TEACHING WITHOUT INFRINGEMENT:  
A NEW MODEL FOR EDUCATIONAL FAIR USE

David A. Simon*

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. While their judicial hearts were in the right place, the courts deciding these cases left their legal skills at home. Their courts’ choice to use the Guidelines had two unintended and destructive consequences. First, they 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, and as a result, educational institutions began 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, almost none deal explicitly with fair use in education. That is exactly what this Article does. Building off 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 negative effects the Guidelines have had on the education. Educational institutions would then have the flexibility and the practical tools they need to teach their instructors and students about the law.

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I. 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, Plato, 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 make sure you comply with the law (never mind that the 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. But even if you do understand these “Guidelines,” you notice that these are the maximum amounts of allowable copying under your copyright policy. 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.

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1 For a more complete description of how these policies function, see infra section II(C).
2 While the Educational Guidelines state they are the minimum permissible copying, schools—and some courts—apply them as the maximum limit on copying. See infra section II.
3 This is a popular component of copying policies at universities. See infra note 152.
That 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. But you still may find your request denied. 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 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. And, despite educational institutions’ use of 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.

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4 This scenario is reminiscent of the Supreme Court’s statement in Wickard v. Filburn, 317 U.S. 111, 125 (1942), that, “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 “small” and “local” one, becomes widespread, it can have large-scale effects.
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. Since 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.

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 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.” At that point, “fair use” was a common law doctrine—made and elucidated by judges. Some clarity came when Congress enacted the Copyright Act of 19765 (“Copyright Act” or “Act”), codifying the doctrine of fair use. While this doctrine is somewhat amorphous, the House of Representatives Report accompanying the Act did note that a committee had convened and created fair-use Guidelines that applied to non-profit educational institutions.

Courts have misapplied and misused these Guidelines, mostly at the behest of copyright owners. These judicial errors have created unworkable and faulty standards that restricted fair

use in the educational environment, 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, little scholarship or legislative activity has been directed toward assisting teachers to determine what uses are fair. This Article does what others have not: explore 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, showing that the consequences of this treatment are largely 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 II 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 Guidelines developed for educators as stated in the House Reports. It also assessed 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. Specifically, educational institutions have been

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6 These Guidelines are discussed in more detail infra section II.
deterred from exercising the appropriate amount of discretion when developing copyright and fair-use policies, as well as using copyrighted materials generally.

After this analysis, Part III 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; 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 section II.

As a result of Part III’s analysis, Part IV proposes a solution. Building off a recent scholar’s suggestion that Congress create an executive agency to “administer fair use,” a fuller account of how Congress and this new agency might address educational fair use is developed. Focusing on the use of positive law, this section 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 and misunderstanding that many educators and educational administrators have about copyright law and fair use. In sum, this model is designed to enhance education though certainty and practicality.

Finally, part V raises and responds to possible objections. These include the increased cost of creating a new agency; the need for an agency specific to education; and the complexity that may result from issuing rules on educational fair use. After each objection is addressed, the

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Article concludes that these are not sufficient reasons to discard the model proposed in part IV, which will enhance education by promoting fair use.

II. 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 section outlines why. That explanation requires a brief introduction to fair use and the guidelines that govern educational fair use that the House of Representatives included in its report accompanying the Copyright Act. After understanding the 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, 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 1790,8 and the doctrine of fair use had been recognized in England under the Statute of Anne,9 it was not until 1841 that any United States court applied the doctrine.10 Since its application in Folsom v. Marsh, however, fair use has changed, if not in substance then in form. In 1976, Congress amended the Copyright Act,

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10 Leval, supra note 9, at 1105; Folsom v. Marsh, 9 F.Cas. 342 (C.C.D. Mass. 1841); Acuff-Rose, 510 U.S. at 575.
codifying the common-law doctrine of fair use.\footnote{11 The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codifying fair use, inter alia, at 17 U.S.C. § 107); Acuff-Rose, 510 U.S. at 575.} 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

(4) the effect of the use upon the potential market for or value of the copyrighted work.\footnote{12 17 U.S.C. § 107.}

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).\footnote{13 17 U.S.C. § 110.}

Section 110(1) exempts the performance or display of images used in teaching.\footnote{14 17 U.S.C. § 110(1) (“[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”)} Section 110(2) also exempted certain uses 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."\textsuperscript{15} This was a policy choice, grounded in neither case law nor substantive legal doctrine. Congress later made an additionally policy choice when it decided educational institutions needed further protection and, in 2002, expanded to cover unanticipated technologies.\textsuperscript{16}

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. The specific exemption provided by § 110(2), however, covered a limited situation: where the teacher performed or displayed a work; it failed 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. As noted above, § 107 specifically mentions “teaching” as a favored use that may be considered


\textsuperscript{16} This amendment was entitled, Technology, Education, and Copyright Harmonization Act (“TEACH Act”), Pub. L. No. 107-273, 116 Stat. 1910 (2002) (codified as § 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. 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.” S. REP. NO. 107-031, 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 made by an instructor as part of the curriculum, 17 U.S.C. § 110(2)(A), and must be “directly related and of material assistance to the teaching content of the transmission.” 17 U.S.C. § 110(2)(B) (“the performance or display is directly related and of material assistance to the teaching content of the transmission[.]”). Additionally, the transmission of this material must be made and received by students enrolled in the course for which it is being shown. 17 U.S.C. § 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. 17 U.S.C. § 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. 17 U.S.C. § 110(2)(D).
“fair” and, therefore, not infringing.\(^{17}\) That, however, does not mean that all educational uses are non-infringing uses. The statute explicitly provides that every use must be assessed using the factors articulated in § 107.\(^{18}\) Furthermore, the exempted use for “teaching (including multiple copies for classroom use)” is ambiguous. It does not define teaching, state how much of a copyrighted work may be copied, or explain how many copies are permissible.

1. The Ad Hoc Committee

The ambiguity inherent in the fair-use provision did not go unnoticed during the drafting of the Copyright Act. Section 110(a)’s guiding principle—a specific exemption provided to teachers by law—was not lost on the educational community. Educators clamored for specific fair-use provisions that permitted copying, which author and publisher groups opposed.\(^{19}\) 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.\(^{20}\) 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.”\(^{21}\) To that end, Congress urged educators and members of the media industry to meet

\(^{17}\) E.g., see, 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 Use*, 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).

\(^{18}\) 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 devise a potential compromise that accommodated all interests.\(^{22}\) 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").\(^{23}\)

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.\(^{24}\) 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," and, in part, because "it is legally risky for teachers to rely wholly on fair use."\(^{25}\) 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.'"\(^{26}\)

Originally, the Ad Hoc Committee pushed for a broad fair-use exemption for educational uses.\(^{27}\) In the minds of educators, the flexibility of the fair use provisions were a liability, not a benefit—in a broad exemption they sought safety.\(^{28}\) Ultimately, they were rebuffed; authors

\(^{22}\) Crews, \textit{supra} note 19, at 599.

\(^{23}\) \textit{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. Rosenfield, \textit{Major Problems of Copyright Law As Viewed By the Ad Hoc Committee on Copyright Law Revision}, Academy for Educational Development, Inc. 1 (1970) (on file with the author). 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. \textit{Id.} at 1-2; \textit{see id.} at ex. 1 (listing participating organizations). The participants discussed how copyright could best accommodate educators. One representative suggested the establishment of the Ad Hoc Committee, which convened for its first meeting on September 5, 1963. \textit{Id.} at 3.

\(^{24}\) Rosenfield, \textit{supra} note 23, at 3.

\(^{25}\) \textit{Id.} at 51.

\(^{26}\) Rosenfield, \textit{supra} note 23, at 7.


\(^{28}\) \textit{Id.} at 279-80.
wanted a case-by-case review and the establishment of a “Copyright Royalty Tribunal” (“CRT”). To create the certainty that educators sought, the Committee eventually agreed on the Classroom Guidelines. Despite this apparent agreement, “the Classroom 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.”

2. The Educational Guidelines

The House Report accompanying the Copyright Act of 1976 included an agreed 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”), “it refer[ed] only to copying from books and periodicals, and [was] not intended to apply to musical or audiovisual works.” The House Report also contained guidelines for the educational use of music (“Music

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30 Crews, supra note 19, at 616.


33 Id.
Additionally, a 1979 House Report articulated guidelines for off-air recording of broadcast programming for educational purposes (“Off-Air Guidelines”). This Article focuses mainly on the Classroom Guidelines because courts have discussed these most frequently, 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.” It also warned that the Classroom Guidelines did not proscribe any uses
articled by case law or those that may arise in the future, even if those uses fall outside the Classroom Guidelines.37

The Ad Hoc Committee divided the Classroom Guidelines for reproduction of books and periodicals into groups: single copying for teachers and multiple copies for classroom use.38 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. A chapter from a book;

B. An article from a periodical or newspaper;

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

D. A chart graph, diagram, drawing cartoon or picture from a book, periodical, or newspaper.39

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.40 The first condition requires that the use satisfy the tests of “spontaneity” and “brevity.”41 The Classroom Guidelines state that spontaneity consists of two components. First, “[t]he copying [must be] at the instance

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37 H.R. REP. NO. 94-1476, at 67. (“The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types 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.”).

38 Id. at 68.

39 Id.

40 Id.

41 Id. at 70. 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.
and inspiration of the individual teacher.[...]” 42 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 that it would be unreasonable to expect a timely reply to a request for permission.” 43

The “brevity” requirement is more detailed, and changes depending on the type of work used. 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.” 44 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.” 45 Brevity for illustrations means a copy of “[o]ne chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.” 46 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.” 47 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.” 48

The second condition for multiple classroom copies requires the use to satisfy the “cumulative effect” test. 49 This test has three requirements. First, the teacher may make copies

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42 Id. at 69.
43 Id.
44 Id. at 68.
45 Id.
46 Id. at 69.
47 Id.
48 Id.
49 Id. at 68-69.
“for only one course in the school in which the copies are made.”

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 one class term.”

