its individual officers and directors. *Id.* at 1159. BOCES was an educational service provider that copied television broadcasts to videotapes and compiled a library of these recordings. *Id.* (“BOCES was created under section 1950 of the New York Education Law for the purpose of providing educational services and specialized instruction on a cooperative basis to the 19 school districts within its geographic region.”).

¹⁰⁸ 60 F.3d 913 (2d Cir. 1994).

¹⁰⁹ 99 F.3d 1381 (6th Cir. 1996).

as legislative history. The *Crooks* court stated that, “[w]hile not controlling[,] . . . the Congressional Reports on the 1976 Copyright Legislation are helpful in outlining acceptable fair use limits in educational settings.”¹¹⁰ Specifically, the court quoted the Senate Report for the proposition that “spontaneity” should be considered, along with whether the teacher or administration directed the copying.¹¹¹

The *Texaco* court only briefly mentioned the Guidelines as legislative history, and did not discuss them in its legal analysis.¹¹² *MDS*, however, did use the Guidelines extensively; it adopted the *Texaco* court’s description of the Guidelines’ effect as “‘persuasive authority,’”¹¹³ noting that “[t]he House and Senate conferees explicitly accepted the Classroom Guidelines ‘as part of their understanding of fair use.’”¹¹⁴ Like the previous courts, the *MDS* court reached the Guidelines only after analyzing the four fair use factors.¹¹⁵ But it nonetheless stated that they provided “general guidance” on the issue of fair use,¹¹⁶ classified them as a “safe harbor,” and found that copying falling well outside their scope

¹¹⁰ *Crooks*, 542 F. Supp. at 1175.

¹¹¹ *Id.* at 1175. The court also observed that the Senate Report suggested fair use inquiries consider the number of copies, the circulation of the copies, and the continued use or destruction of the copies. *Id.* at 1175 (quoting S. REP. NO. 94-473, at 63 (1975)). Although not referring to either the House or Senate Reports, the court did, when examining market effect, look at the “‘cumulative effect of mass reproduction of the copyrighted works.’” *Id.* at 1169 (quoting *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 974 (9th Cir. 1981), *rev’d*, 464 U.S. 417 (1984)). One must remember that the cumulative effect discussed here relates to § 107(4); it is not the same as the one discussed in the Classroom Guidelines. The court noted that “plaintiffs’ blanket assertion that off-the-air videotaping can never be fair use is not supported by the House and Senate Reports on the 1976 Copyrights [sic] Act when videotaping is used for non-profit classroom purposes.” *Id.* at 1179 n.19. In *Crooks*, the court found that the defendant copied generally; that teachers requested the videos; that there was no provision for returning or erasing the videos after use; and that, “in at least one instance, a videotape copy was circulated ‘beyond the classroom.’” *Id.* at 1175. The court held that the defendant’s use was not fair. *Id.* at 1179.

¹¹² *See Texaco*, 60 F.3d at 919 n.5.

¹¹³ *MDS*, 99 F.3d at 1390 (quoting *Texaco*, 60 F.3d at 919 n.5).

¹¹⁴ *Id.* (quoting H.R. REP. NO. 94-1733, at 70 (1976)).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1391 (“Although the guidelines do not purport to be a complete and definitive statement on fair use law for educational copying, and although they do not have the force of law, they do provide us general guidance.”).

“weigh[ed] against a finding of fair use.”¹¹⁷ Even one dissenting judge, who strongly disapproved of the use of legislative history, conceded that the Guidelines were a “safe harbor.”¹¹⁸

Similarly, the court in *Bridge Publications v. Vien*¹¹⁹ applied the Guidelines after analyzing the four fair use factors.¹²⁰ As a result of this analysis, the court found that the “defendant’s use d[id] not fit within the special [G]uidelines approved by Congress as to fair use in the educational context.”¹²¹

In addition to these cases, one other, which did not involve a judicial decision, merits attention. *Addison Wesley Publishing Co. v. New York University*,¹²² involved a settlement between a copy-shop and a publisher.¹²³ The settlement agreement prohibited the copy-shop from making copies except in the following cases: (1) where it secured the copyright owner’s consent;¹²⁴ or (2) at the

¹¹⁷ *Id.*

¹¹⁸ In his dissent, Judge Ryan stated that the majority erred in “using legislative history, specifically the ‘Classroom Guidelines,’ to decide the issue of classroom use.” *Id.* at 1398 (Ryan, J., dissenting). He acknowledged that the Guidelines provide a “safe harbor,” but emphasized that they were not law and should not be treated as such. *Id.* at 1410–11. Judge Ryan did not see why legislative history should be consulted at all, suggesting that the fair use factors did not give rise to any ambiguity. *See id.* at 1411. The remainder of this criticism was not directed at the Classroom Guidelines themselves, but their status as a piece of legislative history. Judge Ryan concluded that

[t]he fact that Congress saw fit, very likely in the interests of political expediency, to pay unusual deference to the “agreement” of interested parties about what *they* would like the law to be, even to the point of declaring (but not in the statute) that the parties’ agreement was part of the committee’s “understanding” of fair use, does not affect the rule of construction that binds this court.

Id. at 1412.

¹¹⁹ 827 F. Supp. 629 (S.D. Cal. 1993).

¹²⁰ *Id.* at 635. In *Vien*, a former member of the Church of Scientology (“COS”) had broken away from COS and founded her own religious organization. *Id.* at 634. As part of new religion, she developed a “course,” which included new written materials that had been copied from COS’s copyrighted works. *Id.* COS sued for copyright infringement. *Id.* The court applied each of the four fair use factors and then found additionally that the “defendant’s use d[id] not fit within the special [G]uidelines approved by Congress as to fair use in the educational context.” *Id.* at 636.

¹²¹ *Id.* at 636.

¹²² No. 82 Civ 8333 (ADS), 1983 WL 1134 (S.D.N.Y. May 31, 1983).

¹²³ *Id.* at *5.

¹²⁴ *Id.* at *2. In other words, the copy-center could make copies after requesting and receiving permission from the copyright owner.

request of New York University (“NYU”) faculty (i) where the requested copying fell within the Classroom Guidelines,¹²⁵ or (ii) where the requested copying had been approved by NYU’s General Counsel as conforming to NYU’s Policy Statement on Copying (“Policy Statement”).¹²⁶

NYU developed its Policy Statement in response to the lawsuit; it did not previously have such a policy.¹²⁷ The opening passage of the Policy Statement explained that it sought to address the concerns of educators who feared committing copyright violations.¹²⁸ It also sought to reduce the University’s exposure to liability.¹²⁹ Essentially, the Policy Statement sought to create certainty where “neither the statute nor judicial decisions give specific practical guidance on what photocopying falls within fair use.”¹³⁰

The Policy itself used the Classroom Guidelines “to determine whether . . . the prior permission of a copyright owner” must be sought.¹³¹ Under the Policy, which is still in place,¹³² “[i]f proposed photocopying is not permitted under the [Classroom] Guidelines[,] . . . permission to copy is to be sought.”¹³³ When that permission is denied, photocopying can take place only after a review by the University’s General Counsel, who will either

¹²⁵ *Id.* The copy-center could make copies “at the request of a faculty member of a non-profit institution” so long as the copying is “in full compliance with the conditions of Paragraph II and III of [the Classroom Guidelines].” *Id.*

¹²⁶ *Id.* The copy-center could make copies “at the request of a New York University faculty member [if the] copying has been approved by the General Counsel of the University in compliance with the University’s ‘Policy Statement on Photocopying of Copyrighted Materials for Classroom and Research Use.’” *Id.*

¹²⁷ *Id.* at *5. Although NYU did not previously have a formal policy, it had distributed a document entitled “Interim Guidelines Concerning Photocopying for Classroom Research and Library Use” on January 18, 1983, which the Policy Statement superseded. *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at *6.

¹³² N.Y. UNIV., FACULTY HANDBOOK (1999), available at <http://www.nyu.edu/oa/policies.html#photocopy> (discussing the “Statement of Policy on Photocopying Copyrighted Materials”).

¹³³ *Id.*

approve or deny the request.¹³⁴ Under the Policy, the University will indemnify or defend faculty where the proposed use falls outside the Guidelines only if they seek and heed the advice of the General Counsel.¹³⁵

Each of these decisions has given the Classroom Guidelines the appearance of law—creating pseudo law. That is, the Guidelines became a form of law that lacks controlling weight, but retains persuasive authority. *Rowley* emphasized the Congressional adoption of the Classroom Guidelines and called them “instructive.”¹³⁶ It further gave them importance by using the Guidelines as a separate test under which it evaluated the fairness of the use.¹³⁷

Basic Books, *MDS*, and *Vien* also elevated the Guidelines status as pseudo law. Calling the Guidelines “legislative history,” the *Basic Books* court stated that they clarified Congress’s intentions with respect to educational fair use and evaluated the defendants’ use under them.¹³⁸ Likewise, the *MDS* court found the Guidelines, as legislative history, offered “general guidance,” which, when applied, weighed against the defendant.¹³⁹

To a lesser extent, *Crooks* and *Texaco* achieved a similar result. The *Crooks* court found that the Congressional Reports were “helpful” in evaluating fair use,¹⁴⁰ while the *Texaco* court found the Guidelines to be “persuasive authority.”¹⁴¹

Finally, while not a judicial decision, *NYU* cemented the Guidelines place as a substantive legal tool for both courts and educators.¹⁴² The consent decree expressly adopted the Guidelines as a de facto *maximum* threshold of fair use, requiring consent of

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983).

¹³⁷ *Id.* at 1178–79.

¹³⁸ *See Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1544–46 (S.D.N.Y. 1991).

¹³⁹ *See Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1390–92 (6th Cir. 1996).

¹⁴⁰ *Encyc. Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1175 (W.D.N.Y. 1982).

¹⁴¹ *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 919 (2d Cir. 1994).

¹⁴² *See infra* Part I.C.

NYU's General Counsel for any copying that exceeded the Guidelines' scope.¹⁴³ The same proscriptions applied to NYU faculty under the University's copying policy.¹⁴⁴

2. Guidelines as Sub-Factors or Additional Factors Under § 107

Beyond the persuasive authority courts give to the Guidelines, some also use the Guidelines directly in their fair use determinations. Because § 107 provides a non-exhaustive list of fair use factors, courts may develop other factors.¹⁴⁵ In this respect, the courts' use of the Guidelines represent two possible scenarios. First, each could represent "sub-factors" included in analysis of some (or all) of the fair use factors. This is essentially what the *Crooks* and *Texaco* courts did when, discussing the purpose and character of the use, they referenced the Senate Report and House Reports.¹⁴⁶

The *MDS* court also took this approach when assessing the third fair use factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."¹⁴⁷ Here, the court observed that "[t]he amounts used in the case at bar . . . far exceed the 1,000-word safe harbor that we shall discuss in the next part of this opinion."¹⁴⁸ This type of sub-factor use solidifies the Guidelines as part of the law—i.e., it adopts them as considerations under § 107's fair use factors.

¹⁴³ See *Addison-Wesley Publ'g Co. v. N.Y. Univ.*, No. 82 Civ 8333 (ADS), 1983 WL 1134, at *6 (S.D.N.Y. May 31, 1983).

¹⁴⁴ *Id.*

¹⁴⁵ 17 U.S.C. § 107 (2006); see *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996); *Texaco*, 60 F.3d at 918–19; *Crooks*, 542 F. Supp. at 1175.

¹⁴⁶ See *Texaco*, 60 F.3d at 918–19; *Crooks*, 542 F. Supp. at 1175.

¹⁴⁷ *MDS*, 99 F.3d at 1389 (quoting 17 U.S.C. § 107(3)).

¹⁴⁸ *Id.* (citing H.R. REP. NO. 94-1476 (1976)). The reference to the Guidelines here raises the following questions: Was the court incorporating by reference its analysis in the following section? If so, how much of its analysis did it incorporate? The best reading takes the statement at face value, viewing it as an incorporation of only the word limit(s) set by the Guidelines.

Second, “other factors” could mean *additional* factors the court may consider *beyond* the four factors articulated in § 107.¹⁴⁹ This is the type of behavior in which the courts in *Rowley*, *MDS*, and *Vien* appeared to engage.¹⁵⁰ Like the use of the Guidelines as sub-factors, their use as additional factors does more than create pseudo law, it adopts the Guidelines *as law*.¹⁵¹ In other words, the courts essentially adopted the Guidelines as additional factors under § 107 when they considered and used them in their fair use analysis. There is merit to that line of analysis: when the courts state that the defendant’s use falls outside the Guidelines, and therefore weighs against fair use,¹⁵² they are stating that this additional factor (the Guidelines) weighs against fair use.

Some courts, however, go further and explicitly treat part(s) of the Guidelines as an additional factor under § 107. The *Basic Books* court did just that when it conducted an analysis under a section titled, “Other Factors.”¹⁵³ First, the court noted that the defendant’s activities “created a new nationwide business” that

¹⁴⁹ Simply using additional factors does not violate § 107, which contemplates the use of factors not listed. 17 U.S.C. § 107 (“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . .”). Additional factors, however, must be tied to the law in some way. The Classroom Guidelines do not exhibit this necessary trait. *See Crews, supra* note 34, at 618.

¹⁵⁰ *See supra* notes 119, 136, 139 and accompanying text.

¹⁵¹ *See Crews, supra* note 34, at 618. Here it becomes easy to see how blurry the line between law and pseudo law is, especially with respect to fair use. While the four fair use factors are the law, courts are free to consider other factors. What is the difference between using an additional factor and looking to the legislative history for guidance? From a practical standpoint, none exists: each is treated as part of the fair use analysis. The obfuscation is due, in part, to courts’ failure to explicitly state how they use the Guidelines in their fair use analyses.

¹⁵² *MDS*, 99 F.3d at 1391 (stating that, because the defendant’s use fell outside the Guidelines, it “weigh[ed] against a finding of fair use”); *see Marcus v. Rowley*, 695 F.2d 1171, 1178–79 (9th Cir. 1983) (stating that the defendant’s use was not fair under the statutory factors or the Guidelines); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1537 (S.D.N.Y. 1991) (considering the Guidelines’ “prohibitions” on anthologies in light of the other fair use factors).

¹⁵³ *Basic Books*, 758 F. Supp. at 1534–35. This section of the opinion is poorly organized. The court discusses the Classroom Guidelines under both heading “A.5,” labeled “Other Factors,” and heading “B,” labeled “The Classroom Guidelines.” *See id.* at 1534–37. To make matters worse, the court then places the word “Anthologies” in italics and proceeds to make an analysis of this issue. *See id.* at 1537. It does not, however, tie all of this analysis together.

usurped the plaintiffs' potential profits.¹⁵⁴ Then, the court found that, because the "Classroom Guidelines express a specific prohibition of anthologies[,] . . . [t]he fact that these excerpts were compiled and sold in anthologies weighs against [the] defendant."¹⁵⁵

The *Vien* court made a similar maneuver. After addressing each fair use factor under § 107, it conducted an independent analysis of the Guidelines, finding that the defendant's use "[was] clearly not within the letter or spirit of the Congressional [G]uidelines."¹⁵⁶ More importantly, however, the court, like the court in *MDS*,¹⁵⁷ weighed that finding in its fair use determination, stating that, "[u]nder the circumstances of this case, and after balancing the four statutory factors, as well as the Congressional [G]uidelines on fair use in the educational context, the . . . defendant [was] not entitled to fair use protection."¹⁵⁸

Both *Basic Books* and *Vien* did more than just create pseudo law; they adopted part(s) of the Guidelines as additional factors under the § 107 analysis.¹⁵⁹ This means that, under certain circumstances, part(s) of the Guidelines should be considered in the fair use analysis as a separately weighed factor.

¹⁵⁴ *Id.* at 1534. This type of reasoning is problematic because the plaintiffs had not yet entered the market. Some of the approaches discussed *infra* Part II address this problem.

¹⁵⁵ *Id.* at 1535. It also bears mentioning that the court rejected fair use in this context (anthologies) because the defendants "failed to prove [their] central contention[,] which [was] that enjoining them from pirating plaintiffs' copyrights would halt the educational process." *Id.* That reasoning is faulty for two reasons. First, fair use, especially in the educational context, does not hinge on the industry at issue "coming to a halt." The court erroneously concluded that, for a use to be educationally beneficial (and fair), the plaintiff must show that absent that use, the educational system could not function. The Copyright Act itself belies such a conclusion. *See, e.g.*, 17 U.S.C. § 110(1)–(2) (2006) (exempting from infringement the display or performance of copyrighted materials in certain educational situations). Education would still continue if § 110 did not exist; the point is that the absence of that section would *hinder* education. Second, the court couched its language in terms of piracy. In that sense, it concluded what it sought to prove.

¹⁵⁶ *Bridge Publ'ns, Inc. v. Vien*, 827 F. Supp. 629, 636 (S.D. Cal. 1993).

¹⁵⁷ *MDS*, 99 F.3d at 1390–91.

¹⁵⁸ *Vien*, 827 F. Supp. at 636.

¹⁵⁹ *See id.* at 636; *Basic Books*, 758 F. Supp. at 1534–37.

Whether treating the Guidelines as “instructive” (*Rowley*)¹⁶⁰ or as part of the four fair use factors,¹⁶¹ courts have elevated the status of this legislative history into pseudo law. When using the Guidelines in these ways, courts apparently aim to better inform their decisions—but they never examine the relationship of the Guidelines to the law of fair use.¹⁶² Instead, they treat the Guidelines as “persuasive” (*Texaco*)¹⁶³ or “helpful” (*Crooks*)¹⁶⁴ by virtue of their status as legislative history.¹⁶⁵ In that sense, courts seem less concerned with the Guidelines’ philosophical and legal justification than with the courts’ ultimate fair use decision, using the Guidelines to bolster a decision already reached.

Not only does this blithe use of the Guidelines distort the law, it means that the precedential value of law, and its subsequent effect, will have distorted results. In other words, courts’ decisions using the Guidelines have negative implications for how the Guidelines are viewed and used by the educational community. That affects both how teachers educate their students and how students learn. The next subpart details the educational response to the courts’ treatment of the Guidelines as pseudo law.

C. *The Educational Response: Consequences of Courts’ Decisions*

As we have seen, the courts’ treatment of the Classroom Guidelines, if not always making them (part of) the law, has made them *look like* the law—turning them into pseudo law.¹⁶⁶ In either case, the courts have erred. The Guidelines, as repeated by

¹⁶⁰ *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983).

¹⁶¹ *MDS*, 99 F.3d at 1390; *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 919 (2d Cir. 1994); *Rowley*, 695 F.2d at 1178; *Vien*, 837 F. Supp. at 636; *Basic Books*, 758 F. Supp. at 1534; *Encyc. Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1175 (W.D.N.Y. 1982).

¹⁶² No court has ever examined whether the Classroom Guidelines have any mooring in fair use law.

¹⁶³ *Texaco*, 60 F.3d at 919.

¹⁶⁴ *Crooks*, 542 F. Supp. at 1175.

¹⁶⁵ One thing the Classroom Guidelines have *not* done is persuade judges to use them *by virtue of the reasoning upon which they are based*. Courts have utilized them because they are legislative history, not because they have any principled basis in the law. Thanks to Harold Krent for helping me articulate this point.

¹⁶⁶ *See Crews*, *supra* note 34, at 618.

commentators and judges, are not the law.¹⁶⁷ Beyond that obvious but overlooked fact, however, is another problem: the Guidelines do not have much, if any, mooring to the law of fair use.¹⁶⁸ That lacuna—between the Guidelines and the Copyright Act—impacts the operation of the law. The copying policies adopted by schools, which frequently are based on the Guidelines, will not be shaped by the law of fair use—or its purpose. At best, the concepts and rules in the Classroom Guidelines reflect proxies for legal concepts found in fair use.¹⁶⁹ At worst, they represent solely the interests of one or more parties to the Agreement.

This acceptance of the Guidelines as some type of legal authority displaces the law of fair use and “freeze[s] the means for satisfying the fair use statute.”¹⁷⁰ That, in turn, has consequences for educators. After all, “[h]ow one understands and characterizes the [G]uidelines . . . will consequently shape the fair use decision based upon them.”¹⁷¹

¹⁶⁷ See *id.* at 618, 664–68; see also *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1410–11 (6th Cir. 1996) (Ryan, J., dissenting); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 863 (1987) (“The legislative history of the 1976 Act contains little evidence of Congress’s specific intent on any substantive issue. Courts searching for such evidence have ultimately relied upon an assortment of often conflicting inferences drawn from the absence of such evidence.”); *id.* at 865 (“Yet one can read this history in its entirety and find no evidence that any member of Congress intended anything in particular to follow from many provisions of the statute.”); *id.* at 870 (“[A] review of the provision’s legislative history will show that credit for its substance belongs more to the representatives of interested parties negotiating among themselves than to the members of Congress who sponsored, reported, or debated the bill.”); *id.* at 887–88 (detailing the process of negotiation within the Ad Hoc Committee and noting that “[p]arties on both sides of the controversy refused to budge, and the compromise came unglued. At the House and Senate Subcommittees’ insistence, the parties continued to hold negotiations with the hope of reaching another, more durable compromise. They agreed, finally, on the language. They failed, however, to agree on what the language meant” (footnotes omitted)); Rothman, *supra* note 47, at 1904.

¹⁶⁸ See Crews, *supra* note 34, at 616–19. *But see, e.g.*, Michael J. Meurer, *Too Many Markets or Too Few? Copyright Policy Toward Shared Works*, 77 S. CAL. L. REV. 903, 937 (2004) (arguing spontaneous uses as being “fairer” because they “usually have little impact on copyright owners’ profit and in aggregate provide significant social benefit”).

¹⁶⁹ See Meurer, *supra* note 168, at 936–37.

¹⁷⁰ Crews, *supra* note 34, at 665–66.

¹⁷¹ *Id.* at 612.

In giving the Classroom Guidelines the effect or appearance of law, courts improperly ossified distorted standards (rules?) of fair use¹⁷² and concomitantly fostered uncertainty.¹⁷³ The ossification process was gradual but steady. *Crooks* and *Rowley* marked the first judicial embrace of the Classroom Guidelines and set the stage for the *NYU* settlement, which “[sent] out a clear warning as to what the publishers believe[d] the obligations that colleges and universities have concerning the duplication of copyrighted works.”¹⁷⁴ Actually, it did more than that; it created a baseline standard, and precedent, for educational fair use, which all other educational institutions felt pressured to follow.¹⁷⁵ Who could blame them? The publishing companies had “sent [out] hundreds of letters to colleges and universities throughout the country urging them to adopt the guidelines or face a risk of litigation.”¹⁷⁶

Fear litigation they did: after this broadcast, even though the settlement was not law, “a significant number of universities had similarly restrictive Guidelines[-]driven photocopy policies in place.”¹⁷⁷ The resulting standard, which the Association of American Law Schools (“AALS”) and the American Association of University Professors (“AAUP”) opposed,¹⁷⁸ followed the *Rowley* court’s use of the Guidelines as a limit on photocopying.¹⁷⁹

¹⁷² Ossification does not refer merely to the development of a rule that is difficult to change. Instead, it describes the process by which courts have improperly relied on the Guidelines to erect pseudo law, which has almost no basis in fair use law. *See supra* Part I.B.

¹⁷³ *See* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007) (“[Fair use] is so case-specific that it offers precious little guidance about its scope to . . . educators . . . who require use of another’s copyrighted expression in order to communicate effectively.”).

¹⁷⁴ Sheldon Elliot Steinbach, *Photocopying Copyrighted Course Materials: Doesn’t Anyone Remember the NYU Case?*, 50 EDUC. L. REP. 317, 320 (1989); *see* *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983); *Encyc. Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1175 (W.D.N.Y. 1982).

¹⁷⁵ *Crews, supra* note 34, at 640.

¹⁷⁶ *Id.*; *see also* *Bartow, supra* note 5, at 170.

