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The Costs of Privilege: Defining Price in the Market for Educational Copyright Use

L. Ashley Aull*

I. INTRODUCTION

Copyright and education have a long, albeit somewhat troubled, history together, dating back to the first American copyright law.¹ Long before its inception, the Copyright Act of 1976 generated debate between copyright owners and educators regarding the extent of their privileges and rights under the new law. In hearings before House and Senate subcommittees on the 1976 Bill, educational and scholarly uses of copyright received more attention than any other topic.² While copyright owners have very rarely sued educators,³ the boundaries of educational privileges under the current Copyright Act, including the limits of fair use, remain highly contentious. Representatives of educational interests decry the perceived contraction of privileged uses of copyrighted materials for educational purposes, particularly those granted by fair use⁴ and specific teaching exceptions to the public-performance rights of owners.⁵ Copyright owners, meanwhile, adamantly argue that such contraction ultimately produces more, and better, copyrighted material, and that increased damages—particularly statutory damages—are necessary to maintain

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¹ . See, e.g., THE PAT. OFF. SOC'Y, *Proceedings in Congress During the Years 1789 and 1790, Relating to the First Patent and Copyright Laws*, 22 J. PAT. OFF. SOC'Y 243, 277-282 (1940) (following the passage of the first copyright act in 1790: a bill "for the encouragement of learning, by securing the copies of maps, charts, books and other writings, to the authors and proprietors of such copies").

² . Ann W. MacLean, *Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System*, 56 VA. L. REV. 664, 664-65 n.5 (1970).

³ . *But see* Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983); Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962); Encyclopedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982).

⁴ . See 17 U.S.C. § 107 (2000).

⁵ . See 17 U.S.C. § 110(1)-(2) (2000).

their incentives to create.⁶

Scarcity of case law fuels the educational debate, as no solid precedent provides an absolute foothold for either producers or educational users. Most high-profile cases on educational use involve fair use, which provides notoriously uncertain immunity to users of copyrighted works. Other sections of the Copyright Act, also explicit in their favoritism of teaching practices, suffer from few precise case applications. Sections 110(1) and 110(2) of the Copyright Act provide clear, albeit qualified, exceptions to the public performance rights of copyright owners for classroom teaching and distance education,⁷ but have produced no reported cases defining their boundaries. Similarly, very few cases apply § 504(c), which significantly discounts—or eliminates—statutory damages using criteria that educational use would commonly satisfy.⁸

While courts have had only limited opportunities to address the propriety of individual educators' teaching practices,⁹ it is clear that academics do not enjoy complete immunity from liability: use of copyrighted materials by preparers of study guides,¹⁰ biographers,¹¹ and other

⁶ . See 17 U.S.C. § 504(c) (2000). See also H.R. REP. No. 106-216, at 6 (1999) (noting, in support of the Copyright Damages Improvement Act of 1999, that "Courts and juries must be able to render awards that deter others from infringing intellectual property rights. It is important that the cost of infringement substantially exceed the costs of compliance. . . .").

⁷ . See 17 U.S.C. § 110(1)-(2).

⁸ . See 17 U.S.C. § 504(c).

⁹ . But see *Wihtol*, 309 F.2d at 777 (denying fair use defense to individual school teacher who created unauthorized rearrangement of a choral piece, in order to make it suitable for school choirs); *MacMillan Co. v. King*, 223 F. 862, 867-68 (D. Mass. 1914) (denying fair use defense to individual tutor who developed summaries and study guides based on popular economics textbook); *Marcus*, 695 F.2d at 1172 (finding public school teacher liable for incorporating substantial portion of another teacher's copyrighted cake-decorating book into her own book).

¹⁰ . See, e.g., *Educ. Testing Servs. v. Simon*, 95 F. Supp. 2d 1081 (C.D. Cal. 1999) (denying fair use defense—in large part based on special status of secure tests—to for-profit tutor who copied test questions for study guides); *Addison-Wesley Publ'g Co. v. Brown*, 223 F. Supp. 219, 225 (E.D.N.Y. 1963) (defendants found liable for publishing and selling solutions manual to popular physics textbook); *MacMillan*, 223 F. at 862.

¹¹ . See, e.g., *Meeropol v. Nizer*, 560 F.2d 1061, 1068-72 (2d Cir. 1977) (reversing order of summary judgment on issue of fair use and remanding for consideration of whether defendant's incorporation of copyrighted letters in a biography would diminish market for the owners' own publication of the letters); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736-

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teachers and scholarly authors have all resulted in findings of infringement. Additionally, owners have used civil litigation to challenge the propriety of decreasingly expensive, and increasingly accessible, copying technologies, targeting large-scale institutional copying of journals and other scholarly materials for use in research and teaching.¹² Particularly in suits against teaching institutions, infringement findings significantly impact actual practice.¹³

Thus, educational copyright debates take place in an am-biguous field of law. Unfortunately, they also use a vocabulary ill-suited for progress or agreement: one characterized by polarized rhetoric and misconceptions of education's true status under the Copyright Act.¹⁴ This paper seeks to address and amend this unproductive

42 (2d Cir. 1991) (determining that use of copyrighted letters of Richard Wright in a scholarly biography was fair use); Maxtone-Graham v. Burtchaeil, 803 F.2d 1253, 1260-65 (2d Cir. 1986) (determining that use of copyrighted interviews taken from predominantly pro-choice compilation of experience with pregnancy by author of pro-life book was fair use); Kraft v. Kobler, 667 F. Supp. 120, 126-29 (S.D.N.Y. 1987) (rejecting fair-use defense of author who incorporated substantial portions of copyrighted letters into a biography of composer Stravinsky).

¹² . See, e.g., Princeton Univ. Press v. Michigan Doc. Servs., 99 F.3d 1381, 1393 (6th Cir. 1996) (rejecting fair-use defense of for-profit copy shop that openly advertised that it refused to pay licensing fees for copied portions of articles used in university course-packs); Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 931 (2d Cir. 1994) (rejecting fair-use defense of commercial employer of research scientists that had photocopied subscription journals by use of those in-house researchers); Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1362 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) (ruling that copying of journal articles by the National Institute of Health and National Library of Medicine for large-scale distribution to in-house research staff was fair use); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1529-37 (S.D.N.Y. 1991) (rejecting fair-use defense of for-profit copy shop that failed to pay licensing fees for articles copied for university course-packs); Encyclopedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1156 (W.D.N.Y. 1982) (rejecting fair-use defense of school system that engaged in large-scale off-the-air taping and librarying of programs broadcast on public television).

¹³ . "After *Kinko's* . . . many copy shops that had not previously requested permission from copyright holders began to obtain such permission." *Princeton Univ. Press*, 99 F.3d at 1384. Concerns for such impacts, however, sometimes motivate judges to avoid findings of infringement. See, e.g., *Williams & Wilkins*, 487 F.2d at 1356 ("There is no doubt in our minds that medical science would be seriously hurt if such library photocopying were stopped.").

¹⁴ . See *infra* note 42 (discussing Paul Goldstein's characterization of copyright "optimists" and "pessimists").

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purpose of promoting science and the useful arts,¹⁸ and a concern for the preservation of long-accepted practices.¹⁹ Accordingly, several provisions of the current copyright act grant privileges to educators, allowing them to use—at no apparent cost—copyrighted works without the permission of the owner: fair use,²⁰ educational exceptions to performance rights,²¹ and decreased statutory damages in the event of infringement.²² However, anecdotal evidence suggests that the popular presumption of immunity far exceeds actual statutory authority for educators to freely copy protected material.