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

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

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. At least they seem that way compared to the fair-use factors, which lend themselves to judicial decisions that

50 Id. at 69.
51 Id.
52 Id. (“There shall not be more than nine instances of such multiple copying for one course during one class term.”).
53 Id.
54 Id. at 68.
55 Id. at 69.
56 Id. at 70.
57 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) (stating her opinion that “[t]he Classroom Guidelines provide a more mathematical and rigid scheme than the four-factor fair use test for determining whether use of a copyrighted material is justified”).
employ post-hoc rationale.\textsuperscript{58} Indeed, some courts endorse the certainty-enhancing characterization of the Guidelines.\textsuperscript{59} This mechanical appearance has influenced the courts use of the Classroom Guidelines in their analysis of cases involving educational fair uses. That treatment affects the way the Guidelines are viewed and used by educational institutions. This section 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. Nevertheless, that disclaimer does not change the practical effect of the courts’ discussion: they are legitimatizing the Guidelines as pseudo-law.

In \textit{Marcus v. Rowley}, for example, the Ninth Circuit analyzed whether the defendant, a teacher, had made “fair use” of the plaintiff’s booklet.\textsuperscript{60} To do this, the court walked through

\textsuperscript{58} Scott M. Martin, \textit{Photocopying and the Doctrine of Fair Use: The Duplication of Error}, 39 J. COPYRIGHT SOC’Y U.S.A. 345, 353-54 (1992) (describing 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).

\textsuperscript{59} \textit{E.g.}, Marcus v. Rowley, 695 F.3d 1171, 1178 (9th Cir. 1983) (“The guidelines were designed to give teachers direction as to the extent of permissible copying an to eliminated some of the double which had previously existed in this area of copyright.”).

\textsuperscript{60} In \textit{Rowley}, the plaintiff was a public school teacher who had published, and owned the registered copyright in, a booklet on cake decorating. \textit{Id.} at 1173. The defendant also was a schoolteacher, though she previously had been a student of the plaintiff. \textit{Id.} In addition to taking the plaintiff’s course and purchasing the plaintiff’s book, the defendant used the plaintiff’s booklet to compile a packet for the food service careers class that she taught. 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.” \textit{Id.} The defendant made fifteen copies of her
each of the fair-use factors eventually, finding that the defendant did not engage in fair use.61

After explaining each factor, the court, in a separate section entitled, “The Congressional
Guidelines,” applied the Classroom Guidelines.62 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].”63 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.”64
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[].”65

So, while the court noted that the Guidelines were not the law, it touted their benefits and
analyzed them anyway. 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.66 It found that “[the defendant’s] copying would not
be permissible under either” the test for brevity or spontaneity.67 Then classifying the
defendant’s book as a “special work,” the court found it still failed the brevity, spontaneity, and

work, which used about fifty percent of the plaintiff’s booklet, and placed them on file for her students. Id. She used
these packets for three consecutive years. Id. at 1173.

61 Id. at 1175-78.
62 Id. at 1178.
63 Id. at 1178.
64 Id. at 1178.
65 Id. at 1778.
66 Id. at 1178
67 Id. at 1178.
cumulative effect tests.\textsuperscript{68} “In conclusion,” the court stated, “it appears that [the defendant’s] copying would not qualify as fair use [under the Guidelines].”\textsuperscript{69}

Other courts have taken a similar tact and treated the guidelines as legislative history that constituted “persuasive authority.” The court in Basic Books v. Kinko’s Graphics Corp.,\textsuperscript{70} like the Rowley court, first examined the four fair-use factors.\textsuperscript{71} Then it stated that the Guidelines were part of the legislative history,\textsuperscript{72} which demonstrated a “Congress[ional] [attempt to avoid] the maelstrom [of dispute over photocopying that was] beginning to churn and . . . to clarify, though a broad mandate, its intentions.”\textsuperscript{73} Like the Rowley court, the court in Basic Books proceeded to apply the Guidelines. Although the court properly noted that the Guidelines represented the minimum standard and were “more or less permissive,”\textsuperscript{74} it found that the

\textsuperscript{68} 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.” \textit{Id.} at 1178. (As explained above, “special works” are those that combine images and text, and are intended for children or a general audience. How impossibly vague is that?!) It then tested the special work for brevity, finding that “[the defendant’s] copying would not be permissible under this test.” \textit{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.” \textit{Id.} As a result, her “copying [did] not meet this requirement.” \textit{Id.} Next it assessed the “cumulative effect” test. The court noted that, because the defendant copied only one piece of the plaintiff’s work,” the “[d]efendant’s conduct . . . satis[ied] the second test under the guidelines.” \textit{Id.} Finally, the court found that the “defendant’s [work] did not acknowledge plaintiff’s authorship or copyright and therefore [failed] . . . [the third] test.” \textit{Id.}

\textsuperscript{69} \textit{Id.} at 1178. 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.

\textsuperscript{70} 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 packs” by copying and then compiling excerpts of various copyrighted works without the copyright owners’ consent. \textit{Id.} at 1526. The defendant was a for-profit business that marketed its services to university professors. \textit{Id.} at 1529. Like the Rowley court, the court in Basic Books first examined the four fair-use factors. \textit{Id.} at 1530-34.

\textsuperscript{71} \textit{Id.} at 1530-534. 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 “[t]he portions copied were critical parts of the books copied[,] since that is the likely reason the college professors used them in their classes.” \textit{Id.} at 1533. If there has ever been a more circular argument, 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.

\textsuperscript{72} \textit{Id.} at 1535 ("The Classroom Guidelines . . . are part of the legislative history of the Copyright Act of 1976.").

\textsuperscript{73} \textit{Id.} at 1535.

\textsuperscript{74} \textit{Id.} at 1536 (footnote omitted).
defendant’s uses violated all three tests—brevity, spontaneity, and cumulative effect—but did not comment specifically on what effect, in terms of fair use, that finding had.75

The court further declined to hold that the Classroom Guidelines’ “prohibitions” constituted rigid bars to certain uses.76 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. The court stated that, simply because the use is “beyond the scope of the Guidelines” does not render the law a nullity: fair-use law still applied.77

The courts in Encyclopedia Britannica v. Crooks,78 American Geophysical Union v. Texaco, Inc.79 and Princeton University Press v. Michigan Document Services,80 also used the Guidelines as legislative history. The Crooks court stated that, “while not controlling, the

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75 Id. at 1537. Professor Ann Bartow has stated that courts, as I argue the courts interpreting the guidelines repeatedly do, “simultaneously [interpret] the Guidelines as both the minimum and maximum scope of fair use.” Ann Bartow, Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely, 60 U. Pitt. L. Rev. 149, 184 (1998). Generally, this type of interpretation starts with a disclaimer that the Guidelines represent the minimum standard of fair use. This is followed by an application of the Guidelines where the court finds that the use is not fair because it falls outside the Guidelines. See e.g., Rowley, 695 F.3d at 1178.

76 Basic Books, 758 F. Supp. at 1536. 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.

77 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 situation” because the copying would typically exceed them. Id. at 1545. The court found this to be self-serving, stating that the defendant essentially “exempted itself from the purview of the Guidelines altogether.” Id. at 1545. This implies that the defendant is subject to the Guidelines, which therefore have some legal effect. This also means that the Guidelines play some legal role, if only to determine good faith.

78 542 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.”)


80 99 F.3d 1381 (6th Cir. 1996) [hereinafter MDS].
Congressional Reports on the 1976 Copyright Legislation are helpful in outlining acceptable fair use limits in educational settings. 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.

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

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81 542 F. Supp. at 1175

82 Id. at 1175. The court also observed that the Senate Report suggested fair-use inquires 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). 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 words” *Id.* at 1169 (quoting Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 974 (9th Cir. 1982), rev’d by 464 U.S. 417 (1984)). One must remember, of course, that the cumulative effect discussed here 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 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, teachers requested the videos, there was no provision for returning or erasing the videos after use, and, “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.

83 *Texaco*, 60 F.3d at 919 n.5.

84 99 F.3d at 1390 (quoting *Texaco*, 60 F.3d at 919 n.5 (citing *Basic Books*, 758 F. Supp. at 1522-36)).

85 *Id.* at 1390 (quoting H.R. REP. NO. 94-1733, at 70 (1976)).

86 *Id.* at 1390.

87 *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.”).

88 *Id.* at 1391.
Even one dissenting judge, who railed against the use of legislative history, conceded that the Guidelines were a “safe harbor.”

Similarly, the court in *Bridge Publications v. Vein* applied the guidelines after analyzing the four fair-use factors. As a result of this analysis, the court found that the “defendant’s use did not fit within the special guidelines approved by Congress as to fair use in the educational context.”

In addition to these cases, one other, which did not involve a judicial decision, merits attention. *Addison Wesley Publishing Co., Inc. v. New York University*, involved a settlement between a copy-shop and a publisher. The settlement agreement prohibited the copy-shop from making copies except in three cases: (1) where it secured the copyright owner’s consent, or (2) at the request of NYU faculty (i) where the requested copying fell within the Classroom
Guidelines,94 or (ii) where the requested copying had been approved by NYU’s General Counsel as conforming to NYU’s Policy Statement on Copying.95

NYU developed its Policy Statement in response to the lawsuit; it did not previously have such a policy.96 The opening passage of the Policy Statement explained that it sought to address the concerns of educators who feared copyright violation.97 It also sought to reduce the University’s exposure to liability.98 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.”99

The Policy itself used the Classroom Guidelines “to determine whether . . . the prior permission of a copyright owner” must be sought.100 Under the Policy, which is still in place,101 “[i]f proposed photocopying is not permitted under the [Classroom] Guidelines[,] . . . permission to copy is to be sought.”102 When that permission is denied, photocopying can take place only after a review by the University’s General Counsel, who will either approve or deny the

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94 Id. at *2. 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.

95 Id. at *2. 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.

96 Id. at *5.

97 Id. at *5.

98 Id. at *5.

99 Id. at *5.

100 Id. at *6.


request. 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.

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, in the legal world. Rowley emphasized the Congressional adoption of the Classroom Guidelines and called them “instructive.” It further gave them importance by using the Guidelines as a separate test under which it evaluated the fairness of the use.

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

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, while the Texaco court found the Guidelines to be “persuasive authority.”

Finally, while not a judicial decision, NYU cemented the Guidelines place as a substantive legal tool for both courts and educators. The settlement expressly adopted the Guidelines as a de facto maximum threshold of fair use, requiring consent of NYU general counsel for any copying that exceeded the Guidelines’ scope. The same proscriptions applied to NYU faculty under the university’s copying policy.

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103 Id. at *6.
104 Id. at *6-7.
105 See infra section II(C).
2. Guidelines as Sub-Factors Under or Additional Factors § 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. 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.106

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.’”107 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.”108 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.