¹⁷⁷ *Bartow, supra* note 5, at 170; *see also* *Rothman, supra* note 47, at 1953–54 (“The settlement in the NYU lawsuit, involving copying of materials for classroom use, led many universities and copy stores to license material, even though there was no governing case law on the legitimacy or legality of copying works for use as course materials.” (footnote omitted)).

¹⁷⁸ *See* Steinbach, *supra* note 174, at 320.

¹⁷⁹ *Crews, supra* note 34, at 650–51.

The *NYU* case and the Association of American Publishers' ("AAP") subsequent lobbying efforts, however important, did not, by themselves, confirm legal status of the Classroom Guidelines; that was space the *Basic Books* and *MDS* courts willingly filled. The former did so by expressly analyzing the Classroom Guidelines in its "other factors" section,¹⁸⁰ and the latter did so by confirming the use of the Classroom Guidelines as a tool for evaluating fair use.¹⁸¹ These decisions quashed any doubts that the Classroom Guidelines would be used as a basis for a fair use determination in educational context.¹⁸² Additionally, *Basic Books* and *MDS*, as well as *Texaco*, did more than merely confirm this standard—they legitimized industry clearance practices and made them part of the fair use calculus.¹⁸³

This distorted ossification has negative effects for educators and educational institutions. First, it creates a fair use system that is asymmetrical, failing to consider the educational (students', teachers', administrators', and school districts') interests. The "legalization" of the Guidelines as a maximum standard—or perhaps a rule—means the courts adopted the industry "clearance culture,"¹⁸⁴ framing the fair use debate in terms of market failure and industry standards instead of the statutory factors.¹⁸⁵ This

¹⁸⁰ See *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1535–37 (S.D.N.Y. 1991).

¹⁸¹ *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1390–91 (6th Cir. 1996) (Merritt, J., dissenting).

¹⁸² See Rothman, *supra* note 47, at 1954 ("[T]he practices that followed in the wake of a single settlement and a single court case further entrenched the custom and also reinforced legal precedents.").

¹⁸³ See *id.* at 1935, 1954; see also Bartow, *supra* note 5, at 185 (noting that, after the *Basic Books* decision, "the Association of American Publishers (A.A.P.) cited [*Basic Books*] with relish in a letter to a commercial photocopying enterprise in College Park, Maryland[,] . . . [in which] the A.A.P. threatened 'enhanced monitoring of anthologies at your facility for copyright infringement' and 'a suit seeking a substantial recovery like that in the [*Basic Books*] case'").

¹⁸⁴ See Rothman, *supra* note 47, at 1911–18; see also Bartow, *supra* note 5, at 151 ("Publishers . . . have used favorable court decisions and the threat of expensive litigation to coerce commercial photocopiers to pay permission fees for the privilege of making any copies at all, whether or not the use might be a fair one, and in some cases even when the work is not eligible for copyright protection.").

¹⁸⁵ See Bartow, *supra* note 5, at 151 ("[O]ver the past decade[,] the scope of educational fair use has been dramatically compressed by judges who ignore the external benefits of fair use, and respond only to the lost dollars publishers ascribe to the doctrine."); Paul

means teachers' arguments that uses are fair *because they are educational (an express feature of § 107), transformative, or something else*, are less relevant.

This focus on market failure, however, is flawed because it presumes (i) that market failure is an adequate barometer of fair use in the educational context;¹⁸⁶ (ii) that transaction costs or social value are adequate measures of the market;¹⁸⁷ and (iii) that the possibility of licensing weighs against a finding of fair use.¹⁸⁸ None of these statements is necessarily true;¹⁸⁹ and their acceptance places educators seeking to utilize fair use in an unenviable position. Their conduct is evaluated against standards

Goldstein, *Fair Use in a Changing World*, 50 J. COPYRIGHT SOC'Y U.S.A. 133, 134–43 (2003); Meurer, *supra* note 168, at 908 (criticizing judges for relying too much on transaction costs and curing market failure); Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. ON TELECOMM. & HIGH TECH. L. 317, 333 (2009) (“Copyright is justified . . . by a fear of market failure created by uncontrolled copying, and resulting in sub-optimal incentives to create new artistic and literary works.”). *See generally* 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, 1631 (1982).

¹⁸⁶ *See* Bartow, *supra* note 5, at 181 (noting in *Basic Books* the “court’s overarching position with respect to market effect was that rather than facilitating educational fair use . . . Kinko’s was usurping royalties that rightfully belonged to publishers in the form of profits on book sales, or permission fees”); *id.* at 189 (“[The MDS] court unmistakably contemplated reducing the fair use inquiry to market effect alone.”).

¹⁸⁷ *See* Gordon, *supra* note 185, at 1628 (“A particular type of market barrier is transaction costs. As long as the cost of reaching and enforcing bargains is lower than anticipated benefits from the bargains, markets will form. If transaction costs exceed anticipated benefits, however, no transactions will occur. Thus, the confluence of two variables is likely to produce a market barrier . . .”).

¹⁸⁸ *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 895–96 (2007) (“[W]hen a court is determining whether a given use of copyrighted material is fair, one important factor is whether there already exists a licensing market for the use in question. If such a market does not exist, then the fair use claim gains ground. If the market does exist, then the fair use claim loses ground.”); *see also* Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 971 (2007) (“[A] copyright owner can nearly always argue that she suffered harm, if only because the defendant could have paid a license fee for the use being challenged.”).

¹⁸⁹ *See, e.g.,* Bohannon, *supra* note 188, at 982 (“[M]arket failure is not an external phenomenon that justifies fair use after the proper scope of copyright protection is determined. Rather, market failure is one basis for finding fair use because it represents a situation in which a copyright owner suffers no real harm as a result of defendant’s allegedly infringing activity.”).

designed to serve industry or market interests, not educational ones.

Under such standards, many educational uses are not fair simply because they do not fulfill market objectives or conform to industry practices. As Professor Jennifer Rothman has put it, “[f]ailing to conform with industry practices is generally viewed by [the] courts as ‘unfair.’”¹⁹⁰ The asymmetric nature of the Classroom Guidelines also puts industry interests ahead of teachers’ interests and prevents teachers from using copyrighted materials to effectively educate students.¹⁹¹ Additionally, focusing on indicia like the market neglects the statutory language, which the dissent in *MDS* noted expressly allows for teachers to make copies.¹⁹² Under these circumstances, “[t]he four factors to be considered, *e.g.*, market effect and the portion of the work used, are of limited assistance when the teaching use at issue fits squarely within specific language of the statute, *i.e.*, ‘multiple copies for classroom use.’”¹⁹³

There are other negative consequences as well: the treatment of the Guidelines as law has a “chilling” effect on teachers and students by enhancing uncertainty.¹⁹⁴ Although the Guidelines

¹⁹⁰ Rothman, *supra* note 47, at 1937.

¹⁹¹ Even Crews, who decries the Guidelines, notes their importance in the courts and practice:

The [G]uidelines are . . . a compelling tool for educators who seek to apply fair use and create policies. The [G]uidelines have the appearance of having an official status, and they are widely accepted by the publishing industry and other proprietor groups who may be potential plaintiffs in copyright actions against the educators. If the objective of an educator making policy is to avoid litigation, adopting and following the [G]uidelines certainly offers the prospect of discouraging a lawsuit.

Crews, *supra* note 34, at 693.

¹⁹² *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1394 (6th Cir. 1996) (Merritt, J., dissenting).

¹⁹³ *Id.* at 1395 (emphasis in original) (quoting 17 U.S.C. § 107 (2006)).

¹⁹⁴ Professor Michael Carroll has recognized such uncertainty. *See* Carroll, *supra* note 173, at 1115 (stating that the Classroom Guidelines “do provide clarity for a subset of educational uses, but, because these guidelines serve only as a floor, many colorable fair uses fall outside their ambit and remain subject to the standard four-factor uncertainty” (footnote omitted)); *id.* at 1116–17 (describing examples of fair use uncertainty for educators); *id.* at 1090 (“[Fair use] is so case-specific that it offers precious little guidance about its scope to . . . educators . . . who require use of another’s copyrighted

seem to give educators a measure of certainty, their status as *actual* law is not settled.¹⁹⁵ The uncertainty of fair use and the Guidelines is exacerbated by the enforcement tactics of copyright owners, who attempt to cement the Guidelines as maximum standards.¹⁹⁶ Because cases like *NYU*, *MDS*, and *Vien* treat the Guidelines as legal rules (or inflexible and maximum standards),¹⁹⁷ some teachers treat them as the law while others do not, relying instead on the doctrine of fair use.¹⁹⁸ This uncertainty—both as to the legal status of the Guidelines as well as fair use itself—can lead to one of two consequences: “Depending on the magnitude and the context of such uncertainty concerning legal rules, affected parties may either over- or under-comply with the stated rule.”¹⁹⁹

This means that, depending on how risk-averse teachers are, some will infringe more²⁰⁰ and some will infringe less.²⁰¹ A

expression in order to communicate effectively.”); *id.* at 1114 (“If the oft-litigated issue of parody remains uncertain *ex ante*, a second candidate for fair use clarity might be educational uses.”). *See generally* Gibson, *supra* note 188, at 898–99 (explaining how “doctrinal feedback” can create fear-induced licensing markets that self-perpetuate and expand).

¹⁹⁵ While the Guidelines are not settled law, copyright owners and interest groups continue to endorse Guidelines. *See, e.g.*, Lois F. Wasoff, *Fair Use Guidelines for Educational Multimedia*, 517 PLI/Pat 111, 124 (1998).

¹⁹⁶ *See* L. Ashley Aull, *The Costs of Privilege: Defining Price in the Market for Educational Copyright Use*, 9 MINN. J. L. SCI. & TECH. 573, 601 (2008) (“[T]he enforcement strategies of copyright owners themselves impact prices [of educational use]—both by manipulating uncertainty and by changing the chance of suit against particular groups of users.”); *id.* at 603–05.

¹⁹⁷ *See supra* Part I.B.1.

¹⁹⁸ *See* Aull, *supra* note 196, at 602.

¹⁹⁹ *Id.* at 602; *see* Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1497–98 (2007) (“[L]aw and economics scholars have long observed that vague standards cause overdeterrence.”).

²⁰⁰ At the beginning of the copyright law unit of my Education Law course, I ask students to raise their hand if they think they ever have violated copyright law. Without fail, nearly every person raises their hand, and yet none can articulate *why*, legally speaking, they may have infringed a particular work. This raises four points. First, teachers have little knowledge of what constitutes fair use (discussed below). Second, they think that fair use is so restrictive that it denies them even basic rights, such as using a picture in a Power Point presentation, which it clearly does not. Third, almost no teachers have read their school’s copyright policy. Fourth, because they perceive copyright law as rigid and do not even remotely understand its contours, or attempt to do so, they continue to use copyrighted works in ways they think violate copyright law. All four of these points are extremely worrisome and, in and of themselves, should motivate a new solution to educational fair use.

greater reliance on the Guidelines as the law—and worse yet, the *upper bound* of the law²⁰²—would lead to fewer fair uses, even when justified, for fear of infringement.²⁰³ The *NYU* settlement and the subsequent university copyright policies developed thereafter are evidence of this.²⁰⁴

Others who rely more on the fair use factors, by contrast, will have greater space in which to teach using copyrighted materials, though they may infringe more. This infringement also may be kept quiet to avoid litigation²⁰⁵ and, in the process, produce instructors who teach students that violating the law is acceptable,

²⁰¹ Aull, *supra* note 196, at 602 (stating that parties “may either become more risk-averse than warranted (relying less upon fair use) or less risk-averse than warranted (relying excessively upon fair use)”).

²⁰² This conception of the Guidelines makes sense because “even the risk-averse actor presumably will not seek a license in the face of clear legal precedent that obviates the need to do so.” Gibson, *supra* note 188, at 905. That would explain, in part, why educational institutions use the Guidelines as a maximum standard or as a rule. The cases treat the Guidelines as the maximum extent of the law, and so educational institutions do not seek licenses in the face of this “clear precedent.”

²⁰³ See Gibson, *supra* note 188, at 900; see also Aull, *supra* note 196, at 602–04 (“[P]ublishers and other owners’ actions can impact the price of educational use.”). Explaining how doctrinal feedback can lead to a fear of infringement that would limit fair use, Gibson states:

One of the interesting things about the doctrinal feedback phenomenon is that it works an expansion of the copyright entitlement in an inadvertent, accretive manner. The whole idea is that risk-averse behavior prevents fair use claims from being litigated, so a licensing culture emerges based on very few and very infrequent guidelines from the positive law. Instead of looking to courts and statutes for guidance, practitioners look to the internal practices of the relevant industries and then apply the same market-referential standards that they would expect courts to apply if they were ever to litigate.

Gibson, *supra* note 188, at 900.

Gibson’s subsequent statement “that those typically blamed for copyright’s growth—courts and legislatures—play at best a secondary role in this insidious means of expansion,” however, is only partially true. *Id.* at 900. He is right that “[d]octrinal feedback has little to do with case law and statutes, except insofar as reported decisions entrench the statutory ambiguities that give rise to the risk aversion in the first place.” *Id.* at 900–01. But that answer does not do justice to the decisions themselves, which do not merely entrench statutory ambiguities; they set the Guidelines as the maximum standard for educational fair use.

²⁰⁴ See *Addison-Wesley Publ’g Co. v. N.Y. Univ.*, No. 82 Civ 8333 (ADS), 1983 WL 1134, at *5 (S.D.N.Y. May 31, 1983); Carroll, *supra* note 173, at 1115–16.

²⁰⁵ See Gibson, *supra* note 188, at 899.

as long as they do not get caught. But infringement is different from litigation because the parties may not enforce their claims. Thus, there may be some truth to the fact that non-enforcement against individual teachers may make a use “free[r].”²⁰⁶ But that same non-enforcement also may make uses *costly*. Because there are so few court decisions, all of which treat the Guidelines as (part of) the law, the slight *risk* of enforcement may be enough to chill fair use.²⁰⁷ Even if the uses were “freer,” however, educational institutions have copyright policies that take the Guidelines and court decisions seriously,²⁰⁸ the cases discussed in this Article

²⁰⁶ Explaining how copyright owners sometimes choose not to enforce their claims, Aull notes

If enforcement were such that individual educators were never sued, then in fact their privileges would be free. It is not completely unheard-of that producers would choose this course of action: in other contexts, theorists have suggested that copyright owners purposefully fail to bring suit against a particular class of infringers, in order to undercut competitors without offending antitrust statutes and to maintain market power by encouraging dependency on their products (particularly software) by non-business users.

Aull, *supra* note 196, at 605 (footnotes omitted).

²⁰⁷ See Gibson, *supra* note 188, at 890 (describing how “even a risk-neutral actor with a good fair use claim would choose to secure a license rather than take the small risk of incurring a severe penalty”); *id.* at 888–900 (describing how doctrinal feedback works with respect to licensing, which may lead to the possibility that “X, being risk-averse and aware of the severe consequences of an adverse ruling, decides not to take that chance and so seeks and pays for a license from Y instead”).

²⁰⁸ E.g., UNIV. OF CAL., UC SYSTEMWIDE COPYRIGHT POLICIES AND RESOURCES, UC COPYRIGHT, 1986 POLICY AND GUIDELINES ON THE REPRODUCTION OF COPYRIGHTED MATERIALS FOR TEACHING AND RESEARCH (1986), available at <http://www.universityofcalifornia.edu/copyright/systemwide/ucpolicies.html> (click through “1986 Policy on the Reproduction of Copyrighted Materials for Teaching and Research”) (using the Classroom Guidelines as the per se maximum and stating that, “[i]f the copying is not within the Guidelines, permission should be obtained from the copyright owner before any copies are made[,] [and] [i]f it is unclear whether copying would require such permission guidance should be requested from the Office of the General Counsel”); CAL. UNIV. OF PA., FACULTY HANDBOOK 92 (2009), available at http://www.cup.edu/nu_upload/faculty_handbook_2009.pdf (wrongly stating the law in its policy, which says, “If a faculty member wishes to reproduce copyrighted materials for class use—whether they are printed or non-print materials such as maps, computer software, and illustrations; whether or not they may be in print; whether the materials are photocopied or retyped; whether the materials are sold or distributed gratis to students—**permission must be sought beforehand from the publisher**; and in most cases a fee for permission to use them must be paid beforehand. Failure to do so is in violation of federal law. Information about how to obtain copyright permission, according to guidelines of the

show how publishers and copyright owners can shape use and “chill” fair use.²⁰⁹

Commentary and recommendations on fair use confirm this suspicion. One commentator suggests to teachers methods of “protect[ing] yourself.”²¹⁰ Among them, he advocates following attorney-approved guidelines, if available; drafting a copying policy that uses the Classroom Guidelines “and a check of current case law;” educating teachers on the copying policy developed; and securing permission to use a work, which he erroneously describes as “often a simple matter of calling the publisher’s office and asking.”²¹¹

Another commentator notes that “[t]here are two sure methods by which the professor will limit liability.”²¹² The first requires the professor to “stay within the boundaries of the Guidelines.”²¹³ The second, which kicks in only when the first is “not feasible,” is to “request copies or anthologies from a commercial copy center that will handle all necessary permissions.”²¹⁴ Another author states that the Guidelines “should be used to assist in determining whether copying procedures or policies are in keeping with the copyright laws.”²¹⁵ This author also treats the Guidelines as law.²¹⁶

Association of American Publishers, may be obtained at the office of the Provost or at the Book Store.” (emphasis in original)).

²⁰⁹ See *supra* Part I.C; see also Aull, *supra* note 196, at 603–04 (noting that “publishers and other owners’ actions can impact the price of educational use” by choosing who and when to sue).

²¹⁰ John William Maddox, *Copyright Violation and Personal Liability in Education: A Current Look at “Fair Use,”* 1995 BYU EDUC. & L.J. 97, 103–04.

²¹¹ *Id.* at 104. Andre Hampton describes how difficult securing permissions can be in his article, *Legal Obstacles to Bringing the Twenty-First Century into the Law Classroom: Stop Being Creative, You May Already Be in Trouble*, 28 OKLA. CITY U. L. REV. 223, 236–40 (2003) (discussing how securing permissions can be difficult for audiovisual works).

²¹² Kasunic, *supra* note 7, at 292. Kasunic also says that educators should consider the four fair use factors before photocopying. *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Mark L. Merickel, *The Educator’s Right to Fair Use of Copyrighted Works*, 51 EDUC. L. REP. 711, 717 (1989).

²¹⁶ *Id.* at 718–19 (“If we look back to the ‘Agreement on Guidelines for Classroom Copying,’ we will see that Part III.B and C state that ‘there shall be no copying of or from works intended to be ‘consumable’ in the course of study or of teaching.’ This *rule* clearly includes workbooks.” (emphasis added)).

These commentators' advice reflects their understanding of how the courts have treated the Classroom Guidelines—as positive or pseudo law. Even Professor Kenneth Crews, who adamantly opposes the Guidelines, both their concept and their use by the courts, recognizes that they have import in practice.²¹⁷ In other words, these commentators base their advice on the Classroom Guidelines as an authoritative legal source. This commentary also illustrates how the chilling effect trickles from the courts (e.g., the *NYU* case) to practical advice (e.g., lawyers and commentators) to implementation (e.g., school policies). Because of this acceptance, Professor Ann Bartow has suggested that non-compliance with the Guidelines may render uses falling outside them “willful.”²¹⁸

Finally, the courts' treatment of the Classroom Guidelines fosters a misunderstanding of the law, which may encourage ignorance or distrust.²¹⁹ The uncertainty discussed above confuses

²¹⁷ Noting how educators may use the Guidelines as an aid, Crews states:

The guidelines are . . . a compelling tool for educators who seek to apply fair use and create policies. The guidelines have the appearance of having an official status, and they are widely accepted by the publishing industry and other proprietor groups who may be potential plaintiffs in copyright actions against educators. If the objective of an educator making policy is to avoid litigation, adopting and following the guidelines certainly offers the prospect of discouraging a lawsuit.

Crews, *supra* note 34, at 693.

²¹⁸ Bartow, *supra* note 5, at 206 (“Moreover, capitulation by educational institutions to publishers' demands may render teaching professionals willful, rather than innocent infringers, thereby increasing their personal liability.”).

²¹⁹ My own experience *teaching* fair use to educators has been frustrating. When I explain to the students that the Guidelines are not *law*, they stare at me quizzically. “What, then, are they?” they ask. “What do they *mean*?” As I strain to emphasize that they are merely suggestions made to teachers, the students press me further. “So can I make more than one copy per student?” one woman asks. “Of course!” I reply. “After all, these are just guidelines, and who among you hasn't needed an extra copy for that absent-minded student?” But then I am always met by (rightly) quizzical looks: “So what are we supposed to do?!” I cannot give them a definitive answer—I can tell them only they should try to get permission to use works, and failing that, to make sure their material relates to the curriculum that they teach. Aside from those maxims, and a few others—including do not copy whole books verbatim—I struggle to give them the answers for which they are searching. In the end, we always come back to the four fair use factors, which are designed to be interpreted by *judges*, not educators. Additionally, some students, exasperated, refuse to *try to understand* the concept of fair use. That acceptance of ignorance fosters ignorance among students.

teachers and students.²²⁰ Beyond the uncertainty, and perhaps what leads to it, is the confusion among teachers about whether the Guidelines are law. Even if we accept the Guidelines as law, teachers have great difficulty applying them. Further complicating matters is the “prohibitions” section of the Guidelines,²²¹ which at least one court applied flexibly.²²² On this point, teachers do not understand how the “rule” stating “prohibitions” could be anything other than mandatory. As a result of this misunderstanding (and many do not even exhibit this level of *misunderstanding*), ignorance or frustration becomes prominent. Ignorance of the law is a detriment to society—and in the educational system, a detriment to students as well as the educational system in general; the sad irony is that it is the *law itself* that causes ignorance and misunderstanding.²²³

²²⁰ See *supra* notes 191, 194 and accompanying text.

²²¹ H.R. REP. NO. 94-1476, at 69–70 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5683–84.

²²² *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1537 (S.D.N.Y. 1991) (“Defendant urges the court to seek a less rigid view of the meaning of the Guidelines. We are convinced that this is the more prudent path than a bright line pronouncement . . . that all unconsented anthologies are prohibited without a fair use analysis.”).

²²³ See Goldstein, *supra* note 185, at 134 (emphasizing that fair use is indeterminate because it “is a constitutive doctrine,” which “entails a reconstruction of copyright, a weighing of the benefits to be secured from excusing a particular use against those to be secured from barring it[.]” and because “the doctrine is historically and technologically contingent”). I add that the doctrine, as by now should be apparent, is *contextually* contingent: whether a use is fair depends on when, how, and under what circumstances it is used. Even publishers acknowledge that “the whole subject [of fair use] is . . . confusing,” preventing any firm rules; “no consensus exists among the publishers surveyed about fair use.” Mortimer D. Schwartz & John C. Hogan, *Copyright Law and the Academic Community: Issues Affecting Teachers, Researchers, Students, and Libraries*, 17 U.C. DAVIS L. REV. 1147, 1176 (1984). Schwartz and Hogan made this observation based on the results of a survey submitted to “commercial publishers, university presses, scholarly and scientific journals” inquiring about word count in determining fair use. *Id.* at 1163.

II. SO IT'S BROKEN, NOW LET'S FIX IT: EXPLORING ALTERNATIVES TO THE CURRENT JUDICIAL ANALYSIS OF EDUCATIONAL FAIR USE

The search for a new model of educational fair use is driven by the doctrine's uncertainty and the failure of the Guidelines, which are neither calibrated to the necessities of teaching nor based on the law. To what extent educational uses of copyrighted materials should be "free" is a matter of debate.²²⁴ One scholar has framed the debate over access to copyrighted works for educational purposes in terms of morality and distributive justice.²²⁵ Others have rightly noted that educational fair uses have far-reaching effects—on students, teachers, education, and society as a whole.²²⁶

One author has downplayed the benefit of educational fair use, claiming that it is favored because many people feel, intuitively,

²²⁴ Perhaps this difference of opinion centers on divergent cultural perspectives, akin to those articulated by Professor Lawrence Lessig in *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (Penguin Press 2008).