Absent at least some immunity from the normal costs of copyright-compliance, educators indeed might face significant roadblocks. As stated by Justice Blackmun in his *Sony v. Universal Studios* dissent:

There are situations . . . in which strict enforcement of [a copyright] monopoly would inhibit the very "Progress of Science and useful Arts" that copyright is intended to promote. An obvious example is the researcher or scholar whose own work depends on the ability to refer to and to quote the work of prior scholars. Obviously, no

valuation of a work. Although society greatly benefits from distributing the work, the buyer is only willing to pay the value personally received.").

¹⁸ . See U.S. CONST. art. I, § 8. See also Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 606 (2001) ("[F]air use is . . . consistent with the constitutional objectives of copyright in general: to promote the progress of science and the useful arts. The framers of the U.S. Constitution clearly intended that the law of copyright—including fair use—would be tailored to serve the advancement of knowledge.").

¹⁹ . The assertion that long-accepted practice makes such use legally permissible, however, is doubtful. One of the principle cases relied upon for support by academics wishing for broader privileges, *Williams & Wilkins*, in fact involved a significant—and problematic—deference to practice. See 487 F.2d at 1350, 1353 ("These customary facts of copyright-life are among our givens."). The court in *Williams & Wilkins* took for granted that a single hand-written copy made by an academic is a fair use when it noted that it is "common for courts to be given photocopies of recent developments, with the publishing company's headnotes and arrangement, and sometimes its annotations."). Later cases have explicitly rejected this reliance upon practice as proof of legal permissibility. See *Sony*, 464 U.S. at 468 n.16 (Blackmun, J., dissenting) ("[I]t is by no means clear that the making of a 'hand copy' of an entire work is permissible; the most that can be said is that there is no reported case on the subject, possibly because no copyright owner ever thought it worthwhile to sue."); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 924 (2d Cir. 1994) (such "argument today is insubstantial").

²⁰ . 17 U.S.C. § 107.

²¹ . 17 U.S.C. § 110(1)-(2).

²² . 17 U.S.C. § 504.

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author could create a new work if he were first required to repeat the research of every author who had gone before him. The scholar, like the ordinary user, of course could be left to bargain with each copyright owner for permission to quote from or refer to prior works. But there is a crucial difference between the scholar and the ordinary user. When the ordinary user decides that the owner's price is too high, and forgoes use of the work, only the individual is the loser. When the scholar forgoes the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar's work, in other words, produces external benefits from which everyone profits.²³

As stated by another author: "[w]ithout paying someone to teach you or buying a book that explains Newton's laws, you are not terribly likely to learn them merely because they are in the public domain."²⁴

Nevertheless, the intuition that educators *always* deserve special treatment may be more modern than many scholars suspect—particularly those scholars who perceive a significant erosion of user privileges over time.²⁵ Although the doctrine of fair use was born in the case of *Folsom v. Marsh* in 1841, that very case denied its application to a biographer's use of George Washington's letters. Justice Story did not consider the academic status of the defendant as a determinative factor in his analysis of infringement. Rather, Justice Story held that fair use was unavailable to the defendant—regardless of the defendant's profession—"if the value of the original is sensibly diminished or the labors of the original author are substantially appropriated."²⁶

By 1914, when fair use had become well established in the courts,²⁷ teachers still did not necessarily receive special

²³ . *Sony*, 464 U.S. at 477-78 (Blackmun, J., dissenting).

²⁴ . Michelle Boldrin & David Levine, *Intellectual Property and the Efficient Allocation of Social Surplus from Creation*, 2 REV. ECON. RES. ON COPYRIGHT ISSUES 45, 64 (2005). Boldrin and Levine, in fact, demonstrate that given any circumstance in which such sources are independently licensed, the likelihood of creation of a new work—or, say, a teaching program—incorporating all such sources decreases to zero as the number of required licenses increases. See *id.* at 61.

²⁵ . See, e.g., Lawrence Lessig, Professor of Law, Stanford Univ., Keynote Address from the Open Source Convention: Free Culture (July 24, 2002), available at <http://www.oreillynet.com/pub/a/policy/2002/08/15/lessig.html>; Siva Vaidhyanathan, *Copyright as Cudgel*, CHRON. OF HIGHER EDUC., Aug. 2, 2002, at B6 (citing James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?* 47 DUKE L.J. 87 (1997)).

²⁶ . *Folsom v. Marsh*, 9 F. Cas. 342, 348 (D. Mass. 1841).

²⁷ . See, e.g., *West Publ'g Co. v. Edward Thompson Co.*, 169 F. 833

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treatment under copyright law. In *Macmillan Co. v. King*,²⁸ the District Court of Massachusetts considered an infringement suit brought against an economics tutor who prepared study sheets for his students, based on, and quoting from, a popular economics textbook. Despite the lack of any evidence showing economic harm to the plaintiff,²⁹ the Court found that the copying had "resulted in an appropriation . . . of the author's ideas and language more extensive than the copyright law permits."³⁰ The Court explicitly rejected the suggestion that, as an educator, King deserved special leeway:

I am unable to believe that the defendant's use of the outlines is any less the infringement because he is a teacher, because he uses them in teaching the contents of the book, because he might lecture upon the contents of the book without infringing, or because his pupils might have taken their own notes of his lectures without infringing.³¹

Thus, while the judge took for granted that certain teaching practices using the book would have been non-infringing, teacher status itself made no difference.

Thus, although there is a strong popular presumption that educators deserve special status in copyright law, neither traditional nor modern copyright cases fully recognize an educational-status-based exemption to intellectual property rights. This difference between perceived and actual immunity creates significant frustration, particularly when many educators perceive licenses as prohibitively expensive or difficult to obtain.³²

(E.D.N.Y. 1910), *decree modified by* 176 F. 833 (2d Cir. 1910) (considering the fair use of excerpts from copyrighted case reports in a legal encyclopedia); *Lawrence v. Dana*, 15 F. Cas. 26, 61 (D. Mass 1869) ("Examined as a question of strict law, apart from exceptional cases, the privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication . . ."). Some of the early cases apply fair use in a manner now more akin to the rejection of copyright in the underlying facts of a work. See, e.g., *Dun v. Lumbermen's Credit Ass'n*, 144 F. 83 (7th Cir. 1906).

²⁸ . *MacMillan Co. v. King*, 223 F. 862 (D. Mass. 1914).

²⁹ . *Id.* at 867.

³⁰ . *Id.* at 866.

