

## *Student Note*

# **Going the Distance: Closing the Gap Between Copyright Provisions and Distance Learning**

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## **I. INTRODUCTION**

On nearly every day of the academic calendar, educators nationwide incorporate copyrighted works from books to audiovisual productions to musical works into their instruction. These educators do so in the course of instruction in their classrooms without significant legal inhibition and often free from any possibility of infringement liability. But what happens when their classes are taken out of the traditional classroom? Distance learning and its many iterations,<sup>1</sup> although not a new concept, have become incredibly relevant in the wake of the COVID-19 pandemic. Many educators moved classes online during this time, which forced primarily in-person courses into a distance learning format.<sup>2</sup> Educators may be unaware that their habitual incorporation of

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1. Of these forms, e-learning is the most rapidly growing method of distance learning, with 65% of higher education institutions naming e-learning “critical to their long-term strategic plans” by 2011. Hope Kentor, *Distance Education and the Evolution of Online Learning in the United States*, 17 CURRICULUM AND TEACHING DIALOGUE, Nos. 1&2, 30 (2015), [https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1026&context=law\\_facpub](https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1026&context=law_facpub).

However, the growth pace for e-learning in higher education has slowed and plateaued as of late. *Number and Percentage of Undergraduate Students Enrolled in Distance Education or Online Classes and Degree Programs, by Selected Characteristics: Selected Years, 2003-04 through 2015-16*, NAT’L CTR. FOR EDUC. STATISTICS [https://nces.ed.gov/programs/digest/d18/tables/dt18\\_311.22.asp](https://nces.ed.gov/programs/digest/d18/tables/dt18_311.22.asp) (last visited Mar. 7, 2021); Doug Lederman, *Online Enrollments Grow, But Pace Slows*, INSIDE HIGHER ED (Dec. 11, 2019), <https://www.insidehighered.com/digital-learning/article/2019/12/11/more-students-study-online-rate-growth-slowed-2018>.

2. In the United States, 93% of primary and secondary students transitioned to distance learning, Kevin McElrath, *Nearly 93% of Households With School-Age Children Report Some Form of Distance Learning During COVID-19*, U.S. Census Bureau (Aug. 26, 2020), <https://www.census.gov/library/stories/2020/08/schooling-during-the-covid-19-pandemic.html>, while 1,300 higher education institutions went online, Andrew Smalley, *Higher*

copyrighted works in the traditional classroom may be impermissible when they enter the distance learning setting simply because they and their students are not in the same room.

Since the 1976 Copyright Act's (Copyright Act) enactment, educators have enjoyed copyright flexibility in the physical classroom through the Copyright Act's carve out for face-to-face learning.<sup>3</sup> Under the Copyright Act, copyright holders possess certain exclusive rights regarding their works and therefore can control who can exercise those rights.<sup>4</sup> These rights are limited, however, in traditional classroom settings because educators displaying or performing copyrighted works in the course of instruction are not considered to be infringing those rights as long as the copies of audiovisual works, if used, are legally obtained.<sup>5</sup> Such an exclusion did not apply to digital and distance learning classrooms until the Technology, Education, and Copyright Harmonization Act of 2002 (TEACH Act).<sup>6</sup> The TEACH Act amended the existing exclusion section to specify that non-profit educational institutions' digital transmissions for distance learning were also not infringements.<sup>7</sup> This specification, however, includes several caveats not applicable to in-person teaching, including limitations on the extent of use for certain types of copyrighted works and the required adherence to a list of institutional and technical specifications and restrictions.<sup>8</sup>

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*Education Responses to Coronavirus (COVID-19)*, Nat'l Conference of State Legislators (Dec. 28, 2020), <https://www.ncsl.org/research/education/higher-education-responses-to-coronavirus-covid-19.aspx>. Although it is unknown what lasting impact this sudden shift will have in the future of education, its methodologies, and its deliveries, the COVID-19 pandemic was certainly transformative and eye-opening for educational institutions and their capabilities to provide distance education. See Cathy Li & Farah Lalani, *The COVID-19 Pandemic Has Changed Education Forever. This Is How*, World Econ. Forum, (Apr. 29, 2020), <https://www.weforum.org/agenda/2020/04/coronavirus-education-global-covid19-online-digital-learning/>.

3. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (specified section codified at 17 U.S.C. § 110(1)).

4. These rights include the right of reproduction, right of distribution, right to produce derivative works, right of public performance, right of public display, and the right of public performance by digital audio transmission (sound recordings only). 17 U.S.C. § 106; see *infra* Section II.B.

5. 17 U.S.C. § 110(1).

6. Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, § 13301, 116 Stat. 1758 (2002) (amending 17 U.S.C. § 110).

7. *Id.*

8. See *id.*; see also discussion *infra* Section II.C.

Therefore, despite the importance of copyrighted works in both traditional and distance learning classrooms, existing copyright law treats the two settings very differently. This disparity in both the allowable portions of use and the lengths to which educational institutions must go to be in compliance to enjoy this limited use is striking. The difference is even more prominent when considered through the lens of an educator who will likely be teaching the same lessons with the same copyrighted works that the educator historically used in the classroom without potential legal ramifications but could now face copyright infringement liability in the distance learning setting.

There are, however, two distinct and robust defenses available for educators to such allegedly infringing behavior: the fair use doctrine and qualified immunity. Fair use, found at 17 U.S.C. § 107, is a statutory defense that excuses otherwise infringing behavior based on four factors: the purpose and character of the use that infringed the exclusive right, the nature of the copyrighted work, the amount and substantiality of the use, and the use's market effect.<sup>9</sup> Courts consider the alleged infringer's behavior in light of these four factors and determine if his or her violation of an exclusive right favors fair use, therefore making the alleged infringer not liable for infringement. Educational uses are specifically listed in the preamble of the section, but this alone is not dispositive.<sup>10</sup>

Qualified immunity, conversely, focuses on the alleged infringer's role as a public servant as opposed to his or her specific utilization of the work. Through qualified immunity, public officials are protected from individual liability that may arise in the course of their employment unless they violate a clearly established right.<sup>11</sup> "Clearly established" is a broad and encompassing term that shields public officials from liability in many scenarios.<sup>12</sup> Courts have often applied qualified immunity in the law enforcement context,<sup>13</sup> but the concept

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9. 17 U.S.C. § 107.

10. *Id.*; see discussion *infra* Section III.A.

11. See *Qualified Immunity*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 12, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/qualified-immunity.aspx>.

12. See *id.*

13. See *id.*

has also been held in some courts as a defense for public employees who have allegedly committed copyright infringements.<sup>14</sup>

Although these two different defenses are available for educators in distance learning settings, the problem is that these defenses do not necessarily apply in every scenario and therefore do not protect distance educators in every infringing situation. Additionally, these defenses could be subject to differing court rationales and applications, which complicates the application.<sup>15</sup> Therefore, despite specific provisions of law creating exclusions for both educators and distance educators from infringement liability, educators' incorporation of copyrighted works into their e-learning instruction could still be infringement—even with several defenses at their disposal. There are statutory damage provisions that can lessen the damages such educators would pay, but these, too, are not always applicable.<sup>16</sup>

This infringement during distance instruction could create legal problems for educators and institutions alike just because an educator is incorporating works that he or she would likely otherwise be allowed to use in the traditional classroom. This could be true even where that distance learning instruction is to the same students and with the same course objectives and personal instruction style as would be present in the physical classroom. Therefore, the learning delivery method alone often dictates if an educator's behavior is infringing or not under the current law.

I propose that reforms to the current copyright law provisions regarding distance learning could ameliorate these unknowns and the potential liability for distance educators. This could be achieved while still upholding standards that will protect educators and their teaching goals as well as copyright holders and their rights.

In this Note, I will further explore the dissonance between face-to-face and distance learning in copyright law provisions, discuss the potential defenses for educators who commit infringements, and offer policy solutions that balance educators' and creators' needs. In doing so, I begin Section II by discussing the evolution and foundations of distance learning. Building on the newly visible and critical nature of e-

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14. See discussion *infra* Section III.B.1.

15. See discussion *infra* Sections III.A.1–2, III.B.1.

16. See discussion *infra* Section IV.

learning in this new age of education, I then introduce e-learning's interaction with current copyright provisions and the challenges these provisions create for educators and students alike.

I develop this analysis by introducing two hypotheticals in Part A. These hypotheticals form the core of this Note, and I reference them as real world examples throughout to provide concrete scenarios that illustrate the statutory and common law principles of each Note Section. The selected case law correlates to the hypotheticals to provide the reader with both nuanced and relevant real-world examples and to portray how those examples may be viewed in a court of law. In Part B, I detail copyright fundamentals, including the types of works that are copyrightable, what protections the copyright holders of those works enjoy, and what infringements of those protections mean for both the creators and the alleged infringers. Part C details the educational exceptions in copyright law, including the exceptions for in-person learning and the more nuanced provisions for distance learning settings.

I then continue this analysis with potential current defenses for allegedly infringing distance learning educators through both statutory language and case law in Section III. In Part A, I explore the Fair Use Doctrine found in 17 U.S.C. § 107, which provides an alleged infringer a complete defense of their otherwise infringing use of a copyrighted work. I will begin here with the statutory language, discussing the four factors that courts consider when weighing whether fair use applies to an infringement, and noteworthy Supreme Court decisions on such factors including *Campbell v. Acuff-Rose Music, Inc.*<sup>17</sup> and *Harper & Row, Inc. v. Nation Enterprises*.<sup>18</sup> Next, I discuss more contemporary lower court decisions that specifically consider fair use analysis within the educational setting. Throughout these analyses, I integrate the hypotheticals to illustrate the potential ramifications of the defense on example teaching methods. Further, this integration details how the hypothetical educators may or may not still be acting in an infringing way despite the defenses and in light of each court's requisite analysis.

After the fair use discussion, I turn to the qualified immunity defense in Part B. Qualified immunity's roots formed in the criminal law environment but has also found applicability for state actors in the

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

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

intersection between educational settings and copyright.<sup>19</sup> Here, I discuss the concept's fundamentals and explore contemporary lower court decisions that apply the concept to educators allegedly infringing in the course of their job before then applying the concept and discussing courts' rationales to the hypotheticals.

Lastly, in Section IV, I discuss another important consideration for copyright in the educational setting, 17 U.S.C. § 504(c)(2), which could lessen the potential damages for infringers in such a setting.

I conclude this exploration in Section V with a discussion of potential policy suggestions as future remedies, including reframing 17 U.S.C. § 110 to better reflect the modern educational needs and discussing the ramifications for creators and copyright holders, before concluding the discussion in Section VI.

## II. BACKGROUND

Distance learning and distance education are prevalent formats and important components of modern-day education. Expressly, distance learning is an educational method that is comprised of physical separation between educators and pupils, spanning across technologies from correspondence to the Internet.<sup>20</sup> A subset, therefore, of distance

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19. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 11.

20. Kentor, *supra* note 1, at 22 (“[d]istance education is defined as a method of teaching where the student and teacher are physically separated. It can utilize a combination of technologies, including correspondence, audio, video, computer, and the Internet.”).

For a reader who wants more information on the background and evolution of distance learning, explore the following. One of the earliest forms of distance learning is correspondence education or learning by mail. *Id.* at 23. Correspondence education relies on distributing learning materials to learners in different locations by way of the mail or other process, and students returning those materials to the instructor for feedback once completed. *Id.* This method of distance learning dates back to the late 1800s in the United States. *Id.* By the end of the 1800s, several higher education institutions began to offer some form of correspondence education. *Id.* at 23–24.

In the early 1900s, radio began to take shape as a new tool for distance education. The University of Wisconsin created the first licensed radio station for education in 1919 and over 170 other institutions followed suit over the next decade. *Id.* at 24. The Great Depression and new radio regulations greatly diminished the number of educational radio stations but soon thereafter universities and national broadcasters began to reinforce the importance of broadcasting educational initiatives. *Id.* at 25. Reflecting this, the National Committee on Education by Radio was formed in December of 1930. *Id.*

learning is e-learning, which utilizes the Internet in its delivery.<sup>21</sup> Although e-learning is considered a type of distance learning, every form of distance learning is not automatically considered e-learning.<sup>22</sup>

Distance learning, perhaps even more so than other teaching methodologies, often requires or can be enhanced by the incorporation of copyrighted works. Educators can feature copyrighted works like books, films, musical songs, theater pieces, and even works of art in their lessons. An educator may play a movie to their pupils, read a passage from a novel, or present an article to their students to demonstrate and underscore learning objectives. These copyrighted works can adequately convey educational concepts to pupils—whether these works be literary, audiovisual, graphic, or musical works—in ways that an educator cannot do on their own.