Second, “other factors” could mean additional factors the court may consider beyond the four factors articulated in § 107.109 This is the type of behavior in which the courts in Rowley, MDS, and Vien appeared to engage. Like the use of the Guidelines as sub-factors, their use as

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106 Crooks, 542 F. Supp. at 1175; Texaco, 60 F.3d at 919.
107 MDS, 99 F.3d at 1389.
108 Id. (citing H.R. REP. No. 94-1476). 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.
109 Simply using additional factors does not violate § 107, which expressly 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. Crews, supra note 19, at 618.
additional factors does more than create pseudo-law, it adopts the Guidelines as law.\footnote{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 as 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.} In other words, the courts’ consideration of the Guidelines, and their inclusion in weighing fair use, could be considered a judicial adoption of them as an additional factor under § 107. 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,\footnote{\textit{MDS}, 99 F.3d at 1391 (the fact that the defendant’s use fell outside the guidelines “weigh[ed] against a finding of fair use”); \textit{Basic Books}, 758 F. Supp. at 1537 (considering the Guidelines’ “prohibitions” on anthologies in light of the other fair use factors); see \textit{Rowley}, 695 F.2d 1179 (stating that the defendant’s use was not fair under the statutory factors or the Guidelines).} 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 \textit{Basic Books} court did just that when it explained an analysis under a section titled, “other factors.”\footnote{\textit{Basic Books}, 758 F. Supp. at 1534. This section of the opinion is extremely confusing. The court, after stating this heading, proceeds next to heading “B,” labeled, “Classroom Guidelines.” No “A” heading appears anywhere. To make matters worse, the court then places the work “Anthologies” in italics and proceeds to make an analysis of this issue. It does not, however, tie all of this analysis together.} First, the court noted that the defendant’s activities “created a new nationwide industry” that usurped the plaintiffs’ potential profits.\footnote{\textit{Id.} at 1534. This type of reasoning is problematic because the plaintiffs had not yet entered the market. Some of the approaches discusses \textit{infra} section III address this problem.} Then, the court found that, because the “Classroom Guidelines express a specific prohibition of anthologies, . . . [t]he fact that these excerpts were complied and sold in anthologies weighs against [the] defendant.”\footnote{\textit{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 is that enjoining them from pirating plaintiffs’ copyrights would halt the educational process.” \textit{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. \textit{E.g.}, see § 110(1), (2) (making display or performance of copyrighted of materials conclusively fair). Education would still continue if
The *Vein* 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.” More importantly, however, the court, like the court in *MDS*, 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 guidelines on fair use in the educational context, the . . . defendant [was] not entitled to fair use protection.”

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

Whether treating the Guidelines as “instructive” (*Rowley*) or as part of the four fair-use factors, 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. Instead, they treat the Guidelines as “persuasive” (*Texaco*) or “helpful” (*Crooks*) by virtue of their status as legislative history. In that sense, courts seem less concerned with the Guidelines philosophical and legal grounds than with their own decision, using the Guidelines to bolster a decision already reached.

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§110, for example, did not exist; the point is that the absence of that section would hinder education. Second, the court couches its language in terms of piracy. In that sense, it concludes what it seeks to prove.

115 827 F. Supp. at 636.

116 *Id.*

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

118 One thing the Classroom Guidelines have *not* done is persuade judges to use them by *virtue of the reasoning upon which they are based*. Court have utilized them because they legislative history, not because they have any principled basis in the law. Thanks to Harold Krent for helping me articulate this point.
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 effects both how teachers educate their students and how students learn. The next section 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. In either case, the courts have erred. The Guidelines, as repeated by commentators and judges, are not the law.\textsuperscript{119} 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.\textsuperscript{120} That lacuna—between the Guidelines and the Act—impacts the operation of the law as intended. 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

\textsuperscript{119} Crews, \textit{supra} note 19, at 618, 665-66; Rothman, \textit{supra} note 31, at 1904; Jessica Litman, \textit{Copyright, Compromise, and Legislative History}, 72 CORNELL L. REV. 857, 875-77, 887-88 (2000) (footnotes omitted) (detailing the process of negotiation within the Ad Hoc Committee and noting that “Parties 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”); \textit{id.} at 864 (“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.”); \textit{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.”); \textit{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”); \textit{MDS}, 99 F.3d at 410-11 (Ryan, J., dissenting).

\textsuperscript{120} Crews, \textit{supra} note 19, at 618; \textit{but see}, e.g., Michael J. Meurer, \textit{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”).
“proxies” for legal concepts found in fair use. 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.” 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.”

In giving the Classroom Guidelines the effect or appearance of law, courts improperly ossified distorted standards (rules?) of fair use and concomitantly fostered uncertainty. 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.” 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. 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.”

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121 See Meurer, supra note 120, at 937.
122 Crews, supra note 19, at 665-66.
123 Id. at 612.
124 Ossification does not refer merely to the fact that a rule has developed that is hard 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 section II(B).
125 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”).
127 Crews, supra note 19, at 639-40.
128 Crews, supra note 19, at 640; Bartow, supra note 75, at 170.
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.” The resulting standard, which the Association of American Law Schools (“AALS”) and the American Association of University Professors (“AAUP”) opposed, followed the Rowley court’s use of the Guidelines as a limit on photocopying. NYU, and the American Association of Publisher’s (“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, and the latter did so by confirming using the Classroom Guidelines as an tool for evaluating fair use. These decisions quashed any doubts that the Classroom Guidelines would be used as a basis for a fair-use determination in educational context. 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.

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’, school districts’) interests. The “legalization” of the

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129 Bartow, supra note 75, at 170; Rothman, supra note 31, at 1953-954 (“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).

130 Steinbach, supra note 126, at 320.

131 Crews, supra note 19, at 641.

132 See Rothman, supra note 31, 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.”)

133 See Rothman, supra note 31, at 1954; see Bartow, supra note 75, at 185 (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 recover like that in the [Basic Books] case’”).
Guidelines as a maximum standard—or perhaps a rule—means the courts adopted the industry “clearance culture,”134 framing the fair-use debate in terms of market failure and industry standards instead of the statutory factors.135 This means that 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; (ii) that transaction costs or social value are an adequate measures of the market; and (iii) that the possibility of licensing weighs against a finding of fair use. None of these statements is necessarily true;136 and their acceptance places educators seeking to utilize fair use in an unenviable position. Their conduct is evaluated against standards 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’.”137 The asymmetric nature of the Classroom Guidelines also puts industry interests ahead of

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134 Id. at 1911-918; see Bartow, supra note 75, 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”).

135 Wendy Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors, 82 COLUM. L. REV. 1600, 1630 (1982); Paul Goldstein, Fair Use in a Changing World, 50 J. COPYRIGHT SOC’Y U.S.A. 133, 134-39 (2003); Meurer, supra note 120, 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.”); Bartow, supra note 75, at 151 (stating that, “over the last 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”).

136 See, e.g., Christina Bohannan, Copyright Harm, Foreseeability, and Fair Use, 85 WASH. U. L. REV. 969, 982 (2009) (arguing that “market failure is one basis for finding fair use because it represents a situation in which a copyright owners suffers no real harm as a result of defendant’s allegedly infringing activity”).

137 Rothman, supra note 31, at 1938.
TEACHING WITHOUT INFRINGEMENT

teachers, and prevents teachers from using copyrighted materials to effectively educate students. Additionally, focusing on indicia like the market neglects the statutory language, which the dissent in MDS noted expressly allows for teachers to make copies. 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’.”

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. Although the Guidelines seem to give educators a measure of certainty, their status as actual law is not settled. 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. Since cases like NYU,

138 Even Crews, who adamantly decries the Guidelines, notes their importance in the courts and practice. Crews, supra note 19, at 693 (“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.”).
139 MDS, 99 F.3d at 1394-395 (Merritt, J., dissenting).
140 Id. (quoting 17 U.S.C. § 107).
141 James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 YALE L.J. 882, 883, 906 (2007) (explaining how “doctrinal feedback” can create fear-induced licensing markets that self-perpetuate and expand). Professor Michael Carroll has recognized such uncertainty, though he glosses over the treatment of the Classroom Guidelines, erroneously describing them as “provide[ing] clarity.” Carroll, supra note 125, at 1115; 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 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.”); id. 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”); id. at 1116-118 (describing examples of fair-use uncertainty for educators).
142 While 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 PRACTISING L. INST. 110, 124 (1998). It might be more accurate to say that the Classroom Guidelines are not law, but their actual status in practice still remains uncertain.
143 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—both by manipulating uncertainty and by changing the chance of suit against particular groups of users.”); id. at 603-04
MDS, and Vein treat the Guidelines as legal rules (or inflexible and maximum standards), some teachers treat them as the law while others do not, relying instead on the doctrine of fair use. This uncertainty—both as to the legal status of the Guidelines as well as fair use itself—can lead to one of two consequences: “[d]epending on the magnitude and the context of such uncertainty concerning legal rules, affected parties may either over- or under-comply with the stated rule.”

This means that, depending on how risk-averse teachers are, some will infringe more and some will infringe less. A greater reliance on the Guidelines as the law—and worse yet, the upper bound of the law—would lead to fewer fair uses, even when justified, for fear of infringement. The NYU settlement and the subsequent university copyright-policies developed thereafter are evidence of this.

144 Id. at 602-603; Gideon Parchomovsky and Kevin A. Goldman, Fair Use Harbors, 93 U. VA. L. REV. 1483, 1497-498 (2007) (stating that “law and economics scholars have long observed that vague standards cause overdeterrence”).

145 At the beginning of the copyright law unit of my Education Law course, I ask students to raise their hand if they think they have ever 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, which it clearly does not. Third, almost no teachers have read their school’s copyright policy. Fourth, because they perceive copyright law as both rigid and do not even remotely understand its contours or attempt to do so, they continue to use copyrighted works in ways they think violates copyright law. All four of these points are extremely worrisome and, in and of themselves, should motivate a new solution to educational fair use.

146 Aull, supra note 143, at 602-603 (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)”).

147 This conception of the Guidelines makes sense because “even the risk-averse actor will presumably not seek a license in the face of clear legal precedent that obviates the need to do so.” Gibson, supra note 141, at 905. That would explain, in part, why educational institutions use the Guidelines as a maximum standard or as a rule.