³¹ . *Id.*

³² . See Kristine H. Hutchinson, *The Teach Act: Copyright Law and Online Education*, 78 N.Y.U. L. REV. 2204, 2215-16 nn.52-59 (2003) (relaying interviews with various online educators frustrated by limitations imposed by their inability to obtain licenses for educational use of material); Carl Belz, *Unwriting the Story of Rock in Fair Use and Free Inquiry: Copyright Law and the New Media* 36, 38 (John Shelton Lawrence & Bernard

The long history of the intuition that educators deserve special treatment under copyright law has an attendant vocabulary of educators' "rights," the use of which contributes to further frustration in debates between educational users and copyright-holders. With respect to both educational uses and copyright generally, commentators utilize a flawed vocabulary to characterize users' and producers' competing interests and respective powers. Discussions of users' "rights" employ a terminology specifically intended to invigorate resistance to changes in copyright law. However, the language of *la résistance* mischaracterizes the educational users' position and conflicts with a dominant vocabulary of producers' rights, all but guaranteeing discordant discussions. Even more fundamentally, the "balance" said to be achieved by copyright—and disrupted by various changes thereto—demands reconsideration, particularly as it applies to educational uses of copyright, including ever-troublesome fair uses.³³

1. "Rights"

Educators concerned with current alleged imbalances in the state of copyright law—particularly the impacts of the Digital Millennium Copyright Act,³⁴ the Sony Bono Copyright Term Extension Act³⁵ and the Copyright Damages Improvement Act³⁶—propose several means of resistance,

Timberg eds., 1980) (explaining the process of rewriting a book on popular music in response to resistance from music publishers that functionally disallowed use of lyrical clips in the work). See generally MARJORIE HEINS & TRICIA BECKLES, *WILL FAIR USE SURVIVE?: FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL* 26 (2005) (including several case studies of academics in different fields frustrated with prohibitively expensive or complicated licensing procedures).

³³ . Fair uses are often described as "the most troublesome in the whole law of copyright." 2 NIMMER ON COPYRIGHT § 145 (1976).

³⁴ . Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 and 28 U.S.C.).

³⁵ . Copyrights—Term Extension and Music Licensing Exemption, Pub. L. No. 105-298, 11 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.), held constitutional by *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003).

³⁶ . Digital Theft Deterrence and Copyright Damages Improvement Act, Pub. L. No. 106-160, 113 Stat. 1774 (codified as amended in scattered sections of 17 and 28 U.S.C.).

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centered on rhetorical strategies designed to highlight the public's plight in copyright law.³⁷ The Electronic Frontier Foundation has taken a lead role in this rhetorical change.³⁸ The resulting rhetoric of desert and "rights"—common in activist circles³⁹ but also in occasional court opinions⁴⁰—provides little promise of producing effective debate, when used against the dominant, producer-based rhetoric of copyright protection.⁴¹ It provides an insufficient bargaining medium for owners and users by ignoring, rather than seeking to address and reduce, the cost of educational use.⁴²

³⁷ . Professor Siva Vaidhyanathan explicitly rejects the rhetoric of copyright as "property," noting that educators "can't win an argument as long as those who hold inordinate interest in copyright maximization can cry 'theft' at any mention of fair use or user's rights." Vaidhyanathan, *supra* note 25. Instead, he advocates allegiance to one or both of two recent rhetorical strategies designed to reorient copyright towards users, rather than owners, interests: that of the information commons, or that users' "rights." *Id.*

³⁸ . See generally Electronic Frontier Foundation, Intellectual Property, <http://www EFF.org/IP/> (last visited Feb. 17, 2008).

³⁹ . See, e.g., DigitalConsumer.org, Bill of Rights, <http://www.Digitalconsumer.org/bill.html> (last visited Feb. 17, 2008) (providing that "users have the right" to various activities—including time-shifting, space shifting, and translation—in respect to legally acquired copies of copyrighted works). The Electronic Frontier Foundation likewise speaks largely in of this vocabulary of freedom and rights: "At the same time, IP must be carefully limited to protect your rights to create, access, and distribute information, as well as to develop new ways to do so." See Electronic Frontier Foundation, *supra* note 38.

⁴⁰ . See, e.g., Princeton Univ. Press v. Michigan Doc. Servs., 99 F.3d 1381, 1393 (6th Cir. 1996) (Martin, C.J., dissenting) ("The fair use doctrine, which requires unlimited public access to published works in educational settings, is one of the essential checks on the otherwise exclusive property rights given to copyright holders [I]t is the essence of copyright and a constitutional requirement."); Harper & Row, Inc. v. Nation Enters., 471 U.S. 539, 604 (1985) (Brennan, J., dissenting) (arguing that the holding denying fair use to the Nation "effect[s a] curtailment in the free use of knowledge and of ideas . . . risking the robust debate of public issues that is the essence of self-government.") (citation removed).

⁴¹ . See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984) ("The purpose of copyright is to create incentives for creative effort."); Addison-Wesley Publ'g Co. v. Brown, 223 F. Supp. 219, 228 (E.D.N.Y. 1963) ("Of preponderant importance to the Court in evaluating the merits in doubtful cases . . . is the recognition by it of 'the economic philosophy behind the (constitutional) clause empowering Congress to grant patents and copyrights.' That philosophy persuades that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents and authors and inventors . . .") (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)).

⁴² . Paul Goldstein has divided the rhetorical camps of copyright—those who support, and those who distrust, strong users' rights as a method of

As a matter of doctrine, educational use is not a "right." Fair use, although championed as a "right" by some activists, is more modestly conceived by most judges as a "privilege"⁴³ equivalent to an "exception to the [owner's] private property rights,"⁴⁴ or simply "not an infringement."⁴⁵ Over-application of the privilege threatens the right of copyright owners and, according to the dominant rhetoric for copyright protection, ultimately hurts users by decreasing the amount of copyrighted work that is produced.⁴⁶ The rhetoric of user rights, particularly where it cooperates with the rhetoric of "freedom" to use copyrighted works,⁴⁷ contributes to polarization of debates about proper copyright protection. While such polarization may invigorate concerned citizens, it offers little promise of progress.

2. "Balance"

Canonically, scholars and judges alike describe copyright as the codification of a "balance" between the interest of authors in financial returns from their work and the interest of the public in access to that work. Through a grant of monopoly power to authors—that is, an almost-complete right to exclude—the copyright law ultimately promotes user access to art, literature and other original creations. Exceptions for educational uses are considered an especially important element of this "balance." As stated in *Williams & Wilkins v. United States*, "the development of fair use has been influenced by . . . tension between the direct aim of the

achieving broad access to copyrighted works—into two camps: "optimists" and "pessimists." See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 15–17 (1994). These labels should indicate the degree to which the camps are unable to make progress in discussions with one another—few optimists can be reasoned into pessimism, and vice versa. *Id.*

⁴³ . *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966).

⁴⁴ . *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1255 (2d Cir. 1986).

⁴⁵ . *Sony*, 464 U.S. at 462 (Blackmun, J., dissenting).

⁴⁶ . See *Harper & Row*, 471 U.S. at 557 ("Respondent's theory . . . would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure. Absent such protection, there would be little incentive to create or profit in financing such memoirs, and the public would be denied an important source of significant historical information.").

⁴⁷ . See Electronic Frontier Foundation, *supra* note 38 ("In each of these instances and many more, your freedom runs up against intellectual property.").

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copyright privilege to grant the owner a right from which he can reap financial benefit and the more fundamental purpose of the protection '[t]o promote Progress of Science and the useful Arts.'"⁴⁸ The fair use doctrine, along with explicit educational privileges, is said to "offer[] a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern. . . ."⁴⁹ Commentators worry about whether the balance—at any given time—provides more benefit to users or producers.⁵⁰

Scholars and courts consider changes in technology and user practices as variables that affect this balance. For instance, the court in *American Geophysical Union v. Texaco* stated that "the invention and widespread availability of photocopying technology threatens to disrupt the delicate balances established by the Copyright Act."⁵¹ Likewise, academic commentary surrounding recent legislative amendments to the Copyright Act bemoans disruption of the idealized balance embodied by the law.⁵² Many advocates identify primarily with users of copyright and express intense concern over the "tipping" of the copyright balance in favor of owners, away from the interests of users.⁵³ The copyright balance thus teeters precariously between "free access" and "individual control," and appears a matter of esoteric policy: metaphysical,⁵⁴ impossible to optimize, and ever on the

⁴⁸ . *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1352 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975).