²²⁵ See Margaret Chon, *Intellectual Property "From Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 818–19, 836–37 (2007) (noting that, "[f]rom a distributive justice standpoint, fair use is a choice in favor of access to a knowledge good that recognizes socially beneficial uses that may not always be better internalized by the rights holder" and, further, educational fair use is markedly different from other fair uses because of its "positive spillover effect on society as a whole").

²²⁶ Kasunic, *supra* note 7, at 290–91. Contextualizing the effects on students, teachers and society, Goldstein notes that

[t]he value that a schoolteacher personally derives from photocopying a magazine article for his class may be lower than a bargain with the copyright owner would require. But if the benefits to be received by his students—and, though more distant, by society from having well-informed citizens—could somehow be measured, taxed, collected, and distributed, the aggregate could well exceed what the copyright owner would require.

Goldstein, *supra* note 185, at 137–38; see also Chon, *supra* note 225, at 837; Gordon, *supra* note 185, at 1630 (noting that markets may not work in education because "teaching and scholarship may yield significant 'external benefits,'" because "all of society benefits from having an educated citizenry and from advances in knowledge, yet teacher salaries and revenues from scholarly articles are arguably smaller than such benefit would warrant"; and because, "[w]hen a defendant's works yield such 'external benefits,' the market cannot be relied upon as a mechanism for facilitating socially desirable transactions").

that educational works should be free to use.²²⁷ She has argued that educators have used rhetoric to reinforce this misguided claim.²²⁸ “Fair use,” she and others commonly claim, is a “privilege,” not a right.²²⁹ Although the author is partially correct to assert that “neither traditional nor modern copyright cases fully recognize an educational, status-based exemption to intellectual property rights,”²³⁰ her characterization of “fair use” as a privilege is wrong. A copyright itself is a privilege; it is a gift of positive law.²³¹ Fair use, then, should be seen as just as much a right as the owner’s copyright itself.²³²

²²⁷ See Aull, *supra* note 196, at 576.

²²⁸ See *id.* at 580–81.

²²⁹ *Id.* at 582; see also Parchomovsky & Goldman, *supra* note 199, at 1521 (agreeing with the view that copyright gives the author rights and fair use is merely a “Hohfeldian privilege” (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913))). I argue *infra* note 232 that the copyright and the fair use doctrine represent competing rights (or privileges), and at least one court has endorsed such a view. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001) (“I believe that fair use should be considered an affirmative *right* under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright.” (citing *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996))). Just to give a preview, a copyright owner has a right to copy its protected expression—which implies, in “Hohfeldian terms,” that the user has a “correlative duty” not to copy the protected expression. Hohfeld, *supra*, at 31 (“Recognizing, as we must, the very broad and indiscriminate use of the term, ‘right,’ what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. That clue lies in the correlative ‘duty,’ for it is certain that even those who use the word and the conception ‘right’ in the broadest possible way are accustomed to thinking of ‘duty’ as the invariable correlative.”). In other words, the right to copy imposes a correlative duty on the unauthorized user not to copy. But a similar statement can be made of fair use when conceived as a “right”: the right to copy (or access) a protected expression imposes a correlative duty on the copyright owner not to interfere with that copying (or accessing). This is precisely the basis from which the fair use model developed in Part III.B works. In this way, I fundamentally disagree with David R. Johnstone’s analysis in *Debunking Fair Use Rights and Copyduty Under U.S. Copyright Law*, 52 J. COPYRIGHT SOC’Y U.S.A. 345, 368–70 (2005).

²³⁰ Aull, *supra* note 196, at 579. *But see* 17 U.S.C. § 107 (2006) (expressly stating that fair use includes “teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright”); *id.* § 110 (delineating status-based exemptions from infringement for certain educational uses of materials).

²³¹ See Tom W. Bell, *Copyright as Intellectual Property Privilege*, 58 SYRACUSE L. REV. 523, 529–31 (2008) (describing copyright as “[a] statutory exception to common law rights and obligations that grants special powers and immunities to copyright holders,” and rejecting the characterization of copyright as Hohfeldian property); *id.* at

535 (“Even as a matter of positive law, the [Copyright] Act’s protections provide copyright holders with only limited use rights. Copyright holders must forbear not only unauthorized uses of their works, but even unauthorized uses that profit others.”); *see also* 17 U.S.C. § 110; David A. Simon, *In Search of (Maintaining) the Truth: The Use of Copyright Law by Religious Organizations*, 16 MICH. TELECOMM. & TECH. L. REV. (forthcoming 2010) (manuscript at 41–50, on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465203 (abstract).

²³² Perhaps the copyright and the fair use doctrine should be seen as “dual rights” or “dual privileges”—and I think that is how they are conceived. That conception is visible in the way a fair use analysis is conducted: judges attempt to balance the copyright owner’s interest against the public’s interest. *Cf.* Bohannon, *supra* note 188, at 985–87 (arguing that the balancing approach—where courts weigh the interests of the copyright owner against the public—is wrongheaded). Darren Hudson Hick makes a cogent argument that fair use cannot possibly be a right—and therefore must be conceived of as a privilege—in his article, *Mystery and Misdirection: Some Problems with Fair Use and Users’ Rights*, 56 J. COPYRIGHT SOC’Y U.S.A. 485, 491–92 (2009). Essentially, Hick claims that describing fair use as a right means that a non-copyright owner would have the *right* to use, and possibly access, an author’s unpublished work. *See id.* at 492–93. He claims that is absurd, and that, even if we describe fair use as a right as applied only to published works, this description fails. *See id.* at 493–95.

Hick, however, misconstrues the nature of the fair use right. The principle of fair use, like the principle of copyright ownership, derives from the copyright law itself. Copyright law, in turn, is based on creating incentives for authors for the public’s benefit. *See* U.S. CONST. art. I, § 8, cl. 8. The author’s “right” to his work is not a natural one—it is a statutory grant designed to encourage creation. *See* Bell, *supra* note 231, at 529–31.

To that end, Hick’s statement about unpublished works assumes too much; it implies that the author *does* have a right to that work, Hick, *supra*, at 493, perhaps even a *moral* right, which, of course, the author does not. *But see* 17 U.S.C. § 106A (providing rights of attribution and integrity to authors of a “work of visual art”). The author’s “rights,” however one defines them, are based on the incentive theory of copyright. *See, e.g.*, Bohannon, *supra* note 188, at 983. In effect, they are privileges granted to the author. Fair use “rights” are based on the public interest and the recognition that copyright ownership does not mean *absolute and exclusive ownership*. Fair use is a privilege or right in the same sense as the copyright itself. Thus, it is plausible to conceive of both the copyright and fair use as competing rights or privileges.

Hick comments that “it is difficult to understand how granting one group (authors) a right thus gives parallel rights to another group (users).” Hicks, *supra*, at 494. I am not sure where the difficulty lies. The Copyright Act grants authors rights (or privileges) in their work, and it also grants users the right (or privilege) to fairly use those works without the permission of the copyright owner. Thus, it is not a matter of granting to a class of individuals a right that somehow, concomitantly but without explanation, births to another class a different and conflicting right. It is a matter of the Copyright Act granting rights to both users and owners based on two different aspects of the same underlying theory. In any case, all of copyright law is, in effect, a privilege. (Note that fair use is explicitly categorized as neither a right nor a privilege by the text of 17 U.S.C. § 107.)

This Article rejects the fair use-as-a-privilege view,²³³ and, beyond that, it accepts the contention that educational fair use is different from other kinds of fair uses given its nature, purpose, and effect. This view works from the fundamental premise that, in education, the non-use of a work can be more detrimental to society than a use would be to the copyright owner.²³⁴ Because educational uses differ from all other uses, but not all educational uses are “fair,” the courts have coped by adopting the Classroom Guidelines.²³⁵ This mistake has led to the problems identified in Part I;²³⁶ principally, creating legal uncertainty for educators who wish to make copies or otherwise invoke fair use for educational purposes. Scholars have recognized this uncertainty in education: for example, Professor Pamela Samuelson, who has argued that fair use is more predictable than many would like to believe,²³⁷ has noted that, out of all the different categories of fair use, “[t]he only clusters of fair use cases in which it is quite difficult to predict whether uses are likely to be fair is in the educational and research use clusters.”²³⁸

In attempting to correct this uncertainty, courts have chilled fair use, diverged from the law, and impeded the mission of educators across the country.²³⁹ Authors and publishers have further pushed educational fair use in the wrong direction, emphasizing industry “clearance culture” and insisting on making

²³³ See Aull, *supra* note 196, at 601; *supra* note 232 and accompanying text.

²³⁴ Kasunic, *supra* note 7, at 290–91 (“If photocopying were unavailable, educators would likely do without certain relevant works rather than demand that students purchase them. While educational photocopying certainly results in some loss to authors and publishers, this loss must be weighed against the loss to students and the educational system if works were not used by professors. Educators and students would do without information that could have benefitted [*sic*] their studies. In short, neither the public nor the copyright owner gains from the non-use of copyrighted works.”).

²³⁵ See *id.* at 280–81.

²³⁶ See *supra* Part I.C.

²³⁷ Samuelson, *supra* note 30, at 2541 (“This Article argues that fair use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns, or what this Article will call policy-relevant clusters.”).

²³⁸ *Id.* at 2542 n.28.

²³⁹ Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 429 (2007).

the Guidelines the upper limit of the law.²⁴⁰ In short, the current mechanisms governing educational fair use are malfunctioning and are on the verge of breaking.

Some have argued that such certainty can never be achieved in the realm of fair use.²⁴¹ They argue that fair use, by its very nature as a legal standard, will leave teachers grabbing smoke.²⁴² Indeed, some argue that it is our *expectation of certainty* that dooms our quest for a solution.²⁴³ They suggest that we “[a]ccept the fact that fair use analysis will always be fact intensive, and predictability always will be an elusive goal.”²⁴⁴

I reject this approach in education. To accept the current state of the law, or something similar, would be to further endorse industry custom, allowing copyright owners to “leverage the vagueness of the law,”²⁴⁵ which, in turn, would force educators farther and farther away from legitimate uses of copyrighted works. As Professor Jason Mazzone has observed, “[f]air use is free use”:²⁴⁶ it “is a use that does not require permission because it is not infringement.”²⁴⁷ We should not let the challenges of uncertainty, and the attendant browbeating publishers, bully this concept into the darkness of circular arguments about licensing.²⁴⁸

To the contrary, this challenge is taken head on by proposing a new model for educational fair use. Before reaching this new model, however, this Part explores several potential changes that scholars have proposed to render fair use more palatable.²⁴⁹ These

²⁴⁰ See Rothman, *supra* note 47, at 1911–20.

²⁴¹ Martin, *supra* note 79, at 347.

²⁴² Joseph P. Liu, *Fair Use: “Incredibly Shrinking” or Extraordinarily Expanding?*, 31 COLUM. J.L. & ARTS 571, 578 (2008).

²⁴³ See Martin, *supra* note 79, at 353, 392–93.

²⁴⁴ *Id.* at 392.

²⁴⁵ Mazzone, *supra* note 15, at 398.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 404.

²⁴⁸ See, e.g., Bohannon, *supra* note 188, at 971 (“Fair use turns primarily on whether the use causes harm to the copyright owner, but the copyright owner can nearly always argue that she suffered harm, if only because the defendant could have paid a license fee for the use being challenged.”); Gibson, *supra* note 188, at 906.

²⁴⁹ For many scholars “palatable” means copyright veers in the direction of the Constitution, instead of away from it. See Bohannon, *supra* note 188, at 980.

include changing the elements of copyright infringement,²⁵⁰ modifying the constituents of fair use or their application,²⁵¹ adopting a code of best practices to govern educators' conduct,²⁵² and creating new apparatuses to administer fair use.²⁵³ After reviewing and evaluating these choices, this Article proposes a model for fair use in education based on the framework of an administrative agency, which offers the best solution to the problems of uncertainty in the context of education.

A. *New Infringement Elements*

Recent literature has attacked copyright for straying from its Constitutional roots, advocating a refocusing or restructuring of the infringement analysis.²⁵⁴ Professor Shyamkrishna Balganesh, for example, has argued that, to properly calibrate copyright to its incentive-based design, copyright infringement should be based on the reasonable foreseeability of the copier's use at the time of creation.²⁵⁵ Balganesh's theory is premised on the idea that copyright incentives should play a role in the infringement analysis; this inclusion limits the "windfall" a copyright owner may receive when it reaps benefits from uses of the copyrighted material that were unforeseen (in terms of their form or purpose) at the time of the work's creation.²⁵⁶ To accomplish this goal, Balganesh proposes that "foreseeable copying" should "operate as a third element in the determination of copying": in addition to proving valid ownership and copying, the plaintiff would have to

²⁵⁰ See *infra* Part II.A.

²⁵¹ See *infra* Part II.B.1–2.

²⁵² See *infra* Part II.B.3.

²⁵³ See *infra* Part II.B.4.

²⁵⁴ See Bohannon, *supra* note 188, at 980.

²⁵⁵ See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1581–89, 1603–25 (2009) (detailing the courts' failure to implement copyright law's incentive structure when deciding doctrinal issues, including fair use, and describing a new model of fair use based on foreseeability, which better addresses this goal).

²⁵⁶ *Id.* at 1571. Professor Justin Hughes correctly points out that Balganesh is not advocating "windfall profits from unexpected hits be curtailed because such proceeds are reasonably unforeseen." Justin Hughes, *Copyright and Its Rewards, Foreseen and Unforeseen*, 122 HARV. L. REV. F. 81, 82 (2009). He notes that Balganesh avoids this by "defin[ing] financial returns as 'unforeseen' . . . in terms of purpose or technology." *Id.*

prove that “the defendant’s use (that is, copying) of the protected work was foreseeable to the plaintiff—in form and purpose—when the work was created.”²⁵⁷ This objective theory²⁵⁸ relieves fair use of its duty to discern which uses are “transformative” enough to render a use non-infringing.²⁵⁹

Though it does have difficulties,²⁶⁰ Balganesch’s proposal is an insightful and well-reasoned one. Applying it to educational uses of copyrighted works, however, shows that it is no substitute for a fair use inquiry.²⁶¹ Nearly all educational uses will infringe under

²⁵⁷ Balganesch, *supra* note 255, at 1605 (emphasis omitted). Under this test, the law would mirror that of the “eggshell plaintiff” in tort. *Id.* As a result, “it should matter little to the foreseeability determination that the defendant copied the entire book, or made a million copies of it, rather than a few.” *Id.* Hughes has responded that this proposal has structural flaws, especially in light of express Congressional language that contemplates copyright persist in unforeseen technologies. Hughes, *supra* note 256, at 87–88.

²⁵⁸ Balganesch’s theory is based on objective foreseeability. Balganesch, *supra* note 255, at 1611 (“It is worth emphasizing that even though it may appear as if the foreseeability inquiry is one of subjective intent—that is, whether one or both parties actually expected the grant to cover a use—in reality, the determination is always objective.”). This standard would ascribe certain baseline characteristics to the plaintiff-creator. *See id.* at 1611–13 (“Such a standard would presume creators are, at a minimum, *informed*—in the sense that the creator knows of the different mediums in existence in which the work can be employed—and *rational*—in that the creator intends to either directly or indirectly control the markets for those different mediums.” (emphasis added)).

²⁵⁹ *Id.* at 1606–07 (“Under current doctrine, questions of this nature[, i.e., those involving transformativeness,] are relegated to the fair use inquiry. Given that fair use is an affirmative defense, the burden then falls to the defendant to show how his actions (of copying) were not harmful to the plaintiff. It places the entire focus on the defendant, glossing over the uses that the plaintiff might have legitimately expected to control *in creating the work*.” (emphasis added) (footnote omitted)).

²⁶⁰ Wendy Gordon has noted the merit in Balganesch’s view while concomitantly criticizing it in several respects. *See* Wendy Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. F. 62, 65–66, 72, 74–80 (2009) (criticizing Balganesch’s theory of foreseeability, supplementing it to protect authors from “new technologies that cannibalize[d] their existing markets,” and discussing the harm-benefit distinction, which teaches us that “an owner will respond less readily to opportunities to maximize the beneficial use of her property than she will to opportunities for avoiding harms to it”).

²⁶¹ Balganesch does not argue that his infringement analysis should supplant fair use, and I do not seek to attribute that view to him here. He does mention, however, that his proposal would move some fair use questions into the infringement analysis. Balganesch, *supra* note 255, at 1606. Hughes argues that part of Balganesch’s proposal actually transplants the fourth fair use factor into the infringement analysis. Hughes, *supra* note 256, at 90–91. While Balganesch’s inclusion of “purpose” into the foreseeability calculus makes his proposal different from the market effect—which considers only technology—

this proposal, especially when teachers are making direct copies for classroom use.²⁶² Put another way, much of teachers' infringement *is foreseeable*.²⁶³ But finding that a teacher or student has infringed copyrighted material says little about whether the use is fair. Therefore, merely re-crafting the infringement analysis does not solve the problem of educational fair use.

Most recently, Christopher Sprigman has modified Balganesch's proposal using themes from antitrust law, arguing that the "foreseeability requirement . . . will not in itself supply an administrable theory of copyright harm."²⁶⁴ This, he argues, results from the Supreme Court's approach to the Sonny Bono Copyright Term Extension Act of 1998 ("CTEA")²⁶⁵ in *Eldred v. Ashcroft*,²⁶⁶ which illustrates that "[w]hat is 'foreseeable' in any particular copyright case is uncertain and readily manipulable."²⁶⁷

Hughes argues that this proposal, coupled with the transformative inquiry in the first fair use factor, essentially is part of the current fair use inquiry. *Id.* at 91.

Though he disagrees with the reasoning on which it is based, Hughes does note a principal difference between the Balganesch proposal and these two parts of fair use:

The chief difference concerns market substitution. While the Balganesch proposal would excuse technologies and purposes that are unforeseen even when they have an adverse impact on existing and foreseen markets, in the standard analysis a new technology's adverse impact on the existing and foreseen markets would weigh strongly against fair use.

Id. at 91 (footnote omitted). To the extent that this can be read to imply that fair use's role should be diminished, this Article disagrees. Furthermore, contrary to some courts' views, *see* Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1400 (6th Cir. 1996); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1530–31 (S.D.N.Y. 1991), transformativeness *can* exist when portions of several works are copied and juxtaposed—that is the whole basis for teaching; teachers often (and rightly) use sometimes unrelated materials in conjunction with one another for pedagogical purposes.

²⁶² *See, e.g.*, Bartow, *supra* note 5, at 178 (discussing how the court in *Basic Books* erred by failing to realize "the incongruity of applying transformative use analysis to the context of course packet duplication[, the purpose of which] . . . is to expose students to a variety of viewpoints, which are arguably most pedagogically useful when unadulterated").

²⁶³ There will be some uses that are not foreseeable at the time of creation. For example, when I use clips from *South Park* in my Education Law class to illustrate the (un)acceptable methods of teaching, the use, at least in its *purpose*, is not foreseeable.

²⁶⁴ Sprigman, *supra* note 185, at 322.

²⁶⁵ Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified at 17 U.S.C. § 302 (2006)).

²⁶⁶ 537 U.S. 186 (2003) (deciding the constitutionality of the CTEA).

²⁶⁷ Sprigman, *supra* note 185, at 322.

As a result, “where the effect of the infringing conduct is ambiguous” in terms of harm,²⁶⁸ Sprigman would require the plaintiff to plead and prove (“actual or likely”)²⁶⁹ harm—here defined in terms of market failure and creation incentive²⁷⁰—as an affirmative element of his infringement case.²⁷¹

By contrast, in cases where “we know . . . [that the infringing conduct] will harm author incentives over the run of cases, . . . we should preserve copyright’s current strict liability rule,” and “perhaps . . . strengthen it by limiting the availability of the fair use defense in these cases of ‘per se’ copyright liability.”²⁷² One per se rule would presume harm for “consumptive” infringement: “infringement involving the reproduction and distribution of copies that are either exact or near enough so that they are almost certain to compete with the original work for patronage.”²⁷³ One example of this is the “reproduction and distribution of exact copies of a copyrighted song.”²⁷⁴

Sprigman’s proposal, like Balganesch’s, faces problems in the educational setting. First, his proposal involves both rules and standards, arguing for some per se rules of infringement and a rule of reason for infringing conduct that has ambiguous effects on the creation incentive.²⁷⁵ The rule-based approach does provide some certainty, but it does so in the wrong place. Under this proposal,

²⁶⁸ *Id.* at 323, 328 (noting that “in most copyright cases it is *the plaintiff* that has superior access to information about harm—harm to himself, directly, and, by extension, harm to other authors similarly situated” (emphasis added)).

²⁶⁹ *Id.* at 330.

²⁷⁰ *Id.* at 339 (“The plaintiff might seek to prove, for instance, that there is significant cross-elasticity of demand between the original and the derivative, and therefore allowing unauthorized reproduction and distribution of the derivative will in fact divert enough of the sales that the original author might otherwise have enjoyed that the court is able reasonably to conclude that the loss, if assessed *ex ante*, would have affected the author’s incentive to create.”).

²⁷¹ *Id.* at 330 (“Employing this liability standard would present greater complexity—the plaintiff’s prima facie case in every rule of reason infringement action would include not just proof of infringing conduct, but an assessment of whether harm is likely.”).

²⁷² *Id.* at 323.

²⁷³ *Id.* at 335. Sprigman does provide several caveats to this approach, but none of them negate the points made *infra*.

²⁷⁴ *Id.*

²⁷⁵ *See id.* at 324–38.

“consumptive” uses are per se infringing.²⁷⁶ That means that a large amount of a teacher’s uses will be infringing. Furthermore, like Balganesch’s proposal, it focuses on changing the infringement analysis and therefore does little with fair use.²⁷⁷ Thus, even if teaching uses were somehow taken out of the per se category of infringement, teachers would still face the problem of fair use: if the defendant managed to show some harm, the fair use inquiry would be tainted by this first-order assumption.²⁷⁸

B. *Modifying the Fair Use Analysis*

Because modifications to the infringement cause of action will not suffice to accommodate educational fair use, a modification to the fair use analysis is the next logical place to look for a solution. Scholars already have labored in this area, proposing changes to the fair use inquiry.²⁷⁹ Some of these proposals have been directed at refocusing the fair use inquiry while others have set out to redefine it.²⁸⁰ These approaches follow one of four patterns: the implementation of burden-shifting;²⁸¹ the re-conceptualization or modified application of the fair use factors;²⁸² the use of a code of best practices; and the use of a new entity to determine fair uses.²⁸³

1. Burden-Shifting Approach

In a paradigm similar to Balganesch, Professor Christina Bohannon has advocated incorporating foreseeability and harm into the fair use analysis.²⁸⁴ This approach to fair use would require “courts . . . [to] presume harm only where the defendant’s use usurps the copyright holder’s most foreseeable markets, or those markets which a reasonable copyright owner would have taken into account in deciding whether to create or distribute the

²⁷⁶ See *id.* at 335–36, 338–39, 342.

²⁷⁷ See *id.* at 340; see also Balganesch, *supra* note 255, at 1603–13.

²⁷⁸ See *infra* notes 303–14 and accompanying text (discussing Professor Matthew Sag’s reconceptualization of fair use).

²⁷⁹ See generally Bartow, *supra* note 5; Bohannon, *supra* note 188, at 184.

²⁸⁰ See generally Balganesch, *supra* note 255; Bohannon, *supra* note 188.

²⁸¹ See *infra* Part II.B.1.

²⁸² See *infra* Part II.B.2.

²⁸³ See *infra* Part II.B.4.