In this Note I will prove that, although educators have flexibility in incorporating these works into their lessons in a traditional classroom through provisions in the Copyright Act, the distance learning

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Several years after its invention, the advent of television was equally revolutionary and was first used in the mid-1930s for educational purposes. *Id.* at 27. In fact, in 1913 Thomas Edison publicly decried motion pictures to be the future of education, even usurping printed books. *Id.* at 26. Although the television did not fully replace textbooks in classrooms, it did become part of classroom learning and as educational television became more prevalent in households in the mid to late 1900s, television did gain momentum as a teaching tool. *Id.* at 27. Individualized distance learning by television, however, did not begin to take shape until the late 1970s and was not ever fully realized as an effective method for distance learning. *Id.* at 27-28.

Online distance learning, or e-learning, got its start in the corporate world in the 1980s when businesses turned to online training platforms for employee training. *Id.* at 28. For profit higher educational institutions spearheaded the shift in the educational setting starting in the early 1990s while non-profit institutions followed in the later part of that decade. *Id.* Non-profit institutions like New York University (NYU) created separate subsidiaries specifically for online learning but these efforts waned just a few years after inception. *Id.* at 28-29. The difference in learning environments, student learning styles, and faculty buy in were all contributing factors to these demises. *Id.* at 29. E-learning eventually found its foothold in the beginning of the new millennium in both non-profit and for-profit institutions where it is now a significant part of education, especially higher learning. *Id.* at 30; NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 1. This was compounded with the COVID-19 pandemic, as discussed *infra*, which brought most institutions into the distance and e-learning sphere almost overnight. See Smalley, *supra* note 2; McElrath, *supra* note 2.

21. MARK J. ROSENBERG, E-LEARNING: STRATEGIES FOR DELIVERING KNOWLEDGE IN THE DIGITAL AGE 28 (2001), <https://catalog.hathitrust.org/Record/004180911> (“the use of Internet technologies to deliver a broad array of solutions that enhance knowledge and performance.”).

22. *Id.* at 29 (“e-learning is a form of distance learning, . . . [all forms of] distance learning [are] *not necessarily* e-learning”) (emphasis in original).

classroom's flexibility is much more rigid.<sup>23</sup> I will further prove that these provisions are so rigid that many of the inclusions of copyrighted works that are legal and promoted in the physical classroom are prohibited and could even make the educator liable for infringement in the distant or virtual classroom. These rigid provisions could create difficulty for educators teaching educational concepts while also maintaining the compliance they would otherwise be in if in a traditional classroom.

### A. Hypotheticals

To illustrate the relationship between distance learning and copyright law, I will weave two hypotheticals into the discussion. The scope of the remainder of this Note will consist of and rely on these hypotheticals to demonstrate various copyright concepts and to promote understanding of the dissonance between teaching methods and current copyright law treats them.

First, Teacher A is teaching his collegiate film class through live, synchronous instruction using an online learning platform with video capabilities. During instruction, Teacher A shares his screen to show a fictional copyrighted film, in its entirety, to his students who are also online with him at the same time. Although not necessarily considered educational, the film often is used during collegiate film classes because of its distinctive narrative style and its unique use of color and symbolism, which is Teacher A's current course unit. He has shown this same film in his in-person courses in past semesters by projecting the film onto the projector screen in the classroom for his students to view. The film is available for licensing for educational use through a third party company but due to department budget cuts, Teacher A does not have the funds to purchase a license for each of the different films in his film course and therefore he did not purchase a license.

Consider also Teacher B. Teacher B is teaching a hybrid literature course this semester where she teaches live and synchronously in-person once a week, but students spend the other portion of class time working independently and asynchronously through an online learning platform. This platform, as a result of her uploads, contains copies of

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23. See discussion *infra* Section II.C.



two consecutive copyrighted novel chapters from a 10-chapter book and excerpts of two copyrighted analytical literary critiques of those chapters. The novel chapters are historical fiction and do not necessarily contain educational material. They do, however, illustrate the author's use of time to guide a reader through a character's development, which is relevant to the course's current unit on time as a literary tool. These chapters also contain the most significant plot developments of the novel. The two critique excerpts contain commentary on the two novel chapters and incorporate some factual information on literary tools and authorship, but primarily focus on the critic's thoughts on the novel author's effectiveness in using time as such a literary tool. The excerpts contained the most analytical portions of the critique.

Teacher B would have normally handed out class sets of book chapters and critique excerpts but opted to add them to the online platform this year so that students could more easily access and download them to add their own notes in the hybrid class format. During her in-person teaching, some of the students are attending online while others will be physically in the classroom. To accommodate those students, Teacher B puts the chapters and excerpts on the projector in class so that the students in class can see the sections she has highlighted in her own copy and shares that output with the students simultaneously attending online so that all her students can adequately see her notes at the same time. She also reads some sections of the chapters and excerpts aloud to her students both in the classroom and attending simultaneously online. The chapters and critique excerpts are not available for licensing through their publishers but are often used in educational settings.

Are these changes that Teacher A and Teacher B implemented to adapt to online learning infringements of copyrighted works? To answer this, first consider some fundamentals of copyright law.

## **B. Copyright Fundamentals**

To understand how copyright law interacts with education, one must first understand some copyright fundamentals. When a creator crafts a work that fits into one of the categories of copyrightable works<sup>24</sup> and the

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24. Types of works that can receive copyright protection are literary works; musical works and lyrics; dramatic works and soundtracks; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. 17 U.S.C. § 102(a).

work is both original and in a sufficiently fixed state,<sup>25</sup> that creator is afforded copyright protection. This copyright protection means that the creator has certain exclusive rights regarding their works. Creators have the following exclusive rights over their works: reproduction (copying), creation of derivative works (making a new work based on the preexisting work), distribution (distributing copies of the work to the public), public display and performance (displaying or performing works except sound recordings in public), and performance of sound recordings publicly through digital audio transmission.<sup>26</sup> Only the work's creator (or the copyright holder if the creator has transferred their rights to another) can control who can exercise these rights. If another person, party, or entity exercises one of these rights without permission, that party committed an infringement of that right.<sup>27</sup>

An infringement of the right of reproduction is constituted by an infringer creating an unauthorized copy of a work that both copies the original in fact<sup>28</sup> and improperly appropriates the portion of the original work that receives copyright protection.<sup>29</sup> The right to produce derivative works is infringed when an unauthorized party creates a work that is substantially based on another's protected work.<sup>30</sup> An unauthorized party that distributes a copy of a protected work to at least a section of the public, either by actual distribution or through providing access, infringes the exclusive right of distribution.<sup>31</sup> The right of public performance is infringed when an unauthorized party performs<sup>32</sup> a literary, musical, dramatic, choreographic, or audiovisual work in a

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25. *Id.*

26. 17 U.S.C. § 106.

27. 17 U.S.C. § 501(a).

28. Copying in fact can be proven by either circumstantial evidence that the infringer had both access to the original work and the copy is sufficiently similar to the original or by direct evidence. NED SNOW, *THE COPYRIGHT CASEBOOK* 104 (2018).

29. *Id.* at 105.

30. This analysis is very similar to that of reproduction right infringement. *Id.* at 121. Additionally, the derivative work exclusive right does not require fixation, unlike other exclusive rights. *See id.*; 17 U.S.C. § 106(2).

31. SNOW, *supra* note 28, at 140; 17 U.S.C. § 106(3).

32. "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101.

public setting.<sup>33</sup> Similarly, an infringement of the right of public display occurs when an unauthorized party displays<sup>34</sup> a literary; musical; dramatic; choreographic; pictorial, graphic, or sculptural work; or the individual images of an audiovisual work to the public.<sup>35</sup> Lastly, an unauthorized party can infringe a sound recording's exclusive right of public performance through digital audio transmission.<sup>36</sup>

The exclusive rights of public performance and display are infringed through unauthorized displays and performances to the *public*, which is defined as a place either open to the general public or a place where a "substantial number" of people outside of a family circle and its acquaintances (familial unit) are assembled.<sup>37</sup> Additionally, "public" also includes communications and transmissions to a public place or to a section of the public, no matter if the viewers are receiving the transmission in the same place or at the same time.<sup>38</sup>

If we apply these exclusive rights to the hypotheticals, Teacher A's film screening to his online class is considered a violation of the film's copyright holder's exclusive right of public performance. Teacher A and his students are not in the same room, making his screensharing to his class an unauthorized public transmission because he audibly played the film with its images in sequence to a substantial number of people outside of a familial unit. It does not matter that these pupils are in different locations from each other, as stated in section 101.

Similarly, Teacher B's uploading of book chapters and literary critiques to the course's learning platform infringes those copyright holders' exclusive right of reproduction (because uploading creates a copy of the works) and distribution (because Teacher B is distributing copies to her students through the learning platform by providing access).

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33. 17 U.S.C. § 106(4) ("in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly").

34. "To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." 17 U.S.C. § 101.

35. 17 U.S.C. § 106(5) ("in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly").

36. 17 U.S.C. § 106(6).

37. 17 U.S.C. § 101.

38. *Id.*

Teacher B is teaching a hybrid course where part of her class hours per week are filled by asynchronous learning facilitated through the learning platform while the synchronous days include some students in the room with her physically and the rest of the class attending simultaneously through an online transmission. For both subsets of students, this would be considered “public” under section 101’s definition of public display and performance. This would meet the threshold of “public” because the in-person students are gathered with a substantial number of people outside their familial unit in a public place, while the online students are receiving a transmission that is transmitted to members of the public, even though they are in their respective locations. Therefore, Teacher B’s display and recitation of portions of the book chapters and critique excerpts both in the classroom and to the students attending simultaneously online would be a violation of those copyright holders’ exclusive rights of display and performance.

Because both Teacher A and Teacher B do not have authorization or license to exercise these enumerated exclusive rights, their behavior is infringing. Educational settings and educators, however, are provided certain statutory exceptions where their infringing behavior does not always constitute infringement. Consider the following.

### C. Copyright in Educational Settings

Integrating copyrighted works into the classroom is an imperative part of education both for student engagement and for educators to effectively deliver educational concepts. Because of this, Congress specifically set aside certain provisions so that educators can avoid some of this infringement.<sup>39</sup> 17 U.S.C. § 110(1) provides that there is no infringement of the exclusive rights of performance or display where an instructor facilitates a performance or display of a copyrighted work in a classroom (“or similar place devoted to instruction”) “during face-to-face teaching activities of a nonprofit educational institution” so long as the instructor does not use an unlawfully made copy of an audiovisual

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39. Although the bulk of these educational provisions are found in 17 U.S.C. § 110, as discussed *infra*, there is also language relating to educational uses in the introductory language of the fair use doctrine, which specifically provides for classroom sets of copies. See discussion *infra* Section III.A; 17 U.S.C. § 107 (“[T]eaching (including multiple copies for classroom use)”).

work and “knew or had reason to believe [that it] was not lawfully made.”<sup>40</sup> This means that in a traditional classroom setting with students in that same physical classroom, Teacher A’s movie screening would be completely acceptable and would not infringe on the film’s copyright holders’ rights as long as he showed a lawfully made copy. Similarly, Teacher B’s display and reading aloud of book chapters and literary critiques would also not be infringing in a traditional classroom setting. Her uploads to the online learning platform that violated the rights of reproduction and distribution, however, would still not be excused under this section.

Until 2002, no statutory exceptions existed for copyright holders’ exclusive rights in educational situations outside of a physical classroom, meaning that any such use in distant places was prohibited.<sup>41</sup> With the revision of 17 U.S.C. § 110(2) through the TEACH Act,<sup>42</sup> instructors now have more flexibility in the distance learning or digital classroom.<sup>43</sup>

To be excused from liability in these performances and displays, several requirements must be met first:

- The work’s performance or display must be facilitated by or supervised by the instructor and must be a “regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;”
- The performance or display must be “directly related and of material assistance to the teaching content of the transmission;”
- The transmission of the work is for and limited to enrolled students or government employees “as part of their official duties or employment; and”
- The transmitting institution must:
  - create policies and “informational materials” regarding and promoting compliance with copyright laws and communicate them to students and staff;

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40. 17 U.S.C. § 110(1).

41. See Nora E. Field & Lori Silver, *Copyright on Campus*, C. & U. L. MANUAL § 3.3.2 (2012); Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 OHIO ST. L.J. 783 (2001).

42. Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, § 13301, 116 Stat. 1758 (2002) (amending 17 U.S.C. § 110).