⁴⁹ . *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977).

⁵⁰ . *See, e.g.*, Silberberg, *supra* note 15, at 620 ("Copyright law balances the societal benefit of public access to information and ideas against the need to provide creators with incentives to produce. As copyright law has developed judicially, commentators have debated whether the creator or the public should be the primary beneficiary of the law.").

⁵¹ . *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 917 (2d Cir. 1994).

⁵² . *See, e.g.*, Silberberg, *supra* note 15, at 620-621 (describing fair use as an important element of the copyright balance, the contemporary limitations on which have negatively affected the balance).

⁵³ . *See, e.g.*, Electronic Frontier Foundation, *supra* note 38 ("In the move from analog to digital, offline to online, this delicate balance is becoming dangerously tilted, as legislators, courts, and IP holders push for ratcheting up IP rights. EFF fights to preserve balance and ensure that the Internet and digital technologies continue to empower you as a consumer, creator, innovator, scholar, and citizen.").

⁵⁴ . *See Folsom v. Marsh*, 9 F. Cas. 342, 344 (D. Mass. 1841)

verge of tipping in one direction or another depending on the actions of legislators, users, and producers.

The more one encounters articulations of this "balance" and prophecies of its imminent disruption, the more it begins to look like "price": an actual value representing the point at which producers' and consumers' interests meet, for a moment, in an exchange. Other legal scholars recognize that copyright law allows a market for otherwise "public" goods,⁵⁵ but do not push further to recharacterize the basic "balance" at the foundation of American copyright law and educational exceptions as the "price" resulting from that market. However, characterized as "price," the "balance" achieved by copyright is neither esoteric nor unfamiliar to the law or economics: it is the long-analyzed and recognized playing ground on which producers and consumers of products always meet. Changes constitute not the disruption of an ideal status, but the natural reactions to changing supply and demand, changing costs of producing copyrighted works, changing public interest in those works, and the public's changed ability to substitute other goods, including pirated copies. Thus the advent of photocopying technology conceived as a "threat" in *Williams & Wilkins* resulted not in a harmful "disruption," but in a natural price adjustment.

C. THE COST OF "FREE" USE

The problem with this characterization of "balance" as "price" is that it appears inimical to the basic presumption that educational use ought to be (as a matter of rightness), and appears to be (as a matter of copyright law), "free." Sections 107, 110(1) and 110(2) of the Copyright Act explicitly make fair use and teaching exceptions "not

("[C]opyrights approach nearer than any other class of cases belonging to forensic distinctions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be very subtle and refined, and sometimes, almost evanescent.").

⁵⁵ . The canonical article on the economics of copyright law, by Richard Posner and William Landes, identifies the operation of the copyright laws as providing legal barriers to access which allow for the alienability and exchange of copyright products for adequate consideration, despite their otherwise being a non-excludable and non-rivalrous "public good." See Richard Posner & William Landes, *An Economic Analysis of Copyright Law*, 18 J. LEGAL. STUD. 325 (1989).

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infringements" of copyright.⁵⁶ Thus, it would appear, at least facially, that owners of copyright would have no rights against fair users and teachers who would enjoy "free" access to copyrighted works; as such, educational users should be able to access such works without cost, and content-owners should be prohibited from manipulating the cost of—i.e., establishing a price for—access to their works.

Unfortunately for educators, however, the status of a use as "not an infringement" under the law does not reduce the cost of that use to zero—even for uses that result in no economic damage whatsoever to the copyright owner. Although educational privileges and fair use appear to prohibit the establishment of a monetary "price" for access to copyrighted works, the uncertain boundaries of these privileges leave would-be educational users subject to a risk of incurring economic damages if they do not seek the permission of content-owners. Section 504 of the Copyright Act, which provides for statutory damages of up to \$150,000 per infringed work, creates an enormous potential cost for any unlicensed use that does not to qualify for the protection under §§ 107, 110(1) or 110(2).⁵⁷ Even if determined in court to be copyright infringements, many educational uses produce nominal or no actual damages to the copyright owner. However, the Copyright Act lets owners choose statutory rather than actual damages as an award in the event of infringement, and authorizes judges to award whatever per-work value they consider "just."⁵⁸ The traditional rationale for such greatly increased damages is that actual damages may be hard to prove and that only the promise of a statutory award will adequately induce owners to invest in their copyrights.⁵⁹ In any case, the availability of such awards drastically changes the ex ante incentives of would-be educational users—where there is even a low probability of such high damages, the expected cost of an unlicensed use of a copyrighted work is not zero.

Admittedly, courts tend to award low statutory damages without evidence of profits lost by plaintiffs or reaped by

⁵⁶ . 17 U.S.C. §§ 107, 110(1)-(2).

⁵⁷ . 17 U.S.C. § 504(c).

⁵⁸ . *See id.*

⁵⁹ . Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 WM. & MARY L. REV. 1585, 1651-52 (1998) (citing 2 PAUL GOLDSTEIN, COPYRIGHT 12.2, 12:34 (2d ed. 1996)).

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defendants.⁶⁰ Even more significantly, statutory damages have never been awarded against an individual teacher,⁶¹ not merely because such damages are statutorily unavailable in many cases of reasonably presumed fair use,⁶² but because plaintiffs apparently have not asked for them. However, occasional awards of astronomical damages in borderline-educational contexts inflate the expected cost of infringement in the case of suit.⁶³ Additionally, publishers have shown considerable willingness to bring suit against low-stakes infringers in order to increase the deterrent effect of suit and encourage compliance with copyright law. For instance, Broadcast Music, Inc. (BMI) regularly sues small establishments for a small number of failures to obtain licenses to play music.⁶⁴ In these suits, BMI consistently asks for statutory, rather than actual, damages.⁶⁵ Thus, although the chances of awarding astronomical damages against an educator are very low, they cannot be discounted entirely.

Particularly with regard to fair use, insofar as the doctrine is applied on a strictly "case by case" basis and is resistant to generalization, every use by an educator involves at least some risk of suit by a copyright owner. The privilege is thus famously and "inordinately costly to vindicate."⁶⁶ Though a defense to copyright infringement, it

⁶⁰ . *Id.* at 1667-68.

⁶¹ . This assertion is based on a review of every reported case in which statutory damages have been awarded.

⁶² . See 17 U.S.C. § 504(c).

⁶³ . In *Encyclopedia Britannica*, for instance, awarding even the minimum statutory damages—at the time \$250 per infringed work—would have resulted in damages of \$93,000 against the public school system. See *Encyclopedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1185 (W.D.N.Y. 1982). Likewise, after having their fair use defense rejected, Kinko's was ordered to pay \$510,000 for just twelve infringements. See *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1545 (S.D.N.Y. 1991).

⁶⁴ . See, e.g., *Broad. Music v. DeGallo*, 872 F. Supp. 167 (D. N.J. 1995) (seven infringements).