²⁸⁴ See Bohannon, *supra* note 188, at 987–1002.

copyrighted work.”²⁸⁵ She argues that courts, when examining fair use, actually have used some variant of this harm formulation.²⁸⁶

This approach faces several difficulties. First, it over-protects users, even in education. Her model would restrict cognizable harm to only a use that “*usurps* the copyright holder’s *most foreseeable* markets, *or* those markets which a reasonable copyright owner would have *taken into account* in deciding whether to create or distribute the copyrighted work.”²⁸⁷ That bifurcated approach gives unduly broad protection to users. The “usurpation” requirement necessarily excludes cases where a use does not usurp, but instead (substantially) dilutes, the most foreseeable market. In education, this would protect an author only if teachers’ photocopying, for example, took the place of the copyrighted work. That is not likely to happen, even if several school districts photocopied an entire fiction novel for every eighth-grade class. This type of copying, however, is unfair.

The second requirement, which can be satisfied in two ways—the most foreseeable market or the market reasonably factored²⁸⁸—also has backwards effects in education, exempting from infringement questionable uses. Assuming market usurpation, would every author who pens a novel, for example, “reasonably take into account”²⁸⁹ the fact that their work might be used, in whole or in part, in classrooms? If so, that assumes that every author *reasonably* thinks that (i) her work is of a certain quality and (ii) likely will yield the author profit from its use in a classroom. Those are not *reasonable* assumptions as applied to the objective, ordinary author;²⁹⁰ thus, Bohannan’s proposal would exempt from copyright infringement nearly all fiction books used in a classroom setting.

²⁸⁵ *Id.* at 989. I will refer to these market requirements as the “most foreseeable market” and the “market reasonably factored.”

²⁸⁶ *See id.* at 1002–31.

²⁸⁷ *Id.* at 989 (emphasis added).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ If these are reasonable assumptions for an author to make, nearly all uses of his or her work will be presumptively unfair.

Second, this approach over-protects authors: if the copyright owner proves usurpation plus the existence of the most foreseeable market or the market reasonably factored, harm is *presumed*.²⁹¹ After such a showing, the burden would shift to the defendant to show that no harm occurred.²⁹² But when the burden shifts, the defendant's fate already will be determined because it likely will have no empirical data to the contrary.²⁹³ Why is this a problem? If harm is found (by usurpation of either the most foreseeable markets or the markets reasonably factored) in education, it is rare that the school will have any evidence whatsoever of market effects. Thus, it will not be able to meet its burden of showing no harm. Furthermore, using the fair use factors at this point will be less effective because, as Professor Matthew Sag points out, their use depends on the first-order presumption of harm.²⁹⁴

Finally, and most importantly, this model does little to create certainty for educators, which has been the primary problem with the fair use inquiry. Instead of implementing firm rules, Bohannon introduces a different type of standard which focuses on (at least as) amorphous legal concepts (as the fair use factors).²⁹⁵ Under this approach, in addition to looking at their own uses of the copyrighted works, teachers and lawyers will begin guessing whether that educational use is a type the author reasonably factored into their decision to create the work. Further uncertainty is introduced when Bohannon suggests that courts should consider how a defendant's use can increase sales.²⁹⁶ How, for instance,

²⁹¹ See Bohannon, *supra* note 188, at 1028.

²⁹² *Id.*

²⁹³ *See id.*

²⁹⁴ See Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 395 (2005).

²⁹⁵ See Bohannon, *supra* note 188, at 988–90.

²⁹⁶ See Bohannon, *supra* note 188, at 1028–30. Although evidence of increased sales can be obtained, litigants must wait to do so until *after* the infringing work is produced. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1274–75 (11th Cir. 2001) (noting that the evidence of “relevant market harm” was limited “due to the preliminary injunction status of the case”). In cases of injunctions, the court would be speculating as to whether the work would increase or decrease sales—and that approach does not seem to find support in Bohannon's proposal, which at times seems to require proof of actual harm. See, e.g., Bohannon, *supra* note 188, at 1015 (discussing *MDS* and stating that “[t]he case should have been remanded for fact findings on this issue so that harm could be determined”).

can Generic School determine whether *its* use will have a positive effect on the sale of the copyrighted work? This new inquiry, while valuable for the fair use inquiry generally, lacks the clarifying mechanism or quality that educators so insatiably covet.

2. Re-Conceptualization or Modified Application

Beyond Bohannan's approach, other tactics, such as a retooling of fair use, also have been proposed. Professor Joseph P. Liu has suggested that the four fair use factors be reduced to two; retaining only the purpose and character of the use and the impact of the use on the market.²⁹⁷ These two factors would be balanced directly against one another,²⁹⁸ with courts "look[ing] at whether a work is non-commercial, whether it is transformative, and more generally, whether the use serves a positive social purpose" and comparing that purpose to "the potential for the use to harm" the current and future market(s) for the work.²⁹⁹

Liu's thought experiment may create more certainty, but it does so in the wrong direction. Depending on how much weight each sub-factor is given, the results will likely come out against most educational fair uses. This results from eliminating two important factors for educational uses: the nature of the copyrighted work, and the amount and substantiality of the portion used.³⁰⁰ Many of the works used by teachers are factual in nature, and the amount of the work used may be incredibly small or at least not significant. When, for example, a teacher copies portions of a history textbook or several sections of a long article and uses them in class, the nature of the work (factual) and the amount used (e.g., two chapters) should be considered.

Furthermore, the sub-factor analysis shows that two factors do not greatly reduce uncertainty; in reality, courts are applying various factors.³⁰¹ This approach probably would not produce

²⁹⁷ Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 572 (2008) [hereinafter Liu, *Two-Factor Fair Use*].

²⁹⁸ *Id.* at 578.

²⁹⁹ *Id.*

³⁰⁰ 17 U.S.C. § 107 (2006); Liu, *Two-Factor Fair Use*, *supra* note 297, at 572.

³⁰¹ *See, e.g.*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1267–68 (11th Cir. 2001) (the court used several factors to determine the outcome of the case).

outcomes substantially different than the current cases dealing with educational fair uses. Furthermore, it leaves the status of the Guidelines intact, and focuses exclusively on two factors that have little relevance, in their traditional sense, in educational fair use (market harm and transformativeness) while excluding the two factors that have the most relevance in education (nature of the work and the amount and substantiality of the portion used).³⁰²

Also working within fair use's confines, Professor Matthew Sag has argued for a re-conceptualization of the factors and how courts apply them.³⁰³ First, Sag argues that "fair use is a structural tool that allows copyright to adapt to changing circumstances," and, as a result, it "must remain a somewhat open-ended standard developed by the judiciary through . . . common law adjudication."³⁰⁴ The revisions to fair use that Sag proposes seek to change the current judicial practice of "treating the factors as outcome-determinative as opposed to question-framing, [which] masks *a priori* assumptions and distorts judicial reasoning."³⁰⁵ Based on this idea—"that the factors . . . provide [only] a framework for their analysis by raising certain second[-]order questions"—Sag argued that courts should consider three first-order assumptions when deciding fair use.³⁰⁶

First, courts should consider the idea/expression dichotomy, which is linked to the core notion about what should be copyrightable.³⁰⁷ Second, courts should consider consumer autonomy: this idea, derived from the first-sale doctrine, states that consumers have a right to manipulate copyrighted works once purchased.³⁰⁸ Third, the principle of medium neutrality, which

³⁰² Although "factors two and three may be of doubtful relevance in all cases," Liu, *Two-Factor Fair Use*, *supra* note 297, at 577, they are important in educational fair use cases. This is true even if "courts . . . have repeatedly recognized the limited relevance of factors two and three." *Id.* The objection I raise here is not—as Liu predicts it might be—based on reductionism. *Id.* at 584. It is not paucity or simplicity of defense this objection fears; it is the lack of consideration for educational fair uses and their express statutory mooring.

³⁰³ See Sag, *supra* note 294, at 382–85.

³⁰⁴ *Id.* at 384.

³⁰⁵ *Id.* at 386.

³⁰⁶ *Id.* at 395.

³⁰⁷ See *id.* at 425–27.

³⁰⁸ See *id.* at 428–32.

states that the fairness of a use does not change depending on the medium of expression,³⁰⁹ should inform courts' fair use determinations.³¹⁰

Sag's proposed first-order assumptions that would guide the fair use analysis, while well reasoned, do little to inform courts of what constitutes educational fair use. Part of this problem results from his proposal's exclusion of statutorily-preferred uses—such as teaching, which includes making multiple copies for classroom use.³¹¹ The principles of idea/expression and medium neutrality have less obvious application to many educational uses of copyrighted works, where the mere fact that the use is educational is the central purpose for deeming it fair. 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.³¹² Thus, a first-order principle that focuses on the idea/expression dichotomy will not inform an analysis of whether photocopying several articles for students is fair use—the expression is copied.³¹³

Consumer autonomy also does not change the educational fair use calculus: copyright owners' inability to control the consumer uses of the copyrighted material (and consumers' attendant freedom to use the work) says nothing about educational

³⁰⁹ *Id.* at 432 (“Medium neutrality is the principle that a use should not receive less protection, simply by virtue of being expressed in a different medium.”).

³¹⁰ *See id.* at 432–34.

³¹¹ 17 U.S.C. § 107 (2006).

³¹² *Id.*

³¹³ The idea/expression first-order assumption may be beneficial for judicial analysis. If, for example, a teacher photocopies 25% of five articles for her students (one copy per student), the court might examine more closely both whether the copyrighted work falls within copyright's “core” protective purposes, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (examining the second fair use factor), and whether the teacher appropriated the “heart” of copyrighted work's protected expression. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985) (concluding that the court of appeals erred in overruling the district judge's finding that the defendant took “the heart of the book”). There, the court may focus on the ideas the articles portrayed, rather than the expression themselves, to determine whether a use was fair. In making such a determination, the court must be vigilant and avoid the trap of circularity to which other courts have fallen victim. *E.g.*, *Basic Books, Inc., v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991); H.R. REP. NO. 94-1476, at 69 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5682.

copying.³¹⁴ For these reasons, Sag's approach, while useful, does not apply to educational fair uses.

In addition to the modifications proposed by Liu and Sag, Professor Laura A. Heymann has proposed “refocus[ing] the [fair use] inquiry, and . . . realign[ing] it with the ultimate question the fair use doctrine asks.”³¹⁵ She attempts to do this by “tying the transformativeness inquiry to” the factor that considers the purpose and character of the use.³¹⁶ This approach also would require taking the reader's perspective to determine transformativeness, focusing on interpretation instead of intent.³¹⁷

At first glance, this approach seems better tailored to education because it would focus on the school, the teacher, or the student in determining transformativeness.³¹⁸ But Heymann notes that this perspective would not change the result reached in *Sony Corp. of America v. University City Studios, Inc.*,³¹⁹ or *American Geophysical Union v. Texaco, Inc.*³²⁰ because “[i]n neither case should the transformative inquiry be dispositive or relevant—both cases are predominately about displacing the copy in which the work is instantiated and, thus, are both better analyzed with respect to other fair use factors.”³²¹ If that is the case, then numerous types of copying done by teachers will be analyzed under the current fair use factors. We therefore arrive back where we started: staring the uncertainty of the factors and the Guidelines square in the face.

³¹⁴ See Sag, *supra* note 294, at 429 (“The first sale doctrine combined with the absence of any ‘use’ right in copyright allow a strong degree of autonomy for consumers; copyright owners are generally unable to control the use (as opposed to copying) of their works by the public.”).

³¹⁵ Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 448 (2008).

³¹⁶ *Id.*

³¹⁷ *Id.* at 453.

³¹⁸ See *id.* (stating that the determination would be based on how a reasonable reader would interpret the use of the work).

³¹⁹ 464 U.S. 417, 456 (1984) (finding that “time-shifting”—taping television programs, using a video cassette recorder, to watch them later—was transformative and constituted fair use).

³²⁰ 60 F.3d 913, 923 (2d Cir. 1994) (“Texaco’s making of copies cannot properly be regarded as a transformative use of the copyrighted material.”).

³²¹ Heymann, *supra* note 315, at 457.

Professor Glynn Lunney has, after reexamining *Sony*, argued that the Supreme Court articulated a “presumption in favor of fair use and a broad conception of the public interest that fair use protects.”³²² Working from that starting point, Lunney claims that “transformativeness” is not controlling or even entitled to much weight; the crux of the fair use analysis turns on the evidence supplied by the copyright owner: once the defendant invokes fair use, the plaintiff bears the burden of showing, “by [a] preponderance of the evidence, that the net benefit to society will be greater if a use is prohibited.”³²³ In other words, the copyright owner must show “concrete evidence of ‘a demonstrable effect upon the potential market for, or the value of, the copyrighted work’” for the use to be infringing.³²⁴ In Lunney’s “ideal world,” where courts had “perfect information, [they] could resolve the fair use issue by determining precisely the social value of additional authorship resulting from prohibiting a use and then comparing that value to the social value of allowing the use to continue.”³²⁵

While it has been criticized as mischaracterizing the judicial treatment of fair use,³²⁶ Lunney’s approach moves us in the right direction. Requiring the copyright owner to prove that the harm outweighs societal benefits captures some educational uses. At the very least, it would force courts to consider how educational uses can be beneficial to society without being transformative and, therefore, that educational uses can be fair without satisfying the market harm approach.³²⁷

³²² Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 977 (2002).

³²³ *Id.* at 977.

³²⁴ *Id.* at 1014 (quoting *Sony*, 464 U.S. at 450).

³²⁵ *Id.* at 998–99.

³²⁶ See Bohannon, *supra* note 188, at 985–87.

³²⁷ Professor Lunney briefly explores this type of analysis in his discussion of how the market-failure approach did not appropriately address the societal concerns in *Texaco*. See Lunney, *supra* note 322, at 1021–22. He points out that, in *Texaco*, the heightened costs for the research institution—which would have to increase its subscriptions to access research materials—either would be internalized by the company (in which case it detracts from their ability to do research) or would be passed along to consumers (in which case it would raise the cost of access to new technology and socially beneficial products). *Id.* (“To cover the fixed costs of innovations, patents, secrecy, or other means of obtaining a lead-time advantage must offer research institutions some market power in the exploitation of their discoveries in order for their research to prove profitable. As a

Unfortunately, this scheme—either in the abstract or as applied generally across fair use categories—does not solve the problems educators face. Like with many of the other approaches discussed, teachers still cannot predict which uses will cause market harm³²⁸ and which uses will have societal benefits that outweigh the additional authorship produced from prohibiting a use.³²⁹ Consider a teacher who copies several songs, poems, and pieces of various articles. It is not feasible to suggest that any reliable data on the harm of this use would exist, or that a court could properly weigh the harm and benefit of the use. In this sense, the unpredictability

result, while research institutions may be able to pass some of these licensing fees along to consumers, part of the fees will come out of the rents the research institutions would otherwise earn on their discoveries. As these rents would otherwise go towards the costs of the research itself, using some part of these rents to pay licensing fees for copies of scientific journal articles means that research institutions will have to cut expenses elsewhere. As a practical matter, this means that institutions like Texaco Research will have to reduce their expenditures on research personnel, supplies, or facilities in order to come up with the licensing fees that the American Geophysical majority made possible. The American Geophysical decision thus increased payments to publishers, but such increased payments will come at the expense of the authors and their research.”). Applying this observation to education, the costs would be borne by the taxpayers, no matter how they are defined (e.g., school district, students, teachers), which diverts resources away from teaching and student education. If “[i]ncreasing the revenue of publishers at the expense of the authors and their underlying research scarcely seems likely ‘[t]o promote the Progress of Science,’ as the Constitution requires,” *id.* at 1022 (quoting U.S. CONST. art. I, § 8, cl. 8), it is hard to fathom that doing the same thing to educators would command a different conclusion.

³²⁸ Bohannan may be overzealous in her criticism of Lunney’s approach as “both under- and over-protect[ing]” copyright because it does not “pay[] sufficient attention to proof of harm.” Bohannan, *supra* note 188, at 986. Bohannan claims this approach over-protects because it is “virtually always possible to imagine some abstract social value associated with a defendant’s use of copyrighted material.” *Id.* It under-protects, she says, because it assumes all uses cause harm, which they do not. *Id.* at 986–87. But these are problems with the current fair use factors, as courts can easily over- or under-protect a work depending on what kind of value-judgments they make about the defendant’s use and the fair use factors. Additionally, Lunney’s approach is not relegated to abstract values. He does retain a focus on harm, emphasizing that to discern the balance, courts should examine whether the use reduces “revenue associated with the copyrighted work; and, if so, how, if at all, that reduction would likely affect the production of copyrighted works.” Lunney, *supra* note 322, at 999.

³²⁹ Bohannan criticizes Lunney’s approach for its abstractness and impracticality, as well. Bohannan, *supra* note 188, at 986 (“[T]he balancing approach leaves courts too much discretion, producing incorrect and inconsistent results. When dealing with uses of copyrighted material, there is likely to be substantial disagreement over which values are at stake and how they should be measured.”).

and impracticality of Lunney's approach make it unsuitable for educational fair use.

The proposals, however, do not cease there. Professor Ann Bartow has suggested a "judicial resuscitation" where the courts would modify the four fair use factors to deal explicitly with educational uses.³³⁰ As to the purpose and character of the secondary use, "there should be a STRONG presumption in favor of educational use," which could be rebutted "only if the 'non-educational' work is lengthy and available for purchase at a reasonable price, and a substantial portion, perhaps one third or more, of the work is reproduced, therefore effecting an unequivocal market substitution."³³¹ With respect to the nature of the copyrighted work, "reasonable permission fees should be permissible only if the work" is aimed at the educational market, is in print, and "there is an actual, demonstrable market substitution problem."³³² The amount and substantiality inquiry, too, would be modified.³³³ It would build off the second factor and require per page fees if the work is aimed at the educational market; but substantiality would not be used to assess this factor.³³⁴ Finally, Bartow would require publishers to prove lost sales or profits instead of relying on circular licensing arguments.³³⁵

Bartow's approach, like Lunney's, focuses more on providing greater movement for users within the doctrine of fair use.³³⁶ Her presumption of educational uses as fair addresses some of educators' concerns by shifting the burden of proof.³³⁷

³³⁰ Bartow, *supra* note 5, at 227.

³³¹ *Id.* at 227–28.

³³² *Id.* at 228.

³³³ *See id.*

³³⁴ *Id.*

³³⁵ *See id.* at 228–29.

³³⁶ *See* Bartow, *supra* note 5, at 151 (stating that the "scope of educational fair use has been dramatically compressed by judges who ignore the external benefits of fair use"); *see also* Lunney, *supra* note 322, at 977 ("*Sony* stands not for the proposition that fair use is justified only in those exceptional cases where a licensing scheme or some other market mechanism is impractical. Rather, *Sony* stands for the recognition of fair use as a central and vital arbiter between two competing public interests.").

³³⁷ *See generally* Bartow, *supra* note 5, at 150 (stating that fair use "is the 'most vital piece of the law that fulfills copyright's constitutional mandate'" (quoting Ann Shumelda

Additionally, the requirement of licensing only for those works that are aimed at the educational market makes good sense: because the creation of those works depends on revenues from the educational market, their use in education should come at a cost.³³⁸ Despite these benefits, none of them provides the amount of certainty educators desire. Under this proposal, although educational uses are supposed to be presumed fair, they may not be; and that determination is not one that educators can make. Put another way, given the courts' history with educational fair use, it is not clear how strong a presumption this would be in practice. Additionally, a strong presumption is an amorphous standard. Bartow speculates as to the limits of the presumption, but the demarcation point—where a use is rebutted because it is too substantial, even for education—is likely to be a fact-sensitive inquiry. In that sense, the fair use factors still provide the general framework of analysis, which means that, while there is less uncertainty, it still exists in great quantities.³³⁹

Professor Gideon Parchomovsky and Kevin A. Goldman have taken a different approach. They propose creating “fair use harbors”: Congress, they argue, should “enact[] clearly defined, nonexclusive fair use safe harbors.”³⁴⁰ Although uses falling within the harbors “would be considered per se fair[,]...

Okerson, *Buy or Lease? Two Models for Scholarly Information at the End (or the Beginning) of an Era*, DAEDALUS, Fall 1996, at 55, 63)).

³³⁸ It is a different and interesting question whether educators could use such works for a purpose other than the one which the creator contemplated. If, for example, a teacher wrote a critical essay of consumable workbooks by using some portions of the workbooks, and distributed the essay to students studying English, that use probably should not be unfair. *See, e.g.*, *Chi. Sch. Reform Bd. of Trs. v. Substance, Inc.*, 79 F. Supp. 2d 919, 921–22, 941 (N.D. Ill. 2000) (holding a teacher liable for copyright infringement where the teacher, who also was the editor of a newspaper, reproduced copies of entire standardized tests in the newspaper and criticized them therein). The same could be said of an art teacher who makes a collage from copyrighted materials intended for science classes (e.g., diagrams of covalent bonds, graphs, etc.). For it to be feasible, modifications to this licensing approach would have to be made.

³³⁹ Liu, *Two-Factor Fair Use*, *supra* note 297, at 572.

³⁴⁰ Parchomovsky & Goldman, *supra* note 199, at 1502. Professor Bartow also has suggested that the Guidelines might be rewritten to better accommodate educational fair use. *See* Bartow, *supra* note 5, at 225–26 (“Congress could continue to categorize educational copying within the rubric of fair use, but discard or amend the current Guidelines and promulgate educational fair use with a far wider scope.”).

[u]ses . . . fall[ing] outside of them would be analyzed under existing doctrine.”³⁴¹

In proposing this model, the authors meet several potential objections. First, they attempt to preempt the challenge that a fair use harbor will become a ceiling instead of a floor.³⁴² They specifically mention the Classroom Guidelines’³⁴³ treatment by courts as an example of this objection.³⁴⁴ According to the authors, several “important differences” exist “between the Classroom Guidelines and [their] proposed safe harbors.”³⁴⁵ First, the Classroom Guidelines “were negotiated, in effect, *not* to reflect a minimum level of utility, but rather as a sort of middle ground compromise. Given this status, it was easier for parties on all sides to fall into the trap of letting the floor become the ceiling.”³⁴⁶ That explanation, however, is not entirely convincing. Even though the Guidelines were the result of a compromise, they expressly stated that they represented the *minimum* allowable fair use;³⁴⁷ the fact that they were negotiated should not make a significant difference, as Congress enacts all laws only after negotiating and horse-trading.

Second, because they “lacked the force of law[,] . . . the Guidelines became a convenient benchmark for litigation.”³⁴⁸ This argument is more convincing³⁴⁹—courts misapplied the Guidelines, sometimes using them as a ceiling either because they used them merely to justify a conclusion already reached or

³⁴¹ Parchomovsky & Goldman, *supra* note 199, at 1502.

³⁴² *Id.* at 1524 (quoting Gibson, *supra* note 188, at 398).

³⁴³ They do note that the Classroom Guidelines were not “bright-line” safe harbors. *Id.* at 1525. Other scholars have noted that the Guidelines mix rules and standards. *E.g.*, Mazzone, *supra* note 15, at 413–27 (introducing his two Models and noting that rules or standards can be used accordingly).

³⁴⁴ Parchomovsky & Goldman, *supra* note 199, at 1525.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ Eric D. Brandfonbrener, *Fair Use and University Photocopying*: Addison-Wesley Publishing v. New York University, 19 U. MICH. J.L. REFORM 669, 686 (1986).

³⁴⁸ *Id.*

³⁴⁹ While this makes more sense, there is still at least one argument in response: if the Guidelines lacked the force of law, that provides a reason for them *not* to become “a convenient benchmark for litigation.” In other words, lawyers would rather rely on *law* to give legal advice, or file lawsuits, than they would rely on legislative history.

because they used them sloppily.³⁵⁰ In that sense, “safe harbors” with the force of law would provide more certainty for educators; they would clearly articulate *some* limit of acceptable copying.

The safe-harbor proposal would not, however, provide practical certainty: educators would have the benefit of a safe harbor, but it would be one that was designed to apply broadly to all uses of works. That does not help educational uses, which we have seen frequently use more of a work than other uses. Furthermore, failing to tailor these safe harbors to education risks that educators will retain the same fears and uncertainty as before: because they do not know and cannot ascertain how far outside the Guidelines they may venture, they will likely stay within them. In other words, the Guidelines, despite trying to increase fair use, may chill it.