148 Gibson, supra note 141, at 900 (“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.”); Aull, supra note 143, at 601-03; id. at 603-04 (“publishers and other owners’ actions can impact the price of educational use”). 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. Gibson, supra note 141, at 900. While he claims 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,” he is right. Id. at 901. But that answer does not do justice to the decisions themselves, which are in many cases erroneously reasoned; and it does
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 litigation and, in the process, produce instructors who teach students that violating the law is acceptable, as long as they do not get caught. But infringement is different from litigation because the parties may not to enforce their claims. Thus, there may be some truth to the fact that non-enforcement against individual teachers may make a use “free[r].” 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. Even if the uses were “freer,” however, educational institutions have copyright policies that take the Guidelines and court decisions seriously; the cases discussed in this article show how publishers and copyright owners can shape use and “chill” fair use.

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149 Gibson, supra note 141, at 899-900.
150 Aull, supra note 143, at 605 (“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.”) (footnotes omitted).
151 See Gibson, supra note 141, at 888-900 (describing how doctrinal feedback works with respect to licensing); id. 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”).
152 E.g., University of California, UC Systemwide Copyright Policies and Resources, UCCopyright, 1986 Policy and Guidelines on the Reproduction of Copyrighted Materials for Teaching an Research, 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”); California University of Pennsylvania, Faculty Handbook, 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
Commentary and recommendations on fair use confirm this suspicion. One commentator suggests to teachers methods of “protecting yourself.” 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.”

Another commentator notes there are two “sure methods” by which the professor will limit liability. The first requires the professor to “stay within the boundaries of the Guidelines.” 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.” 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.” This author also erroneously treats the Guidelines as law.

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


Maddox, supra note 154, 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 securing permissions can be difficult for audiovisual works).

Kasunic, supra note 27, at 292. Kasunic also says that educators should consider the four fair-use factors before photocopying. Id.

Id. at 292.

Id.


Merickel, supra note 159, at 718-19 (“If we look back to the ‘Agreement on Guidelines for Classroom Copying,’ we will see that section 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.161 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.”162

Finally, the courts’ treatment of the Classroom Guidelines fosters a misunderstanding of the law, which may encourage ignorance or distrust.163 The uncertainty discussed above confuses teachers and students. Beyond the uncertainty, and perhaps what leads to it, is the confusion among teachers about whether the Guidelines are law. Even if we accept Guidelines as law, I have found teachers have great difficulty applying them. Further complicating matters is

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161 Crews, supra note 19, at 693 (“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.”)

162 Bartow, infra note 75, at 206. (“Moreover, capitulation by educational institutions to publishers’ demands may render teaching professionals willful, rather than innocent infringers, thereby increasing their personal liability.”)

163 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 need 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.
the “prohibitions” section of the Guidelines, which at least one court applied flexibly. 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 determinant 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, or at least misunderstanding. 164

III. 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. One scholar has framed the debate over access to copyrighted works for educational purposes in terms of morality and distributive justice. 165 Others have rightly noted that educational fair uses have far-reaching effects—on the students, teachers, education, and society as a whole. 166

164 See Goldstein, supra note 135, at 134 (fair use is indeterminate because it “is a constitutive doctrine,” which “entails a reconstruction of copyright, a weighing of 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. Mortimer D. Schwartz and 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) (results of a survey submitted to “commercial publishers, university presses, scholarly and scientific journals” inquiring about word count in determining fair use.

165 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 educational fair use is markedly different from other fair uses because of its “positive spillover effect on society as a whole”)

166 Kasunic, supra note 27, at 290-291; Goldstein, supra note 135, at 137-38 (“The value that a schoolteacher personally derives from photocopying a magazine article for his class may be lower than a bargain
One author has downplayed the benefit of educational fair use, claiming that it is favored because many people feel, intuitively, that educational works should be free to use.\textsuperscript{167} She has argued that educators have used rhetoric to reinforce this misguided claim. “Fair use,” she and others commonly claim, is a “privilege,” not a right.\textsuperscript{168} 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,”\textsuperscript{169} her characterization of “fair use” as a privilege is wrong. A copyright itself is a privilege; it is a gift of positive law.\textsuperscript{170} Fair use, then, should be seen as just as much a right as the owner’s copyright itself.\textsuperscript{171}

\textsuperscript{167} Aull, supra note 143, at 576.

\textsuperscript{168} Aull, supra note 143, at 582; e.g., Parchomovsky and Goldman, supra note 144, at 1521 (agreeing with the view that copyright gives the author rights and fair-use is merely a “Hohfeldian privilege” (citing Wesley Newcomb Hohfeld, \textit{Some Fundamental Legal Conceptions as Applied in Judicial Reasoning}, 23 \textit{Yale L.J.} 16, 30 (1913).) I argue infra note 171 that the copyright and the fair use doctrine represent competing rights (or privileges), and at least one court has endorsed such a view. \textit{See Suntrust Bank v. Houghton Mifflin Co.} 268 F.3d 1257, 1269 n.1 (“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 copyright violation. (citing \textit{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 note 168, 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 fair 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 section IV works. In this way, I fundamentally disagree with David R. Johnstone’s analysis in \textit{Debunking Fair Use Rights and Copyduty Under U.S. Copyright Law}, 53 J. Copyright Soc’y U.S.A. 345, 368-70 (2005).

\textsuperscript{169} Aull, supra note 143, at 579; but see 17 U.S.C. § 107 (expressly stating that fair use includes “teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright”); 17 U.S.C. § 110 (delineating status-based exemptions for certain educational uses of materials).

\textsuperscript{170} Tom W. Bell, \textit{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
This article rejects the “fair-use-as-a-privilege” view; 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.

Because educational uses different from all other uses, but not all educational uses are “fair,” the courts have coped by adopting the Classroom Guidelines. This mistake has led to the problems and immunities to copyright holders,” and rejecting the characterization of copyright as Hohfeldian property); id. at 534-35 (“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.”); David A. Simon, In Search of (Maintaining) the Truth: Use of Copyright Law by Religious Organizations, 16 Mich. Telecomm. & Tech. L. Rev. (forthcoming 2010); see also 17 U.S.C. § 110.

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. Cf. Bohannan, infra note 136, at 985-87 (arguing that the balancing approach 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, 492-95 (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. 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. Id. at 493-95.

Hick, however, misconstrues the nature of the right of fair use. 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. The author’s “right” to his work is not a natural one—it is a statutory grant designed to encourage creation. Simon, supra note 170, at 22.

To that end, Hick’s statement about unpublished works assumes too much; it implies that the author does have a right to that work, perhaps even a moral right, which, of course, the author does not. Id. The author’s “rights,” however one defines them, are based on the incentive theory of copyright. 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’s comments that “it is difficult to understand how granting one group (authors) a right thus gives parallel rights to another group (users).” Id. 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 § 107.)

See supra notes 168, 171.

Kasunic, supra note 27, 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.”).
identified in section II; 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,\textsuperscript{174} 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.”\textsuperscript{175}

In attempting to correct this uncertainty, courts have chilled fair use, diverged from the law, and impeded the mission of educators across the country. Authors and publishers have further pushed educational fair use in the wrong direction, emphasizing industry “clearance culture” and insisting on making the Guidelines the upper limit of the law. 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. They argue that fair use, by its very nature as a legal standard, will leave teachers grabbing smoke. Indeed, some argue that it is our \textit{expectation of} certainty that dooms our quest for a solution.\textsuperscript{176} 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.”\textsuperscript{177}

I reject this approach. To accept the current state of the law, or something similar, would be to further endorse industry custom, allowing copyright owners to “leverage vagueness,”\textsuperscript{178} which, in turn, would force educators farther and farther away from legitimate uses of

\textsuperscript{174} Samuelson, \textit{supra} note 17, 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.”).
\textsuperscript{175} Samuelson, \textit{supra} note 17, at 2542 n.28 (2009).
\textsuperscript{176} Martin, \textit{supra} note 58, at 353, 392-93.
\textsuperscript{177} \textit{Id.} at 392.
\textsuperscript{178} Mazzone, \textit{supra} note 7, at 1.
copyrighted works. As Professor Jason Mazzone has observed, “[f]air use is free”:179 it “is a use that does not require permission because it is not infringement.”180 We should not let the challenges of “uncertainty,” and the attendant browbeating publishers, bully this concept into the darkness of circular arguments about licensing.181

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 section explores several potential changes that scholars have proposed to render fair use more palatable.182 These include changing the elements of copyright infringement, modifying the constituents of fair use or their application, and creating new apparatuses administer fair use. After reviewing and evaluating these choices, a fair-use model for education is proposed 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 re-focusing or restructuring the infringement analysis. Professor Shyamkrishna Balganeshe, 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

179 Id.
180 Id. at 6.
181 See, e.g., Bohannan, supra note 136, 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 141, at 906.
182 For many scholars “palatable” means copyright veers in the direction of the Constitution, instead of away from it.
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use at the time of creation.\textsuperscript{183} 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 creation.\textsuperscript{184} To accomplish this
goal, Balganesh proposes that the “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 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.”\textsuperscript{185} This
objective theory\textsuperscript{186} relieves fair use of its duty to discern which uses are “transformative” enough
to render a use non-infringing.\textsuperscript{187}

\textsuperscript{183} Shyamkrishna Balganesh, \textit{Foreseeability and Copyright Incentives}, 122 HARV. L. REV. 1569, 1581-589,
1603-625 (2009) (detailing the courts failure to implement copyright law’s incentive structure when deciding
doctrinal issues, including fair use, and describing how a new model of fair use based on foreseeability better
addresses this goal).

\textsuperscript{184} Balganesh, \textit{supra} note 183, at 1605. 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, \textit{Copyright and Its Rewards, Foreseen and Unforeseen}, 122 HARV. L. REV. 81, 82 (2009). He notes
that Balganesh avoids this by “defin[ing] financial returns as ‘unforeseen’ . . . in terms of purpose or technology.”
\textit{Id.}

\textsuperscript{185} Balganesh, \textit{supra} note 183, at 1605 (emphasis omitted). Under this test, the law would mirror that of the
“eggshell plaintiff” in tort. \textit{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.” \textit{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, \textit{supra} note 184, at 87-88.

\textsuperscript{186} Balganesh’s theory is based on objective foreseeability. Balganesh, \textit{supra} note 183, 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. \textit{Id.} at 1613 (“Such a
standard would presume creators are, at a minimum, informed — in the sense that the creator knows of the different
media 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 in original).