⁶⁵ . See *id.*

⁶⁶ . Thomas F. Cotter, *Accommodating the Unauthorized Use of Copyrighted Works for Religious Purposes Under the Fair Use Doctrine and Copyright Act § 110(3)*, 22 *CARDOZO ARTS & ENT. L.J.* 43, 44 (2004). Likewise, systems for compliance with other aspects of copyright law are also "cumbersome, expensive, and slow." Duane Webster, *The Practical Realities of the New Copyright Laws: A Librarian's Perspective* (Dec. 28, 2002) (transcript archived at <http://web.archive.org/web/20060824053059/http://www.arl.org/info/frn/copy/webstermla02.html>).

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is not a shield against all control of the copyright owner.⁶⁷ Additionally, the privilege provided to educators under § 110(2)—a recently amended, highly qualified privilege for the limited use of materials in distance education programs—has not been tested by courts, and applies to online uses to which copyright owners are particularly sensitive.

In short—there is always a risk of suit. It is not a negligible risk. As one commentator has recognized: “Educators, as guardians of a primary public interest, enjoy . . . exceptions . . . which give them a comparatively free, if somewhat uncertain, rein to use copyrighted materials in their teaching activities.”⁶⁸ Insofar this commentator recognizes that the educators’ use is only “comparatively” free—which means cheaper, but not free—and dependent upon risk, she is correct. Statutory damages almost always remain a possibility. As such, every educator’s use of copyrighted works has an expected cost: the potential cost—i.e., statutory damage award plus litigation cost—multiplied by the probability of that cost being assessed.⁶⁹

The content of the debate about educational use, then, is primarily a debate about controlling the cost for that use: §§ 107, 110(1) and 110(2) set limits on copyright-owners’ abilities to set prices for educational use of their works, but they do not entirely eliminate the expected cost of “privileged” educational use. The following section more carefully discusses the “cost” of educational use, which depends—for its existence—upon the Copyright Act’s grant of monopoly control to authors,⁷⁰ and depends—for its value—upon varied, subtle aspects of the Copyright Act which enforce a regime of price discrimination.⁷¹ The section will

⁶⁷ . But see Silberberg, *supra* note 15, at 621 (“fair use acts as a shield against the monopoly of copyright”).

⁶⁸ . Maclean, *supra* note 2, at 666.

⁶⁹ . See generally Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, *ECONOMETRICA* 263, 263–64 (1979) (describing general calculation for the utility of a decision made under risk, and noting the impact of risk aversion).

⁷⁰ . See generally Landes & Posner, *supra* note 55, at 328 (theorizing that because copyrighted material is a “public good,” absent a limited monopoly, “the market price of the book will eventually be bid down to the marginal cost of copying, with the unfortunate result that the book will probably not be produced in the first place, because author and publishers will not be able to recover their cost of creating the work.”).

⁷¹ . Cf. Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 *CARDOZO L. REV.* 55, 67 (2001) (“There are varied and subtle methods used

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is the voluntary and sole choice of copyright producers⁷⁵ and that user privileges embodied in the Copyright Act generally "impede" producers' ability to discriminate.⁷⁶ These analyses have overlooked elements of the Copyright Act itself—including provisions for user privileges—that *mandate* price discrimination in the pricing of copyrighted works for educational users.

The Copyright Act itself establishes a system of decreased damages and privilege which lower the cost of copyright for a small subset of users—namely, educational users. At the same time, the Act demands limitations on those uses in order to limit the impact of the use on outside markets (limiting "arbitrage"). Statutory damage provisions, the fair use defense generally, and the teaching exceptions in § 110(1)-(2) embody the boundaries of these exclusive markets. Courts engage in precise line-drawing between markets—based on factors which correlate directly to a perceived ability to pay—in a way well-recognized among private actors for copyrighted works,⁷⁷ but rarely ascribed to

⁷⁵ . Meurer, *supra* note 71, at 91.

⁷⁶ . *Id.* at 61 ("[B]road user rights impede price discrimination. Compulsory licenses and fair use are two doctrines that contribute to broad user rights and create obvious obstacles to price discrimination.").

⁷⁷ . Price discrimination by copyright owners is well-documented. See *generally* Meurer, *supra* note 71 (presenting key examples of price discrimination for copyrighted works and analyzing such practices' effects on the distribution of welfare). Among the most prevalent forms of such discrimination is the "educational discount," analogous to that provided intrinsically by copyright law. Thus, for instance, Broadcast Music Inc. (BMI) offers blanket licenses to colleges and universities for all music—including concerts, student dining halls, etc.—at a rate significantly lower than that required from commercial offices, concert-promoters or restaurant owners. See, e.g., License Agreement from BMI, BMI College/University Music Performance Agreement (One Tier), *available at* <http://bmi.com/forms/licensing/college58.pdf> (providing for a per-student fee of \$0.31 per year); License Agreement from BMI, BMI Business Multiple Use License, *available at* <http://bmi.com/forms/licensing/multilic.pdf> (providing for a per-employee fee of up to \$0.69 per year for the first 250 employees); License Agreement from BMI Music License for Eating & Drinking Establishments, *available at* <http://bmi.com/forms/licensing/ede.pdf> (providing for a minimum per-occupant fee of \$2.45 per year solely for playing of recorded music); License Agreement from BMI Musical Attractions Music Performance Agreement, *available at* <http://bmi.com/forms/licensing/musicalattractions.pdf> (requiring payment of fee equal to 0.30% of gross ticket revenues per attraction for arena with up to 9999 seats). BMI additionally discriminates between for-profit and not-for-profit performances of music. See *id.* (for a concert with 9999 in

the government.

Likewise, arbitrage controls appear in other factors of the fair-use analysis, and in the requirements under § 110(1)-(2) for various technological controls designed to limit the leakage of educational-use copyright material into other more profitable markets. Courts vigilantly patrol the boundaries between the resulting educational and general markets, and exhibit wariness to deem educational uses privileged that would undermine the price-discriminatory scheme.⁷⁸

A. DEFINING THE EDUCATIONAL MARKET

The first element of this statutorily established regime of price discrimination is its identification of different markets

attendance, BMI charges a total fee of only \$125 if the concert is a no-charge benefit concert, but otherwise 0.30% of total ticket revenue for concerts for which there is a charge). Software companies, likewise, provide significant educational discounts—thus discriminating against educational and non-educational users (as well as, frequently between corporate and individual users). Such discounts may be based less on altruism than on an assessment of educational users as having a lower ability or willingness to pay than business users. See Hal R. Varian, *Pricing Information Goods*, June 15, 1995, <http://www.sims.berkeley.edu/~hal/Papers/price-info-goods.pdf>; Meurer, *supra* note 71, at 70 n.51 (providing the example of Microsoft's 1999 price list). One wonders if the dearth of debate about educational fair use of software does not result from the software companies having successfully priced their goods below the expected cost of fair use. Textbooks provide a glaring exception to the general rule—and college bookstores tend to charge much higher prices for books than normal bookstores, no doubt because college students must buy those books and thus have a higher valuation on them than the average, flexible reader. *Id.* at 70 n.52 (college bookstores charge more because "student customers of college bookstores have a fairly inelastic demand for required course books"). See also Christos Cabolis et al., *A Textbook Example of International Price Discrimination*, Sept., 2005, <http://www.econ.ucy.ac.cy/papers/3-2005.pdf> (outlining features of general textbook market as well as hypothesizing that differing international prices for identical products result from cross-cultural differences on willingness to pay, resulting from differences in valuation of education generally).