Finally, the authors state that “even if the critics are absolutely correct, we still believe that *on the whole* our proposal will improve the current state of affairs.”³⁵¹ In other words, the use of this standard may harm some parties, but, overall, it will be a boon. Nevertheless, despite David Hume’s comment about the error of induction,³⁵² the best evidence of how something will work in the future is how it has worked in the past. As we have seen, and as these authors readily admit, the Classroom Guidelines have been used as a ceiling rather than a floor;³⁵³ the authors do not provide strong reasons for thinking that a law to the same effect would have contrary results.

³⁵⁰ See Parchomovsky & Goldman, *supra* note 199, at 1496, 1504.

³⁵¹ *Id.* at 1526 (emphasis added).

³⁵² See DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 17 (Forgotten Books 2008) (“Matters of fact, which are the second objects of human reason, are not ascertained in the same manner; nor is our evidence of their truth, however great, of a like nature with the foregoing. The contrary of every matter of fact is still possible; because it can never imply a contradiction, and is conceived by the mind with the same facility and distinctness, as if ever so conformable to reality. That the sun will not rise tomorrow is no less intelligible a proposition, and implies no more contradiction, than the affirmation, that it will rise. We should in vain, therefore, attempt to demonstrate its falsehood. Were it demonstratively false, it would imply a contradiction, and could never be distinctly conceived by the mind.”).

³⁵³ See Parchomovsky & Goldman, *supra* note 199, at 1525.

3. Best Practices

Although novel, reformulating fair use is not the only mechanism scholars have proposed to improve it. A recent movement, spearheaded by Professor Peter Jaszi, has proposed a solution geared toward scholars' observations—like those of Jennifer Rothman and Lawrence Lessig—that copyright has created a “clearance culture” by adopting the custom of copyright owners.³⁵⁴ The solution is a “code of best practices”:³⁵⁵ general principles of conduct educators should follow when using copyrighted materials (specifically visual media).³⁵⁶

This code of best practices is built on observations about the problems teachers face when instructing students about, and in the process using, film media.³⁵⁷ Over one hundred and fifty members

³⁵⁴ CTR. FOR SOCIAL MEDIA, AM. UNIV. SCH. OF COMM'C'N, CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION 14 (2008), http://www.centerforsocialmedia.org/files/pdf/Media_literacy.pdf [hereinafter CODE FOR MEDIA EDUCATION] (“Most ‘copyright education’ that educators and learners have encountered has been shaped by the concerns of commercial copyright holders, whose understandable concern about large-scale copyright piracy has caused them to equate any unlicensed use of copyrighted material with stealing This code of best practices, by contrast, is shaped by educators for educators and the learners they serve, with the help of legal advisors.”); see also Michael Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 396–416 (2005) (arguing that § 107 should be rewritten to reflect a standard of fairness based on social practices). See generally CTR. FOR SOCIAL MEDIA, AM. UNIV. SCH. OF COMM'C'N, STATEMENT OF BEST PRACTICES FAQ (2007), <http://www.centerforsocialmedia.org/files/pdf/faqapr07.pdf> [hereinafter FAQ].

³⁵⁵ The “code of best practices” will be referred to as the “CBP.”

³⁵⁶ CODE FOR MEDIA EDUCATION, *supra* note 354, at 9; see FAQ, *supra* note 354. There also is a code of best practices for documentary filmmaking. CTR. FOR SOCIAL MEDIA, AM. UNIV. SCH. OF COMM'C'N, DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/. Film scholars too have developed their own code of best practices. SOC'Y FOR CINEMA & MEDIA STUDIES, STATEMENT OF BEST PRACTICES FOR FAIR USE IN TEACHING FOR FILM AND MEDIA EDUCATORS (2005), <http://www.cmstudies.org/documents/SCMSBestPracticesforFairUseinTeachingFinal.pdf>.

³⁵⁷ See PETER JASZI, CTR. FOR SOCIAL MEDIA, AM. UNIV. SCH. OF COMM'C'N, COPYRIGHT, FAIR USE AND MOTION PICTURES (2007), http://www.centerforsocialmedia.org/files/pdf/fairuse_motionpictures.pdf [hereinafter PETER JASZI, COPYRIGHT AND MOTION PICTURES]. The CBP for documentary filmmakers was designed to respond to problems documentary filmmakers faced. PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOCIAL MEDIA, AM. UNIV. SCH. OF COMM'C'N, UNTOLD STORIES: CREATIVE

of various educational institutions convened ten times to create the CBP.³⁵⁸ Legal scholars subsequently reviewed the CBP prior to its adoption.³⁵⁹

While there appears to be little data on the effectiveness of the CBP in education, the CBP for documentary filmmakers has enjoyed success.³⁶⁰ Jaszi and Professor Patricia Aufderheide publicized this CBP, and gradually copyright owners began to accept its validity.³⁶¹ Even insurance companies “[that] offer errors and omissions insurance to filmmakers” came around, “offering to cover fair use claims.”³⁶²

Despite its success, the CBP has limits, particularly the one directed at media education.³⁶³ Its creators explicitly note that it “does not tell [educators and students] the limits of fair use rights.”³⁶⁴ It avoids this rigid approach and “[i]nstead . . . describes how those rights should apply in certain recurrent situations.”³⁶⁵ That means that the CBP will not cover all situations, and thus “[e]ducators’ and students’ fair use rights may . . . extend to other situations as well.”³⁶⁶

While the CBP offers practical value by providing a set of principles by which educators can act, its lack of certainty leaves us in a similar space as the Guidelines. The first principle (and attendant limitations) of CBP for media education, for example, illustrates the vagueness that would create uncertainty for educators in other situations:

CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 4 (2004), http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf.

³⁵⁸ CODE FOR MEDIA EDUCATION, *supra* note 354, at 2.

³⁵⁹ *Id.*

³⁶⁰ See CTR. FOR SOCIAL MEDIA, AM. UNIV. SCH. OF COMM’N, SUCCESS OF THE STATEMENT OF BEST PRACTICES, http://www.centerforsocialmedia.org/files/pdf/success_of_the_statement.pdf; JASZI, COPYRIGHT AND MOTION PICTURES, *supra* note 357, at 30–32; Pat Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, INTELL. PROP. TODAY, Oct. 2007, at 26, available at <http://www.centerforsocialmedia.org/files/pdf/IPTodaySuccess.pdf>.

³⁶¹ See JASZI, COPYRIGHT AND MOTION PICTURES, *supra* note 357, at 30–32.

³⁶² *Id.* at 32.

³⁶³ See CODE FOR MEDIA EDUCATION, *supra* note 354, at 1.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

PRINCIPLE: Under fair use, educators using the concepts and techniques of media literacy can choose illustrative material from the full range of copyrighted sources and make them available to learners, in class, in workshops, in informal mentoring and teaching settings, and on school-related Web sites.

LIMITATIONS: Educators should choose material that is germane to the project or topic, *using only what is necessary for the educational goal or purpose for which it is being made*. In some cases, this will mean using a clip or excerpt; in other cases, the whole work is needed. Whenever possible, educators should provide proper attribution and model citation practices that are appropriate to the form and context of use. Where illustrative material is made available in digital formats, educators should provide reasonable protection against third-party access and downloads.³⁶⁷

It is not clear how this type of principle helps teachers determine the proper amount they can use. Think back to the example given at the beginning of the Article—a teacher wants to photocopy and distribute three short chapters of a particular book. How would a principle like this one help her? Could she use less of the copyrighted work to make the same point? What if she could but the effectiveness of the message would be decreased? Could she use information in the public domain instead? These are questions without definite (or readily discernable) answers under a CBP. These broad principles do not provide the certainty educators are seeking.

Further complicating the issue is the legal status of CBPs. They are not the law—they are suggested customs that educators develop. Although they may *become* the law at some later point, for now they are just suggested principles by which to develop customs—and there is no guarantee they become *accepted*

³⁶⁷ *Id.* at 10–11 (emphasis added).

custom.³⁶⁸ Furthermore, given the dearth of case law, identifying the point at which they become de facto law—if that happens—will be difficult. More importantly, if our goal is to change the current custom or culture, the question becomes, why wait? And, for that matter, why risk it? Why risk any liability from a preemptive attack in the form of a lawsuit by publishers or copyright owners? This type of attack, if waged soon enough, could place us in constraints more restrictive than the Guidelines. The lack of legal authority, as well as this “time lag,” represent a challenge to the CBP’s approach.

Additionally, the CBP notes that “[a]lthough professional groups create such codes, no one needs to be a member of a professional group to benefit from their interpretations.”³⁶⁹ This certainly is a beneficial effect of the CBP, but it also raises the issue of *which* organizations should be charged with creating a CBP. Moreover, it highlights an important reality: as the CBP’s popularity grows, numerous groups and organizations will propose codes for various uses. In a world replete with non-organizational actors, how can teachers reliably use a particular set of codes or principles?

Certification may be one method of controlling which codes are authoritative—but then the certification institution becomes a non-binding committee on fair use. The certification decisions will represent what a small cadre of individuals think fair use should be—and this certification, at least at first, has no legal effect.³⁷⁰ There is still no certain way of discerning which codes are the “best” or the “most legal.” One would expect, not only infighting among various groups for authoritative control of the process, but also opposition from groups with opposing interests, such as publishing houses. These groups likely would create their own set

³⁶⁸ While the documentary CBP has enjoyed success, there is no guarantee that educational CBPs will have similar success. *But see* Hume, *supra* note 352, at 17.

³⁶⁹ CODE FOR MEDIA EDUCATION, *supra* note 354, at 7.

³⁷⁰ This type of situation has pushed the author in the direction of an administrative agency, which would act as this certification entity, but do so with the force of law. This also raises a question of fairness: how can we be sure that the CBP will be “fair” without any opposing voice? As the adoption of clearance culture has shown, “unfair” practices can be adopted quickly and become fair. Without any opposing viewpoints in education, there is some risk that unfair practices will become customary.

of codes. Then, if a court were faced with a lawsuit and ended up looking to “custom” to determine fair use, there likely would be numerous codes from various institutions. This discussion demonstrates that the benefits of a CBP are inversely related to the number of CBPs available.

That uncertainty again highlights the main problem with shifting the balance of “cultural power” using guidelines. Clearance culture represents the current *law*—courts apply circular licensing arguments and the Guidelines.³⁷¹ But CBPs are not law, and beyond how much practical *effect* they have—as not all CBPs will be as successful as those for documentary filmmakers—further questions remain about what *legal* authority they have. Currently, they are not the law;³⁷² and there is no reason to think that courts would consult non-judicial CBPs to *create* new federal common law.

Despite this uncertainty, some might argue *this kind of vagueness*—vagueness based on CBPs—is desirable. In this way, educators have space in which to work without having the rigidity of rules. It also provides flexibility so that, when customs change, they will still be legal. But this argument still leaves educators wanting more. As discussed above, CBPs are not current law, and their legal status remains uncertain until cases are litigated.³⁷³ Additionally, they provide no substantive guidance about what, specifically, educators can do with copyrighted works. Without specific rules about what uses are fair, educators will still be guessing as to the fairness of their uses. In other words, the CBP illustrates the need for a new solution, one that takes into account the changing fair use principles but also *ex ante* certainty for educators.

To achieve flexibility and certainty, this Article advocates a *separate* standard for educational fair use—one that is broader and more expansive than the type used for other uses.³⁷⁴ In other

³⁷¹ See Bohannon, *supra* note 188, at 971; see also Parchomovsky & Goldman, *supra* note 199, at 1505–09.

³⁷² See *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1390–91 (6th Cir. 1996).

³⁷³ See *id.*

³⁷⁴ See *infra* Part III.

words, educational fair use would apply in certain educational contexts. The CBP, however, advocates *universal* application of the fair use doctrine. The CBP for media education, for example, includes “Principle Three: Sharing Media Literacy Curriculum Materials”:

PRINCIPLE: Educators using concepts and techniques of media literacy should be able to share effective examples of teaching about media and meaning with one another, including lessons and resource materials. If curriculum developers are making sound decisions on fair use when they create their materials, then their work should be able to be seen, used, and even purchased by anyone—since fair use applies to commercial materials as well as those produced outside the marketplace model.³⁷⁵

This Article argues that this view is misguided because educational fair use is unique; it is different from other kinds of fair uses.

Section 110 of the Copyright Act illustrates this difference by exempting certain educational uses of works—i.e., those in the classroom.³⁷⁶ This exemption indicates something about educational fair use—Congress rightly thought educational fair use was different from other kinds of uses and so should be given broader scope. As a corollary, some uses of copyrighted works

³⁷⁵ CODE FOR MEDIA EDUCATION, *supra* note 354, at 11–12.

³⁷⁶ 17 U.S.C. § 110 (2006). One might think that § 110 might, then, be a good place to build a new fair use model. Why not just expand § 110 to cover situations we think are fair? There are several problems with this approach. First, § 110 is an exemption, deeming non-infringing *all uses* that fall within its ambit. But an educational fair use model must account for the reality that not all educational uses are fair—thus, expanding § 110 could not cover every use. Therefore, this approach would capture some uses, but would leave the remaining uses in the legal vagueness that currently exists. Additionally, expanding § 110 would be extremely onerous, requiring Congress to articulate specific categories of *per se* fair uses—this may quickly begin to break down into complicated rules about copying. Finally, exemptions created by Congress are difficult to enact, and, once enacted, they could not sufficiently react to changing educational circumstances. An administrative agency, as proposed *infra*, could create better rules for fair use (and exemptions where appropriate) while retaining the ability to modify these rules based on changing technologies and circumstances.

will be fair in an educational context but not in other contexts. Thus, a student may be able to create a particular movie or song using copyrighted materials for class but may not be able to distribute that work outside the educational setting.

Finally, the language of this CBP principle requires educators to make a *legal judgment*, evaluating whether “curriculum developers are making sound decisions on fair use.”³⁷⁷ This is undesirable. As we have seen, educators are not equipped to make legal judgments—and they should not be burdened with this responsibility. For all of these reasons, the CBP approach does not solve the problems of educational fair use.

4. New Entity to Decide Fair Uses

In addition to the best practices approach, others have argued for a more general solution: creating new entities to decide which uses are fair. Retaining the four fair use factors but reformulating the process of adjudication, Professor Michael W. Carroll has suggested a new apparatus to better serve the doctrine of fair use.³⁷⁸ He advocates that Congress create a “Fair Use Board,” which would be analogous to the Copyright Royalty Board,³⁷⁹ in that “the Copyright Office would have authority to adjudicate fair use petitions and, subject to judicial review, issue fair use rulings.”³⁸⁰ Fair use arbiters would issue rulings, all of which would be non-binding, that determine the fairness of a use.³⁸¹ A fairness finding would immunize the user from liability for infringement, and even if the arbiter made a finding of unfairness,

³⁷⁷ CODE FOR MEDIA EDUCATION, *supra* note 354, at 11–12.

³⁷⁸ See Carroll, *supra* note 173, at 1087.

³⁷⁹ *Id.* at 1124. The Copyright Royalty Board is explained *supra* note 45.

³⁸⁰ See Carroll, *supra* note 173, at 1090, 1123–28. Professors Mark Lemley & R. Anthony Reese have proposed a similar solution. See Mark Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1413 (2004). They suggest allowing copyright owners with the option to combat infringement over peer-to-peer (“P2P”) networks in “an administrative dispute resolution proceeding before an administrative law judge in the Copyright Office.” *Id.* This proposal, like the others described in this Part, is unworkable because, among other reasons, it does nothing to shift the burden off the educational user and retains the unpredictable fair use factors. For a more detailed explanation of why these models do not work well in educational fair use cases, see *supra* Part II.B.1–3.

³⁸¹ See Carroll, *supra* note 173, at 1126–27.

the “petitioner [would] retain[] all other defenses to copyright infringement.”³⁸² Either party could appeal the ruling to the Register of Copyrights and then to any federal circuit court.³⁸³ He notes that this is a standard-based approach, as it advocates the application of the fair use factors on a case-by-case basis.³⁸⁴

Professor David Nimmer has sketched a similar approach to the administration of fair use.³⁸⁵ This proposal, like Professor Carroll’s, would use the Copyright Office to run “an expedited, voluntary, inexpensive, non-binding procedure to obtain an impartial” fair use determination.³⁸⁶ The individual seeking to use a copyrighted work would file a petition and pay a \$1,000.00 (which can increase by an additional \$9,000.00) filing fee.³⁸⁷ A response from the opposing party and a reply from the petitioner would be allowed, and both parties would agree on an arbiter.³⁸⁸ Rulings would have no precedential effect but could be used in determining damages, remedies, and attorneys’ fees.³⁸⁹

While Carroll’s and Nimmer’s proposals are laudable, they do not alter the doctrine of fair use or its legal application. One benefit of these models would be using “[t]he threat of administrative fair use adjudication [to] redistribute the balance of bargaining power in some measure, [which] should increase the range of an aggressive copyright owner’s zone of possible agreement.”³⁹⁰ There may be some increase in users’ bargaining power, but that redistribution does not change the balance of the fair use inquiry, which retains the unruly application of the fair use factors. In other words, this model does nothing to modify *how* courts analyze fair use.

³⁸² *Id.* at 1123.

³⁸³ *Id.* at 1126–27.

³⁸⁴ *See id.* at 1123, 1128 (accepting the option that “reduce[s] the costs of obtaining a fair use determination ex ante under the current legal standard”). Carroll’s approach will be called “micro-adjudication.”

³⁸⁵ *See* David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 11–15 (2006).

³⁸⁶ *Id.* at 11.

³⁸⁷ *See id.* at 12–14.

³⁸⁸ *See id.* at 13–14.

³⁸⁹ *See id.* at 14–15.

³⁹⁰ Carroll, *supra* note 173, at 1129.

Another purported benefit of this model is the reduction in litigation costs—but those costs will still be substantial. Additionally, the petition fee and process may deter schools or teachers from petitioning for fair use.³⁹¹ Over and above a filing fee, costs will rise because lawyers will likely be(come) a necessary component to argue the user’s case, or at the very least to balance out the likely presence of a lawyer on behalf of a copyright owner.³⁹² Despite the fact that these micro-decisions will be “published on the Copyright Office website,” they would be non-precedential,³⁹³ therefore, they are unlikely to tell the user anything more than the judicial decisions that have utilized the Guidelines.³⁹⁴ In fact, these decisions may even continue the

³⁹¹ Given the unpredictability of the outcome and the costs associated with filing and adjudicating a petition (possibly more than \$10,000.00), a school is likely to face resistance from the community. Schools may be able to pool money together to advance certain claims, but that seems unlikely given the number of educational uses and the variety of teaching techniques.

³⁹² Carroll makes the inspirational statement that “the goal should be a procedure that would not require a petitioner or a copyright owner to be represented by counsel to achieve substantively just outcomes.” Carroll, *supra* note 173, at 1127. It seems difficult to achieve a “substantively just” outcome in a morass of legal concepts without the aid of attorneys or some other assisting advocate. Realizing this, I think, Carroll tempers this statement by permitting “copyright agents” to represent the parties. *Id.* These agents will add costs and, like in Social Security disability benefits cases, maybe lawyers. *See* 42 U.S.C. § 406(a)(1) (2006) (providing the Commissioner of Social Security the power to “prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Commissioner of Social Security”); *id.* § 406(b) (providing for attorney representation). Indeed, it seems likely that lawyers will become involved, not only because the copyright owner—who typically will represent a well-funded and litigious interest—is likely to have a lawyer, but also because the individual filing with the Fair Use Board will likely be a lawyer acting on behalf of the user.

³⁹³ Carroll, *supra* note 173, at 1126; Nimmer, *supra* note 385, at 14 (stating that “[t]he Register of Copyrights shall make publicly available on a website or otherwise, all petitions, responses, and rulings submitted” and that “[t]he court shall not be obligated to accord any weight to the Fair Use Arbiter(s)”).

³⁹⁴ There is also a possibility that such a system would create *more* uncertainty. Given that the fair use factors are so unruly to begin with, categorizing non-binding, advisory opinions to craft a legal opinion about what is fair use to copy seems far-fetched. *Cf.* Parchomovsky & Goldman, *supra* note 199, at 1525 (stating that, because they “lacked the force of law[,] . . . the Guidelines became a convenient benchmark for litigation”). Decisions will not necessarily follow any particular pattern, and many decisions in non-educational settings will have an uncertain impact on educators as lawyers will try to analogize non-educational decisions to educational ones. Given this possibility, Carroll’s

judicial tradition of using the Guidelines.³⁹⁵ For these reasons, educators may view the petition process as too costly and uncertain, especially given that, beyond the petition process, a lawsuit may await. As a result, educational users will continue their current practice of restrictive use of copyrighted materials.

Professor Jason Mazzone also has entered the fray, presenting two models that would allow an agency to “administer fair use.”³⁹⁶ They differ from those proposed by Carroll and Nimmer, both of which involved a form of micro-adjudication,³⁹⁷ because they use the informal rulemaking process—otherwise known as notice-and-comment rulemaking—to regulate and administer fair use.³⁹⁸ Mazzone’s first model (“Model One”) requires three steps: Congress would declare it “unlawful to interfere with fair uses of copyrighted works;”³⁹⁹ create an agency to enforce this statute; and state expressly “that federal fair use law, including [the agency’s] regulations, preempts state laws of contract limit[ing] fair uses of copyrighted works.”⁴⁰⁰

Under this model, the agency would “specify . . . the uses that constitute fair uses of copyrighted works within specific

statement that “intermediaries should accord a favorable fair use ruling the same weight as a license from the copyright owner” falls under greater scrutiny. Carroll, *supra* note 173, at 1128–29.

³⁹⁵ After all, such administrative decision-makers must rely on previous case law.

³⁹⁶ See Mazzone, *supra* note 15, at 415. Professor Joseph Liu also has urged a greater role for rulemaking in copyright, suggesting that more authority might be delegated to the Copyright Office—using the Librarian of Congress’s Digital Millennium Copyright Act (“DMCA”) rulemaking-authority as evidence of the feasibility of this approach. See Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 148–50 (2004) [hereinafter Liu, *Regulatory Copyright*]. Liu notes that the Copyright Office, as it currently stands, is ill-equipped to deal with the additional rulemaking duties. *Id.* at 156–57. Nevertheless, he notes that, “by increasing the expertise of the Copyright Office, granting it more substantive authority, and ensuring that a wide range of copyright interests are represented, these reforms would ideally place more emphasis on the Copyright Office as a nexus of coherent copyright policymaking.” *Id.* at 159. This type of authority, he says, may give “the existing institutional structure . . . a strong, informed, centralized policymaking body” that it currently lacks. *Id.*

³⁹⁷ See Carroll, *supra* note 173, at 1087; Nimmer, *supra* note 385, at 11–15.

³⁹⁸ See Mazzone, *supra* note 15, at 416, 419.

³⁹⁹ *Id.* at 415.

⁴⁰⁰ *Id.*

sectors.”⁴⁰¹ It would, like other agencies under the Administrative Procedure Act (“APA”),⁴⁰² have the ability to adjudicate disputes, and have a corresponding appeals process that ultimately could reach federal court.⁴⁰³ The agency would have enforcement authority, like the Federal Trade Commission (“FTC”).⁴⁰⁴ Mazzone also advocates judicial deference to the regulations developed by the agency in copyright infringement lawsuits.⁴⁰⁵

Mazzone’s second model (“Model Two” or “EEOC Model”) employs a federal agency, which has “more general responsibility in copyright infringement claims” than the agency in Model One.⁴⁰⁶ It mirrors the current structure and function of the Equal Employment Opportunity Commission (“EEOC”).⁴⁰⁷ Model Two requires a copyright owner who alleges infringement to file a complaint with the agency.⁴⁰⁸ The respondent would have a limited-time opportunity to assert a fair use defense, after which the complainant could file in federal court.⁴⁰⁹ If a timely defense is asserted, the agency, like the EEOC, would investigate to determine whether infringement has occurred.⁴¹⁰

Mazzone’s Models have a combination of several desirable qualities that the other proposals possess in isolation or altogether lack. First, these Models are rule-based:⁴¹¹ this bodes well for educators who desire certainty. An agency that can administer rules that specify what uses are per se fair is a valuable tool that eliminates much guesswork for educational institutions; and it also provides flexibility because the agency may adopt some standards or rule-standard hybrids.⁴¹² Second, while an administrative decision regarding a regulation is not binding on the courts, the

⁴⁰¹ *Id.*; see Samuelson, *supra* note 30, at 2580–87 (detailing the cluster Samuelson calls “uses that promote learning”).