43. See Field & Silver, *supra* note 41.

- “provide notice to students that material used in connection with the course may be subject to copyright protection; and”
- employ measures to “reasonably prevent— retention of the work in accessible form . . . for longer than the class session; and unauthorized further dissemination of the work[;]” and
- refrain from conduct “that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination[.]”<sup>44</sup>

Once these prerequisites are met, section 110(2)’s exceptions provide that, in distance learning settings, as long as the copy of the work is not unlawfully obtained or made and the institution knew or had reason to know of the unlawfulness and the work is not specifically created and marketed primarily as “part of mediated instructional activities transmitted via digital networks,” the following uses are allowed:

- “performance of a nondramatic literary or musical work” *in its entirety*,
- “*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 setting.”<sup>45</sup>

This means that, if the educational institution has the requisite copyright and technical policies in place, educators can perform nondramatic literary works and musical works (but not sound recordings of those works) in their entirety—the same proportion as a traditional classroom setting—as long as they are facilitated or supervised by the instructor and are both a “regular part of the systemic mediated instructional activities” and “directly related and of material assistance to the teaching content.”<sup>46</sup> All other types of works, however, can only be performed in “limited portion[s].”<sup>47</sup> There is not any additional guidance on what a “limited portion” is, though it is assumedly less than the full portions allowed for performance of non-

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44. 17 U.S.C. § 110(2).

45. *Id.* (emphasis added).

46. *Id.*

47. *Id.*

dramatic literary and musical works.<sup>48</sup> Additionally, displayable works can also be displayed “in an amount comparable” to their use in a traditional classroom.<sup>49</sup>

Thinking back to our hypotheticals, to show the film Teacher A screened to his students without committing infringement, the film must be directly related and materially relevant to his instruction, the showing must be a regular part of the instruction, and he can show only a limited portion of the film. Additionally, he can show that limited portion of the film only if his institution has the online classroom and learning platform restricted to enrolled students, has crafted and instituted policies regarding copyright law, employed policies preventing retention of copyrighted works, gives notice to students about the use of copyrighted works, and does not engage in conduct that could interfere with anti-dissemination methods employed by copyright owners. Teacher A is subject to this litany of requirements to merely be able to show a portion of the feature film in his own film class. Teacher A would not experience the same litany of restrictions in person because he would show the film in the course of instruction.

Teacher A would therefore infringe the film’s copyright holder’s exclusive right of performance if he chose to show the entire film in his distance learning course even though the film is indeed directly related, of material assistance to the lesson, and his institution followed all of these requirements because of the audiovisual work limited portion provision. Therefore, Teacher A’s full screening of the film still constituted an infringement in the TEACH Act exceptions.

Teacher B, conversely, would be integrating non-dramatic literary works into her hybrid course. Non-dramatic literary works can be performed in their entirety in synchronous e-learning classes and can be displayed for the same amount of time as they would be displayed in a classroom. This means Teacher B’s reading (performance) of the chapters and excerpts would pose no infringement while showing (displaying) these chapters and excerpts in class on the projector screen and through screensharing would also be excused so long as that display is in an amount comparable to what she would have shown in a fully face-to-face class. Because her display was for such a comparable

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48. *Id.*

49. *Id.*

amount of time, Teacher B's actions would not be considered infringing under the rights of display and performance.

However, posting these book chapters and literary critiques to the online learning platform would violate her institution's requirement to prevent retention longer than the class session and further dissemination, as required by section 110(2), because this use would no longer be a display, but instead a distribution and reproduction—both of which are not excused in this provision. Uploading these files would allow Teacher B's students to easily access them and download them for their own files and perhaps make their studies easier. Doing so, however, would still likely violate these copyright holders' exclusive rights of reproduction and distribution because Teacher B's upload would constitute a new copy of the chapters and critique excerpts and Teacher B's posting of them constitutes a distribution to the public. Teacher B's uploads, therefore, would still violate the copyright holders' exclusive rights of reproduction and distribution despite the more flexible provisions for distance learning provided through the TEACH Act. Because only Teacher B's uploads are violative under the TEACH Act, the remainder of this Note will focus on Teacher B's infringement of the rights of reproduction and distribution.

Both Teacher A and Teacher B's behavior violates at least some exclusive rights, constituting copyright infringement, even with the specific statutory e-learning exceptions. They both do have some potential defenses to their infringement though. Contemplate the following.

### III. DEFENSES

If an educator's use of copyrighted works does not fit squarely into these categories or situations, they must rely on legal defenses to justify their unauthorized use of copyrighted works in their digital and distant classrooms. These defenses include fair use and qualified immunity.

#### A. Fair Use

Fair use is a copyright law concept that acts as a limitation on a



copyright holder's exclusive rights.<sup>50</sup> An action that may otherwise be infringing behavior of the owner's copyright may be fully excused under this concept as a "fair use" of the work.<sup>51</sup> Its purpose relates to the Constitution's benediction for Congress's promotion of the arts and sciences: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>52</sup> To promote such science and useful arts, Congress designed the fair use doctrine, which "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."<sup>53</sup>

The fair use doctrine states: "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."<sup>54</sup> "[T]eaching (including multiple copies for classroom use)" is explicitly included in the introductory fair use provisions.<sup>55</sup> This alone, however, does not mean that someone can utilize works in any way they wish under the promise of an educational setting. Section 107 continues:

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

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50. 17 U.S.C. § 107 (entitled "Limitations on exclusive rights: Fair use").

51. *Id.* ("the fair use of a copyrighted work . . . is not an infringement of copyright").

52. U.S. CONST. art. I, § 8, cl. 8.

53. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

54. 17 U.S.C. § 107.

55. *Id.*

- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>56</sup>

All four factors must be considered when deciding if a use of a copyrighted work is indeed a fair, and thus non-infringing, use.<sup>57</sup>

The first factor, purpose and character of the use, generally favors educational uses as fair uses, as shown in the provision's language. This factor also considers if the new use is transformative compared to the original work. This is just one factor, however, and is thus not dispositive regardless of the educational nature of the use. Instead, one must consider all four factors together and weigh them to make a final determination on fair use: "Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness."<sup>58</sup> The second factor considers the nature of the work, or how creative of a work it is. The more creative and less fact-based the work is, the more likely that the fair use doctrine would not apply for that factor. The third factor considers what amount and what part of the work is being invoked in the new use. The larger the proportion of the work and the more that the portion represents the work as a whole, the more likely that use will not qualify as a fair use. Lastly, the market effect of the use is considered. If the use of the work substantially impacts the work's potential market, this use would weigh against fair use. All four factors must be weighed together to make the determination if the use should be considered fair use and thus not an instance of copyright infringement.

The fair use doctrine, when applied to the hypotheticals, yields conclusory results on their face. Teacher A's film screening public performance would likely not be considered a fair use. The film's purpose would be an educational one for his students, thus making factor one favor fair use. The second factor, nature of the underlying work, would weigh against fair use because the film is highly creative. Teacher A showed the film in its entirety so the third factor, substantiality of the use, would certainly weigh against fair use as well. The fourth factor of market effect could be viewed as weighing against

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56. *Id.*

57. *See Campbell*, 510 U.S. at 578.

58. *Id.* at 584.

fair use too because those students would likely not participate in the film's market after viewing the film for free in class but may have otherwise entered the market. Such an impact, cumulatively across campuses, could create a large impact on the film's market.<sup>59</sup> Therefore, with only one factor weighing strongly in favor of fair use, Teacher A's film screening would likely not qualify based on the statutory language alone.

Teacher B's reproduction and distribution of the two novel chapters and critique excerpts would possibly be considered fair use under the statutory language. First, under factor one, her integration of the works was for an educational purpose, which makes this factor favor fair use. Both of the works are creative or analytical in nature, making the second factor weigh against fair use. Teacher B only uploaded portions of the book and critiques, which would make the third factor, proportion and substantiality of use, favor fair use. The works' market effect would potentially weigh either way because although the aggregate impact of the students' consumption may be substantial across campuses, Teacher B only used part of the works in her instruction, which may mean that the students would just forgo participation in the market altogether. This factor is therefore neutral. Teacher B's uploads would likely be considered fair use based on the statutory language alone because two factors favor fair use while a third is neutral.

Court interpretations of section 107's language, especially within educational settings, are not always this straight forward, however. Consider the following court decisions.

### *1. Supreme Court Decisions*

The Supreme Court has had significant influence over lower courts' analyses of the fair use doctrine's four factor test with several notable decisions over the last few decades. Contemplate these two examples that provide information and analysis pertinent to the hypotheticals.

#### ***Campbell v. Acuff-Rose Music, Inc.***

First, in *Campbell v. Acuff-Rose Music, Inc.*, the Court considered rap group 2 Live Crew's song "Pretty Woman," which Acuff-Rose

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59. See discussion on aggregate market effect *infra* Section III.A.2.

claimed infringed Roy Orbison's hit "Oh, Pretty Woman," a song they held rights to.<sup>60</sup> The petitioners, 2 Live Crew, wrote the song as a parody to include "comical lyrics, to satirize [Orbison's] original work" and attributed the original songwriters in the song's credits.<sup>61</sup> The Supreme Court granted certiorari to determine if such a parody could be considered a fair use of the underlying work.<sup>62</sup> The Court ultimately found that this parody was fair use,<sup>63</sup> but its analysis applied to the hypotheticals would likely result in both educator's infringements to not be considered fair use.

The Court's opinion began with an exclamation that 2 Live Crew's use of "Oh, Pretty Woman" would certainly be considered an infringement unless the use was found to be a fair use.<sup>64</sup> Under the four factor analysis, the Court suggested that the first factor, purpose and character of the use, weighs in favor of fair use if the new work "adds something new, with a further purpose or different character . . . in other words, whether and to what extent the new work is 'transformative.'"<sup>65</sup> Further, "the more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use."<sup>66</sup> Parody, the court explains, "has an obvious claim to transformative value."<sup>67</sup> To qualify for such parody use, the new work must comment on the original work in some way and if it fails to do so, the diminishment of the other factors is reversed.<sup>68</sup> Parody uses do, obviously, rely on "mimic[ing] an original to make its point."<sup>69</sup>

In applying this standard for the first factor to the parody song "Pretty Woman," the Court found that this new imagination does comment on the original.<sup>70</sup> Additionally, the Court determined that

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60. *Campbell*, 510 U.S. at 569.

61. *Id.* at 572–73.

62. *Id.* at 574.

63. *Id.* at 594.

64. *Id.* at 574 ("It is uncontested here that 2 Live Crew's song would be an infringement . . . but for a finding of fair use").

65. *Id.* at 579.

66. *Id.*

67. *Id.*

68. *Id.* at 580.

69. *Id.* at 580–81.

70. *Id.* at 583.

“Pretty Woman” was commercial in nature, but that commerciality would be “entitled to less indulgence under the first factor” because of its parody purpose.<sup>71</sup>

Applying *Campbell* rationale to the two hypotheticals, Teacher A and Teacher B’s behavior would likely not be considered transformative under factor one. Both Teacher A’s film screening and Teacher B’s uploads were not transformative in nature because they handled the works in the same form as they originally existed. This would lead the first factor analysis away from the Court’s provisions for highly transformative parody work provisions. Both Teacher A and Teacher B’s incorporations would still qualify as educational purposes, which the Court did address by saying that such purposes do not automatically qualify a use as fair.<sup>72</sup> However, factor one would likely still favor fair use because of the educational purpose.

The Court held that the second factor weighed against fair use of “Oh, Pretty Woman,” while the third factor favored fair use.<sup>73</sup> The Court did not add significant analysis to these factors outside of parody works, which makes their application difficult to the hypotheticals. Applying the analysis under the second factor, nonetheless, both educators’ actions related to creative works, making this factor weigh against fair use. Because neither Teacher A nor Teacher B used the works in a parody format, their uses would not achieve the delineated exclusion for parodies set out by the Court for the third factor. Teacher A showed the film in its entirety, which would still weigh against fair use. Teacher B’s uploads, although only of portions of the works, would also weigh against fair use under the third factor because the uploaded portions were not parody but did include the “heart” of the works<sup>74</sup> (the most

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71. *Id.* at 585.

72. *See id.* at 578.

73. Specifically, the Court determined that the second factor weighed against fair use because “Oh, Pretty Woman” was “creative expression.” *Id.* at 586. The third factor, the Court pronounced, applies differently in cases of parody because “the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.” *Id.* at 588. The amount and portion of the original needed to accomplish this depends on the character of the use. *Id.* at 588. Even using the “heart” of the work does not necessarily dismiss a fair use claim because the heart may be what one needs to effectively conjure up the original of the parody (so long of course the parody maker still adds their own comment, criticism, and creative additions). *Id.* at 588–89. The Court therefore found the third factor to be somewhat borderline because the lyrics did not take more than necessary but the music was a question of fact that needed to be remanded. *Id.* at 589.