\textsuperscript{187} Balganesh, \textit{supra} note 183, at 1606 (“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
\textit{in creating the work.”}) (emphasis in original) (footnote omitted).
Though it does have problems, though Balganesh’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. Nearly all educational uses will infringe under this proposal, especially when teachers are making direct copies for classroom use. Put another way, much of teachers’ infringement is foreseeable. 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 Balganesh’s proposal using themes from antitrust, arguing that the “foreseeability requirement . . . will not in itself supply an

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188 Wendy Gordon has noted the merit in Bangalesh’s view while concomitantly criticizing it in several respects. Wendy Gordon, Trespass-Copyright Parallels and the Harm-Benefit Distinction, 122 Harv. L. Rev. 62, 65-66, 72, 74-80 (2009) (criticizing Balganesh’s theory of foreseeability, supplementing it to protect authors from “new technologies that cannibalize their existing markets,” and discussing what 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”); Hughes, supra note 184, at 87-88.

189 Balganesh 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. Balganesh, supra note 183, at 1606. Hughes argues that part of Bangalesh’s proposal actually transplants the fourth fair-use factor into the infringement analysis. Hughes, supra note 184, at 90-91. While Bangalesh’s inclusion of “purpose” into the foreseeability calculus makes his proposal different from the market effect—which considers only technology—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 Bangalesh proposal and these two parts of fair use: “The chief difference concerns market substitution. While the Balganesh 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. 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’ view, MDS, 99 F.3d at 1175; Basic Books, 758 F. Supp. at 1537, transformativeness can exist when portion of several works 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.

190 See e.g., Bartow, supra note 75, 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”).

191 There will be some uses that are not foreseeable at the time of creation. For example, when I use clips from Southpark in my Education Law class to illustrate the (un)acceptable methods of teaching, the use, at least in its purpose, is not foreseeable.
administrable theory of copyright harm.”192 This, he argues, results from the Supreme Court’s approach to the Sonny Bono Copyright Term Extension Act of 1998193 in *Eldred v. Ashcroft*,194 which illustrates that “[w]hat is ‘foreseeable’ in any particular copyright case is uncertain and readily manipulable.”195 As a result, “where the effect of the infringing conduct is ambiguous” in terms of harm,196 Sprigman would require the plaintiff to plead and prove (“actual or threatened”)197 harm—here defined in terms of market failure and creation incentive198—as an affirmative element of his infringement case.199

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 ability of the fair[-]use defense in these cases of ‘per se’ copyright liability.”200 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

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196 *Id.* at 323; *id* at 328 (nothing 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 others authors similarly situated”) (emphasis in original).
197 *Id.* at 329.
198 *Id.* at 338 (“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.”).
199 *Id.* at 329 (“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.”).
200 *Id.* at 323.
patronage.”201 One example of this is the “reproduction and distribution of exact copies of a copyrighted song.”202

Sprigman’s proposal, like Balganesh’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. The rule-based approach does provide some certainty, but it does so in the wrong place. Under this proposal, “consumptive” uses are per se infringing. That means that nearly all copying a teacher does will be infringing. Furthermore, like Balganesh’s proposal, it focuses on changing the infringement analysis and therefore does little with fair use. 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.203

B. Modifying the Fair Use Analysis

Since 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. Some of these proposals have been directed at refocusing the fair-use inquiry while others have set out to redefine it. These approaches follow one of three patterns: the implementation of burden-shifting; the re-conceptualization or modified application of the fair-use factors; and the use of a new entity to determine fair uses.

201 Id. at 335. Sprigman does provide several caveats to this approach, but none of them negate the points made below.
202 Id. at 335.
203 See infra (discussing Professor Matthew Sag’s reconceptualization of fair use).
1. **Burden-Shifting Approach**

In a paradigm similar to Balganesh, Professor Christina Bohannan has advocated incorporating foreseeability and harm into the fair-use analysis.\(^{204}\) 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 copyrighted work.”\(^{205}\) She argues that courts, when examining fair use, actually have used some variant of this harm formulation.\(^{206}\)

This approach faces several problems. 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.”\(^{207}\) 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 market in 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 typically deemed unfair.

\(^{204}\) Bohannan, *supra* note 136, at 987-1002.

\(^{205}\) *Id.* at 989. I will refer to these market requirements as the “most foreseeable market” and “market reasonably factored.”

\(^{206}\) *Id.* at 1002-031.

\(^{207}\) *Id.* at 989 (all emphasis added).
The second requirement, which can be satisfied in two ways—most foreseeable market or market reasonably factored—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” 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; thus, Bohannan’s proposal would exempt from copyright infringement nearly all fiction books used in a classroom setting.

Second, this approach overprotects authors: if the copyright owner proves usurpation plus the existence of most the foreseeable market or the market reasonably factored, harm is presumed. After such a showing, the burden would then shift to the defendant to show that no harm occurred. But when the burden shifts, the defendant’s fate already will be determined since it likely will have no empirical data to the contrary. Why is this a problem? If a harm is found (by usurpation of either most foreseeable markets or markets reasonable 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.

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208 If these are reasonable assumptions for an author to make, nearly all uses of their work will be presumptively unfair.
209 Bohannan, supra note 136, at 1028.
210 Id. at 1028.
211 See infra section II(B)(2).
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, Bohannan introduces a different type of standard, which focuses on (at least as) amorphous legal concepts (as the fair-use factors). Now, 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 Bohannan suggests that courts should consider how a defendant’s use can increase sales. How, for instance, can Generic School determine whether its use will have a positive effect on the sale of the copyrighted work? That new inquiry, while valuable for the fair-use inquiry generally, lacks any clarifying mechanism or quality that educators so insatiably covet.

2. Re-Conceptualization or Modified Application

Beyond Bohannan’s approach, less radical 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. These two factors would be balanced directly against one another, with courts “look[ing] at whether a work is non-commercial, whether it is transformative, and more

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212 Bohannan, supra note 136, at 1028-030. Although evidence of increased sales can be obtained, litigants must wait to do so until after the infringing work is produced. See also e.g., Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1274-275 (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 Bohannan’s proposal, which at times wants to require empirical claims of harm. E.g., see, Bohannan, supra note 136, 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”).


214 Id. at 578.
generally, whether the use serves a positive social purpose” against “the potential for the use to harm” the current and future market(s) for the work.”

Lui’s “thought experiment” may create more certainty, but 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 will result from eliminating two important factors for educational uses: the nature of the copyrighted work and the amount and substantiality of the portion used. Many of the works used by teachers are factual in nature, and the amount of the work use 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, instead of four, does not greatly reduce uncertainty; courts are, in reality, applying various factors. This approach probably would not produce outcomes substantially different the current cases dealing with educational fair uses. Furthermore, it leaves the status of the Guidelines in tact, 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).

Also working within fair-use’s confines, Professor Matthew Sag has argued for a re-conceptualization of the factors and how courts apply them. First, Sag argued that fair use “is a

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215 Id.

216 Although Liu notes that “factors two and three may be of doubtful relevance in all cases,” Liu, Two Factor, supra note 213, at 577, he neglects to observe that they are extremely 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 Lui 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.
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.”217 The revisions to fair use that Sag proposed sought 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.”218 Based on this idea—“that the factors . . . provide [only] a framework for their analysis by raising certain second[-]order questions”—Sag argued that courts three first-order assumptions courts should make when deciding fair use.

First, courts should consider the idea/expression dichotomy, which is linked to the core notion about what should be copyrightable.219 Second, courts should consider consumer autonomy: this idea, derived from the first-sale doctrine, that consumers have a right to manipulate copyrighted works once purchased.220 Third, the principle of medium neutrality—which states that the fairness of a use does not change depending on the medium of expression221—should inform courts’ fair-use determinations.222

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.223 The principles of idea/expression and

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218 Id. at 386.
219 Id. at 425-28.
220 Id. at 428-32.
221 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.”).
222 Id. at 432-34.
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—that is what §107 recognizes when it states that making “multiple copies for classroom use” is fair use.\textsuperscript{224} 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.\textsuperscript{225}

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 copying.\textsuperscript{226} 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.”\textsuperscript{227} She attempts to do this by “tying the transformativeness inquiry to” the factor that considers the purpose and character of the use.\textsuperscript{228} This approach also would

\textsuperscript{224} 17 U.S.C. § 107.

\textsuperscript{225} The idea/expression first-order assumption may be beneficial for judicial analysis. If, for example, a teacher photocopies twenty-five percent 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, \textit{Acuff-Rose}, 510 U.S. at 586 (examining the second fair use factor), and whether the teacher appropriated the “heart” of copyrighted work’s protected expression. \textit{Harper & Row Publ’rs, Inc. v. Nation Enters.}, 471 U.S. 539, 565, 600 (1985) (finding 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 instead 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. \textit{E.g., Basic Books}, 758 F. Supp. at 1533; \textit{supra} note 71.

\textsuperscript{226} Sag, \textit{supra} note 217, 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.”).


\textsuperscript{228} \textit{Id.} at 448.
require taking the reader’s perspective to determine transformativeness, focusing on interpretation instead of intent.\textsuperscript{229}

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. But Heymann notes that this perspective would not change the result reached in \textit{Sony Corp. of America v. University City Studios, Inc.},\textsuperscript{230} or \textit{Texaco} because “in 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.”\textsuperscript{231} 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.

Professor Glen Lunney has, after reexamining \textit{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.”\textsuperscript{232} 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.”\textsuperscript{233} 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

\textsuperscript{229} Id. at 453.
\textsuperscript{230} 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”).
\textsuperscript{231} Heymann, \textit{supra} note 227, at 457.
\textsuperscript{233} Id. at 977-78.
work’’ for the use to be infringing. 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.”

While it has been criticized as mischaracterizing the judicial treatment of fair use, 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 they can be fair without satisfying the market harm approach.

Unfortunately, this scheme, as applied in the abstract, or generally across fair use categories, does not solve the problems educators face. Like with many of the other approaches

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234 Id. (quoting Sony, 464 U.S. at 450).
235 Id. at 998-99.
236 Bohannan, supra note 136, at 985-87.
237 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. He points out that, in Texaco, the increase costs for the research institution—which would have to increase its subscriptions—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). Lunney, supra note 232, at 1021-022 (“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 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 (brackets in original), it is hard to fathom that doing the same thing to educators would command a different conclusion.
discussed, teachers still cannot predict which uses will cause market harm and which uses will
have societal benefits that outweigh the additional authorship produced from prohibiting a use.
Consider a teacher who copies several songs, poems, and pieces of various articles. It is not
feasible to suggest that there would exist any reliable data on the harm of this use, or that a court
could properly weigh the harm and benefit of the use. In this sense, the unpredictability 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. As to the purpose and character of the secondary use, “there should be
a STRONG presumption in favor of educational use.” 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.” The amount and substantiality inquiry, too, would be modified. It would build off
the second factor and require per page fees if the work is aimed at the educational market; but

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238 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 136,
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 232, at 998.