⁴⁰² See Administrative Procedure Act, 5 U.S.C. §§ 500–596 (2006).

⁴⁰³ Mazzone, *supra* note 15, at 417.

⁴⁰⁴ *Id.* at 418.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 419.

⁴⁰⁷ *Id.* at 419–20.

⁴⁰⁸ *Id.* at 419.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 419–20.

⁴¹¹ See *id.* at 415.

⁴¹² See *id.* at 425–27.

regulations are; i.e., the regulations have the force of law, and administrative interpretations of those rules will be given deference.⁴¹³ That means that the rulings will be followed by publishers and educational institutions alike. Third, the process by which the rules are formulated is not subject to judicial reasoning that employs the fair use factors.⁴¹⁴ The notice-and-comment rulemaking process allows for greater flexibility in developing rules, which will have greater specificity.⁴¹⁵ The regulations, interpretations, and policy statements, coupled with subsequent decisions by the courts, will provide the stability and certainty that educators seek.

These Models, therefore, are a good place to start; but they need to be developed and tailored to the educational setting. Therefore, the next Part, using Mazzone's Model One as a rough sketch, draws a fuller picture for administering educational fair use.

III. A NEW MODEL FOR EDUCATIONAL FAIR USE

Mazzone's model provides a foundation from which further discussion can take place. This Article, like Mazzone's, advocates creating an agency to administer fair use. It also agrees with Mazzone that Congress should give the agency power to specify fair uses within "specific sectors."⁴¹⁶ This Part, however, takes

⁴¹³ See *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (footnotes omitted)).

⁴¹⁴ See Mazzone, *supra* note 15, at 418 ("In determining whether a particular use is fair and therefore renders the defendant's copying noninfringing, courts would defer to [the Office for Fair Use]'s regulations.").

⁴¹⁵ See *id.* at 433–37.

⁴¹⁶ *Id.* at 415.

that proposition one step further and proposes the creation of an executive agency devoted *exclusively* to administering fair use within the education “sector.” The reason education deserves special treatment is a matter of policy: the foregoing analysis has shown that education is uniquely important, and different from many other types of fair uses;⁴¹⁷ and educators are not likely to agree with publishers on what is fair.⁴¹⁸ An agency is needed to administer copyright specifically as to fair use.⁴¹⁹

This executive agency, which I call the Copyright Regulatory Administrative Body (“CRAB”), will create a workable, flexible, and coherent legal framework for educators to assess whether their uses are fair. Because it is limited exclusively to educational fair uses, it will not face the myriad problems that the administration of fair use generally would. Interest groups, for example, will be more easily identified, isolated, and controlled in this closed, “educational universe” of fair use.

Explaining the creation of the CRAB and how it will operate takes several steps, and requires us to work backwards. First, the structure and operation of the CRAB will be outlined, with attention given to mitigating the disproportionate influence of special interest groups and agency “lock-in.” This will include explaining why Mazzone’s EEOC Model should be rejected in favor of a modified form of Model One. Describing the structure and content of the agency first allows us to understand what type of language Congress will employ to do this. Therefore, after

⁴¹⁷ See Bartow, *supra* note 5, at 211 (“If the creation of course packets or making of multiple copies promotes scholarship, and advances the goals of higher education by optimizing access to the ideas contained in the copied, copyrighted works, a broad construction of educational fair use is more than justified.”).

⁴¹⁸ Professor Samuelson has stated that “[n]either Congress nor the courts have been able to definitively resolve the intense controversy over learning-related uses, even after more than forty years of debate.” Samuelson, *supra* note 30, at 2620. She also argues that “educational and research uses . . . have become so ubiquitous and widely tolerated that they may have, in effect, become fair uses after all.” *Id.* Even if that is true, it does not mean that the current educational uses are broad enough. Teachers may now be more restricted to the customs imposed by industry clearance practices.

⁴¹⁹ This model heeds the call of Samuelson and others that “commentators should stop wringing their hands about how troublesome fair use law is,” and proposes a meaningful solution that addresses this worry. Samuelson, *supra* note 30, at 2621.

articulating the CRAB model, the Congressional language that should be used to create the CRAB is explored briefly.

A. *Rejecting Model Two*

Mazzone gives us two Models from which to work.⁴²⁰ The best choice, at least for educational fair use, is an agency based on Model One. The reason lies both in the adverse effects that Model Two would have on educational institutions, as well as the beneficial results of Model One.

Giving the CRAB EEOC-like powers would encourage publishers and copyright owners to pursue claims they normally would not. If, for example, the CRAB was given investigatory powers similar to the EEOC, publishers would be more likely to pursue infringement claims against the educational institutions that, in the past, have been left largely un-sued.

The reason lies in the cost and publicity for both educational institutions and copyright owners. Under the EEOC model, if the CRAB investigates an infringement claim, the cost is borne entirely by the CRAB and the educational institution; the CRAB bears the expense, investigates, and makes particular findings.⁴²¹ Additionally, this type of system makes the educational institutions look like bad social actors. This system is set up to investigate possible infringement or “wrongdoing” on the part of schools.⁴²² Thus, for an educational institution, much like for an employer under investigation by the EEOC, a finding of infringement is detrimental, but a non-finding does not resolve the claim itself; the copyright owner still can file a lawsuit in federal court.⁴²³

⁴²⁰ Mazzone, *supra* note 15, at 415.

⁴²¹ See 42 U.S.C. § 2000e-4(g) (2006) (describing the powers of the EEOC, which include making technical studies and intervening in a civil action); *id.* § 2000e-5 (describing the EEOC’s powers, including bringing a civil action in federal court or referring the matter to the attorney general); *id.* § 2000e-8 (describing EEOC’s investigative powers).

⁴²² See generally *id.* § 2000e-5(b).

⁴²³ 29 C.F.R. § 1614.110 (2009) (providing that after a final agency action by a judge or otherwise, the EEOC must provide the complainant with notice of their right to appeal the final action to the EEOC and “right to file a civil action in federal district court”).

Beyond creating an incentive to file complaints, Model Two imposes significant costs on educational institutions. Any time the CRAB received a complaint, it would be obligated to investigate that complaint and make a determination of infringement.⁴²⁴ Every investigation requires lawyers, who, in turn, use discovery. That discovery costs money for educational institutions. The EEOC, for example, has broad investigative powers and routinely requests documents from employers.⁴²⁵ These requests are handled by the employers' lawyers. Under the CRAB, the transaction costs—these include legal costs, search and information costs associated with gathering the required documents, and lost productivity—imposed by investigations would be significant,⁴²⁶ especially considering how easy filing a complaint may be for a publisher or copyright owner.⁴²⁷ Employers, for example, face substantial costs when a charge is filed with the EEOC:

Winning [an EEOC charge] avoids court-imposed remedies, but it does not free the employer from the transaction costs of conducting litigation. The

⁴²⁴ Mazzone, *supra* note 15, at 419.

⁴²⁵ 42 U.S.C. § 2000e-5(b) (describing the EEOC's investigatory power); *id.* § 2000e-9 (describing the EEOC's subpoena power). The EEOC, by statute, is authorized to access "any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation." *Id.* § 2000e-8(a). To obtain this evidence, it may issue subpoenas. *Id.* § 2000e-9. Using this power, the EEOC has "access to virtually any material that might cast light on the allegations against [an] employer." *EEOC v. Shell Oil Co.*, 446 U.S. 54, 68–69 (1984).

⁴²⁶ See Robert C. Ellickson, *The Case for Coase and Against "Coaseanism,"* 99 *YALE L.J.* 611, 615–16 (1989) (defining "transaction costs" to include "get-together costs," "decision and execution costs," and "information costs"); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 *U. PA. J. LAB. & EMP. L.* 73, 81 (1999) ("Responding to a charge costs an employer who does not have in-house counsel thousands of dollars in attorneys' fees."); *id.* ("Additional employer costs include the loss of productivity of other employees involved in the case, adverse publicity, and of course, liability.").

⁴²⁷ Under the EEOC regulations, individuals who feel they have been discriminated against under Title VII "must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter." 29 C.F.R. § 1614.105(a). At that initial meeting, the Counselor informs the complainant of their rights and responsibilities. *Id.* § 1614.105(b)(1). Barring a different choice, the last Counselor conducts a final interview with the complainant within thirty days, *id.* § 1614.105(d), after which time the complainant may file its complaint alleging discrimination. *Id.* § 1614.106(b).

employer must retain lawyers, respond to an EEOC investigation of the employee's complaint, conduct and respond to discovery, and pay other litigation-related expenses. The employer must also bear the cost of any time which human resources personnel, managers, and other employees dedicate to depositions, document requests, meetings with lawyers, and appearances in court.⁴²⁸

The costs would be similar—though reduced—for educational institutions responding to the CRAB's investigations.⁴²⁹ These costs also may be detrimental to student learning and society. Educational institutions will be forced to spend money locating material and outside counsel instead of spending it to educate their students. A less educated citizenry means a less productive and competitive citizenry. Additionally, teachers, administrators, and possibly students would spend time with lawyers or engage in other non-educational activities necessitated by investigations.

These monetary risks would encourage schools to settle with copyright owners.⁴³⁰ Thus, the CRAB, if based on the EEOC Model, would encourage resolution of claims through mediation or settlement simply to avoid educational costs.⁴³¹ Doubtless such

⁴²⁸ Seth D. Harris, *Law, Economics, and Accommodations in the Internal Labor Market*, 10 U. PA. J. BUS. & EMP. L. 1, 60–61 (2007) (footnotes omitted).

⁴²⁹ Under this Model, investigations of educational institutions may be less costly or complex than investigations of employers. For example, in an EEOC investigation, the employer typically disputes the reasons for an adverse action, the details of the employment policy, to whom the policy applies, and the treatment of other similarly situated employees. In the educational context, these issues may not be as complex since schools will have copying policies in place and teachers' conduct is not being compared; the issues are related more to infringement and use. Those are factual issues, but not nearly as complex as in employment discrimination actions. How much less these investigations would cost schools is beyond the scope of this Article. Thanks to Jason Mazzone for raising this point.

⁴³⁰ See Sherwyn, *supra* note 426, at 81–82 (“Because defending discrimination lawsuits in federal court can cost an employer hundreds of thousands or even over one million dollars, employers are induced to settle a case regardless of the worthiness of the plaintiffs' allegations.” (footnotes omitted)).

⁴³¹ See 29 C.F.R. § 1614.105(b)(1)–(2) (requiring that the EEOC must explain to complainant her rights, which include alternative dispute resolution as well as counseling activities); Sherwyn, *supra* note 426, at 80 (“The agency with which the employee files a charge will investigate the allegation and try to settle the matter by having the employer

negotiation and settlement will mean concessions by the school, which likely would include licensing fees or completely ceasing to copy the work altogether. That result would be contrary to the one sought by creating an administrative agency. As noted before, fair use is use *without* authorization; it is free.⁴³² Encouraging settlements on these claims would *discourage* fair use and further entrench the current clearance culture.

Additionally, positive publicity for copyright owners can be bad publicity for schools. The public nature of the CRAB's decisions, if modeled after the EEOC, would negatively affect schools, regardless of the outcome.⁴³³ If the determination is favorable to the educational institution, the copyright owner may still pursue litigation. If the determination is unfavorable to the educational institution, that prods schools into the licensing or other agreements that fair use may not require, or else risk litigation. If the case is litigated after an unfavorable decision, the school's decision not to comply is disclosed.⁴³⁴ Noncompliance makes schools look like bad actors. Again, the EEOC provides a rough analogy: "[EEOC] [l]itigation also publicly discloses the employer's decision to deny an accommodation and thereby increases the likelihood that prospective employees in the external labor market will learn about the decision."⁴³⁵ This negatively impacts schools' reputations and reinforces the industry culture,

remunerate and/or reinstate the employee."); U.S. Equal Employment Opportunity Commission, EEOC Investigations—What An Employer Should Know, <http://archive.eeoc.gov/employers/investigations.html> (last visited Jan. 26, 2010) ("In many cases, you may opt to resolve a charge early in the process through mediation or settlement. At the start of an investigation, EEOC will advise you if your charge is eligible for mediation, but feel free to ask the investigator about the settlement option. **Mediation and settlement are voluntary resolutions.**" (emphasis in original)). *But see* 29 C.F.R. § 1614.105(b)(1) (noting that a complainant must be advised of "the right to file a notice of intent to sue pursuant to 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part").

⁴³² See Mazzone, *supra* note 15, at 398.

⁴³³ See generally U.S. Equal Employment Opportunity Commission, Questions and Answers—Freedom of Information Act (FOIA) Requests, http://www.eeoc.gov/eeoc/foia/qanda_foiarequest.cfm (last visited Jan. 26, 2010) (advising that EEOC Orders, Directives, and Decisions can be publicly viewed and copied at EEOC District Offices).

⁴³⁴ See Harris, *supra* note 428, at 60.

⁴³⁵ *Id.* (footnotes omitted).

which emphasizes payment-for-use in lieu of fair use. All the more reason for copyright owners to file complaints.

Thus, Model Two encourages copyright owners to file complaints with school districts across the country. One can imagine a scenario where copyright owners and publishers file complaints far and wide. In investigating these complaints, the CRAB will necessarily impose substantial costs—monetary, reputational, and educational—on educational institutions. In other words, Model Two's design prejudices educational institutions by forcing them to combat infringement claims. That starting position casts them as wrongdoers. Both of those outcomes do not further the goals of fair use or education. Thus, Model Two is rejected as a platform on which to build the CRAB.

B. The CRAB: Structure, Organization, and Powers

Although Model Two cannot solve the educational fair use problem, Model One may do so with further explanation and adaptation. To review, Model One started with three separate acts of Congress:

First, Congress [passes a statute] . . . that make[s] it unlawful to interfere with fair uses of copyrighted works and subject[s] offenders to civil penalties. . . . Second, Congress . . . create[s] an agency . . . to enforce this statute. . . . Third, Congress . . . specif[ies] that federal fair use law, including [the agency's] regulations, preempts state laws of contract that limit fair uses of copyrighted works.⁴³⁶

The basic principle in this scheme starts from the right place: by affirmatively placing the obligation on copyright owners to comply with fair use laws, educational institutions have more space within which to teach.⁴³⁷ Because the burden is on the copyright owners *not* to interfere with fair use, educational institutions will not face investigative costs. Additionally, as described below, the agency itself will be able to enforce its

⁴³⁶ Mazzone, *supra* note 15, at 415.

⁴³⁷ This conception of fair use better reflects the view that copyright and fair use each represent dueling rights. *See supra* note 232 and accompanying text.

regulations against copyright owners seeking to frustrate or interfere with educational fair use.

With that guiding principle, the CRAB, like Mazzone's Model One, would operate by both notice-and-comment rulemaking, informal adjudication, and enforcement mechanisms.⁴³⁸ The differences between the CRAB and Model One lie in the details; in that sense, the CRAB may be seen merely as an outgrowth of Model One.

1. Negotiated Rulemaking Versus Informal Rulemaking

Model One assumes that a regular, informal rulemaking process under 5 U.S.C. § 553 of the APA would be the best course of action.⁴³⁹ It does not consider a negotiated rulemaking process under 5 U.S.C. § 561.⁴⁴⁰ To understand the difference, and the template after which the CRAB should be modeled, we should understand each individually. During this discussion, the benefits and drawbacks of each will be briefly discussed.

Informal rulemaking, also known as notice-and-comment rulemaking, provides a procedure that is designed to include public participation.⁴⁴¹ In the first step of this process, the agency publishes a general notice of a proposed rulemaking in the Federal Register.⁴⁴² Next, the agency must provide "interested persons an opportunity to participate" in rulemaking by submitting comments, data, views, or argument.⁴⁴³ The agency then publishes the rule at least thirty days before it takes effect.⁴⁴⁴ Although notice-and-comment rulemaking encourages participation in the rulemaking

⁴³⁸ See Mazzone, *supra* note 15, at 415–18.

⁴³⁹ *Id.* at 415–16.

⁴⁴⁰ 5 U.S.C. § 561 (2006).

⁴⁴¹ Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005) (explaining that "[the notice-and-comment requirements] are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review" (citation omitted)).

⁴⁴² 5 U.S.C. § 553(b).

⁴⁴³ *Id.* § 553(c).

⁴⁴⁴ *Id.* § 553(d).

process, public participation is limited.⁴⁴⁵ Prior to publishing the notice of the rule provided by the agency, for instance, an agency typically spends a large amount of time and research developing a rule.⁴⁴⁶ This extensive development results, in part, from the “hard look” standard of judicial review, which encourages the agency to build a substantial record.⁴⁴⁷ In this process, the agency becomes cognitively committed to the proposed rule, an effect known as “lock-in.”⁴⁴⁸ Agency lock-in makes the agency less receptive and responsive to public comments; few agencies actually change rules in response to public comments.⁴⁴⁹ This effect can be mitigated

⁴⁴⁵ See Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 597–99 (2002).

⁴⁴⁶ See *id.* at 597 (“The timing of rulemaking encourages agency lock-in by concentrating the bulk of decisionmaking in the pre-notice period. Notice occurs after the agency has completed substantial amounts of development, analysis, and review.”).

⁴⁴⁷ See *id.* at 621 (“[T]he nature and timing of notice and comment rulemaking can result in a premature psychological commitment to a position. Due to judicially-imposed requirements, political and executive controls, and agency management practices, the bulk of regulatory decisionmaking and theory-formation occurs when the agency prepares a proposed rule for publication, long before the public has a formal opportunity to comment.”). The “hard look” standard of review is derived from several cases, including *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), but was coined by Judge Leventhal. Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 754 n.1 (2006). Essentially, hard-look review requires the court, when reviewing the agency’s explanation for its decision, to “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Motor Vehicle*, 463 U.S. at 43 (internal citations omitted). To satisfy this requirement, the agency must develop a record such that the court can determine whether

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. In other words, this approach emphasizes “the adequacy of the record and the quality of the agency’s explanation.” Stephenson, *supra*, at 758.

⁴⁴⁸ Stern, *supra* note 445, at 592 (“Agency lock-in, or resistance to modification of proposed rules during the notice and comment process, impinges on the participatory and deliberative ideals of rulemaking. Agency lock-in can occur when agency staff develop a strong psychological commitment to a proposal or when certain interest groups communicate their views in advance of the notice of proposed rulemaking.”).

⁴⁴⁹ See *id.* at 598–60 (reviewing empirical studies).

where an agency views its own decision to propose a rule as less than final.⁴⁵⁰

Another form of rulemaking is called “negotiated rulemaking,” which adds a new component to the front end of the rulemaking process.⁴⁵¹ This process involves interest groups during the formation process of the initial proposed rule.⁴⁵² Negotiated rulemaking begins when the “head of the agency determines . . . [it] is in the public interest.”⁴⁵³ The agency head, when making this determination, must consider numerous factors, including the need for the rule, the identifiable interests affected by a rule, the ability to achieve balanced representation in the committee, the likelihood of a timely consensus, and the costs and resources available.⁴⁵⁴

To aid in determining the identity of the interested parties, as well as these parties’ concerns, the agency may use a “convener.”⁴⁵⁵ The convener will then issue a report of his findings.⁴⁵⁶ If the agency decides not to establish a committee, it must publish notice.⁴⁵⁷

If the agency decides to establish a negotiated rulemaking committee, it must publish notice of its intent to do so, which includes a description of the rule’s subject and scope; the interested

⁴⁵⁰ See *id.* at 599.

⁴⁵¹ See 5 U.S.C. § 561 (2006).

⁴⁵² See Stern, *supra* note 445, at 642.

⁴⁵³ 5 U.S.C. § 563(a).

⁴⁵⁴ *Id.* § 563(a)(1)–(7) (“(1) there is a need for a rule; (2) there are a limited number of identifiable interests that will be significantly affected by the rule; (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who—(A) can adequately represent the interests identified under paragraph (2); and (B) are willing to negotiate in good faith to reach a consensus on the proposed rule; (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time; (5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule; (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and (7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.”).

⁴⁵⁵ *Id.* § 563(b).

⁴⁵⁶ *Id.* § 563(b)(2).

⁴⁵⁷ *Id.* § 565(a)(2).

parties; the people representing such interests and the agency; the proposed agenda and schedule for the committee; a description of administrative support for the committee; a solicitation for comments on the proposal to establish the committee; and an explanation of how to nominate another or apply for membership.⁴⁵⁸ The cap on participants is twenty-five unless the agency head decides more are necessary.⁴⁵⁹ While the committee may establish its own operating rules,⁴⁶⁰ its operation and existence terminates “upon promulgation of the final rule under consideration, unless the committee’s charter [otherwise provides].”⁴⁶¹ The resulting rule is then subject to the standard notice-and-comment rulemaking process under § 553.⁴⁶²

The chief goals of negotiated rulemaking—reducing litigation and time used to create a rule—have been called into question by empirical research.⁴⁶³ It is clear that, while “[a]ny agency action relating to establishing, assisting, or terminating a negotiating rulemaking committee” cannot be reviewed in court, the subsequent rule published can be.⁴⁶⁴ Negotiated rulemaking may not actually reduce time spent or litigation.⁴⁶⁵

⁴⁵⁸ *Id.* § 564(a).

⁴⁵⁹ *Id.* § 565(b).

⁴⁶⁰ *Id.* § 566(e).

⁴⁶¹ *Id.* § 567.

⁴⁶² *Id.* § 553; see Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1257 (1997) (“The committee meets publicly to negotiate a proposed rule. If the committee reaches consensus, the agency typically adopts the consensus rule as its proposed rule and then proceeds according to the notice-and-comment procedures specified in the APA.” (footnotes omitted)).

⁴⁶³ See Coglianese, *supra* note 462, at 1261; *id.* at 1271–86 (reviewing the time-savings of negotiated rulemaking); *id.* at 1289–1309 (reviewing results of frequency of litigation in negotiated rulemaking).

⁴⁶⁴ 5 U.S.C. § 570.

⁴⁶⁵ See Coglianese, *supra* note 462, at 1261; *id.* at 1332 (“Negotiated rulemaking has long been regarded as necessary to avoid litigation and conflict. My analysis shows that this is not the case. Litigation is not the inevitable product of agency rulemaking. Many agencies, after all, do not face much conflict between interest groups. Among those agencies that do face conflicting interest groups, public managers appear much more adept than ordinarily assumed at anticipating interests and managing conflict in the normal rulemaking process.” (footnotes omitted)).

2. Modified Process of Notice-and-Comment Rulemaking

While negotiated rulemaking may narrow issues and focus deliberations, it too closely resembles the Ad Hoc Committee that developed the Classroom Guidelines.⁴⁶⁶ There are differences, including the comment period and nomination and objection process for group members;⁴⁶⁷ but these differences do not change the fundamentals: interest groups, including copyright owners and publishers, will push a narrow scope of, and educational institutions will be forced to compromise on, fair use.⁴⁶⁸ That did not work out well for educational institutions in the past,⁴⁶⁹ and there isn't much reason to suspect any different result this time around.

Because the dynamic of the group-model negotiated rulemaking does not differ from the dynamic of the Ad Hoc Committee,⁴⁷⁰ this Article rejects it as a plausible approach. Instead, it accepts informal rulemaking as a better starting place for developing the CRAB.