74. *See id.* at 588–89.

significant plot developments of the book and the most analytical sections of the critiques).

Under the last factor, the market effect, the Court concedes that a transformative new use makes the market effect “at least less certain,” while a parody makes it “more likely that the new work will not affect the market for the original in a way cognizable under this factor.”<sup>75</sup> This transformative use is in contrast to the Court’s view on non-transformative uses: “[D]uplication . . . of the original . . . serves as a market replacement for it, making it likely that cognizable market harm to the original will occur.”<sup>76</sup>

The Court suggests that this factor, like the first, should not enjoy evidentiary presumption just because of the nature of the use. Therefore, both educators’ non-commercial, non-profit uses of the original works do not automatically make the market effect favor fair use. Instead, the educators’ uses of the works must be examined to determine if they usurp the markets for the original works. Both educators’ uses likely would usurp the works’ markets because students would not need to purchase, rent, or procure the works for their own use—creating an impact on the works’ markets. Further in line with the Court’s reasoning, both educators did not transform the work in any way in their uses, which weighs heavily against fair use under the fourth factor because such uses serve as a “market replacement.”

The Court ultimately determined that the Court of Appeals erred in their decision that the song’s commercial nature “rendered it presumptively unfair” because a court cannot use an “evidentiary presumption” to address the first or fourth factor.<sup>77</sup> The Supreme Court decided that, based on the four factors and lower court errors, the finding of no fair use should be reversed and remanded.<sup>78</sup> Conversely, when all four factors are considered in the hypotheticals, both educators would have a difficult time convincing a court that their uses were fair uses under the *Campbell* rationale.

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75. *Id.* at 591.

76. *Id.*

77. *Id.* at 594.

78. *Id.*

*Harper & Row Publishers, Inc. v. Nation Enterprises*

Next, consider the Supreme Court's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*.<sup>79</sup> This case centers on Nation Enterprise's alleged infringement of Harper & Row's forthcoming autobiography of President Ford. The *Nation Magazine* produced an article with quotes from the unpublished manuscript, obtained without Harper & Row's authorization and from a secret source, with the intent to "scoop" a similar article that was set to appear in *Time Magazine*, which purchased the right to print excerpts from Harper & Row.<sup>80</sup> The "scoop" article was released before *Time's* and Harper & Row terminated the agreement with *Time* as a result of that *Nation* article.<sup>81</sup> The Court ultimately did not find that this article was a fair use of the autobiography,<sup>82</sup> and the Court's analysis applied to the hypotheticals would result in the same outcome for both educators' infringements.

The Court first considered the potential dismissal of liability for Nation Enterprises by discussing the importance of first publishing<sup>83</sup> before beginning the four factor fair use analysis. News reporting is specifically mentioned in the beginning of section 107 as an example of fair use, but this, the Court contends, "[w]as not intended to . . . single out any particular use as presumptively a "fair use."<sup>84</sup> The commercial nature of the use is also examined, with the Court finding that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary

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

80. *Id.* at 542-43.

81. *Id.* at 543.

82. *Id.* at 569.

83. For a reader who may want additional insight on the Court's handling of this concept, explore the following. The right of first publication shifts the evaluation of fair use because of the fact there is only one first publication of a work. *Id.* at 554. This first publication right plays heavily into the fair use analysis, and Congress suggested that the first publication right exceeds even the delineated classroom copy purpose (where an educator can provide a class copy for students in a face-to-face class setting) in the analysis. *Id.* Nation Enterprises, however, contends that the public concern factor relating to the autobiography's content exceeds any such right because of the importance of the press and fact sharing. *Id.* at 556. The Court rejects this contention and instead exclaims that even "factual narratives" should "at least enjoy the right to market the original expression" and such a system would prevent any public figure from enjoying copyright protection because of lack of incentive and profit potential, in addition to undermining the Constitution's goal of promoting the useful arts and sciences. *Id.* at 556-58.

84. *Id.* at 561.

price.”<sup>85</sup> Nation Enterprises’s purpose of publishing part of the manuscript was to “scoop” *Time* and the book’s release itself, indicating that the use was not in good character, weighing against fair use.<sup>86</sup>

If we apply the hypotheticals to this Court’s rationale, this application would yield a different analysis compared to the analysis in light of *Campbell* but would likely also result in a finding of infringement, not fair use, for both educators. The *Harper & Row* Court’s exploration of the book’s first publication right is not expressly applicable to Teacher A’s and B’s uses because the works they incorporated were already published. Under the first factor analysis, however, *Harper & Row* does provide helpful insight. For instance, Teacher B’s historical fiction novel chapters were somewhat fact-based and the critique excerpts provided news-like commentary, both reminiscent of the book at issue in this case. *Harper & Row* provides, however, that these characteristics do not, on their own, make Teacher B’s uploads fair use because the analysis also centers on the purpose of the use and the commercial nature of that use.

Both educators did not act in bad faith, nor did they use the underlying works for any sort of commercial advantage where they benefitted financially. Nevertheless, the Court’s language here is that “profit from exploitation of the copyrighted material without paying the customary price” is the issue with commercial purpose.<sup>87</sup> This could be construed to suggest that using works without paying licensing fees (which both educators did) would weigh against fair use if a court loosely applies “profit” to include non-monetary beneficial receipts and, instead, views “profit” in terms of time and money saved while still completing their instructional objectives with the works. Therefore, under the *Harper & Row* framework, this factor would likely favor fair use for both educators but could weigh against it with a court’s liberal application of the “profit from exploitation” component.

The Court determined that the second factor, the nature of the underlying work, weighed against fair use even though the book is

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85. *Id.* at 562.

86. *Id.* at 562–63.

87. *Id.* at 562.



mostly historical and fact-based because of the expressive portions Nation Enterprises chose to include in their “scoop” article.<sup>88</sup>

In light of the hypotheticals, *Harper & Row* does not introduce any new elements under the second factor, and, because both educators’ works at issue were inherently creative in nature and their utilized portions reflected this creativity, the second factor will still weigh against fair use for both Teacher A’s and B’s screening and uploads.

Under the third factor, the Court examined the amount and substantiality of the original work used in the article. The Court deciphered specifically if the portions Nation Enterprises invoked in its article constituted the “heart” of the work.<sup>89</sup> Although the overall amount of the autobiography included in the article was minimal, the Court found that the excerpts used were exceptionally interesting and “among the most powerful passages in those chapters.”<sup>90</sup> Therefore, the Court found that this factor weighed against fair use.<sup>91</sup>

*Harper & Row*’s interpretation of the third fair use factor therefore centers on the “heart” of the work and its importance in determining the amount and substantiality of the underlying work in the new use. Teacher A showed his chosen film in its entirety so his performance would certainly weigh against fair use in this analysis. Teacher B, conversely, only used excerpts in her reproduction and distribution of the works. Those excerpts, though, contained the novel’s most important plot development section and the critiques’ heavy analytical sections, constituting the “heart” of each work. Therefore, under this analysis, Teacher B’s use would likely make factor three weigh against fair use as well.

The Court exclaims that the fourth factor, market effect, “is undoubtedly the single most important element of fair use.”<sup>92</sup> The Court adds that “[m]ore important, to negate fair use[,] one need only show that if the challenged use ‘should become widespread, it would adversely affect the *potential* market for the copyrighted work.’”<sup>93</sup> This potential market, the Court contends, also includes any potential future

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88. *Id.* at 563–64.

89. *Id.* at 564–65.

90. *Id.* at 565.

91. *Id.* at 566.

92. *Id.*

93. *Id.* at 568 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (emphasis in original)).

derivative works.<sup>94</sup> The Court held that the nature of the use, because it was released before the only authorized prepublication article and the autobiography itself, “directly competed for a share of the market for prepublication excerpts.”<sup>95</sup> The use was determined, therefore, to not be a fair use and instead constituted infringement.<sup>96</sup>

Applying this to the hypotheticals, *Harper & Row* emphasizes the imperative nature of the use’s market effect, even naming it the most important factor to consider in fair use analysis. The Court stressed again the importance of the first publication, which is not relevant in either educator’s uses. However, the Court also underlined the cumulative nature of unauthorized uses by saying that fair use could be negated if such unauthorized use becomes widespread and then impacted the work’s market. One educator showing a film once and one educator uploading two book chapters and critique excerpts do not seem, on their face, to have a drastic market effect. However, if such use became widespread, there would certainly be an impact on the work’s potential market, especially because Teacher A’s film could be licensed at the time of his performance. Therefore, this factor weighs against fair use for both educators’ infringements. Because *Harper & Row* emphasizes factor four’s importance and both educator’s uses weighed against fair use in at least one other factor, both educator’s uses would have the potential if not likelihood to still be considered infringing, similar to the Court’s holding of infringement for Nation Enterprise’s article.<sup>97</sup>

Both *Campbell* and *Harper & Row* Supreme Court approaches to fair use suggest a likelihood of Teacher A’s and B’s performance and uploads to be considered infringement, not fair use. Next, I will examine some educational setting-specific fair use analyses from lower courts.

## 2. Lower Court Case Examples

Jurisdictions have approached fair use in the educational context in different ways. Below are some recent and pertinent examples of this

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94. *Id.*

95. *Id.*

96. *Id.* at 569.

97. *Id.*

intersection. These cases correlate with the hypotheticals to effectively illustrate the real-world ramifications of these court decisions in the scenarios the hypotheticals present.

*Ass'n for Information Media & Equipment v. Regents of the University of California*

First, in *Ass'n for Information Media & Equipment v. Regents of the University of California*, the defendant university put their legally licensed DVDs onto their university intranet for students to stream remotely, which was not explicitly provided for in the agreement with the plaintiff.<sup>98</sup> The court found for the university, stating:

[T]he licensing agreement allow[ed] Defendants to put the DVD content on the UCLA internet network as part of the provision of the agreement that Defendants could ‘publicly perform’ the DVD content, and therefore Plaintiffs have failed to state a claim of copyright infringement over their right to publicly perform the DVD.<sup>99</sup>

Here the court essentially held the university’s use to non-infringing because no matter where content is viewed, the DVDs will still be within the “educational context.” The court, in consideration of the agreement terms, finally held that “[b]ecause placing the DVD on the UCLA network is part of the right that Plaintiff licensed to Defendants, the copying was incidental fair use.”<sup>100</sup>

After this decision, the Association for Information Media & Equipment amended their complaint and the Central District of California reconsidered the case the following year. In this analysis, the court undertook a traditional four factor fair use analysis and again found fair use.<sup>101</sup> Under this court’s rationale, Teacher A’s public

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98. *Ass'n for Info. Media & Equip. v. Regents of the Univ. of Cal.*, No. CV 10-9378, 2011 WL 7447148, at \*1 (C.D. Cal. Oct. 3, 2011).

99. *Id.* at \*6.

100. *Id.*

101. *Ass'n for Info. Media & Equip. v. Regents of the Univ. of Cal.*, No. 2:10-cv-09378, 2012 WL 7683452, at \*6 (C.D. Cal. Nov. 20, 2012).

performance would be ambiguous as to fair use while Teacher B's uploads would possibly be considered fair use.

Under the first factor, the court found the educational nature of the DVDs favored fair use.<sup>102</sup> If we apply *Ass'n for Information Media & Equipment's* analysis to our hypotheticals, somewhat similar results occur in the application as in the case itself for Teacher A's film screening. Both Teacher A's film screening and Teacher B's uploads could be considered fair use under the first factor. This court took a liberal approach with the first factor, almost presuming fair use because of the educational purpose. This would mean that both educators' respective behaviors would favor fair use under the first factor.

The court deemed the second factor neutral because the DVDs (of Shakespeare plays) were both creative and informative.<sup>103</sup> The second factor analysis was a simple creative nature analysis, which would lead to both hypothetical educators' uses weighing against fair use because the film, book chapters, and literary excerpts would all have creativity and are not necessarily fact-based like the DVDs in this case.

The court determined that the third factor favored infringement because the entirety of each of the DVDs were up on the intranet.<sup>104</sup> The third factor analysis here is very similar to Teacher A's screening because both used a film in its entirety. Therefore, like the court decided here, Teacher A's public performance would likely weigh against fair use. Teacher B, conversely, used only portions of the works in her uploads. Therefore, this would not necessarily constitute a finding weighing against fair use. This is especially true because this court was almost persuaded by the defendant university's argument that because the DVDs in the case were not all streamed at the same time that could favor fair use and that the university did not meet fair use in this factor because the use "were . . . not *just* portions [of the full work]."<sup>105</sup> Thus, under *Ass'n for Information & Media Equipment*, Teacher B's uploads would likely be neutral or in favor for finding a fair use under factor three.