239 Bohannan criticizes Lunney’s approach for its abstractness and impracticality, as well. Bohannan, supra
note 136, at 986 (“The 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 measure.”)

240 Bartow, supra note 75, at 227.

241 Id. at 227.

242 Id. at 228.
substantiality would not be used to assess this factor. Finally, Bartow would require publishers to affirmatively prove lost sales or profits instead of relying on circular licensing arguments.

Bartow’s approach, like Lunney’s focuses more on providing greater movement for users within the doctrine of fair use. Her presumption of educational uses as fair creates the type of safe-guard educators seek. Additionally, the requirement of licensing only for those works that are aimed at the educational market makes good sense: since the creation of those works depend revenues from the educational market, their use in education should come at a cost. Despite these benefits, none of these benefits creates the kind of certainty educators desire. Under this proposal, although educational uses are presumed fair, they may not be; and that determination is not one that educators can make. Additionally, 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.

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.” Although uses falling within the harbors “would be

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243 Id. at 228.
244 Id. at 228-29.
245 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., Chicago Sch. Reform Bd. of Trustees v. Substance, Inc., 79 F. Supp. 2d 919, 921, 922, 941 (N.D. Ill. 2000) (teacher held 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.). Modifications to this licensing approach, for it to be feasible, would have to be made.
246 Parchomovsky and Goldman, supra note 144, at 1502. Professor Bartow has also suggested that the Guidelines might be rewritten to better accommodate educational fair use. Bartow, supra note 75, at 225-26. (stating that 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).
considered per se fair[,] . . . [u]ses . . . fall[ing] outside of them would be analyzed under existing doctrine." 247

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. 248 They specifically mention the Classroom Guidelines 249 treatment by courts as an example of this objection. 250 According to the authors, several “important differences,” however, exist “between the Classroom Guidelines and [their] proposed safe harbors.” First, because the Classroom Guidelines “were negotiated, in effect, not to reflect a minimum level of utility, but rather as a sort of middle ground compromise.” 251 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; the fact that they were negotiated—as are all laws enacted by Congress—should not make a significant difference.

Second, because they “lacked the force of law[,] . . . the Guidelines became a convenient benchmark for litigation.” 252 This argument is more convincing 253 —courts misapplied the Guidelines, sometimes using them as a ceiling either because they used them merely to justify a

247 Parchomovsky and Goldman, supra note 144, at 1502.
248 Id. at 1524 (quoting Gibson, supra note 141, at 398).
249 They do note that the Classroom Guidelines were not “bright-line safe harbors.” Parchomovsky and Goldman, supra note 144, at 1525. Other scholars have noted that the Guidelines mix rules and standards. E.g., Mazzone, supra note 7, at 15 (introducing his two Models and noting that rules or standards can be used accordingly).
250 Parchomovsky and Goldman, supra note 144, at 1525.
251 Id. at 1525.
252 Id. at 1525.
253 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.
conclusion already reached or because they used them sloppily. In that sense, “safe harbors” with the force of law would provide more certainty for educators.

It 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 educators retaining 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.”254 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,255 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; the authors do not provide strong reasons for thinking that a law to the same effect would have contrary results.

3. New Entity to Decide Fair Uses

254 Parchomovsky and Goldman, supra note 144, at 1526.

255 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.”).
Although novel, reformulating fair use is not the only mechanism scholars have proposed to improve it. 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. He advocates that Congress create a “Fair Use Board,” which would be analogous to the Copyright Royalty Board, in the Copyright Office that would have authority to adjudicate fair use petitions and, subject to judicial review, issue fair use rulings.”

Fair use arbiters would issue rulings, all of which are non-binding, that determine the fairness of a use. A fairness finding would immunize the user from liability for infringement, and a finding of unfairness would the “petitioner retains all other defenses to copyright infringement.” Either party could appeal the ruling to the Register of Copyrights and then to any federal circuit court. 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.

Professor David Nimmer has sketched a similar approach to the administration of fair use. 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

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256 Carroll, supra note 125, at 1124. The Copyright Royalty Board is explained supra note 29.

257 Carroll, supra note 125, at 1090, 1123-128. Professors Mark Lemley and R. Anthony Reese propose a similar solution. Mark Lemley and 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 pursue infringement over 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 section, 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 infra.

258 Carroll, supra note 125, at 1123.

259 Id. at 1124.

260 Id. (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.”

determination.262 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.263 A response from the opposing party and a reply from the petitioner would be allowed, and both parties would agree on an arbiter.264 Rulings would have no precedential effect but could be used in determining damages, remedies, and attorneys’ fees.265

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.”266 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.

Another 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.267 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.268 Despite the fact that these micro-

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262 Id. at 11.
263 Id. at 12-13.
264 Id. at 13-14
265 Id. at 14-15.
266 Carroll, supra note 125, at 1129.
267 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.
268 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 125, at 1126. It seems difficult to achieve a “substantively just” outcome in a morass of legal concepts without
decisions will be “published on the Copyright Office website,” they would be non-precedential; therefore, they are unlikely to tell the user anything more than the judicial decisions that have utilized the Guidelines. In fact, these decisions may even continue the judicial tradition of using the Guidelines. For these reasons, educators may view the petition process as too costly and uncertain, especially given that, beyond the petition process, a lawsuit may wait. 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.” They differ from those proposed by Carroll and Nimmer, both which involved a form of micro-adjudication, because they use the informal aid of attorneys or some other assisting advocate. Realizing this, I think, he 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, may be lawyers. See 42 U.S.C. § 406(a)(1) (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”); 42 U.S.C. § 406(b)(1) (providing for attorney representation). Indeed its 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.

269 Carroll, supra note 125, at 1126; Nimmer, supra note 261, 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 Arbitrator(s)").

270 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. See, e.g., Parchomovsky and Goldman, supra note 144, at 1525 (stating that, because they “lacked the force of law[,] . . . the Guidelines became a convenient benchmark for litigation”). Decisions are not likely to 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 statement that “intermediaries should accord a favorable fair use ruling the same weight as a license from a copyright owner” falls under greater scrutiny. Carroll, supra note 125, at 1128-129.

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

272 Professor Lui 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’ DMCA rulemaking-authority as evidence of the feasibility of this approach. Joseph P. Liu, Regulatory Copyright, 83 N.C. L. REV. 87, 148-150 (2004). Lui notes that the Copyright Office, as it currently stands, is ill-equipped to deal with the additional rulemaking duties. Id. at 155-58. 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.
rulemaking process—otherwise known as notice-and-comment rulemaking—to regulate and administer fair use.273 Mazzone’s first model (“Model One”) requires three steps: Congress declaring it unlawful to interfere with fair uses of copyrighted works; Congress creating an agency to enforce this statute; and Congress stating expressly that federal fair-use law, including the agency’s regulations, preempts state contract laws limiting fair uses of copyrighted works.274

Under this model, the agency would “specify . . . the uses that constitute fair uses of copyrighted works within specific sectors.”275 It would, like other agencies under the Administrative Procedure Act (“APA”),276 have the ability to adjudicate disputes, and have a corresponding appeals process that ultimately could reach federal court.277 The agency would have enforcement authority, like the Federal Trade Commission (“FTC”).278 Mazzone also advocates judicial deference to the regulations developed by the agency in copyright infringement lawsuits.279

Mazzone’s second model (“Model Two” or “EEOC Model”) employs a federal agency, which has “more responsibility in copyright infringement claims” than the agency in Model One.280 It mirrors the current structure and function of the Equal Employment Opportunity Commission (“EEOC”). Model Two requires a copyright owner who alleges infringement to file a complaint with the agency. The respondent would have a time-limited opportunity to assert a

273 Mazzone, supra note 7, at 16-17, 19.
274 Id. at 16.
275 Id. at 16; see Samuelson, supra note 17, at 2580-587 (detailing the cluster Samuelson calls “uses that promote learning”).
276 5 U.S.C. § 500 et seq.
277 Mazzone, supra note 7, at 18.
278 Id. at 18.
279 Id.
280 Id. at 19.
fair-use defense, after which the complainant could file in federal court.\textsuperscript{281} If a timely defense is asserted, the agency, like the EEOC, would investigate to determine whether infringement has occurred.\textsuperscript{282}

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: this bodes well for educators who desire certainty. An executive 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. Second, while an administrative decision regarding a regulation is not binding on the courts, the regulations are; i.e., the regulations have the force of law, and administrative interpretations of those rules will be given deference.\textsuperscript{283} 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. The notice-and-comment rulemaking process allows for greater flexibility in developing rules, which will have greater specificity. The regulations, interpretations, and policy statements, coupled with subsequent decisions by the courts will provide reinforce the stability and certainty that educators seek.

\textsuperscript{281} Id.
\textsuperscript{282} Id.
\textsuperscript{283} Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (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).
These Models, therefore, are a good place to start; but they need to be developed and tailored to the educational setting. Therefore, the next section, using a Mazzone’s Model One as a rough sketch, draws a fuller picture for administering educational fair use.

IV. 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.” This section, however, takes 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; and educators are not likely to agree with publishers on what is fair. An agency is needed to administer copyright specifically as to fair use.

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

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284 Samuelson, supra note 17, at 2620; see Bartow, supra note 75, at 211 (“If the creation of course packets or making of multiple copies promotes scholarship, 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.”). 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 17, at 2620. Less convincing, however, is her claim that “educational and research uses . . . have become so ubiquitous and widely tolerated that they may have, in effect, become fair uses after all.” Id.

285 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. Id. at 2621.
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 have to use to do this. Therefore, after articulating the CRAB model, the Congressional language that should be used to create the CRAB is briefly explored.

A. Rejecting Model Two

Mazzone gives us two Models from which two work. 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 more likely pursue infringement claims against the educational institutions that have, in the past, 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. 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. 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.

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. Every investigation uses 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. 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, especially considering how easy filing a complaint may be for a publisher or

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

287 29 C.F.R. § 1614.100 (providing that after a final agency action by a judge or otherwise, the EEOC must provide the complaint with notice of their right to appeal the final action to the EEOC and “right to file a civil action in federal district court”).


copyright owner. 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 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.