Informal rulemaking, however, does not adequately address the concerns of educational institutions because the agency is subject to capture and lock-in.⁴⁷¹ Thus, it must be adapted. This Part does not purport to completely remodel the APA or provide a complete account of how this new model would work. Instead, it will offer some suggestions that can assist the CRAB in achieving its goals.

First, to avoid agency lock-in,⁴⁷² the notice-and-comment process should be a three-level, two-tiered, open process. "Three level" means that three independent groups will operate within the CRAB to propose a rule. These groups can function in one of two ways. In the first scenario ("Sequential Groups"), Group 1

⁴⁶⁶ See *supra* Part I.A.2.

⁴⁶⁷ Compare Part III.B.1, with Part I.A.2.

⁴⁶⁸ See *supra* Part I.C (discussing how universities were forced to accept the Classroom Guidelines at the threat of litigation).

⁴⁶⁹ See *supra* Part I.

⁴⁷⁰ One important difference between the two is that, in negotiated rulemaking, a member of the agency participates. 5 U.S.C. § 565(b) (2006) ("Each committee shall include at least one person representing the agency.").

⁴⁷¹ See Stern, *supra* note 445, at 596–97.

⁴⁷² See *id.*

prepares the initial rule. Group 2 will review Group 1's proposed rule and data and present potentially opposing views.⁴⁷³ Group 3 will review both Group 1's and Group 2's data and proposed rules, and then adopt its own rule.

In the second scenario ("Competing Groups"), Groups 1 and 2 operate on the same time frame and propose competing rules based on the same data. Group 3 then reviews the data and both proposals, and it can accept or reject one, reject both, create a *mélange* of the two, or create its own rule.

"Open" means that the CRAB will receive comments and suggestions on a rolling basis. These comments and suggestions should be related to areas in which new fair use rulemaking should take place. For example, the AALS might submit a comment on the need for fair use regulations concerning casebook copying. "Open" also means that there should be a streamlined and easily accessible comment process, as described below.

"Two-tiered" means employing two notice-and-comment periods. The first period will be a notice of general nature ("General Rule Notice"), stating, for instance, that the CRAB is contemplating a rule regarding educational photocopying of textbooks. After the CRAB publishes the General Rule Notice, the public will be able to comment on the topic.

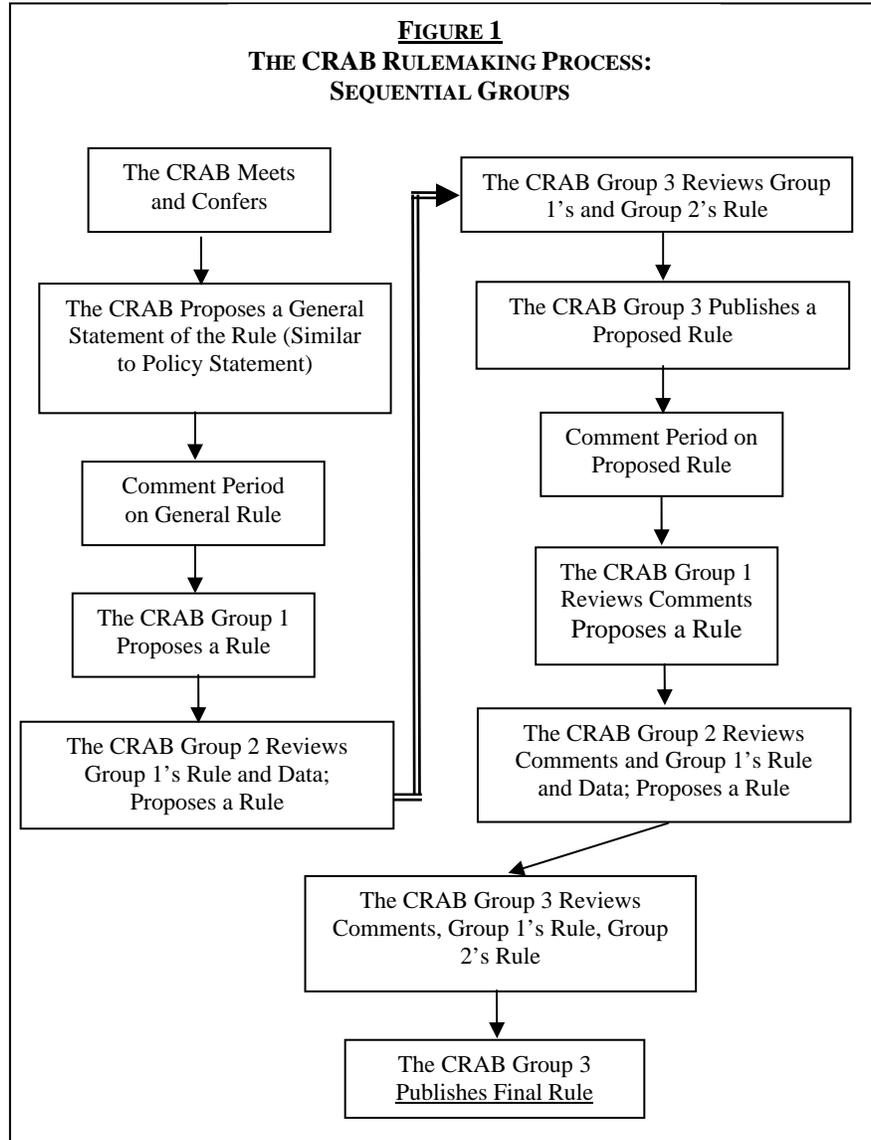
After the first comment period closes, the CRAB's three-level process will resume under either the Sequential Group scenario or the Competing Group scenario. Under the Sequential Group scenario, Groups 1 and 2 will sift through the comments and present counter-arguments to the others' proposal(s). After this process, the CRAB's Group 3 will develop a more concrete rule, and the effect of lock-in will be both reduced and beneficial.⁴⁷⁴

⁴⁷³ The ability of agencies to argue different views may be able to reduce the likelihood of agency lock-in. *Id.* at 626–27.

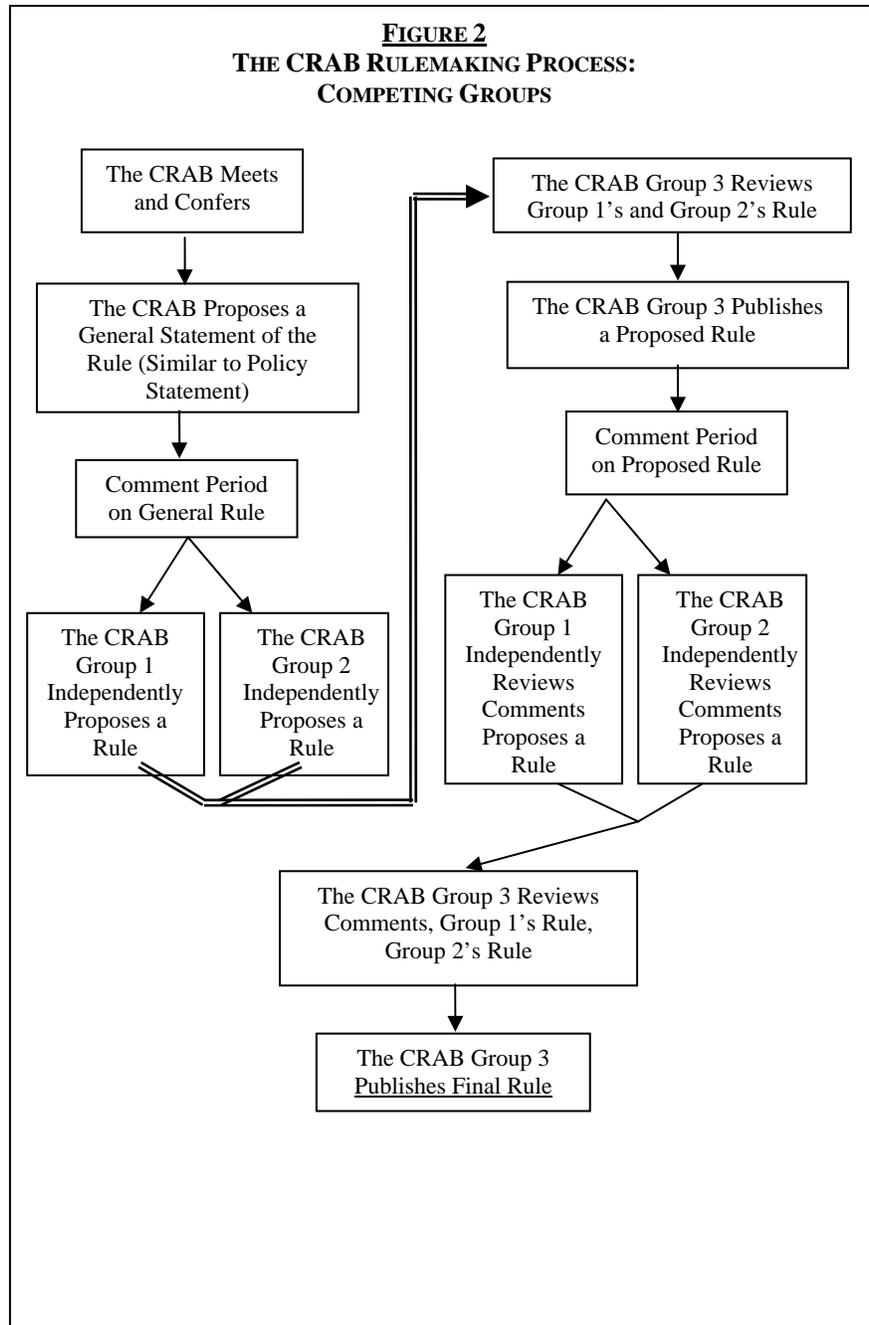
⁴⁷⁴ Lock-in, while detrimental, also has benefits, such as preventing agency capture. *Id.* at 596 n.41 ("In an earlier era of regulatory history, commentators may have viewed lock-in as a positive attribute of agencies because of the overwhelming concern with 'agency capture.' Lock-in does prevent capture by powerful interest groups, at least in cases where the agency was insulated from interest group pressures before publication of the proposed rule."). Additionally, the lock-in effect would be reduced because the initial rule is developed in response to the public comments, and thus the agency would not

After Group 3 proposes and publishes a rule, the notice-and-comment period begins again. After the close of that period, the three-level system activates, eventually producing a final rule as promulgated by Group 3.

view itself as entirely committed to the rule, especially knowing another round of comments (likely) from a similar group of people would follow.



Under the Competing Groups scenario, the comments are processed differently, with Groups 1 and 2 independently developing and proposing rules. Each Group submits its rule to Group 3, which considers, along with the comments, both Groups' rules. Group 3 then proposes its own rule, which may entail some, all, or none of the other Groups' proposed rules.



3. Group Identification and Involvement

As part of the “open” component of the modified rulemaking, there must be a proper framework for making, receiving, and sorting through comments. History teaches us that copyright owners and publishers will be represented adequately in the notice-and-comment process.⁴⁷⁵ Aside from the lessons of the Ad Hoc Committee, the current participation of interest groups in Digital Millennium Copyright Act (“DMCA”) anti-circumvention rulemaking shows that their involvement will be robust.⁴⁷⁶

The concern, then, should be about educators’ participation. To solve part of the participation problem, existing educational groups or associations should participate and communicate with one another in the process.⁴⁷⁷ Additionally, new educational associations should be formed. In particular, each state should form an educational committee comprised of educators and lawyers who will convene to discuss issues of fair use in their classrooms. Further, each state might be a member in a national organization, which would consist of a standing committee that could solicit comments and a convening committee that would

⁴⁷⁵ See *infra* note 476 and accompanying text.

⁴⁷⁶ The Electronic Frontier Foundation has been particularly vocal in this regard, criticizing the Librarian of Congress for not taking consumer comments seriously and acquiescing to moneyed interests. FRED VON LOHMANN & GWEN HINZE, ELECTRONIC FRONTIER FOUNDATION, DMCA TRIENNIAL RULEMAKING: FAILING THE CONSUMER 3–4 (2005), available at http://w2.eff.org/IP/DMCA/copyrightoffice/DMCA_rulemaking_broken.pdf (“[D]uring the 2003 rulemaking, 51 initial comments requesting exemptions were filed, and 337 reply comments were filed. Of these, 254 reply comments were filed by consumers in support of the consumer-oriented exemptions proposed by the EFF and Public Knowledge (PK). . . . In the end, none of the 4 classes of consumer-oriented exemptions requested by EFF and PK were granted. In each case, the Register and Librarian of Congress determined that any harm to consumers was ‘de minimis’ based on the evidence presented by proponents.”).

⁴⁷⁷ At primary and secondary education levels, some of these organizations include the National Association of Education School Principals, <http://www.naesp.org> (last visited Sept. 1, 2009); the American Association of School Administrators, <http://www.aasa.org> (last visited Sept. 1, 2009); and the National Association of Secondary School Principals, <http://www.nassp.org> (last visited Sept. 1, 2009). At the post-secondary and graduate education levels, these include the National Association of Colleges and Employers, <http://www.nacweb.org> (last visited Sept. 1, 2009); the Association of American Universities, <http://www.aau.edu/> (last visited Sept. 1, 2009); and the American Association of Law Schools, <http://www.aals.org/> (last visited Sept. 1, 2009).

hold meetings semi-yearly to discuss fair use issues in educational institutions.

Additionally, electronic rulemaking should be used to facilitate group involvement. In his article, Mazzone cites an article by Professor Beth Noveck in which she describes how the online structure of e-commenting and e-rulemaking can have a great effect on participation.⁴⁷⁸ Several of her suggestions to increase involvement bear mentioning here. First, she discusses the merits of creating a listserv, run by the CRAB to which individuals and groups can subscribe.⁴⁷⁹ Subscribers could receive updates and proposed rules via email, which would facilitate rule making being accessible to all.⁴⁸⁰ Second, Noveck suggests using a Rich Site Summary (“RSS”) feed to provide notice to institutions and individuals, thereby soliciting comments and suggestions.⁴⁸¹ These two suggestions are in addition to the existing practices of e-rulemaking that use websites.⁴⁸² Third, the model by which comments are received and reviewed is critical.⁴⁸³ While this Article is not meant to detail all of those requirements, Noveck’s article is a smart place to start.

4. Adjudication

In addition to rulemaking, the CRAB also should have adjudicative powers, as Mazzone suggests.⁴⁸⁴ The basics of his proposal do not need much tinkering. Essentially, Mazzone proposes an informal adjudication process that would entitle a party to judicial review of a “final agency action.”⁴⁸⁵ Appellate courts reviewing agency actions would conduct a review consistent

⁴⁷⁸ Mazzone, *supra* note 15, at 416 & n.81 (citing Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 480–92 (2004)).

⁴⁷⁹ See generally Noveck, *supra* note 478, at 471–74.

⁴⁸⁰ See *id.*

⁴⁸¹ See *id.* at 477–79 (noting that an RSS can facilitate discussion).

⁴⁸² See *id.* at 444.

⁴⁸³ See *id.* at 479–91 (describing numerous methods of improving online commenting, including rule descriptors, taxonomies, threaded comments, and comment authentication).

⁴⁸⁴ Mazzone, *supra* note 15, at 419 (suggesting that CIRO, an organization created hypothetically by Mazzone for the same purposes as CRAB, should have adjudicative power).

⁴⁸⁵ See *id.*; see also 5 U.S.C. §§ 702, 704 (2006).

with the “arbitrary,” “capricious” and “hard look” standard currently used by federal courts.⁴⁸⁶ To be reviewable, of course, the party seeking review must first exhaust all administrative remedies, including a hearing before an Administrative Law Judge and an appeal to the CRAB Appeals Review Council.⁴⁸⁷

5. Enforcement

Under Model One, Mazzone advocates that the agency have enforcement powers like the FTC.⁴⁸⁸ The CRAB should have similar enforcement powers. The CRAB’s enforcement power would necessarily be coupled with an investigative power similar to the FTC, which includes compulsory powers to collect information and documents.⁴⁸⁹ These powers provide judicial deference—a court cannot review the FTC’s action until it issues an order to cease and desist.⁴⁹⁰ All appeals travel from the agency to the federal circuit courts.⁴⁹¹

The primary benefit of the CRAB’s FTC-like enforcement powers will, however, come from its deterrent effect on copyright owners. Like employers responding to EEOC complaints, copyright owners responding to FTC investigations face

⁴⁸⁶ See 5 U.S.C. § 706; *supra* note 447 and accompanying text.

⁴⁸⁷ See *supra* Figure 1.

⁴⁸⁸ See Mazzone, *supra* note 15, at 436.

⁴⁸⁹ See 16 C.F.R. § 2.1 (2009) (“Commission investigations and inquiries may be originated upon the request of the President, Congress, governmental agencies, or the Attorney General; upon referrals by the courts; upon complaint by members of the public; or by the Commission upon its own initiative. The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition, the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection and, the Regional Directors and Assistant Regional Directors of the Commission’s regional offices, without power of redelegation, limited authority to initiate investigations.”); *id.* § 2.7 (detailing compulsory process in investigations).

⁴⁹⁰ 15 U.S.C. § 45(c) (2006) (“Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside.”); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 245 (1980).

⁴⁹¹ 15 U.S.C. § 45(c)–(d).

substantial costs in responding to and complying with investigations.⁴⁹² As an additional deterrent, those subject to CRAB investigations, like those subject to FTC investigations, would face criminal and civil penalties.⁴⁹³ This deterrent effect is tempered by the “high standard”⁴⁹⁴ that the FTC not commence an investigation unless it has “reason to believe that . . . any unfair method of competition or unfair or deceptive act or practice in or affecting commerce” is being used and a proceeding would be in the public interest.⁴⁹⁵

In addition to providing this deterrent effect, it also places educational institutions in a good bargaining position vis-à-vis publishers and organizations should licensing or other negotiations need to take place. Finally, it reduces litigation costs for educational institutions because the FTC brings actions on their behalf.⁴⁹⁶

C. *The Congressional Language and Grant of Authority*

The CRAB is conceived of as an executive agency.⁴⁹⁷ As such, Congress must create it.⁴⁹⁸ The language used to complete this task is important, and could determine the “fairness” of particular uses. Considering the purpose, structure, and function of the CRAB, several aspects of the statutory language deserve attention.

⁴⁹² See David P. Wales, *Reflections on Procedure at the Federal Trade Commission: Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission*, 1715 PLI/Corp 799, 808 (2009) (“The adjudicatory proceedings which follow the issuance of a complaint may last for months or years. They result in substantial expense to the respondent and may divert management personnel from their administrative and productive duties to the corporation.”).

⁴⁹³ 15 U.S.C. § 50 (describing the civil and criminal penalties for violating reporting requirements or refusing to comply with certain FTC requests).

⁴⁹⁴ See Wales, *supra* note 492, at 808–11 (detailing four consequences of this “very high standard”).

⁴⁹⁵ 15 U.S.C. § 45(b); see *Standard Oil*, 449 U.S. at 246 n.14.

⁴⁹⁶ See 15 U.S.C. § 45(b).

⁴⁹⁷ As noted *infra* Part IV.A, Congress may choose to create the CRAB as part of the Copyright Office, an existing legislative agency.

⁴⁹⁸ See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 327 (Aspen Publishers 2006) (noting that Congress has delegated broad power to federal agencies to make, enforce, and adjudicate rules).

The language of the statute Congress enacts must be specific to education. In other words, it must create the CRAB explicitly to regulate *educational* fair use. While “educational fair use” may be a term with numerous definitions, it can and should be limited by Congress. In describing the statute’s purpose, for example, Congress can expressly state that it designed the statute to free educational institutions from fair use’s shackles of vagueness, to encourage student learning, to facilitate teaching, and to encourage the use of copyrighted materials without fear of litigation. The purpose of the statute will then guide the CRAB’s regulations and adjudications.

Second, Congress can make specific findings about educational uses of copyrighted works. This common component of statutes would further explain why Congress decided to delegate its lawmaking authority to an agency, and would provide a backdrop for evaluating particular agency actions. In this case, Congressional findings could detail, among other things, the number of schools that have Educational Guidelines-based copyright or copying policies; the importance of fair use in the educational setting; the importance of education; teachers’ lack of knowledge and understanding regarding copyright law; fair use’s vague nature; the deterrent and detrimental effects of limiting educational uses; and the need for more certainty among educational users of copyrighted works.

Third, Congress can broadly define the term “educational uses”—i.e., describe the general nature of the fair uses contemplated by Congress. This definition should not be overly specific. The CRAB, to fulfill its mission, must develop the details of which uses constitute educational fair uses and cannot be interfered with; a specific definition risks constraining the CRAB’s reach and effectiveness. The specific limitations on educational fair use should probably be created by the CRAB, though they also might be included in an express grant of authority from Congress.

The definition might look something like this: “Educational uses’ are uses of copyrighted material by students, teachers, aides, administrators, or other similar individuals in preparation for teaching, in conjunction with teaching, for teaching purposes, or as part of teaching activities.” This definition is not meant to be the

only definition in the statute, or even one of any possible definition. It is meant merely to illustrate how Congress might broadly define educational uses and the power of the CRAB.

In crafting this and other definitions, Congress should remember the Ad Hoc Committee's statements that "good teaching practice may not always be legal copyright practice,"⁴⁹⁹ and that "it is legally risky for teachers to rely wholly on fair use."⁵⁰⁰ Congress's mission should go beyond the Ad Hoc Committee, which recognized "the need to legitimize current and developing reasonable educational practices so that teachers will not be forced either to drop them or to continue them 'under the table.'"⁵⁰¹ Current educational fair use practices and customs are unsatisfactory and insufficient.⁵⁰² New rules recognizing the need for educational freedom should be created. In other words, certain uses that publishers have tried to label as infringement should be made fair by the statute and its definitions.

Further questions may arise about what substantive statements Congress should make in its delegation. Mazzone, for example, has suggested that Congress should look to the courts for guidance on what constitutes fair use.⁵⁰³ This Article rejects that approach, arguing instead that Congress should abrogate the Classroom Guidelines and the judicial treatment thereof. Congress may look at the case law—not necessarily for substantive guidance on educational fair use, but to understand how it might classify educational uses. Samuelson has provided a good base by grouping cases into categories, one of which includes educational fair use.⁵⁰⁴ These cases might show Congress the benefits and drawbacks of classifying certain uses as "educational."⁵⁰⁵

Additionally, Congress should shy away from any statement that defers to the judiciary's interpretation of fair use as applied to educational works—although incorporating the doctrine generally,

⁴⁹⁹ Rosenfield, *supra* note 38, at 6.

⁵⁰⁰ *Id.* at 51.

⁵⁰¹ *Id.* at 7.

⁵⁰² *See supra* Part I.

⁵⁰³ Mazzone, *supra* note 15, at 426–27.

⁵⁰⁴ Samuelson, *supra* note 30, at 2582.

⁵⁰⁵ *Id.* at 2587.

as does the Copyright Act, should not present a problem. Past judicial treatment of the Guidelines has resulted in a distorted standard of educational fair use. Thus, judicial deference can be harmful to the CRAB, the mission of which would be expressly and specifically defined by Congress. To develop fair and sound regulations concerning educational fair use, the CRAB should promulgate regulations using its procedures as defined above, referencing the case law only to ensure that its regulations find grounding in the fundamental principles of fair use law.⁵⁰⁶

D. The Regulations Envisioned

It would be best to end with a brief and general description of the CRAB's regulations. Many of the points made here will be addressed in Part IV, so they will be only sketched here. The first question is what *kinds* of regulations the CRAB would promulgate. Most regulations should be maximum limits, or rules, on uses of copyrighted works in education. These should be simple to understand and apply, using plain language percentages and including simple methods of computation.⁵⁰⁷ Not every regulation needs to be in the form of a rule, and the CRAB should be free to promulgate standards or rule-standard hybrids to address specific concerns.⁵⁰⁸ Rules should address all kinds of copying, from photocopying, to recording television shows, to uploading content

⁵⁰⁶ The CRAB should also make rules specific to issues in education involving the electronic classroom. Posting materials on Blackboard, *see* Blackboard, <http://www.blackboard.com/> (last visited Jan. 17, 2010), for example, may present unique situations. Some rules might apply equally to paper copies and photocopying. A rule allowing a teacher to photocopy for students a percentage of a book, for example, might apply equally to posting that material for students online. Specific questions about posting materials online for students is outside the scope of this Article's discussion. Nevertheless, these are issues the CRAB should and could address.