⁷⁸ . Cf. William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1742, 1782 (1988) ("Accordingly, judges should watch for situations in which unauthorized use of copyrighted material undermines price discrimination schemes and should be chary of holding such uses fair. . . . The more that privileging the activity would undermine the ability of copyright owners to engage in price discrimination, the weaker the case for fair use, because price discrimination both increases the rewards available to creators (without increasing monopoly losses) and equalizes consumers' access to works of the intellect.").

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for copyrighted work. At first, the law purports to admit only of one type of consumer and one type of producer: the bland personalities "A" and "B" of law-school exams and formalist analysis. But in fact, copyright law recognizes several different types of users: religious users,⁷⁹ journalists and commentators,⁸⁰ public broadcasters,⁸¹ and educators.⁸² By singling out these groups for reduced damages or special privileges to use or perform works, the copyright law defines markets in which copyright is necessarily—on average—less expensive.⁸³ Appropriate definitions of these markets ensure that the appropriate parties qualify for the "discount," and ensure that reduced prices do not damage the marketability of works in non-identified markets.

The kind of price discrimination functionally instituted by the Copyright Act itself is third-degree price discrimination: that which gauges a consumer's ability to pay (and thus adjusts the cost of access) by some immutable characteristic of that consumer. Second-degree price discrimination—that which depends upon particular behaviors to indicate willingness to pay—also abounds in producer-side price discrimination, but appears less common under the Copyright Act, which prefers categorical line-drawing.⁸⁴ Third-degree price discrimination requires the accurate determination of relevant buyer characteristics which, as closely as possible, track ability to pay.⁸⁵ American copyright law has visibly struggled to find these characteristics over time.

1. "Nonprofit" Status under 1909 Law and Modern Fair Use

Under the provision of the 1909 Copyright Act, equivalent to modern § 110(1), educators enjoyed the benefits of a pure "not-for-profit" exception to copyrights in

⁷⁹ . 17 U.S.C. § 110(3). See generally Cotter, *supra* note 66 (analyzing recent fair use cases involving religious uses of copyrighted material and, in some instances, affording them special treatment).

⁸⁰ . See 17 U.S.C. § 107.

⁸¹ . See 17 U.S.C. § 504(c)(2).

⁸² . See 17 U.S.C. §§ 107, 110(1)-(2), 504(c).

⁸³ . Because, as previously discussed, the law thus decreases the risk of suit or magnitude of damages available against these parties, as compared to the risk of suit for a general user.

⁸⁴ . See generally Meurer, *supra* note 71, at 74-76 (comparing second- and third-degree price discrimination methods used by copyright owners).

⁸⁵ . See *id.* at 75-76.

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affords the defendant a presumption that his activity did not economically harm the defendant⁹² and makes a finding of fair use generally more likely. Commercial use is presumed unfair.⁹³

While the express words of the statute direct courts' attention only to the character of the use, the character of the user often plays into this factor as well. As stated by the Second Circuit in *Texaco*: "Though [the defendant] properly contends that the court's focus should be on the *use* of the copyrighted material and not simply on the user, it is overly simplistic to suggest that the purpose and character of the use can be fully discerned without considering the nature and objectives of the user."⁹⁴ Some judges go further, arguing that the status of the user should be all-but-determinative of the fairness of their use—so much so that a use, even if for profit, should be presumptively fair if the user is a researcher.⁹⁵ Attention to status becomes particularly acute in the instance of non-profit uses by educators, whose identity and activity is unified to the extent that courts interpret § 107's preference for "teaching, . . . scholarship, or research"⁹⁶ to afford teachers, scholars and researchers a presumption of privilege under fair use.⁹⁷ Thus, although courts emphasize that it is the character of the "use" primarily at issue under § 107, the status or identity of the would-be infringer plays a significant role in considerations of this factor. For instance, research for a non-profit company gets drastically different treatment

⁹² . See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) ("[I]f the intended use is commercial gain, that likelihood [of future economic harm] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.").

⁹³ . See *id.* at 451 ("commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright").

⁹⁴ . *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994).

⁹⁵ . See, e.g., *Texaco*, 60 F.3d at 932 (Jacobs, J., dissenting) ("The photocopying was . . . integral to ongoing research by a scientist. In my view, all of the statutory factors organize themselves around this fact.").

⁹⁶ . 17 U.S.C. § 107.

⁹⁷ . See *Sony*, 464 U.S. at 477 (Blackmun, J., dissenting) ("There are situations . . . in which strict enforcement of [the copyright] monopoly would inhibit the very 'Progress of Science and useful Arts' that copyright is intended to promote. An obvious example is the researcher or scholar whose own work depends on the ability to refer to and quote the work of prior scholars.").

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institution. The statutory regime keeps the nonprofit educational market stable and containable enough to be afforded a discount on copyrighted works without risking arbitrage into the "normal" market. It maintains a group of discount users discrete enough that their existence does not "impair[] the copyright holder's ability to demand compensation from (or deny access to) any group who would otherwise be willing to pay. . . ." ¹⁰⁰ As such, statutory regimes governing—and courts analyzing—educational uses exhibit as much concern for the permeability of the boundary between the educational and normal markets as for that boundary's location.

In order to avoid arbitrage—the "leakage" of low prices across the boundary from the educational to the general market—copyright law incorporates a series of explicit requirements, weighing analyses and other provisions that only allow educators to obtain lower-cost uses when they have engaged in an activity that does not pose an unreasonable risk of "leaking" low prices into the general market. These arbitrage controls appear explicitly in § 110, and more subtly in the fair use analysis under § 107. ¹⁰¹

1. Educational Privileges Under Sections 110(1) and 110(2)

Arbitrage controls are most explicit in the context of the § 110(1) and § 110(2) teaching exceptions, which—particularly since revisions in 2002 under the TEACH Act—require physical or technological quarantining of works used for educational purposes, to avoid their leaking into other markets and thereby decreasing non-educational demand. ¹⁰² These sections provide that, notwithstanding the rights granted to copyright-holders by § 106 of the Copyright Act, "the following are not infringe-ments to copyright":

- (1) 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 . . . ; [and]
- (2) . . . the performance of a nondramatic literary or musical work or reasonable limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed

¹⁰⁰ . *Sony*, 464 U.S. at 485 (Blackmun, J., dissenting).

¹⁰¹ . 17 U.S.C. §§ 107, 110(1)-(2).

¹⁰² . Technology, Education, and Copyright Harmonization Act of 2002 [hereinafter TEACH Act], Pub. L. No. 107-273, 116 Stat. 1910 (codified as amended in scattered section of 17 U.S.C.).

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education programs, which—by not enjoying the benefits of § 110(1) or § 110(2)—paid significantly higher costs for use of teaching materials.¹⁰⁸ After a long process of public comment and consideration, Congress significantly altered § 110(2) to accommodate those online distance-education practices.¹⁰⁹

The modified § 110(2) responded significantly to fears of copyright owners that allowance of certain performances and displays over the internet—even in the context of educational use—would lead to broader damage to their markets because of the ease of digital piracy and inadequacy of most digital-rights management systems.¹¹⁰ The provision thus includes an explicit arbitrage control that requires institutions to take adequate technological precautions against downstream piracy.¹¹¹ In particular, § 110(2)(D) requires the institution in which a particular teacher works to “institute[] policies regarding copyright” and “apply technological measures that reasonably prevent . . . unauthorized further dissemination of the work in accessible form by . . . recipients to others.”¹¹² The law thus requires that teachers covered by the section avoid creation of unreasonable risk of down-stream piracy following their educational use. A use is not privileged whatsoever under § 110(2) if it poses such an unreasonable

¹⁰⁸ . See generally Laura N. Gasaway, *Distance Learning and Copyright: An Update*, 49 J. COPYRIGHT SOC'Y U.S.A. 195, 200 (2001) (“The current Copyright Act recognizes the unique position and importance of education by providing crucial exemptions to the exclusive rights of the copyright holder. Unlike the exemption for face-to-face teaching, however, instructional transmission (i.e., distance education) is not so favored.”).