The costs would be similar—though reduced—for educational institutions responding to the CRAB’s investigations. These costs also may be detrimental to student learning and society. Educational institutions will be forced to spend money on locating material and outside counsel instead of spending it to educate their students. A less educated citizenry mean a less productive and competitive citizenry. Additionally, teachers, administrators, and possibly students would

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290 Under the EEOC, 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.” 16 C.F.R. § 1614.105(a). At that initial meeting, the Counselor informs the complainant of their rights and responsibilities, as well as the Counselors obligation to continually report to the EEOC. 16 C.F.R. § 1614.105(b)(1). Barring a different choice, the last Counselor conducts a final interview with the complainant within thirty days, 16 C.F.R. § 1614.105(d)-(f), after which time the complainant may file its complaint alleging discrimination. 16 C.F.R. § 1614.106.

291 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)

292 Under this Model, investigations 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 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 costs schools is beyond the scope of this Article. Thanks to Jason Mazzone for raising this point.
spend time with lawyers or engaged in other non-educational activities necessitates by investigations.

These monetary risks would encourage schools to settle with copyright owners.\textsuperscript{293} Thus, the CRAB, if based on the EEOC Model, would encourage resolution of claims through mediation or settlement simply to avoid educational costs.\textsuperscript{294} Doubtless such negotiation and settlement will mean concessions by the school, which likely would include licensing fees or a complete cessation altogether. That result would be contrary to the one sought by creating an administrative agency. As noted before, fair use is use \textit{without} authorization; it is free. Encouraging settlements on these claims would \textit{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 decision, if modeled after the EEOC, would negatively affect schools, regardless of the outcome. 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

\textsuperscript{293} See Sherwyn, \textit{supra} note 289, 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).

\textsuperscript{294} 16 C.F.R. § 1614.105(b)(1)-(2) (explaining that the EEOC must explain to complainant her rights, which include alternative dispute resolution as well as counseling activities); United States Equal Employment Opportunity Commission, \textit{EEOC Investigations – What and Employer Should Know}, \texttt{http://www.eeoc.gov/employers/investigations.html} (“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. \textbf{Mediation and settlement are voluntary resolutions.}”) (bold in original); Sherwyn, \textit{supra} note 289, 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 remunerate and/or reinstate the employee.”); \textit{but see} 16 C.F.R. § 1614.105(b)(1) (noting that a complainant may “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”).
Because of the CRAB, then, educational institutions look like bad actors—just like the Guidelines look like the law. That reinforces the industry culture, 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 making them the party that must 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 a three separate acts of Congress:

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295 Harris, supra note 291, at 61.
“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.”

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. Since 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 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. 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. It does not consider a negotiated rulemaking process under 5 U.S.C. § 561. 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.

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296 Mazzone, supra note 7, 16.
297 This conception of fair use better reflects the view that copyright and fair use each represent dueling rights. See supra notes 128, 131.
Informal rulemaking, also known as notice-and-comment rulemaking, provides a procedure that is designed to include public participation.\textsuperscript{298} In the first step of this process, the agency publishes a general notice of a proposed rulemaking in the Federal Register.\textsuperscript{299} Next, the agency must provide “interested persons an opportunity to participate” in rulemaking by submitting comments, data, views, or argument.\textsuperscript{300} The agency then publishes the rule at least thirty days before it takes effect.\textsuperscript{301} Although notice-and-comment rulemaking encourages participation in the rulemaking process, public participation is limited. 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.\textsuperscript{302} This extensive development results, in part, from the “hard look” standard of judicial review, which encourages the agency to build a substantial record.\textsuperscript{303} In this process, the agency becomes cognitively committed to the proposed

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\item Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005) (citation omitted) (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”).
\item 5 U.S.C. § 553(b).
\item 5 U.S.C. § 553(c).
\item 5 U.S.C. § 553(d).
\item Stephanie Stern, Cognitive Consistency: Theory Maintenance and Administrative Rulemaking, 63 U. Pitt. L. Rev. 589, 597 (2002) (“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.”).
\item 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 Mfrs. Ass’n v. State Farm Mut. Auto. Ins. 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 creation of an
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rule, an effect known as “lock-in.”\textsuperscript{304} Agency lock-in makes the agency less receptive and responsive to public comments, and few agencies actually change rules in response to public comments.\textsuperscript{305} This effect can be mitigated where an agency views its own decision to propose a rule as less than final.\textsuperscript{306}

Another form of rulemaking is called “negotiated rulemaking,” which adds a new component to the front end of the rulemaking process.\textsuperscript{307} This process involves interest groups during the formation process of the initial proposed rule. Negotiated rulemaking begins when the “head of the agency determines . . . [it] is in the public interest.”\textsuperscript{308} The agency head, when making this determination, must consider numerous factors, including the following: 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.\textsuperscript{309}

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\item\textsuperscript{304} Stern, supra note 303, 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.”).
\item\textsuperscript{305} Id. at 597 (reviewing empirical studies).
\item\textsuperscript{306} Id. at 599.
\item\textsuperscript{307} See 5 U.S.C. § 561.
\item\textsuperscript{308} 5 U.S.C. § 563.
\item\textsuperscript{309} 5 U.S.C. § 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.)
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To aid in determining the identity of the interested parties, as well as these parties’ concerns, the agency may use a “convener.”\textsuperscript{310} The convener will then issue a report of his findings.\textsuperscript{311} If the agency decides not to establish a committee, it must publish notice.\textsuperscript{312}

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 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.\textsuperscript{313} The cap on participants is twenty-five unless agency head decides more are necessary.\textsuperscript{314} While the committee may establish its own operating rules,\textsuperscript{315} its operation and existence terminates “upon promulgation of the final rule under consideration” unless the committee charter otherwise provides.\textsuperscript{316} The resulting rule is then subject to the standard notice-and-comment rulemaking process under § 553.\textsuperscript{317}

The chief goals of negotiated rulemaking—reducing litigation and time used to create a rule—have been called into question by empirical research.\textsuperscript{318} It is clear that, while “any agency action relating to establishing, terminating, or assisting of committee” cannot be reviewed in

\textsuperscript{310} 5 U.S.C. § 563(b).
\textsuperscript{311} 5 U.S.C. § 563(b)(2).
\textsuperscript{312} 5 U.S.C. § 565(a)(2).
\textsuperscript{313} 5 U.S.C. § 564(a)(1)-(8).
\textsuperscript{314} 5 U.S.C. § 565(b).
\textsuperscript{315} 5 U.S.C. § 566(e).
\textsuperscript{316} 5 U.S.C. § 567.
\textsuperscript{317} 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).
\textsuperscript{318} Id. at 1271-286 (reviewing the time-savings of negotiated rulemaking); id. at 1286-1309 (reviewing results of frequency of litigation in negotiated rulemaking).
court, the subsequent rule published can be. Negotiated rulemaking may not actually reduce time spent or litigation.

2. Modified Process of Notice and Comment Rulemaking

While negotiated rulemaking may narrow issues and focus deliberations, it resembles too much the Ad Hoc Committee that developed the Classroom Guidelines. There are differences, including the comment period and nomination and objection process for group members; 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. That did not work out well for educational institutions in the past, and there is no 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, 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. Thus, it must be adapted. This section 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.

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319 5 U.S.C. § 570

320 Coglianese, supra note 317, 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).

321 See supra section II.

322 One important difference between the two is that, in negotiated rulemaking, a member of the agency participates. 5 U.S.C. § 565(b) (“Each committee shall include at least one person representing the agency.”).
First, to avoid agency lock-in, 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 prepares the initial rule. Group 2 will review Group 1’s proposed rule and data and present potentially opposing views.\textsuperscript{323} 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 proposed 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 American Association of Law Schools 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 books. 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

\textsuperscript{323} Stern, \textit{supra} note 303, at 626-27.
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. 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. A flow chart of this process is pictured below.

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324 Lock-in, while detrimental, also has benefits, such as preventing agency capture. Id. at 569 n.41 (noting that, “[i]n 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 rule developed initially would be in response to the public comments, and thus the agency would not 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. A diagram of this process is pictured below.
The CRAB Meets and Confers

The CRAB Proposes a General Statement of the Rule (Similar to Policy Statement)

Comment Period on General Rule

The CRAB Groups 1 Independently Proposes a Rule

The CRAB Group 2 Independently Proposes a Rule

The CRAB Group 3 Reviews Group 1’s and Group 2’s Rule

The CRAB Group 3 Publishes a Proposed Rule

Comment Period on Proposed Rule

The CRAB Group 1 Independently Reviews Comments Proposes a Rule

The CRAB Group 2 Independently Reviews Comments Proposes a Rule

The CRAB Group 3 Reviews Comments, Group 1’s Rule, Group 2’s Rule

The CRAB Group 3 Publishes Final Rule

FIGURE 2
THE CRAB RULEMAKING PROCESS: COMPETING GROUPS
3. Group Identification and Involvement

As part of the “open” component of the modified rulemaking, there must be proper framework for making, receiving, and sorting through comments. History teaches us that copyright owners and publishers will be adequately represented in the notice-and-comment process. Aside from the lessons of the Ad Hoc Committee, the current participation of interest groups in Digital Millennium Copyright Act anti-circumvention rulemaking shows that their involvement will be robust.325

The concern, then, should be over educators’ participation. To solve part of the participation problem, existing educational groups or associations should participate and communicate with one another in the process.326 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

325 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. Electronic Frontier Foundation, DMCA Triennial Rulemaking: Failing the Consumer, available at http://w2.eff.org/IP/DMCA/copyrightoffice/DMCA_rulemaking_broken.pdf (last accessed Aug. 26, 2009). (“[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.”)

326 At primary and secondary education levels, some of these organizations include the National Association of Education School Principals (“NAESP”), http://www.naesp.org (last accessed September 1, 2009); the American Association of School Administrators (“AASA”), http://www.aasa.org (last accessed September 1, 2009); and the National Association of Secondary School Principals (“NASSP”), http://www.nassp.org (last accessed September 1, 2009). At the post-secondary and graduate education levels, these include the National Association of Colleges and Employers, http://www.naceweb.org (last accessed September 1, 2009); the Association of American Universities (“AAU”), http://www.aau.edu/ (last accessed September 1, 2009); and the American Association of Law Schools (“AALS”), http://www.aals.org/ (last accessed September 1, 2009).
committee that could solicit comments and a convening committee that would hold meetings semiyearly to discuss fair use issues in educational institutions.