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (emphasis added).

Lastly, the court found the fourth factor favored fair use, stating that students are “no more likely to purchase the DVD than if the student watches the DVD on his or her computer.”<sup>106</sup> Ultimately, the

[c]ourt conclude[ed] that there is, at a minimum, ambiguity as to whether Defendants’ streaming constitutes fair use and that it would not have been clear to a reasonable person in Defendants’ position that its streaming did not constitute fair use. Notably, no Court has considered whether streaming videos only to students enrolled in a class constitutes fair use, which reinforces the ambiguity of the law in this area.<sup>107</sup>

The court’s approach to the last factor, market effect, deviates significantly from the Supreme Court decisions discussed *supra*. Here, the *Ass’n for Information & Media Equipment* court found for the university in fair use under this factor, arguing that because a student’s likelihood to buy a DVD does not change if he or she watches that DVD in the classroom or outside of the classroom on his or her computer through the university intranet the market is not affected.<sup>108</sup>

Under this rationale, Teacher A’s film screening would therefore also meet the same fate under this factor because his film performance would not change the student’s mind about purchasing the film themselves. Further, because Teacher B uploaded excerpts and chapters in the learning platform, this court would not find these uses to be impactful upon the work’s market effect because such use would not impact the likelihood that a student would buy the book or criticism. Therefore, both educators would likely be found to have undertaken a fair use under this factor with their copyrighted work integrations in their courses.

When weighing all four factors for both educators, Teacher A had two factors weighing against and two factors weighing in favor of fair use while Teacher B would have one against, one neutral, and two

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106. *Id.*

107. *Id.* The court then affirmed the previous decision that such remote viewing did not violate the classroom or library agreement provisions and that the uploading process that created a copy of the DVD was incidental fair use. *Id.* at \*8. However, this holding of no infringement primarily focused on the individualized licensing agreement and therefore not necessarily a “resounding fair use victory for streaming.” See Field & Silver, *supra* note 41, § 3.5.4.

108. *Ass’n for Info. Media & Equip.*, 2012 WL 7683452, at \*6.

weighing in favor of fair use. This court did not discuss weighing factors at different levels like some other courts, so Teacher A's use would likely be considered "ambiguous" like the DVDs in the case<sup>109</sup> while Teacher B's use would likely be considered a fair use.

***Tresona Multimedia, Inc. v. Burbank High School Vocal Music Ass'n***

The Ninth Circuit also considered an educational setting copyright infringement case several years after the *Ass'n for Information Media & Equipment* decision in *Tresona Multimedia, Inc. v. Burbank High School Vocal Music Ass'n*.<sup>110</sup> In this case, a high school vocal group performed four songs without copyright holder permission. The court dismissed three of the songs for lack of standing but moved forward analyzing the fourth performance, "Magic."<sup>111</sup> The lower court did not address the issue of rearrangement, but instead just relied on qualified immunity to dismiss because it mentioned "education."<sup>112</sup> However, the Ninth Circuit proclaimed that fair use needs to be addressed regardless, and, if the use was deemed to be fair, it is thus acceptable in that circuit: "Moreover, the fair use defense renders a use non-infringing, and has long served as an important defense in copyright law, unlike the qualified immunity defense which has never been used in our circuit or by the Supreme Court to shield a public official from a copyright infringement action."<sup>113</sup> The court ultimately found the vocal group's performance to be fair use,<sup>114</sup> but their rationale applied to the hypotheticals would likely result in a finding of infringement, not fair use.

Under the four factor fair use doctrine analysis, the court held that the first factor favored fair use because the group's performance was both transformative, because it was rearranged and used in a mash up with another song, and educational, because the performance was

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109. *Id.*

110. *Tresona Multimedia, Inc. v. Burbank High Sch. Vocal Music Ass'n*, 953 F.3d 638 (9th Cir. 2020).

111. *Id.* at 646–47.

112. *Id.* at 647.

113. *Id.*

114. *Id.* at 652.

performed in a non-profit, educational way.<sup>115</sup> Additionally, the court held that a use in an educational setting leans towards fair use but is not entirely dispositive.<sup>116</sup>

If we apply the *Tresona Multimedia* court's rationale to our hypotheticals, we would not find fair use for either educator. This court considered educational purposes under factor one but did not find them dispositive, instead relying on the transformative nature of the use in the case. Both educators' uses are non-transformative; therefore, they would both likely only "lean towards" fair use.<sup>117</sup>

The court held that the second factor weighed against fair use because the song's original arrangement was creative.<sup>118</sup> Because the court based its second factor analysis on if the work was creative and both educators' invoked works were creative, both educators' uses would weigh against a fair use finding under this court's rationale.

Under the third factor, amount and substantiality, the court found that the portion of the song the group performed was short but included the chorus, and, thus, the excerpt was substantial as a result.<sup>119</sup> However, here the court also referenced back to the first factor's purpose and transformative nature and stated: "Even 'entire verbatim reproductions are justifiable where the purpose of the work differs [enough] from the original.'"<sup>120</sup> The Ninth Circuit then held that the third factor did not therefore weigh against fair use.<sup>121</sup>

The *Tresona Multimedia* court considered the "heart" of the work considerably, finding against the school group even where they did not use a significant amount of the song proportionately but used the chorus before then excusing that substantial use because of the transformative element.<sup>122</sup> Therefore, both educators' uses would weigh against fair use because Teacher A's screening involved the entire work and Teacher B's uploads contained the "heart" of the works, all without transformation.

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115. *Id.* at 649–50.

116. *Id.* at 648.

117. *Id.*

118. *Id.* at 650.

119. *Id.*

120. *Id.* at 650–51 (citation omitted).

121. *Id.* at 651.

122. *Id.* at 650.

Under the last factor, the *Tresòna Multimedia* court again referenced the first factor and suggested that “[b]ecause the use in this case ‘falls within a transformative market,’ Tresòna was not harmed by the loss of any fees for the licensing of the song ‘Magic.’”<sup>123</sup> The court, therefore, considered the transformative use heavily. The court even held that this transformation was so imperative to the fourth factor analysis that the performance did not impact the copyright holder’s licensing fee collection as a result of that performance.<sup>124</sup> The educational aspect for the students also swayed the court to a finding of fair use under this factor.<sup>125</sup>

This court’s rationale applied to the hypotheticals provides different results from the case’s holding. Although both educators’ respective performance, reproduction, and distribution were in the educational setting, licenses for Teacher A’s film were available, and, thus, the absence of these licensing revenues would have harmed the copyright holder. Though Teacher B’s excerpts were not available to license, there could be a similar outcome under this factor because her non-transformative use could have a usurping the market effect. Because the court does not provide additional information on how these components interact without transformation, both Teacher A’s and Teacher B’s uses should be considered neutral in a finding of fair use under factor four.

Ultimately, the Ninth Circuit held that the “Magic” performance was fair use:

The educational use of “Magic” falls into an enumerated fair use purpose and three of the four factors we consider are neutral or weigh in favor of finding that Defendants’ use of “Magic” was fair use. We are especially swayed here by the limited and transformative nature of the use and the work’s nonprofit educational purposes in enhancing the educational experience of high school students.<sup>126</sup>

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123. *Id.* at 652.

124. *Id.*

125. *Id.*

126. *Id.*



This reasoning makes it hard to imagine there is a case where a creative inclusion of copyrighted material by a school or school official would ever violate fair use. The *Tresona Multimedia* court, however, also gave significant weight to the transformative nature of the choir group's performance because it was a new arrangement of the underlying musical work. Therefore, the court's reasoning must be contemplated in this context where the first factor weighed heavily in fair use because of not just its educational setting but also its transformative nature.

Considering all four factors, both educators would likely have only one factor favoring fair use with one neutral factor and two factors weighing against fair use. Therefore, both Teacher A's and Teacher B's uses would be infringing, not fair use, under the *Tresona Multimedia* court's rationale.

### ***Author's Guild, Inc. v. HathiTrust.***

The Second Circuit considered fair use in the university library setting in *Author's Guild, Inc. v. HathiTrust*.<sup>127</sup> In *Author's Guild*, multiple research universities worked with Google to scan books in their libraries and make the books text-searchable, eventually culminating in a compilation of an online repository consisting of ten million works and eighty institutions entitled HathiTrust.<sup>128</sup>

First, in deciding that the works uploaded to HathiTrust were excused under fair use,<sup>129</sup> the court completed a full fair use analysis. However, applying this analysis to the hypotheticals would likely result in a toss-up finding of fair use for both Teacher A's film screening and Teacher B's uploads.

Under the first factor, purpose or transformative use, the court held that creating full text search capability documents is transformative and thus favors fair use.<sup>130</sup> This case, like *Tresona Multimedia*, was heavily influenced by the transformative nature of the online repository and the universities' conversion of the works to text searchable documents. Because of this, the court's rationale is somewhat difficult to apply to the hypotheticals' non-transformative uses. However, these case facts

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127. *Author's Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

128. *Id.* at 90.

129. *Id.* at 101.

130. *Id.* at 97.

especially correlate with Teacher B's uploads because her digitalization of the works on the institutional learning platform served a similar purpose as the repository, though she did not transform the excerpts to be text searchable. Therefore, under the first factor analysis, both Teacher A's and Teacher B's uses would likely still lean towards fair use because of their educational nature. Although the court does not explicitly mention this purpose, it framed transformative purposes as so important that they are almost dispositive, and one could hypothesize that the court would view educational use as imperative as well given that this case took place in an educational setting.

The court held the second factor to weigh against fair use but suggested that this "factor 'may be of limited usefulness where,' as here, 'the creative work . . . is being used for a transformative purpose.'"<sup>131</sup> The court views the second factor as not dispositive but that the creative nature of the works would also weigh against fair use.<sup>132</sup> Therefore, because both educators used creative works in non-transformative ways, their uses would likely weigh against fair use under this factor.

Under the third factor, the court found the repository's amount and substantiality of use favored fair use. Even though HathiTrust used the entire works, the court determined that this use was not excessive because they need to use whole work to make it searchable: "For some purposes, it may be necessary to copy the entire copyrighted work."<sup>133</sup> The court's approach to the third factor was especially interesting because it focused on the importance of how much one needs of a work to adequately effectuate their use, relying on the *Campbell* parody rationale.<sup>134</sup> If we apply this rationale to the hypotheticals, Teacher A needed to show the entire film to effectively convey his lesson on the film for his film students while Teacher B also needed all of her chapters and excerpts to teach her lesson, and, therefore, none of these uploads were excessive in their substantiality. Consequently, factor three would favor fair use for both educators.

Lastly, under the fourth factor, the court determined that the market effect should be approached differently: "under Factor Four, any

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131. *Id.* at 98.

132. *Id.*

133. *Id.*

134. *Id.*

economic ‘harm’ caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work.”<sup>135</sup> The court’s fourth factor analysis underlined the importance of “the harm that results because the secondary use serves as a substitute for the original work” and that it is the harm that decides the fourth factor.<sup>136</sup> Both educators’ uses were not transformative and thus served the same purpose and assumedly the same sect of people. Therefore, these uses would be considered substitutes for the original work in the market under this court’s rationale and would weigh against fair use.

Ultimately, the court found that HathiTrust’s digitalization of ten million works in their repository was fair use.<sup>137</sup> In terms of all four factors of the hypotheticals, both educators would likely prevail on fair use based on factor one and three but the remaining two factors would weigh against fair use, making their screening and uploads toss-ups in the *Author’s Guild, Inc.* court as to whether they were infringements.

### ***Cambridge University Press v. Becker***

One of the more detailed and lengthy copyright battles in the educational setting is *Cambridge University Press v. Becker*,<sup>138</sup> which was a six-year legal fight encompassing several different legal issues that were ultimately held differently many times culminating in a 2020 remand back to the district court from the Eleventh Circuit.

In 2009, Georgia State University (the named defendant’s institution) started an initiative where professors could post excerpts of works on an electronic reserve system.<sup>139</sup> Students could access and copy the works only during their enrollment in the course, but Georgia State University never paid any licensing fees to the plaintiff publisher.<sup>140</sup>

The lawsuit centers on a multitude of different allegedly infringing uses of digitized works, and of these, the court held that only two were not covered by fair use and therefore infringements.<sup>141</sup> This court’s

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135. *Id.* at 99.