⁵⁰⁷ Word counts may be too onerous, so a page count may be a better way to determine percentage limits. The formulas for computation should include both short-hand measurements and more detailed approaches. For example, one rule could specify a certain percentage of copying. While the rule should contain a detailed description of the calculation procedure, it also should include a rough rule-of-thumb, such as, "When photocopying portions of science textbooks for classroom use, you generally cannot copy more than one chapter from a book and distribute it to your students." To ensure that such a short-hand rule corresponds to the percentage in the actual rule, it should be based on objective evidence of the typical length of a chapter in a science textbook.

⁵⁰⁸ As discussed *infra* Part IV.C, rules themselves are not always as rigid as they seem.

on Blackboard.⁵⁰⁹ As to specific rules themselves, those are outside the scope of this Article. To make them easy to read, the regulations should be grouped into two indices, one grouped by subject matter and one grouped by keyword.

IV. OBJECTIONS

The administrative approach is not impervious to criticism, and it is likely to meet substantial resistance for a variety of reasons. This Part explores four possible objections to the CRAB model: (A) the CRAB is overly specific; (B) the CRAB unnecessarily increases costs; (C) the CRAB's regulations are too rigid and do not provide educators with enough flexibility; and (D) the CRAB, paradoxically, creates more uncertainty because of the technical and confusing nature of agency regulations.⁵¹⁰

⁵⁰⁹ Some of the regulations, like those that apply to photocopying, also may apply directly to posting materials on Blackboard. The amount of a book that can be photocopied and distributed to students, for example, probably should be the same amount that can be posted on a secure Blackboard-type site. To the extent that online materials need to be password protected or otherwise protected from unauthorized copying, the CRAB should promulgate separate regulations regarding technological protections.

⁵¹⁰ Two other objections are raised and briefly discussed in this footnote. First, one might suggest we also ought to incorporate a "good faith" component into fair use. Put another way, if the educator is copying in good faith, their copying is per se fair. That approach is untenable, however, because of the nature of a good faith standard. Good faith, of course, must be defined against a backdrop—what constitutes good faith in one context may not in another, and all the facts surrounding the copying need to be included. That raises two problems. First, under current standards, some may consider the Guidelines as the good faith standard, or are at least highly relevant in the good faith determination. Bartow, *supra* note 5, at 205–06; *see also* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1545 (S.D.N.Y. 1991) (using the Classroom Guidelines in its "innocent infringer" discussion of statutory damages). Second, even if the Guidelines are not used, the good faith standard will need to be articulated, and it will be amorphous. The unpredictable nature of such a standard will do little to remedy the uncertainty surrounding which uses are fair.

The second objection says that a better solution would provide blanket immunity to educational uses of copyrighted materials. This would, the argument goes, save lots of costs and headaches. That solution is easy, but it fails to take into account the legitimate interests of copyright owners. This would destroy, for example, the incentive of authors who create copyrighted works expressly for educational use. If the authors' incentives are destroyed, they likely will no longer create these educational works. The results of this could be disastrous—no materials would be created exclusively for educational use

A. *Specificity Requirement*

Creating an administrative agency specific to education is unique. It differs from Mazzone's proposal because it is not designed to address all possible fair uses;⁵¹¹ it is confined to a specific universe of uses. While this specificity will provide clearer direction for educators, one may object that the creation of such a specific agency is unnecessary; if we are going to accept an administrative agency, why not create one that administers fair use generally?⁵¹²

There are several responses to this objection. First, as we have seen, educational fair uses pose particular problems. The Guidelines, for example, are not the law but have been treated as such, creating uncertainty and asymmetric rights for educators.⁵¹³ Additionally, not just any agency will do.⁵¹⁴ The nature of educational uses of copyrighted materials requires particular tailoring that sufficiently considers the value of educational uses. Thus, the body administering fair use must be specifically tailored to education to obviate these problems.

If still not satisfied, then the next option would be to implement a Mazzonian approach but define specific categories of uses, as Professor Samuelson already has shown us is possible.⁵¹⁵ Thus, the administering agency would delegate powers and create regulations specifically as to each category of fair use. Mazzone briefly suggested that the agency's "regulations would specify, consistent with the provisions of § 107 of the Copyright Act, the

because no author could ever recover the costs of publishing the book. Therefore, broad immunity for educators is not a viable solution. It is another issue altogether whether the Eleventh Amendment bars suits against educators. *See* Bartow, *supra* note 5, at 223–24.

⁵¹¹ *See* Mazzone, *supra* note 15, at 433 (arguing for the creation of an administrative agency because "[r]egulations issued by an administrative agency . . . work wholesale . . . [and] apply to all users").

⁵¹² If we need specificity of this nature, for example, why not create "a separate agency for environmental problems in Hawaii because Hawaii has a different ecosystem." E-mail from Harold Krent, Dean and Professor of Law, Chicago–Kent College of Law, to David A. Simon, Law Clerk, Hon. Martin C. Ashman (Aug. 7, 2009, 16:51 CST). Thanks to Harold Krent for raising this objection.

⁵¹³ *See supra* Part I.C.

⁵¹⁴ *See* Mazzone, *supra* note 15, at 420 n.99 (citing commentators' criticisms of the effectiveness of Uniform Domain-Name Dispute-Resolution Policy).

⁵¹⁵ *See* Samuelson, *supra* note 30, at 2541.

uses that constitute fair uses of copyrighted works in specific sectors.”⁵¹⁶ But the description ends there. “Specific sectors,” as referred to by Mazzone, probably means § 107’s express mentioning of “criticism, comment, news reporting, teaching . . . scholarship, or research,”⁵¹⁷ though he does not explicitly say so. Those categories are good places to start drawing categorical lines, but Samuelson’s article is another.

In other words, the categories should focus on the *use* of the work, not the work itself. Regulations concerning use of several articles or a movie clip in a classroom would fall under the “educational” category of uses, rather than specific categories concerning articles or movies with rules pertaining specifically to the use of those *types* of materials. Thus, rules and regulations would address how much of a movie or book you could copy *in the educational setting*. There might be, for instance, regulations regarding the use of multiple articles when creating a “course pack,” or regulations concerning the use of copying photographs for classroom or educational use.

Thus, under this scheme, educational fair uses would occupy one area that the fair use administration would regulate. In this case, the CRAB’s contribution would not go to waste. The agency could still implement the CRAB model to the degree it aligns with the overall language, purpose, and structure of the legislation creating the agency. It may even function as a sub-agency within the larger one, such as the Copyright Office.

That raises another issue: even under such an approach, one might wonder why we need a new agency at all. Why not, for example, use the FTC or some other extant administrative body?⁵¹⁸ The reason lies in expertise. The FTC is an administrative body with a specific task⁵¹⁹—to expect them to immediately understand, regulate, and enforce copyright law and the nature of the interests at stake is impossible.

⁵¹⁶ Mazzone, *supra* note 15, at 415.

⁵¹⁷ 17 U.S.C. § 107 (2006).

⁵¹⁸ Thanks to Harold Krent for commending to my attention this point.

⁵¹⁹ See Federal Trade Commission—About Us, <http://www.ftc.gov/ftc/about.shtm> (last visited Oct. 21, 2009).

Perhaps, as Professor Liu suggests,⁵²⁰ the Copyright Office offers an existing institution in which to implement the CRAB. But, as Mazzone points out, the Copyright Office has come under scrutiny for favoring the interests of copyright owners.⁵²¹ Even so, there may be measures that Congress could take consistent with the CRAB proposal to limit capture, which have been outlined in the modified rulemaking process.⁵²² Thus, if the objection is centered on *newness* of the agency, it is possible to move the CRAB into the Copyright Office with legislation like that already articulated: the structural differences from the DMCA-rulemaking also would reduce, if not eliminate, many of the obstacles to public participation as well as the risk of capture.⁵²³ The primary additions to the legislation would be centered on where the CRAB would reside and the additional powers it would have. Congress would have to clearly articulate those powers.

B. Increased Costs

The argument about costs is a familiar one—especially given the scholarly embrace of the law and economics movement.⁵²⁴ Using an agency to administer fair use will increase the raw costs of copyright law. A new agency means new staffing and operating expenditures. The modifications proposed to the notice-and-comment rulemaking process will add further costs. Copyright owners—and some users—may also face increased costs. But raw costs are only one part of the equation. Conceiving of them as the only result of the agency would be a mistake for several reasons.

⁵²⁰ See Liu, *Regulatory Copyright*, *supra* note 396, at 148–50.

⁵²¹ Mazzone, *supra* note 15, at 429.

⁵²² These mechanisms were outlined in *supra* Part III.B.2, which describes the modified notice-and-comment rulemaking process.

⁵²³ The Electronic Frontier Foundation has criticized the DMCA as being too technical and inaccessible to the ordinary consumer by placing too many requirements on DMCA-created exceptions. See LOHMANN & HINZE, *supra* note 476, at 2–4. Many of these problems, most of which deal with defining works and demonstrating non-infringing use, would not be required under the CRAB's rulemaking.

⁵²⁴ See David A. Hoffman & Michael P. O'Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 381 (2002) (quoting JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 123 (1975)).

First, it fails to account for the current costs imposed on educational users. There are real benefits lost when teachers decide against using certain copyrighted materials because they think it is illegal. And, in many cases of educational copying, there are no costs imposed upon the copyright owner, in terms of either revenue or ability to control copying or distribution. There are even greater costs when institutions that educate our nation's young people internalize that fear. As has been detailed, universities implement restrictive policies that stifle education and creative growth.⁵²⁵ Not only does this impede teaching and student learning, it also impresses upon teachers and students a constrained view of copyright law and one's ability to create.⁵²⁶ For teachers, this means less effective instruction will likely result. For students, it (wrongly) teaches them that many novel and creative uses of copyrighted materials are illegal.⁵²⁷

Second, the imposition of cost should not be viewed as a wasteful economic burden but a necessary price for an invaluable and inexhaustible good: education. Taking this approach means making a "normative judgment about the value of fair use and about the value of fair use clarification."⁵²⁸ It also means making a value judgment about the importance of education vis-à-vis private profits of copyright owners.⁵²⁹ Carroll argues that clarifying fair use acts as a "free speech safeguard" because it quashes much of the uncertainty surrounding fair use—warming, instead of chilling, speech.⁵³⁰ But it is more than that. Implementing policies that are education-friendly will allow educators to teach effectively and

⁵²⁵ See *supra* Part I.C.

⁵²⁶ See generally LESSIG, *supra* note 224.

⁵²⁷ See *id.* at 293 (describing copyright law as creating a generation of criminals); Lisa Dush, *Beyond the Wakeup Call*, in COMPOSITION & COPYRIGHT: PERSPECTIVES ON TEACHING, TEXT-MAKING, AND FAIR USE 114, 122 (Steve Westbrook ed., SUNY Press 2009) (noting that in the study the author conducted, students "spoke of 'thinking twice' before they used a copyrighted text in their own compositions, . . . but then used the copyrighted text anyway").

⁵²⁸ Carroll, *supra* note 173, at 1138.

⁵²⁹ See *id.* at 1114. It is ironic that the Constitution secures copyrights in authors' works for the benefit of the public only to severely restrict the use of those works in education.

⁵³⁰ *Id.* at 1138.

develop students who will use copyright and fair use laws to their advantage, producing social benefits.

C. Rigidity of Regulations

Besides costs, some may turn a skeptical eye to prescriptive rules that educators must follow under the CRAB. Such skepticism derives from the notion that educators should not be required to consult a rulebook to determine how to teach.⁵³¹ They need a flexible approach to fair use, not rigid rules. This objection has merit—there are benefits to standards like the CBP.⁵³² To the extent that standards can be used, the CRAB is free to adopt them. But, as we have seen, standards can take teachers only so far—and while CRAB-promulgated standards, unlike ordinary CBPs, would have certain legal effect, they would still be vague.⁵³³

To solve this problem, the CRAB should promulgate more rules than standards—setting maximum limits on specific types of educational fair uses. Despite the argument that rules are too restrictive, the CRAB's rules could ameliorate this problem by requiring only substantial compliance—or enforce the rules in a manner that does not require literal compliance. This, of course, occurs in many other situations, and the speed limit is a good example. Sure, a sixty miles-per-hour speed limit requires you to drive at that speed or below; but police generally allow a five to ten miles-per-hour window in which to speed—legally. The degree to which speeding is allowable, as any person who has received a speeding ticket can attest, varies by municipality, county, city, and state.

The CRAB's rules could do the same. Imagine, for example, a rule that permitted teachers to photocopy for their students no more than 25% of any literary book. What happens when a teacher decides to use two chapters (totaling fifty-five pages) of a book containing 200 pages (27.5%)? If the CRAB's rules required only substantial compliance, then this use might be fair. Whether it is

⁵³¹ This was the general tenor of several objections this Article received at the 2009 Intellectual Property Scholars Conference.

⁵³² See *supra* note 360 and accompanying text.

⁵³³ See, e.g., *supra* note 367 and accompanying text.

fair would depend on the custom developed in education. In this way, the rules could incorporate some of the beneficial flexibility of the CBP while providing the certainty educators seek.⁵³⁴

This example also provides an opportunity to speak briefly about the effect of maximum rules. If we twist the facts of the aforementioned example just slightly, and say the teacher wanted to use seventy-five pages of the book for a total of 37.5%, the use would be unfair. What then? The answer is simple—the teacher could not use the approximately twenty additional pages. Sure, this would affect some educational fair uses and force teachers to choose sections of some works over others, but it does not deprive them of all of their uses.⁵³⁵ Indeed, the CRAB's rules should be drafted to permit uses that generally would allow the educator to use a particular type of material to educate their students on the point they desire.⁵³⁶ While the allowable percentage for usage of a book may not be 25%, some percentage should suffice.

D. Complexity of Regulations

Another objection to the CRAB or any rulemaking procedure is that the regulations, not to mention the process of developing them, is complicated. As to the complexity of the process, one must assume that groups will form to better address the agency's rulemaking process. Accepting the administrative model means sacrificing the typical case-by-case method of fair use adjudication. Not everyone will be satisfied with the rules and regulations, but the avenues of participation are open. Participation also requires organization and action—educators cannot expect the process will mobilize itself and completely and exhaustively protect teachers' rights without any input whatsoever.

⁵³⁴ Special thanks to Professor Peter Lee for giving me this idea in a discussion we had about one of his current projects.

⁵³⁵ It seems that there is a fear of secure limits on fair use, perhaps because of the current culture given the Guidelines. But, at some point, there has to be a limit on educational fair use. Why not promulgate it?

⁵³⁶ I realize this is a vague statement that tells us very little. But this Article is not meant to detail the specifics of each and every rule. Rather, its purpose is to propose a model upon which certain types of rules can be based. Rules should be designed to maximize education and respect the legitimate rights of copyright owners.

The rules themselves present a greater difficulty. Taking one look at the EEOC's rules and regulations is intimidating. The Code of Federal Regulations looks like a book and reads like an ancient Greek manuscript. The CRAB's regulations would mitigate these problems in at least two ways.

First, because the CRAB is specific to education, the number of regulations will be far fewer than in employment law. Second, the CRAB regulations should be written with an emphasis on common-sense organization and design. As noted above, these regulations should be written practically and include short-hand rules that educators can consult and understand easily. Unlike the Guidelines, the rules should focus on direct percentages and numbers, rather than adopt amorphous notions of "spontaneity."⁵³⁷ A rule governing photocopying textbooks for students, for example, might allow 15% of any textbook to be photocopied without permission or payment. This type of rigidity will actually provide for greater flexibility: rather than remaining in the straight jacket of the Guidelines and uncertainty, rules demarcate clear maximum boundaries for educators. As noted above, these boundaries can still accommodate some uses that may modestly fall outside a strict limit on a particular use.

Second, if necessary, would be "A Manual on Educational Fair Use" ("The Manual"). The Manual would lay out permissible uses in lay terms, and would also illustrate how the regulations should work in practice by using examples and commentary.⁵³⁸ The Manual may incorporate additional situations and short-hand rules if necessary.

There may also be educational programs designed to teach educators about fair use and encourage them to exercise their rights as provided by law. Finally, the CRAB should administer a website where teachers could find answers to frequently asked questions, as well as provide an e-mail address and telephone number at which a "Fair Use Genius," who would direct the

⁵³⁷ See *supra* notes 59–62 and accompanying text.

⁵³⁸ The actual regulations themselves, depending on the kind of regulation (i.e., rule, standard, rule-standard hybrid), may benefit from this approach.

individual to certain regulations,⁵³⁹ could be reached. This website should also contain the regulations and indices complete with hypertext, which would allow teachers to “click through” and easily navigate the regulations. The regulations should be hyperlinked to, or contain, the commentary and examples where necessary. Additionally, the website should contain the Manual and other webpages containing information about how the CRAB works, the procedures that need to be followed, how to obtain permissions should they be necessary, contact information, and other educational materials.⁵⁴⁰

CONCLUSION

The U.S. copyright doctrine of fair use has been both revered for its benefits and criticized for its vagueness.⁵⁴¹ Indeed, fair use has received much attention in literature.⁵⁴² Despite this attention generally, however, few observations exist about educators’ and educational institutions’ struggles with the doctrine.

For educators, issues began to percolate in 1955, when Congress decided to reform the copyright laws.⁵⁴³ Eight years later, these Congressional efforts resulted in the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, which was comprised of numerous individuals from various organizations, including educational organizations, publishers, and copyright owners.⁵⁴⁴ Between 1963

⁵³⁹ These individuals, like the “Geniuses” who work at Apple Stores, will not have sophisticated, technical knowledge about the regulations themselves or how they operate. They will merely be giving non-legal advice; that is, pointing people in the right direction.

⁵⁴⁰ In some ways, the EEOC’s website may be a good place to learn the Dos and Don’ts of website construction and the accessibility of legal concepts to educators. See United States Equal Employment Opportunity Commission Homepage, <http://www.eeoc.gov/> (last visited Aug. 26, 2009).

⁵⁴¹ Compare *supra* note 103 (stating that the rules have been interpreted as the minimum and maximum), with *supra* note 91 and accompanying text (stating that a court has revered the benefits of the fair use laws).

⁵⁴² See generally Lloyd L. Weinreb, *Fair Use*, 67 FORDHAM L. REV. 1291 (1999) (providing a broad overview of the case and literature on the fair use doctrine).

⁵⁴³ See *supra* note 38 and accompanying text.

⁵⁴⁴ See *supra* note 39 and accompanying text.

and 1976, the Ad Hoc Committee met numerous times, consulting with various interest groups.⁵⁴⁵ Although educators originally sought a broad-based, educational fair use exemption, the Ad Hoc Committee issued, in 1976, an agreement on educational fair use.⁵⁴⁶ This agreement contained Classroom Guidelines for uses of copyrighted works, which purported to state the minimum, not the maximum, standards for educational fair use.⁵⁴⁷

Even though the Guidelines were not optimal, at the very least they promised educators a certain amount of legal certainty that had eluded them in the past. But as educational fair use was litigated, that promise was left largely unfulfilled. Even though the Guidelines were not the law, courts used them in their fair use analyses.⁵⁴⁸ Some treated the Guidelines as pseudo law;⁵⁴⁹ some treated them as additional factors under § 107;⁵⁵⁰ some treated them as sub-factors within the four factors listed in § 107;⁵⁵¹ and some did a combination of the three.⁵⁵²

As a result of this judicial treatment, the Guidelines effectively *became* part of the law. Publishers used these decisions to bully educational institutions into conforming to the Guidelines as a limit on fair use even though they are not the law, have no basis in law, and were intended to be a floor, not a ceiling.⁵⁵³ The courts' treatment of the Guidelines has improperly ossified educational fair use into restrictive, per se maximum allowances, preventing it from retaining the trademark flexibility that has made the doctrine so useful.

Ironically, fair use has chilled fair uses. Educational institutions, now fearful of infringement, avoid the specter of liability by severely restricting their use of copyrighted works.⁵⁵⁴ This has negative consequences for student learning, as well as

⁵⁴⁵ See *supra* note 39 and accompanying text.

⁵⁴⁶ See *supra* note 48 and accompanying text.

⁵⁴⁷ See *supra* Part I.A.2.

⁵⁴⁸ See *supra* Part I.C.

⁵⁴⁹ See *supra* Part I.B.1.

⁵⁵⁰ See *supra* Part I.B.2.

⁵⁵¹ See *supra* Part I.B.2.

⁵⁵² See *supra* Part I.B.2.

⁵⁵³ See *supra* note 54 and accompanying text.

⁵⁵⁴ See *supra* Part I.B.2.

their perception of the law. Furthermore, past judicial treatment of the Guidelines fosters misunderstanding of copyright law among educators. Without knowing the actual bounds of the law, educators' misperceptions and copyright owners' customs seeped into the educational culture, restricting teaching and student learning, and generally impeding the educational mission. The Guidelines also created an asymmetrical legal environment that catered only to copyright owners' interests, with the courts adopting industry standards in lieu of fair use.

Based on these failings, a new model for fair use was explored. The recent literature contains proposals to either modify or re-conceptualize copyright infringement or the fair use inquiry.⁵⁵⁵ Some scholars have even specifically taken issue with the current fair use framework. They proposed a variety of options, including reallocating the burden of proof;⁵⁵⁶ eliminating some of the fair use factors;⁵⁵⁷ re-conceptualizing the factors by using substantive copyright law doctrine to inform their application;⁵⁵⁸ using a code of best practices;⁵⁵⁹ and creating a new entity to adjudicate or administer fair use.⁵⁶⁰ Examination of these proposals revealed that they suffer deficiencies when applied to educational fair use: none sufficiently accounted for the value fair use provides, or the uncertainty it forces educators to confront.⁵⁶¹ As a result, these approaches were not used in developing a model for fair use.

Based on these findings, this Article concluded that the best approach was to create a new entity to regulate educational fair use. To that end, a new mechanism for administering educational fair use, which built on Professor Jason Mazzone's previous work,⁵⁶² was proposed. It suggested a Congressionally-created administrative agency—the CRAB—that would regulate educational fair use. The structure and operation of this agency were then detailed. The CRAB would engage in a modified

⁵⁵⁵ See *supra* Part II.B.

⁵⁵⁶ See *supra* Part II.B.1.

⁵⁵⁷ See *supra* Part II.B.2.

⁵⁵⁸ See *supra* Part II.B.2.

⁵⁵⁹ See *supra* Part II.B.3.

⁵⁶⁰ See *supra* Part II.B.4.

⁵⁶¹ See *generally supra* Part II.

⁵⁶² See *supra* Part III.

notice-and-commenting rule making process, which would reduce agency capture and lock-in. Additionally, the CRAB would utilize informal adjudication and enforcement mechanisms.

After defining the structure and function of the CRAB, the Article described the statutory language that would create the agency. This language limited the concept of educational uses without limiting the CRAB's authority to regulate them. It then raised and responded to four possible objections: the CRAB entails too much specificity; the CRAB unjustifiably increases costs; the CRAB's rules are too rigid; and the CRAB creates more, rather than less, complexity. The responses to these objections explained how the CRAB's specificity and rigidity were actually advantages; how the increased costs, when viewed in context, are necessary to improve education; and how the fear of complexity was overstated.

To recap, this Article has shown that the current state of educational fair use is troublesome. After examining possible solutions to this problem, a new model for educational fair use was proposed: the CRAB. Ultimately, the CRAB's goal is to provide educators with the identifiable standards and rules by which they can operate, to maintain fidelity to the law of fair use, and to facilitate the learning process without fear of litigation by publishers and copyright owners.