Additionally, electronic rulemaking should be used to facilitate group involvement. In his article, Mazzone cites a piece 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. Several of her suggestions to increase involvement bear mentioning here. First, she suggests creating a listserv, run by the CRAB (call this “ServCRAB”) to which individuals and group can subscribe. Subscribers could receive updates and proposed rules via email as soon as they are announced. Second, Noveck suggests using a Really Simple Syndication (“RSS”) feed to which institutions and individuals. The suggestions are in addition to the existing practices of e-rulemaking that use websites. Third, the model by which comments are received and reviewed are critical. While this article is not meant to detail all of those requirements, Noveck’s article is a smart place to start.

4. Modified Adjudication

In addition to rulemaking, the CRAB also should have adjudicative powers, as Mazzone suggests. 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.” Appellate courts reviewing agency actions would conduct a review consistent with

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328 Id. at 473.
329 Id. at 477.
330 See id. at 479-91 (describing numerous methods of improving online commenting, including rule descriptors, taxonomies, threaded comments, and comment authentication).
the “arbitrary and capricious” and “hard look” standard currently used by federal courts. To be reviewable, of course, the party seeking review must first exhaust all administrative remedies, including a hearing before an Administrative Law Judge (“ALJ”) and an appeal to the CRAB Appeals Review Council.

5. Enforcement

Under Model One, Mazzone advocates that the agency have enforcement powers like the Federal Trade Commission (“FTC”). 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. These powers provide judicial deference—a court cannot review the FTC’s action until it issues an order to cease and desist. All appeals travel from the agency to the federal circuit courts.

The primary benefit of the CRAB’s FTC-like enforcement powers will, however, come from its deterrent effect. Like employers responding to EEOC complaints, corporations responding to FTC investigations face substantial costs in responding and complying with the

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332 5 U.S.C. § 706; see supra.
333 See 16 C.F.R. § 2.1 (“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.”); 16 C.F.R. § 2.7 (detailing compulsory process in investigations).
334 FTC v. Standard Oil Co. of California, 449 U.S. 232, 246 (1980); 15 U.S.C. § 45(c) (“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.”)
335 15 U.S.C. §45(c), (d).
investigation. As an additional deterrent, those subject to CRAB investigations, like those subject to FTC investigations, would face criminal and civil penalties. This deterrent effect is tempered by the “high standard” that the FTC not commence an investigation unless it has “reason to believe . . . that . . . any unfair method of competition or unfair or deceptive practice in or affecting commerce” is being used and a proceeding would be in the public interest.

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.

C. The Congressional Language and Grant of Authority

The CRAB is conceived of as an executive agency. As such, Congress must create it. 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.

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336 David P. Wales, Reflections on Procedure at the Federal Trade Commission: Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, 1715 PRAC. L. INST. 801, 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.”).

337 15 U.S.C. § 50 (describing the civil and criminal penalties for violating reporting requirements or refusing to comply with certain FTC requests); 15 U.S.C. § 57(b) (describing when the FTC can bring civil actions); 15 U.S.C. §§ 53-54 (describing the penalties, which include injunctions, temporary restraining order, fines, and imprisonment, for using false advertisements);

338 Wales, supra note 336, at 808-11 (detailing four consequences of this “very high standard”).


340 As noted infra section V, Congress may choose to create the CRAB as part of the Copyright Office, an existing legislative agency
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 agency’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 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,” and “it is legally risky for teachers to rely wholly on fair use.” Congress’ 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.’” Current educational fair use practices and customs are unsatisfactory and insufficient. New standards recognizing the need for educational freedom should be created. In other words, the statute and its definitions should make certain uses fair that publishers have tried to label as infringement.

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. 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 authoritative guidance, but to understand how it might classify educational uses. Samuelson has provided as good base by grouping cases into

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341 Rosenfield, supra note 23, at 51.
342 Id. at 7.
343 Mazzone, supra note 7, at 26-27.
categories, one of which includes educational fair use. These cases might show Congress the benefits and drawbacks of classifying certain uses as “educational.”

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, 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 is 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.

V. OBJECTIONS

The administrative approach is plausible, but not impervious to criticism. It is likely to meet substantial resistance for a variety of reasons. This section explores some possible objections that the CRAB model might meet. Among them are the following: (A) the CRAB is overly specific; (B) the CRAB unnecessarily increases costs; and (C) the CRAB, paradoxically, creates more uncertainty because of the technical and confusing nature of agency regulations.

344 Samuelson, supra note 17, at 2580-587.

345 Two other objections are raised and briefly discussed in this footnote. First, one might suggest we ought to also 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, the Guidelines may be deemed to be the good-faith standard, or at least highly relevant in the good-faith determination. Bartow, supra note 75, at 205-06; see, e.g., Basic Books, 758 F. Supp. at 1545 (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 use of copyrighted materials. This would, the argument goes, save lots of costs and headaches. That solution is easy, but it
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; 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? 346

There are several responses to this objection. First, as we have seen, educational fair uses pose particular problems. The Educational Guidelines, for example, are not the law but have been treated as such, creating uncertainty and asymmetry for educators. Additionally, as the analysis of Mazzone’s EEOC-model has shown, not just any agency will do. The nature of educational uses of copyrighted materials requires particular tailoring, which sufficiently consider 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. 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

fails to take into account the legitimate interests of copyright owners. This would destroy, for example, the incentive of authors who create copyrighted works created expressly for educational use. If the authors’ incentives are destroyed, they will no longer create these educational works. The results of this could be disastrous—no materials would be created exclusively for educational use 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 75, at 222-224.

346 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 (Aug. 7, 2009, 4:51 p.m. CST). Thanks to Harold Krent for raising this objection.
specify, consistent with the provisions of section 107 of the Copyright Act, the uses that constitute fair uses of copyrighted works in specific sectors.” 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,” 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 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? The reason lies in expertise. The FTC is an administrative body with a specific task—to

347 Mazzone, supra note 7, at 16.
349 Thanks to Harold Krent to commending my attention to this point.
expect them to immediately understand, regulate, and enforce copyright law and the nature of the interests at stake is impossible.

Perhaps, as Professor Lui suggests, 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. 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. Thus, if the objection is centered on newness of the agency, it is possible to sidestep 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. 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. 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

350 Lui, Regulatory Copyright, supra note 272, at 148-150.
351 Mazzone, supra note 7, at 29.
352 These mechanisms have been outlined in section IV(B)(2), which describes the modified notice-and-comment rulemaking process.
353 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. Electronic Frontier Foundation, DMCA Triennial Rulemaking: Failing the Consumer, available at http://w2.eff.org/IP/DMCA/copyrightoffice/DMCA_rulemaking_broken.pdf (last accessed Aug. 26, 2009). 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.
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.

First, it fails to account for the current cost 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 of ability to control copying or distribution. There are even greater costs when that fear is internalized by institutions that educate our nation’s young people. As has been detailed, universities implement restrictive policies that stifle education and creative growth. 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. For teachers, this means less effective teaching likely will result. For students, it (wrongly) teaches them that many novel and creative uses of copyrighted materials are illegal.354

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.”355 It also means making a value judgment about the importance of education vis-à-

354 See generally Lawrence Lessig, Remix: Making Art and Commerce Thrive in the Hybrid Economy (Penguin Press 2008) (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 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”).

355 Carroll, supra note 125, at 1138.
vis private profits of copyright owners. 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. But it is more than that. Implementing policies that are education-friendly will allow educators to teach effectively and develop students who will use copyright and fair use laws to their advantage to produce more social benefit.

C. Complexity of Rules

Another objection to the CRAB or any rulemaking procedure is that the rules and 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.

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 have two components. The

\[356\] It is ironic that the Constitution secures copyrights in author’s works for the benefit of the public only to severely restrict the use of those works in education.

\[357\] Carroll, supra note 125, at 1138.
first would be the actual regulation written with an emphasis on common-sense organization and
design. The second would be “A Manual on Educational Fair Use.” This 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.358

There may also be educational programs designed to teach educators about fair use and
courage 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 and provide an e-
mail and telephone number at which a “Fair Use Genius,” who would direct the individual to
certain regulations,359 could be reached. This website also should contain the Manual and other
webpages containing information about how the CRAB works, the procedures that needed to be
followed, and other educational materials.360

VI. CONCLUSION

The doctrine of fair use has been a crucial part of United States copyright law. The
document has been both revered for its benefits and criticized for its vagueness. Indeed, fair use
has received much attention in the literature. Despite this attention generally, however, few
observations exist about educators’ and educational institutions’ struggles with the doctrine.

For educators, issues began percolate in 1955, when Congress decided to reform the
copyright laws. Eight years later, these Congressional efforts resulted in the Ad Hoc Committee

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

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

360 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 The United States Equal Employment
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. Between 1963 and 1976, the Ad Hoc Committee met numerous times, consulting with various interest groups. Although educators originally sought a broad-based, educational fair-use exemption, the Ad Hoc Committee issued, in 1976, an agreement on educational fair use. This agreement contained Classroom Guidelines for uses of copyrighted works, which purported to state the minimum, not maximum, standards for educational fair use.

Even though the Guidelines were not optimal, at the very least they promised educators 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. Some treated the Guidelines as pseudo-law; some treated them as additional factors under § 107; some treated them as sub-factors within the four factors listed in § 107; and some did a combination of the three.

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. 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 educational fair uses. Educational institutions, now fearful of infringement, avoid the specter of liability by severely restricting their use of copyrighted works. This has negative consequences for student learning, as well as 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, misperceptions seep into the educational culture, restrict teaching and student learning, and generally impede the educational mission. It also created an asymmetrical legal environment that catered only to copyright owners’ interests, with the courts adopting industry standards—i.e., required licenses—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. Some have even specifically taken issue with the current fair-use framework. These proposed a variety of options, including reallocating the burden of proof; eliminating some of the fair-use factors; re-conceptualizing the factors by using substantive copyright law doctrine to inform their application; and creating a new entity to adjudicate or administer fair use. Examination of these proposals revealed that they suffer deficiencies when applied to educational fair use: none sufficiently accounted for the value fair use provides. 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, new mechanism for administering educational fair use, which built on Professor Jason Mazzone’s previous work, 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 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 three possible objections: the CRAB entailed too much specificity; the CRAB unjustifiably increases costs; and the CRAB creates more, rather than less, complexity. The responses to these objection explained how the CRAB’s specificity was actually an advantage; how the increased costs, when viewed in context, are necessary to improve education; and how the fear of complexity was overstated.

This Article has shown that the current state 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.