136. *Id.*

137. *Id.* at 101. The court also held that transforming works for ADA reasons was also acceptable fair use. *Id.*

138. *Cambridge Univ. Press v. Becker*, 446 F. Supp. 3d 1145 (N.D. Ga. 2020).

139. *Id.* at 1161.

140. *Id.*

141. *Id.* at 1145.

rationale applied to the hypotheticals would likely result in a finding of infringement, not fair use, for both Teacher A's public performance and Teacher B's reproduction and distribution under both of the court's rationale excerpts discussed *infra*. First, evaluate the court's approach to one of the works the court held was excused by fair use.

The *Cambridge University Press* court found that the reserve system's inclusion of one chapter of *African American Single Mothers: Understanding Their Lives and Families* was fair use.<sup>142</sup> This literary work was "designed for academic users studying and working in areas related to race and ethnic relations . . . [and] gives an Afrocentric, feminist perspective on the African American mother-centered family."<sup>143</sup>

Under the first factor of the fair use analysis, the court found that the non-transformative use was nonetheless educational, making this factor favor fair use.<sup>144</sup> Under factor one, the *Cambridge University Press* court suggested that non-transformative but educational uses favor fair use. Applied to the hypotheticals, this approach would result in a finding of fair use for both educators under factor one because both educators' screening and upload of the works were non-transformative and in an educational setting.

The *Cambridge University Press* court found the second factor to be neutral for this selection because, although the excerpt is fairly objective, it includes both data and commentary.<sup>145</sup> The court considered factor two based on the work's proportion of analytical material versus fact-based material.<sup>146</sup> In the hypotheticals, Teacher A's film was entirely creative so his performance would weigh against fair use. Teacher B's chapters were also highly creative, but her criticism excerpts contained some fact-based commentary in addition to personal analysis. This combination of content would likely still meet the criteria for the factor to weigh against fair use because the excerpts included significant analysis on the chapters in comparison to its commentary value in the selected excerpt.

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142. *Id.* at 1219.

143. *Id.* at 1216.

144. *Id.* at 1216–17.

145. *Id.* at 1217.

146. *Id.*

The excerpt of this book in *Cambridge University Press*, though just one chapter, constituted 12.5% of the entire book, which the court determined made the excerpt substantial and therefore weigh against fair use under the third factor.<sup>147</sup> If applied to the hypotheticals, both Teacher A's film screening in its entirety and Teacher B's two full chapters and two excerpts of criticism would likely weigh against fair use as well because the court examined the percent used and both educators used at least 12.5% of the work in their instruction.<sup>148</sup>

The court held that the last factor weighed against fair use because the selected excerpts were available for licensing and the cumulative unlicensed use of such excerpts could be impactful for the publisher and the book's market across educational institutions.<sup>149</sup> The court's evaluation for the fourth factor emphasized the availability of licensing, deeming that, because the book was available to be licensed and the cumulative effect across campuses would be significant, the work's use weighed against fair use.<sup>150</sup> Teacher A's film was available to be licensed, making this factor weigh against fair use for Teacher A's screening. Teacher B's novel chapters and criticism excerpts were not available to be licensed at the time of her uploads. However, given the court's hostility to aggregate uses, Teacher B's uploads could likely still weigh against a finding of fair use under the fourth factor when such an exploitation is considered across campuses.

In considering all four factors, even with a high priority on the fourth factor's effect, the court found that the excerpt's use still prevailed on fair use.<sup>151</sup> Although the court found the educator's use in the case to be fair use, this same approach applied to our hypotheticals would likely result in the educators' uses being infringing, not fair use. Teacher A's and Teacher B's copyrighted works in their respective performance, reproduction, and distribution were more creative than the referenced text in the case, making the second factor and therefore the overall analysis weigh against fair use.

Although the *Cambridge University Press* court held that most of the contested works were excused under fair use, it did hold that some of the uses of works were not exempt. One of these works was the

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147. *Id.*

148. *See id.*

149. *Id.* at 1217–19.

150. *Id.* at 1219.

151. *Id.*

inclusion of two chapters of *Utilization-Focused Evaluation: The New Century Text*, which “advocates user-based evaluation of government and institutional programs . . . [and] prescribes standards and evaluation methods.”<sup>152</sup>

The court’s fair use analysis found that the first factor favored fair use because of its educational purpose, even though it was not transformative.<sup>153</sup> Both educators’ respective performance, distribution, and reproduction would be, like the application in the case, non-transformative but serve an educational purpose that would favor fair use for both educators under the first factor.

The second factor in the case was neutral because the selection was both conversational and factual but also contained some analysis.<sup>154</sup> Factor two would likely weigh against both Teacher A and B in the hypotheticals because unlike the neutral finding in the case, both educators’ respective works were more creative than commentary or fact-based.

Only about 8.28% of the work was included in this excerpt in *Cambridge University Press*, and it did not include the heart of the work.<sup>155</sup> However, the court held that the inclusion of two entire chapters weighed against fair use.<sup>156</sup> The court’s third factor analysis is striking because the court still considered the 8.28% of the overall work to weigh against fair use because of that excerpt’s importance to the work as a whole in terms of proportionality.<sup>157</sup> Teacher A’s film screening would certainly meet this threshold to weigh against fair use because he performed the entire film. Teacher B would face a similar fate because she included two entire chapters, just like in *Cambridge University Press*, and an additional two excerpts that included weighty critic analysis. Both educators would subsequently fail to meet fair use under this factor.

This particular book in *Cambridge University Press* was out of print, but the publisher contended that there was a “ready market” for excerpts, which led the court to hold that the unpaid use was significant

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152. *Id.* at 1269.

153. *Id.* at 1270.

154. *Id.*

155. *Id.* at 1270–71.

156. *Id.*

157. *Id.*

when cumulative and thus weighed against fair use under the fourth factor.<sup>158</sup> In the hypotheticals, both educators would certainly fail to have their uses recognized as fair use under this last factor analysis because the court heavily weighed this factor and held that even a ready market where no such licenses exist was enough to affect the market.<sup>159</sup> Teacher A's film was available to license for performances and though Teacher B's novel and criticism piece were not available for license, there was a ready market for such licenses because the works are often used in educational settings. Therefore, under this rationale, this factor weighs against fair use for both educators.

Ultimately, the court found that Georgia State's use here was not fair use, heavily weighing the fourth factor.<sup>160</sup> For both Teacher A and Teacher B, only the first factor favored fair use in this part of the *Cambridge University Press* decision, meaning that their fair use claims would fail and that their uses would constitute infringing despite the fair use defense.

*Cambridge University Press* is a significant case concerning copyright and education. Several law review articles have been penned on the subject and the case's potential ramifications—including classroom guidelines<sup>161</sup> and higher education sovereign immunity.<sup>162</sup>

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Looking back at the hypotheticals through all the various fair use lenses provided in these lower court cases delivers additional insight on the intricacies of copyright law as it relates to educational settings. Despite these four case analyses, both Teacher A's public performance and Teacher B's reproduction and distribution are unlikely to be considered fair use. Consider these overall applications below for both educators based on all four lower court decisions taken together.

Teacher A's film screening screenshare in his class instruction would likely fail to meet fair use. Under factor one, his use would favor fair use because the performance is for educational purposes and,

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158. *Id.* at 1271.

159. *Id.*

160. *Id.*

161. See, e.g., Brandon Butler, *Transformative Teaching and Educational Fair Use After Georgia State*, 48 CONN. L. REV. 473 (2015).

162. See, e.g., Deidré A. Keller & Anjali S. Vats, *Centering Education in the Next Great Copyright Act: A Response to Professor Jaszi*, 54 DUQ. L. REV. 173 (2016).

despite its lack of transformation, all four court case applications weighed in favor of fair use.

Similarly, Teacher A's second factor application also produced unanimous results under all four court case applications because the screening included a very creative work—a motion picture—and thus would favor infringement, not fair use.

Third, the amount and the substantiality of the work would also likely favor infringement because Teacher A is intending to show the film in its entirety. Only one case application yielded different results (*Authors Guild, Inc. v. HathiTrust*), but this court was very focused on the necessity of including large amounts of the work for the particular transformative use and such proportion was okay as long as the amount was not “excessive.”<sup>163</sup> Though, the court did not reflect this rationale in other cases, making this factor still weigh against fair use overall.

Lastly, the market effect of the screening may appear to be minimal on its face. The film would only be shown to his class during his lesson, and he is not posting the film to an online learning platform, but instead showing it in real time. However, students would likely avoid purchasing or renting the film during their studies, and, importantly, Teacher A skirted the licensing fee available to license for such use. This, in aggregate, could have a significant impact on the film's market, making this factor also weigh against a finding of fair use. Two of the four case applications heavily focused either on the aggregate nature of such use or the availability of licensing. Teacher A likely would not be successful in a fair use claim here because the fourth case did not provide adequate information on how to approach non-transformative uses' market effect, making that application neutral.<sup>164</sup> The other case, *Ass'n for Information Media & Equipment*, stated that educational purposes effectuated “no more likely to purchase” the works.<sup>165</sup> This holding, however, has been criticized as not a “resounding fair use victory” but instead a holding centered on the individual licensing agreement in place.<sup>166</sup>

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163. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014).

164. *See Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, 953 F.3d 638, 652 (9th Cir. 2020).

165. *Ass'n for Info. Media & Equip. v. Regents of the Univ. of Cal.*, No. 2:10CV-09378-CBM, 2012 WL 7683452, at \*6 (C.D. Cal. Nov. 20, 2012).

166. *See Field & Silver, supra* note 41, § 3.5.4.



Teacher A's film screening, considering all four factors, would therefore be considered infringement under two of the four cases and neutral or "toss up" in the other two. Consequently, absent a finding of a single application that yielded a potential fair use victory, Teacher A's film screening, which was statutory infringement despite 17 U.S.C § 110's exceptions for teaching, would also not be excused through fair use, making his conduct constitute infringement nonetheless.

Teacher B's uploading of book chapters and literary criticism excerpts would face a similar fate as Teacher A under the fair use defense when considered in light of all four cases. Under the first factor, Teacher B's uploads would favor fair use because they are for an educational, not commercial, purpose. Despite their lack of transformative quality, a fair use finding was the conclusion under all four court approaches.

Next, under the second factor, the uploads would likely favor infringement and not fair use because of the creativity of the underlying works. This factor was also unanimous under all four approaches.

In terms of the third factor, both the chapters and criticism excerpts are portions of the respective works. The book chapters are two consecutive chapters, which contain the heart of the author's work. Although they comprise a small portion of the book, the chapters substantively represent a large proportion of the work, and, thus, their inclusion favors infringement. Similarly, although the criticism excerpts are merely excerpts, the excerpts contain the heart of the work and thus weigh against fair use. Only *Authors Guild, Inc.*'s factor three approach yielded a resounding fair use victory for Teacher B, but this was predicated on the fact that her use was not excessive.<sup>167</sup> The *Ass'n for Information Media & Equipment*'s third factor approach application was a neutral or narrow finding for fair use because its approach was focused on the proportionality of the use.<sup>168</sup> This factor is therefore neutral for Teacher B between the works.

Lastly, the fourth factor, market effect from these uploads, may be minimal on its face because of the overall small portions used. In the aggregate of students across the board, however, this could be problematic for the publisher's bottom line, and, therefore, this factor weighs in favor of infringement. *Ass'n for Information Media &*

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167. *Authors Guild, Inc.*, 755 F.3d at 98.

168. *Ass'n for Info. Media & Equip.*, 2012 WL 7683452, at \*6.

*Equipment*'s last factor rationale yielded the only resounding fair use finding out of the four case applications for Teacher B because that court found that educational uses made a student no more likely to purchase the work.<sup>169</sup> This holding, though, has been criticized as being agreement-specific and therefore not widely applicable.<sup>170</sup> *Tresòna Multimedia, LLC*'s approach to this factor yielded a neutral application for Teacher B, but this is mainly because the court did not provide concrete information on how to approach a non-transformative use's market effect.<sup>171</sup> Therefore, this factor overall weighs against a finding of fair use for Teacher B's uploads.

In weighing all four factors across all four cases, Teacher B's uploads would probably not satisfy the fair use defense. Her distribution and reproduction of the book chapters and critique excerpts, however, are closer to satisfying the fair use defense than Teacher A's performance because of the nature and proportionality of their respective incorporated works. Though Teacher B had two overall findings of infringement in the case applications, she did have one overall finding of fair use under *Ass'n for Information Media & Equipment*'s four factor approach and a toss-up finding of fair use under the court's approach in *Author's Guild, Inc.* Therefore, Teacher B's uploads would also likely still be acts of infringement despite the specific statutory exceptions for educators and the fair use defense.<sup>172</sup> Let us consider an additional potential defense for the educators.