¹⁰⁹ . See TEACH Act, *supra* note 102.

¹¹⁰ . The dangers of piracy and the inadequacy of protections dominated the publisher-side comments about proposed amendments to the act. See, e.g., Comments from the American Society of Journalists and Authors to the United States Copyright Office, Office of Policy and International Affairs (Feb. 4, 1999), available at <http://www.copyright.gov/disted/comments/init007.pdf>; Comments from the Motion Picture Association of America to the United States Copyright Office, Office of Policy and International Affairs (Feb. 5, 1999), available at <http://copyright.gov/disted/comments/init022.pdf> (“greater protections are necessary to stimulate the production and dissemination of works necessary to carry out effective distance education activities”); Comments from the Recording Industry Association of America to the United States Copyright Office, Office of Policy and International Affairs (Feb. 5, 1999), available at <http://www.copyright.gov/disted/comments/init023.pdf>.

¹¹¹ . See Hutchinson, *supra* note 32, at 2222.

¹¹² . 17 U.S.C. §§ 110(2)(D)(i)-(ii)(I)(bb).

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risk. This provision of the law thus reinforces the barrier between the "educational" market and the "general market," and imposes technological arbitrage controls to prevent leakage from one market into another.¹¹³

2. Fair Use

Fair use imposes further arbitrage controls, particularly under the fourth factor analyzed by courts under § 107: "the effect of the use upon the potential market for or value of the copyrighted work."¹¹⁴ As interpreted by Justice Blackmun in *Sony*, in order to successfully plead fair use, "the infringer must demonstrate that he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work."¹¹⁵

Analysis of this factor in the fair-use analysis is as old as the doctrine itself—referenced, even, in the "first" articulation of the fair use doctrine in *Folsom v. Marsh*:

[W]e must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and *the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.*¹¹⁶

Although the Supreme Court has disavowed its once-articulated view that this is the most important factor considered in the fair-use analysis,¹¹⁷ lower courts certainly continue to give this factor special weight.¹¹⁸

Many criticisms of fair use point out that this "definition-of-the-market" test is circular, insofar as in some sense

¹¹³ . Viewed in this context, copyright owners' particular resistance to extensions of fair use on the internet, and litigiousness in that area, may be viewed as recognition that arbitrage controls appear—at least as of yet— weaker in the internet sphere. It is difficult to assure copyright owners of the non-market-impacting use of a particular work where the medium of its usage is notorious for leakage.

¹¹⁴ . 17 U.S.C. § 107(4).

¹¹⁵ . *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 485 (1984) (Blackmun, J., dissenting).

¹¹⁶ . *Folsom v. Marsh*, 9 F. Cas. 342, 348 (D. Mass. 1841) (emphasis added).

¹¹⁷ . See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 594 (1994); *Harper & Row, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985).

¹¹⁸ . See, e.g., *Princeton Univ. Press v. Michigan Doc. Servs.*, 99 F.3d 1381, 1387–89 (6th Cir. 1996); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 921 (2d Cir. 1994).

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every instance of fair use will result in harm to the plaintiff's market—plaintiff will lose its right to refuse access or charge at least one licensing fee to the defendant at issue.¹¹⁹ This test functions coherently, however, if the world of users is divided into two markets, and the factor works to patrol the boundary between those markets. As stated by the majority of the Supreme Court in *Harper & Row*: fair use is unavailable if, "should [the challenged use] become widespread, it would adversely affect the *potential* market for the copyrighted work."¹²⁰ The Court, in such passages, functionally separates the market for copyright into two distinct markets—one in which the copyright holder has no right to exclude and may not directly charge for access to his works (the fair-use market) and the other in which all of the rights under the copyright act apply (the general or "potential" market).¹²¹ Courts thus determine every instance of fair use by reference to its impact on the permeability of the line between the fair-use market and the general market, attempting to avoid "major inroads" from one market into the other.¹²² If, all other factors weighing in favor of the fair user, a finding of fair use would harm the

¹¹⁹ . See *Princeton Univ. Press*, 99 F.3d at 1407 (Ryan, C.J., dissenting) ("the majority's logic would *always* yield a conclusion that the market had been harmed because *any* fees that a copyright holder could extract from a user if the use were found to be unfair would be 'lost' if the use were instead found to be 'fair use.'"); see also Fisher, *supra* note 78, at 1671 ("[I]n almost every case in which the fair use doctrine is invoked, there will be some material adverse impact on a 'potential market' as . . . the Court . . . define[s] the phrase To permit the defendant to engage in the activity for free prevents the plaintiff from exacting a fee from the defendant. Thus, in all but the rare cases in which the defendant for some reason would be unwilling to pay the plaintiff anything, a finding that the defendant's conduct is 'fair' will 'impair the marketability of the work.'"); Pierre N. Leval, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (1990) ("By definition every fair use involves some loss of royalty . . ."). See also *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1357 n.19 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) ("It is wrong to measure the detriment to plaintiff by loss of presumed royalty income—a standard which necessarily assumes that plaintiff had a right to issue licenses. . . . In determining whether the company has been sufficiently hurt to cause these practices to become "unfair," one cannot assume at the start the merit of the plaintiff's position, *i.e.*, that plaintiff had the right to license.").

¹²⁰ . *Harper & Row*, 471 U.S. at 568 (quoting *Sony*, 464 U.S. at 451) (emphasis added).

¹²¹ . "In the economists' view, permitting 'fair use' to displace normal copyright channels disrupts the copyright market without a commensurate public benefit." *Id.* at 566 n.9.

¹²² . *Sony*, 464 U.S. at 481 (Blackmun, J., dissenting).

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The fair use analysis, so considered, not only recognizes but actively defends the separation of two distinct markets for copyrighted works, and—on a case by case basis—determines the boundaries of the fair-use market so as to maintain its distinctiveness from the general market.¹²⁸ Case-by-case findings of fair use which would tend towards significant intrusion upon the general market are rejected.¹²⁹ All other factors being equal,¹³⁰ more insular uses are more likely to be found fair, and thus come at a significantly lower expected cost for educational users.

IV. OTHER INFLUENCES ON THE PRICE OF EDUCATIONAL USE

While the Copyright Act—both in form and in function—defines a separate and lower-cost market for educational use, the lack of quantified clarity in the law allows for additional, non-statutory, factors to affect the price of educational use. As this section will discuss, in addition to statutory influences on price—quantifiable factors which define damages and delineate immunities from copyright infringement—two additional factors influence the ultimate “price” of educational use. First, lack of certainty about the boundaries of fair use and other privileges impacts the real and perceived price of use. Second, the enforcement strategies of copyright owners themselves impact prices—both by manipulating uncertainty and by changing the chance of suit against particular groups of users. Commentators have recognized these factors but not

journals Impairment of the market for these works is unlikely.” *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991).