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169. *Id.*

170. See Field & Silver, *supra* note 41, § 3.5.4.

171. See *Tresòna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, 953 F.3d 638, 652 (9th Cir. 2020).

172. Note: An article similar to this Note provides an additional introduction to fair use in educational settings and suggests that educators can also consider making their incorporations of works in their instruction more transformative and using fact-based (versus creative) works to better their chances of their uses being considered fair. See Elizabeth Vulaj, *Copyright & COVID-19: Navigating Streaming Laws for Online Classrooms in the New Normal*, 92 OCT. N.Y. ST. B.J. 36 (2020).

## B. Qualified Immunity

Qualified immunity<sup>173</sup> is considered an affirmative defense, meaning that the charges against a qualifiedly immune party can be automatically dismissed; though most often found in civil rights or criminal law settings,<sup>174</sup> some jurisdictions have applied this concept in the context of copyright infringement.<sup>175</sup> Essentially, qualified immunity applies “[w]hen an official's conduct does not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known,’ [and therefore] that official is shielded from liability for civil damages” under the defense.<sup>176</sup> Because copyright law is not always clearly established, as demonstrated in the previous analyses, “[t]he question before the Court as to the [alleged infringers] in their individual capacity is not whether their actions as alleged violate a law, but whether a reasonable [alleged infringer] would have known that the alleged actions violated clearly established copyright law.”<sup>177</sup>

### 1. Case Examples

Consider these case examples regarding qualified immunity and copyright infringement in the educational setting. These cases correlate with the hypotheticals to better illustrate the real-world ramifications of these decisions in situations like the hypotheticals present.

#### *Ass’n for Information Media & Equipment v. Regents of the University of California*

The *Ass’n for Information Media & Equipment v. Regents of the University of California* court explicitly tackled the concept of qualified

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173. Defined in Black’s Law Dictionary as “[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights.” *Immunity*, BLACK’S LAW DICTIONARY (11th ed. 2019).

174. For a general introduction to the concept of qualified immunity and some contextual examples, see NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 11.

175. *Ass’n for Info. Media & Equip. v. Regents of the Univ. of Cal.*, No. 2:10-CV-09378-CBM, 2012 WL 7683452, at \*5 (C.D. Cal. Nov. 20, 2012).

176. *Id.* (citation omitted).

177. *Id.* at \*6.

immunity.<sup>178</sup> This case, as referenced first in Section III.A.2, centered on the University of California's uploading of licensed DVDs to their university intranet for streaming in accordance with an agreement between the parties.<sup>179</sup> The defendants included the university's president, chancellor, provost, and several media and information personnel in both their official and personal capacities.<sup>180</sup> The court, as mentioned above, noted that the question pertaining to qualified immunity was "not whether their actions as alleged violate a law, but whether a reasonable [alleged infringer] would have known that the alleged actions violated clearly established copyright law."<sup>181</sup>

The court then considered the fair use provisions and found that, because the uploads were "ambigu[ous]" as to fair use, the law would therefore not be clear to an average person.<sup>182</sup> Next, the court contemplated if an average person would have realized that such uploading violated the agreement between the parties, holding that it too was ambiguous as to its terms and therefore not clear to the average person.<sup>183</sup> As both of these components favored qualified immunity because of their ambiguity, the court found these defendants to be "qualifiedly immune from civil damages."<sup>184</sup>

This rationale, applied to the hypotheticals, does not likely result in qualified immunity for Teacher A or Teacher B. The *Ass'n for Information Media & Equipment* rationale on qualified immunity centered on a reasonable person's understanding of the copyright law. Although the educators are not law professors, there is at least a potential that they would understand these basic provisions. However, a reasonable defendant in the distance education setting, which both educators are, would likely be aware that such actions would violate copyright law because of the TEACH Act's requirement that educational institutions must provide educational copyright law materials to their employees.<sup>185</sup> The second part of the *Ass'n for*

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178. *Id.* at \*5.

179. *Id.* at \*1.

180. *Id.*

181. *Id.* at \*6.

182. *Id.*

183. *Id.* at \*7.

184. *Id.* at \*8.

185. 17 U.S.C. § 110(2)(D)(i).

*Information Media & Equipment* court's analysis dealt with the university's specific agreement licensing provisions. This would not be applicable in this hypothetical because neither educator procured a license. Therefore, both educators would likely still be liable for their infringing uses under this court's approach to qualified immunity and despite the fair use defense.

***Tresona Multimedia, LLC v. Burbank High School Vocal Music Ass'n***

Similarly, in *Tresona Multimedia, LLC v. Burbank High School Vocal Music Association*, the Central District of California considered the potential qualified immunity of school officials in the context of musical performances.<sup>186</sup> This case, also first introduced in Section III.A.2, involved a copyright infringement claim against a school choir group for a vocal performance that did not have proper arrangement, synchronization, and grant right licenses for the underlying musical works.<sup>187</sup> The court held that qualified immunity applies in copyright suits where the right is not clearly established under copyright law and also when the conduct is "objectively reasonable."<sup>188</sup>

The court outlined several factors in their decision. First, there was no evidence that the individually sued choir director acted outside his scope of duties.<sup>189</sup> Additionally, although the law was "firmly established" in the unlicensed performance, "'the contours' of these rights were not 'sufficiently clear [so] that a reasonable official would understand that he is doing so violates that right.'"<sup>190</sup> In their claim, the plaintiff relied on trade publications at the time discussing copyright law and show choirs, which the court deemed did not meet the threshold of proving sufficiently clear established right.<sup>191</sup>

The court further suggested that qualified immunity in copyright may also be granted if the official's conduct was objectively reasonable.<sup>192</sup> The court notes that because the fair use section, 17

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186. *Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, No. CV 16-4781-SVW-FFM, 2016 WL 9223889 (C.D. Cal. Dec. 22, 2016).

187. *Id.* at \*1.

188. *Id.* at \*6 (citation omitted).

189. *Id.* at \*7.

190. *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

191. *Id.*

192. *Id.* at \*6.

U.S.C. § 107, explicitly lists education as an example of fair use: “[A] public school teacher acting in his teaching capacity would be reasonable in believing the fan [sic] use defense applies.”<sup>193</sup>

*Tresona Multimedia, LLC*'s approach to qualified immunity, if applied to the hypotheticals, would potentially result in qualified immunity. This court's approach, like the *Ass'n for Information Media & Equipment* court, begins with the clearly established standard. As discussed *supra* in the context of *Ass'n for Information Media & Equipment*, both Teacher A and B may not be able to prevail under this standard because of the TEACH Act's institutional materials requirement. This court, however, adds the additional considerations of the public official's scope of duties and their reasonable behavior. Although both educators used the copyrighted works in their official duties, a reasonable official, especially in an educational institution compliant with the TEACH Act, would likely be aware of the copyright law provisions.

However, this court also suggested that an official who acted objectively reasonably would also meet qualified immunity, and the court specifically gives an educator as an example of when this would apply.<sup>194</sup> This objectively reasonable standard would mean that to bar qualified immunity someone, objectively speaking, would need to be able to recognize that an educator's incorporation of a copyrighted work into their instruction violated copyright law. Because of the face-to-face exemption provisions in section 110(1) and the synonymous nature between education and copyrighted works, this standard makes it difficult for an objective perspective to prevent a qualified immunity claim in such an educational setting. This approach would essentially give both Teacher A and Teacher B qualified immunity even though they should have reasonably been aware of the copyright law provisions relating to distance learning as educators. Consider now, both cases together.

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Between both *Ass'n for Information Media & Equipment* and *Tresona Multimedia, LLC*, there are three factors to consider in applying

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193. *Id.* at \*8.

194. *Id.*

qualified immunity to copyright cases: whether the official was working in their official scope of duty, whether a reasonable defendant would be aware that their actions violated clearly established copyright law, and whether the defendant's conduct was objectively reasonable.

Applying the approaches to qualified immunity from both cases to the explanatory hypotheticals results in ambiguity. Considering both Teacher A's film screening and Teacher B's uploads, both educators worked in their official capacities and within their respective scopes of duty during the alleged infringements, favoring qualified immunity. According to the two referenced cases and discussion *supra*, the fair use analyses and distance learning copyright provisions may not be clearly established because of their intricacies and ambiguities. However, the TEACH Act requires non-profit educational institutions to provide their employees with information and resources relating to and promoting compliance with copyright law,<sup>195</sup> making this argument weak. Lastly, the educators' conduct could be considered objectively reasonable because education is specifically listed in the heading of section 107 fair use doctrine as an example of a fair use and the face-to-face provisions in section 110(1) provide for flexible copyrighted work integration. However, this is not dispositive, as shown in case law like *Cambridge University Press*, and is instead just one factor in analysis.<sup>196</sup>

When heavily weighing the TEACH Act's requirements, both educators would likely not receive qualified immunity and would still be liable for infringement. Such weight given to a specific component of qualified immunity was not addressed in these cases, and thus, there is some ambiguity as to whether the concept applies in these hypotheticals. Nevertheless, this application shows that there is a perhaps significant likelihood that Teacher A's and B's infringement in their respective performance, reproduction, and distribution in the course of their instructional employment would likely *not* be excused through the existing statutory provisions for distance learning, the fair use defense, or qualified immunity.

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195. 17 U.S.C. § 110(2)(D)(i).

196. *See Cambridge Univ. Press v. Becker*, 446 F. Supp. 3d 1145, 1171–74, 1270–71 (N.D. Ga. 2020).

#### IV. OTHER CONSIDERATIONS

In addition to the underlying copyright provisions that interact directly with teaching, 17 U.S.C. § 110(1)–(2), and the defenses to those potential infringements (fair use and qualified immunity), one must also consider 17 U.S.C. § 504(c)(2).<sup>197</sup> Section 504(c)(2) provides limitations on money damages arising from non-willful infringers and employees of nonprofit educational institutions and their acts of copyright infringement.<sup>198</sup>

Section 504, which delineates remedies for copyright holders under the 1976 Copyright Act, provides the following:

In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed *willfully*, the court in its discretion may *increase the award of statutory damages to a sum of not more than \$150,000*. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was *not aware and had no reason to believe* that his or her acts constituted an infringement of copyright, the court in its discretion may *reduce the award of statutory damages to a sum of not less than \$200*. The court *shall remit* statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public

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<sup>197</sup> These are not the exclusive Copyright Act sections that relate to educational uses. Specific provisions for libraries and archives, for example, can be found in 17 U.S.C. § 108.

<sup>198</sup> Note that this section would only impact the damages an educator would be liable for, not his or her underlying liability for infringement.



broadcasting entity (as defined in section 118(f))  
infringed by performing a published nondramatic  
literary work or by reproducing a transmission program  
embodying a performance of such a work.<sup>199</sup>

In other words, the maximum penalty for a willful infringement can be up to \$150,000 but the court may reduce these damages down to as low as \$200 if the infringer proves that they were not aware they were infringing and that they had no reason to believe their acts were infringing. In other words, if someone legitimately did not know he or she were committing an act of infringement, he or she could be punished at a lower amount of damages than if they were willfully infringing (but still must pay at least \$200). Further, the damages can be completely omitted, but only if the infringer *reasonably thought* that his or her reproduction of a copyrighted work would be considered a fair use *and* he or she committed the act (reproduction) as part of his or her employment at a non-profit educational institution or performance.<sup>200</sup> These exceptions allow courts to give more consideration to those public-serving employees who may unintentionally infringe by allowing them to be punished at a potentially lower rate; however, this does not clear them from liability or wrongdoing.

The last sentence of section 504(c)(2) could serve as an effective assist to educators at non-profit institutions who reasonably believe that their integration of a copyrighted work is not infringing. However, what is or is not reasonable under the circumstances, especially when the Copyright Act contains specified sections for educational purposes,<sup>201</sup> complicates this potential assistance. Additionally, there is a large limitation of this last provision as an assistive measure because it only covers infringement of the right of reproduction. Alleged infringement of other exclusive rights would not be included here and would thus still be infringing with the same amount of potential damages as they would otherwise face.

Applying section 504(c)(2) to the hypotheticals yields inconsistent results across the subsections. Under the first scenario where infringer(s) could face up to \$150,000 in damages, the infringer(s) must

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199. 17 U.S.C. § 504(c)(2) (emphasis added).

200. This section also provides for a clear of damages for reproduction of a transmission as part of one's employment at a public broadcasting entity.

201. 17 U.S.C. § 110(1)–(2).

have willfully infringed. Both Teacher A and Teacher B did not willfully infringe their works' copyright holder's rights. Instead, they both simply assumed they could perform or display the works like they had done numerous times in their classrooms in face-to-face teaching. They both, therefore, would most likely avoid the maximum level of statutory damages but still face liability for their actions.

In considering the reduced damages (minimum \$200), the infringers must prove that they were not aware, nor did they have any sort of reason to believe that their actions were infringing. Both Teacher A and Teacher B were not aware that their acts were infringing, but they likely had reason to believe these acts were infringing because of the requirements that the institution must provide materials on copyright law under 17 U.S.C. § 110(2). They could, of course, be confused as to what exactly these materials meant or had confusion as to what differences they as educators face in a digital classroom versus a traditional classroom. However, there is no provision here in section 504 for confusion, ambiguity, or specific circumstances. Instead, section 504(c)(2) only suggests that the court must decide if the infringer had reason to believe he or she could be infringing. A court could decide either way for the educators, therefore holding them to the middle standard of damages in this provision.

Lastly, the final scenario in section 504(c)(2) details a total eradication of damages (but not liability) in certain narrow circumstances.<sup>202</sup> To be cleared of damages, an infringer must first have both thought *and* had reason to think that their infringing act was a fair use of the copyrighted work.<sup>203</sup> Next, they must have done so in the course of their employment at a non-profit educational institution and the act must have been reproducing the work.<sup>204</sup> Both Teacher A and Teacher B, as discussed *infra*, would likely not be able to rely on fair use as a defense for their infringing acts. They may or may not have had reason to believe that their acts were justified as fair uses, though.

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202. 17 U.S.C. §504(c)(2) (“The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use. . . .”)

203. *Id.*

204. *Id.* (“infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecord”).

However, for Teacher A, this does not matter because his infringing act was a violation of the film's copyright holder's exclusive right of public performance and thus does not qualify as an exception here, which is reserved for infringement of the right of reproduction. Therefore, Teacher A would likely still face a higher level of damages despite the potential defense of fair use and limitation of damages under section 504.

Teacher B violated the exclusive rights of reproduction and distribution. She could potentially be able to use section 504(c)(2) as reduction in damages (but not infringement liability) related to the act of reproduction, depending on what weight the court gives to the institutional materials requirement, but that is it. Teacher B, like Teacher A, would not be eligible for a reduction in damages under this scenario of section 504.

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Consequently, Teacher A would likely be considered, or at the very least potentially, liable for infringement of the right of public performance for his film screening to his online students despite both the fair use doctrine and the qualified immunity defense and further would still likely face a medium level of statutory damages. Teacher B's uploads to her school's learning management system for her literature students that violated the works' copyright holders' rights of reproduction and distribution would also likely, or at the very least possibly, make her liable for infringement despite both defenses. Her right of distribution violation would, like Teacher A's public performance infringement, likely result in the medium level of damages provided in section 504(c)(2). Teacher B may, however, qualify for the lowest level of damages for her right of reproduction infringement.

Nevertheless, both educators would most likely be considered copyright infringers and would therefore face liability and likely damages as a result of their integration of copyrighted works into their lessons for their online learners. This is true under the current copyright law even when their exact actions in the course of instruction in a traditional classroom would not create liability or stem damages. Such dissonance in the treatment of face-to-face and distance learning should be addressed to modernize copyright law to reflect the modern educational tools and methods educators use today. Consider the following proposed solutions.

## V. PROPOSED SOLUTIONS

One could attempt in several different ways to ameliorate these copyright problems that educators face while still balancing creators' and copyright holders' rights. Updating the TEACH Act amending 17 U.S.C. § 110(2), is perhaps the most appropriate solution. In its current state, section 110(2) only includes non-infringing uses of copyrighted works in distance learning in minimal circumstances and only if adhering to a multitude of requirements. These requirements are even more numerous for works outside not non-dramatic literary works and musical works. Such outside works like dramatic literary works; audiovisual works; and pictorial, graphic, and sculptural works are especially impacted in section 110(2)'s distance learning provisions because they currently can only be included in "reasonable and limited portions."<sup>205</sup> Not only are these terms ambiguous, but they also force the educators to redesign their lesson plans that were perfectly acceptable in a traditional classroom to fit into undefined portions.<sup>206</sup> In addition to these differences between types of works, section 110(2) also does not have provisions for classroom copies in distance learning settings, as referenced in the introductory language of section 107.<sup>207</sup> Treating all copyrighted works the same in all types of classrooms would allow for educators to more effectively incorporate copyrighted materials into their lessons and introduce these works to new consumers.

Additionally, Congress could amend section 110(2) so that educators no longer have to rely on fair use to excuse any unintentional uses outside of the current scope of the section. Congress could do so by including more flexibility in the covered exclusive rights to preclude infringement at the outset. Fair use, as discussed *supra* in both case law and the extensive hypothetical analyses, can be difficult to apply and can be interpreted very differently across jurisdictions. This current state puts educators in a difficult position that, because of the complexities and different court approaches, can result in liability and damages for

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205. 17 U.S.C. § 110(2).

206. 17 U.S.C. § 110(2) requires educational institutions to provide materials to employees regarding these copyright provisions. These materials can be displayed in an accessible and easy to understand format. *See, e.g., TEACH Act*, UNIV. OF TEX. LIBRS., <https://guides.lib.utexas.edu/copyright/teachact> (last visited Apr. 10, 2021).

207. 17 U.S.C. § 107 ("[T]eaching (including multiple copies for classroom use)").

them even in their official capacities. A defined exclusion from liability, like provided in section 110(1), would allow educators in the digital and distance classroom to enjoy similar flexibility.

These changes to section 110(2) would allow educators to use copyrighted works in the course of instruction in a similar way that they would be able to in the physical classroom space; however, these rights must be balanced with the copyright holders' rights as well. For this reason, such broad changes must be made in consideration of copyright holders' interests in mind to preserve their exclusive rights. Section 110(2) does a good job of this now by requiring institutions to have certain measures in place to prevent further distribution of copyrighted works. These measures can expand and update to better reflect today's technological capabilities (and requisite workarounds) to allow educators to use copyrighted works but not allow for those works to leave the digital classrooms and proliferate around the Internet.

For example, these requirements could indicate that non-dramatic literary works can only be posted to online class participants in a format to prevent students from printing, further editing, or transferring the work.<sup>208</sup> Further, Congress could amend the section to include a requirement that any material posted to an online learning platform or otherwise electronically delivered to students must have an inconspicuous copyright notice. This notice should be included on each page of a literary work, throughout an audiovisual work, or appended to other works to indicate to students of their nature and limitations. Similarly, educators could include audiovisual works in their lessons under the condition that students cannot further access the work outside of the viewing portal nor screen record in their chosen learning platform. Technology providers and institutional IT staff could work to ensure that students cannot record, screengrab, or copy these copyrighted works. If these updates to Section 110(2) are adequately narrowly tailored and enforced, copyright holders will not experience any less enjoyment of their exclusive rights compared to their work's inclusion in traditional classroom learning.

Additionally, Congress or perhaps even the U.S. Department of Education could introduce model standards of practice for modern

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208. See, e.g., ADOBE, *Protect Your PDF File with Permissions Using Adobe Acrobat XI* (2012), <https://www.adobe.com/content/dam/acom/en/products/acrobat/pdfs/adobe-acrobat-xi-protect-pdf-file-with-permissions-tutorial-ue.pdf>.

educators indicating specific, but not necessarily completely inclusive, example scenarios that illustrate the different exclusive rights, infringements of those rights, and the ramifications for those infringements. Educators are potentially completely unaware that their actions could be infringing, like those illustrated in the hypotheticals, even when their institution is in compliance with the requirements. Expanding these requirements with sample standards and scenarios could promote more compliance, especially if the exceptions for distance learning are expanded to be more congruent with the face-to-face exceptions. Further, an enhanced approach to these informational materials could make the educational provisions more clearly established and thereby bolster copyright holders' infringement claims against public officials who would then not be able to lean as much on qualified immunity as a defense to their infringements.

Similarly, Congress could amend 17 U.S.C. § 108<sup>209</sup> to provide for digitalization across more mediums and additional types of copyrighted works than are currently allowed in the section's language. Such expansion could help with students' accessibility to the works through their school's library or archives and make it easier to have those with less access to technology still be able to access their education. Section 108 could also include more updates regarding digital copies and their accessibility for online, off-campus learning to facilitate this accessible learning. Such updates could take the form of allowing offline, off campus access to internal networks and library or archive systems with the copyrighted content. Such expansion could allow students more access to copyrighted materials needed in the course of their studies without the strict involvement of their instructor. Further, such digitalization and copies could increase accessibility to those with learning and physical/mental disabilities to access and interact with copyrighted works, as discussed as being a fair use in *Author's Guild, Inc.*<sup>210</sup>

The current provisions for using copyrighted works in the classroom and through libraries and archives impact all types of courses but especially impact arts and humanities courses. The ability to show entire audiovisual works imperatively helps with film, history, music, theatre,

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209. This section provides specific copyright provisions for libraries and archives.

210. *Author's Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101 (2d Cir. 2014).

and art classes where motion pictures are paramount to the students' learning processes. Audiovisual works are also helpful in literature and history classes to help demonstrate learning objectives and study of the underlying copyrighted works. Dramatic literary works, not currently included in the broad distance learning provisions, are pertinent to both literature and theatre courses. Updating these provisions to be more inclusive of distance learning allows for these courses and area subjects to be more effectively conveyed to students despite their potential distance from their instructor while also introducing new works and creators to those pupils.

## VI. CONCLUSION

Educators often need and rely on copyrighted works to effectively teach their students in a variety of subjects, methodologies, and intentions. Although these educators are usually free to do so with little restriction in the course of instruction in the traditional classroom, they do not enjoy such flexibility in the digital or distant classroom. The TEACH Act was a starting point to make the provisions more applicable to distance learning, but more elasticity in the law is needed, especially given the pace of technology, for educators to continue to use copyrighted works in an effective way for all their students and those students' respective needs.

The COVID-19 pandemic exposed the severity of the problem with the current laws and underlined the need to update the almost decades old patch in the law for distance learning. This patch, though revolutionary at the time, only allows the use of certain types of works in their entirety and only under certain circumstances while the use of other types of works is only permissible in a reasonable amount and methodology if other criteria are met including a high bar of relevance to the teaching.

Educators who are inadvertently and unintentionally infringing could rely on several different defenses to avoid liability for their acts of infringement. Fair use, which heavily favors excusing otherwise infringing acts for educational purposes, could be an easy and applicable defense in many situations. However, it is not always a foolproof defense, as shown in the hypotheticals, where both educators failed to secure a resounding fair use defense in the Supreme Court context or across all four lower court cases. Additionally, qualified immunity is a

defense that would, in theory, provide a solid protection to educators. The evolution of case law and building of common law, however, that finds against fair use for educators, in combination with the TEACH Act's informational copyright materials provision, have already caused ambiguity in this defense and could soon erode this defense's strength for excusing educators' infringing acts. 17 U.S.C. § 504(c)(2) also provides a potential safety net for educators, but its narrow scope essentially only lowers the damages in specific instances and nevertheless does not absolve them from liability.

This culminates in the scenarios displayed in the hypotheticals: Educators in the digital classroom who use copyrighted works in reasonable, expected ways in the course of their instruction are infringing despite their conduct being non-infringing in the physical classroom. This is even more striking when these educators are left with little to no defense to that infringement. The relative lack of defenses for educators' infringing behavior in the distant or digital classroom necessitates legislative changes to avoid liability among educators.

Updates to the current TEACH Act and perhaps other copyright provisions would offer educators the flexibility to teach in a compliant and more organic way as if they were in the physical classroom. This would present such educators with a formidable option of compliance and flexibility, which is a stark difference from the choice they currently face between rigid copyright law that can force changed lesson plans or committing acts of infringement. This is especially true for arts and humanities courses, which are significantly impacted by the additional bars for copyrighted works like audiovisual works.

Changes in these legislative provisions would allow educators to do their job in a compliant way while still allowing copyright holders to enjoy their exclusive rights as if the educator was teaching in the traditional classroom, where they can often teach without any concern over violating copyright law. Distance learning has been significantly prevalent during the COVID-19 pandemic. Such prominence compels these updates for the use of copyrighted works in education so that educators and pupils alike can experience and enjoy the benefits of learning with copyrighted works while remaining in compliance with copyright law.