¹²⁸ . The Guidelines to Educational Copyright provide further insight into the arbitrage controls which are built into the copyright law through fair use provisions. One commentator explicitly noted that the “temporariness” factor read into fair use by the House Report appears to be intended to prevent circulation of copies beyond members of the class—itsself a “reasonable limitation to prevent encroachment on the copyright owner’s market.” See MacLean, *supra* note 2, at 671 (citing H.R. REP. No. 90-83, at 29-37 (1967)). MacLean suggests that the requirement might be fulfilled by “systematic recall” of all distributed copies at the end of a semester or year.

¹²⁹ . See, e.g., *Harper & Row*, 471 U.S. at 552.

¹³⁰ . Though, in particular, the quantity of copying may also work towards the same goal of assessing the insularity of an expected fair use: the more of a work that is copied, or the more copies that are created, the more likely is free access to the work by general market customers.

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Supreme Court has emphasized that "fair use analysis must always be tailored to the individual case."¹³⁶

Depending on the magnitude and the context of such uncertainty concerning legal rules, affected parties may either over- or under-comply with the stated rule—they may either become more risk-averse than warranted (relying less upon fair use) or less risk-averse than warranted (relying excessively upon fair use). As stated by Professors Richard Craswell and John Calfee:¹³⁷

Real enforcement institutions always involve some degree of uncertainty and . . . that uncertainty can change the incentives created by the legal rules in unexpected ways. In some cases, it can lead to more deterrence than would be socially optimal; in other cases, it can lead to far less.¹³⁸

According to Craswell and Calfee, overcompliance with a particular law is likely to be common—even for risk-neutral parties—if the uncertainty is "relatively small"; conversely, broad uncertainty is more likely to lead to undercompliance.¹³⁹ Ultimately, there is no way to tell which of these two effects will dominate: but anecdotal evidence may provide support for a given hypothesis.¹⁴⁰

Within different segments of the educational-use community, both under- and over-compliance appear common. Many educational users who publish on the subject either explicitly recognize or exhibit under-reliance upon fair use in the educational community. Institutional users, for instance, have wedded themselves to extremely conservative internal fair use policies;¹⁴¹ individuals, expressing anxiety about their lack of knowledge of the scope of possible liabilities, simply fail to rely upon fair use or other privileges.¹⁴² Simultaneously, many teachers and educators simply assume that what they do must be legal—and, as such, perhaps tread too far into the area of unprotected activities under an assumption that because of the nonprofit, educational nature of their activities they are

¹³⁶ . Harper & Row, Inc. v. Nation Enters., 471 U.S. 539, 552 (1985).

¹³⁷ . Professor of Economics at the University of Southern California and representative of the Federal Trade Commission.

¹³⁸ . Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 299 (1986).

¹³⁹ . *Id.* at 280.

¹⁴⁰ . *Id.* at 282.

¹⁴¹ . See, e.g., Brandfonbrener, *supra* note 132, at 669.

¹⁴² . See, e.g., Belz, *supra* note 32, at 38; Webster, *supra* note 66.

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acting within the law.¹⁴³

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B. ENFORCEMENT STRATEGY

This uncertainty about educational privilege, however, has a Heisenbergian quality—although at a given moment it may be impossible to tell whether over- or under-reliance on fair use dominates the academic community, one can easily tell what kinds of behavior increase or decrease an educator’s tolerance for risk. In particular, publishers and other owners’ actions can impact the price of educational use. Namely, publishers might purposefully decrease uncertainty about a particular legal rule in order to increase risk-averse behavior on the part of educators. An intelligent and strategic publisher would thus seek to manipulate the variables of Craswell and Calfee’s uncertainty equation—namely, adjusting the likelihood of being caught and the size of possible damages—in order to encourage large-scale under-reliance upon fair use.¹⁴⁴ Thus, both producers and consumers can predict the kinds of behavior that producers can take to decrease reliance upon fair use and other privileges.

Under the rubric provided in the Calfee article, the size of uncertainty can be measured as the proportionality of enforcement-to-violation of a rule.¹⁴⁵ “Large” uncertainty is that in which one’s level of, say, copyright infringement has no effect on the likelihood of being caught—a situation perhaps akin to that of many users of Napster and online

¹⁴³ . Hutchinson, *supra* note 32, at 2231-32 (“The majority of educators are unaware of the intricacies of copyright law. . . . [They] largely do not follow the latest developments in copyright law.”).

¹⁴⁴ . Note that the fair use factors themselves admit to alteration through enforcement strategies. Because the fourth factor under § 107 looks to the economic impact of a particular use, the mere existence of a market price may decrease the likelihood of a finding of fair use, insofar as some quantifiable market damage (as a loss of licensing fee) can always be shown so long as such a fee exists *ex ante*. See Fisher, *supra* note 78, at 1671.

¹⁴⁵ . See Craswell & Calfee, *supra* note 138, at 286 (“Since the effect of *x* [defendant’s violation-level] on the likelihood of being punished was the only factor creating an incentive to overcomply, the incentive to overcomply becomes weaker as this factor becomes smaller. The extreme case, where shifts in the defendant’s level of *x* have no effect on the chance of punishment (so that only the incentive to undercomply is left) is precisely the situation modeled by traditional deterrence theorists who concluded that uncertainty about enforcement would always produce undercompliance.”).

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downloading services. In a regime in which all violations of the rule are detected and enforced, there is no uncertainty. Thus, to "decrease" uncertainty is to increase the degree to which large-scale violators are punished more often than small-scale violators: to attempt to perfect the proportionality of enforcement to violation. In the educational context, this would appear as visible, occasional suits brought against individual teachers; increasingly more common suits against teachers who used relatively more copyrighted material; and extremely common suits against large institutional copiers.

The actual enforcement policies of owners against educational users do not (yet) exhibit such a tidy pattern. Owners undoubtedly disfavor suits against individual educators and in educational contexts, and thus have mostly brought suit against large institutional copiers while neglecting smaller players.¹⁴⁶ This enforcement strategy has the overall effect of reducing the "cost" of copyright use—even infringing use—to educational users, because it creates relatively large uncertainty about whether they will ever, at all, be sued.

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 statutes¹⁴⁷ and to maintain market power by encouraging dependency on their products (particularly software) by non-business users.¹⁴⁸

Nevertheless, the import of this analysis is in showing that the price of educational privilege remains volatile and easily influenced by the behaviors of copyright owners. The uncertainty inherent in the legal standards governing

¹⁴⁶ . Only three reported cases indicate suits brought directly against non-profit educators. See *Marcus v. Rowley*, 695 F.2d 1171, 1172 (9th Cir. 1983); *Wihtol v. Crow*, 309 F.2d 777, 778-79 (8th Cir. 1962); *MacMillan Co. v. King*, 223 F. 862, 867-68 (D. Mass. 1914).

¹⁴⁷ . See Danny Ben-Shahar & Assaf Jacob, *Selective Enforcement of Copyright as an Optimal Monopolistic Behavior*, 3 CONTRIBUTIONS TO ECON. ANAL. & POL'Y 1118 (2004); see also Giovanni B. Ramello, *Copyright and Antitrust Issues*, 114 LUC PAPERS-SERIE ECONOMIA IMPRESA 1 (2002) (noting that copyright enforcement can also be used as an anticompetitive strategy).

¹⁴⁸ . Ramello, *supra* note 147, at 9-10.

