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### Centering Education in the Next Great Copyright Act: A Response to Professor Jaszi

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# Centering Education in the Next Great Copyright Act: A Response to Professor Jaszi

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\* Associate Professor of Law at Ohio Northern University. I am grateful to have been invited by Jacob Rooksby to participate in the Symposium on Intellectual Property at Duquesne University School of Law in April 2015. It was such a pleasure to engage with a group of scholars who are so passionate and informed. I learned so much and am thankful for the insights of all of the participants and, especially, for the comments I received from Brian Frye. I must thank Eden Adkins, Jennifer English, and Laura Waymire for research assistance. A special thanks to James H. Walker (ONUL 2013) for bringing the Northern District of Georgia opinion to my attention way back when. All errors and omissions are the sole responsibility of the authors.

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## I. INTRODUCTION

Education in America is making the news often these days, and usually not in a good way.<sup>1</sup> Much of the discussion centers on access by those historically underserved by the American educational system.<sup>2</sup> A good amount of the coverage deals more specifically with access to educational materials.<sup>3</sup> The textbook industry at both the K–12 and the higher education levels has been noted for its profit-driven model and the issues that model presents.<sup>4</sup> Many educators rely upon fair use to provide their students with supplemental materials while minimizing cost.<sup>5</sup> A recent case that originated in the Northern District of Georgia, *Cambridge Univ. Press v. Becker*

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1. See, e.g., Valerie Strauss, *America's School Funding Problems, State by State*, WASH. POST (Feb. 5, 2014), [www.washingtonpost.com/blogs/answer-sheet/wp/2014/02/05/americas-school-funding-problems-state-by-state/](http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/02/05/americas-school-funding-problems-state-by-state/); Doug Lederman, *State Budgeters' View of Higher Ed*, INSIDE HIGHER ED (Mar. 27, 2013), <https://www.insidehighered.com/news/2013/03/27/state-state-funding-higher-education>.

2. See, e.g., Lindsey Cook, *U.S. Education: Still Separate and Unequal*, U.S. NEWS & WORLD REPORT (Jan. 28, 2015 12:01 AM), <http://www.usnews.com/news/blogs/damine/2015/01/28/us-education-still-separate-and-unequal>.

3. See, e.g., Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleague (Oct. 1, 2014) available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>; Bruce D. Baker, David G. Sciarra & Danielle Farrie, *School Funding in Most States Unfair: Inequitable Funding Systems Shortchanging Nation's Students*, SCHOOLFUNDINGFAIRNESS.ORG (June 8, 2015), <http://www.schoolfundingfairness.org/>.

4. See, e.g., Zachary Crockett, *Why are Textbooks so Expensive?*, PRICEONOMICS (Dec. 18, 2013), <http://priceonomics.com/why-are-textbooks-so-expensive>.

5. Many educational institutions provide a roadmap of fair use on their websites in order to encourage fair use in the classroom and to ensure it is done in an appropriate manner. See, e.g., *Copyright: Academic Copying and Student Course Packets*, YALE UNIVERSITY, OFFICE OF THE VICE PRESIDENT AND GENERAL COUNSEL, <http://ogc.yale.edu/copyright-academic-copying-and-student-course-packets> (last visited Dec. 9, 2015); *Fair Use*, STANFORD UNIVERSITY LIBRARIES, <http://fairuse.stanford.edu/overview/fair-use/> (last visited Dec. 9, 2015); *Copyright and Fair Use*, NEW YORK UNIVERSITY, <https://www.nyu.edu/footer/copyright-and-fair-use.html> (last visited Dec. 9, 2015); *Fair Use Checklist*, COLUMBIA UNIVERSITY LIBRARIES, COPYRIGHT ADVISORY OFFICE, <https://copyright.columbia.edu/basics/fair-use/fair-use-checklist.html> (last visited Dec. 9, 2015); see also, Caitlin Ubl, *Faculty Members Propose Intellectual Property Rights for Scholarly Works*, THE WILLIAMS RECORD (February 17, 2016), <http://williamsrecord.com/2016/02/17/faculty-members-propose-intellectual-property-rights-for-scholarly-work/> (creating a policy to protect not only the intellectual property rights of the college, but also the professors and students).

(“*Georgia State*”),<sup>6</sup> and has since been appealed to and reversed and remanded by the Eleventh Circuit in *Cambridge Univ. Press v. Patton* (“*Georgia State II*”),<sup>7</sup> demonstrates some potential landmines associated with fair use in the educational context. This article considers those landmines and suggests an alternative approach to educators depending upon fair use.

In 2012, the U.S. District Court for the Northern District of Georgia issued a lengthy and detailed decision in *Georgia State* which undertook to consider, work-by-work, whether Georgia State University had committed copyright infringement in over seventy instances or, in the alternative, engaged in fair use.<sup>8</sup> The copyright infringement allegations in the case rested upon actions that very likely take place at educational institutions all over this country, every day—teachers placing portions of copyrighted works on the school’s electronic reserves or learning management system.<sup>9</sup> The works at issue were all nonfiction, social science, or education-related texts, including: *Pronunciation Games*,<sup>10</sup> *The Cambridge Companion to Beethoven*,<sup>11</sup> *Understanding Trauma*,<sup>12</sup> and *The Handbook of Feminist Research*.<sup>13</sup> A complete list of the works appears in an appendix to the district court’s opinion.<sup>14</sup> Ultimately, after the case had been pending for more than four years,<sup>15</sup> after both parties had filed motions for summary judgment,<sup>16</sup> and one year after a trial that began on May 17, 2011 and in which testimony ended on June 7, 2011,<sup>17</sup> the court only found five instances of infringement.<sup>18</sup>

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6. *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) [hereinafter *Georgia State*].

7. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014) [hereinafter *Georgia State II*].

8. *See generally, id.*

9. *Id.* at 1220–21. Note that it is merely our intuition that these practices are widespread. We have conducted no empirical analysis, but believe that such an undertaking would be a useful first step in developing the data that educators would need in order to meaningfully engage in an effort for statutory changes.

10. *Id.* at 1244–46.

11. *Id.* at 1297–99.

12. *Id.* at 1291–92.

13. *Georgia State*, 863 F. Supp. 2d at 1255–56.

14. *Id.* at 1364.

15. *Id.* at 1201 (“The original Complaint was filed on April 15, 2008.”).

16. *Id.* at 1202 (“Summary Judgment Motions were filed by both sides on February 26, 2010.”).

17. K. Matthew Dames, *Decision Summary: Publishers v. Georgia State University*, SYRACUSE COPYRIGHT & INFORMATION POLICY OFFICE (May 14, 2012, 8:00 AM), <http://copyright.syr.edu/publishers-v-georgia-state/>.

18. *Georgia State*, 863 F. Supp. 2d at 1363.

Shortly after the district court decision, Professor Peter Jaszi, of American University Washington College of Law, authored a piece entitled *Fair Use and Education: The Way Forward*.<sup>19</sup> The piece was published as the case was up on appeal.<sup>20</sup> In it, Professor Jaszi argues that the idea of “educational exceptionalism” is a myth. He defines “educational exceptionalism” as:

[T]he notion that teaching and learning are so special, and so highly favored in copyright policy and fair use law, that it ought to be possible to get courts to cut education some special slack, beyond that which they extend to uses of third-party copyright material by filmmakers or musicians or publishers..<sup>21</sup>

Rather, as the Georgia State decisions exemplify, educators and educational institutions are treated like every other unlicensed user of copyrighted materials;<sup>22</sup> they are expected to prove that each use is a fair use firmly within the confines of existing fair use jurisprudence. Jaszi further asserts that endeavoring to change the copyright statute is a lost cause<sup>23</sup> and offers, as the least bad alternative, the possibility of educators articulating their uses as transformative and, therefore, well within the recognized parameters of the fair use doctrine.<sup>24</sup>

This piece responds to Professor Jaszi’s article. Part II briefly analyzes the *Georgia State* decisions out of the Northern District of Georgia and the Eleventh Circuit. The analysis is intended to demonstrate the uphill battle educational institutions are likely to face in following Professor Jaszi’s recommendation. In Part III this

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

20. *Id.* at 34.

21. *Id.* at 36 (“There’s little if any evidence for the proposition that education actually enjoys (as distinct from being morally entitled to enjoy) a preferential position in the array of positive human activities that, from time to time, may lay claim to special treatment under copyright law.”).

22. See generally *Georgia State*, 863 F. Supp. 2d 1190; *Georgia State II*, 769 F.3d 1232.

23. Jaszi, *supra* note 19, at 35–36 (“There is absolutely no indication that educators could lobby Congress to expand their specified use rights under copyright (let alone those of their students), especially in an environment where rightsholders in general appear to have taken a pledge not to support any new exceptions to copyright, no matter how well justified.”).

24. *Id.* at 36 (“So in the end, educators don’t have any good choices here—except to try to make the fair use doctrine as it stands work better for teachers and students today and tomorrow.”); *id.* at 40 (“Educators’ best chance, then, is to catch a ride on the train that is already moving—the clear trend toward transformativeness analysis.”). One of the authors has previously suggested that a particular group of alleged copyright infringers take advantage of the potential “transformativeness” presents. See Deidré A. Keller, “*What He Said...*”: *The Transformative Potential of the Use of Copyrighted Content in Political Campaigns, or, How a Win for Mitt Romney Might Have Been a Victory for Free Speech*, 16 VAND. J. ENT. & TECH. L. 497 (2014).

article considers the pragmatic issues fair use presents for educational institutions accused of copyright infringement; specifically institutional risk-aversion and potential costs of and exposure to liability. In Part IV, we suggest an alternative to Jaszi's approach; we call for educators to organize and strategize around a legislative solution that recognizes the importance of education to the purpose of copyright, as articulated in the Constitution.<sup>25</sup> Part V concludes.

## II. THE GEORGIA STATE DECISIONS AND THE MESS THAT IS EDUCATIONAL FAIR USE

Jaszi's piece begins with a reference to the Northern District of Georgia's opinion in *Georgia State*:<sup>26</sup> "In May 2012, Judge Orinda D. Evans of the federal district court in Atlanta issued a decision . . . that has been rightly hailed as a significant recognition of educators' rights to use copyrighted material in their teaching."<sup>27</sup> While the opinion was read as a victory for Georgia State—even Judge Evans saw it this way, declaring the defendants the prevailing party and awarding them attorneys' fees and costs<sup>28</sup>—one need not dig too far to recognize the pyrrhic nature of that victory for educational institutions writ large. As an initial matter, both the Northern District of Georgia and the Eleventh Circuit held that the uses in question were "nontransformative."<sup>29</sup> Moreover, these decisions demonstrate the very real problems posed by the Agreement on Guidelines in Classroom Copying in Not-for-Profit Educational Institutions ("Classroom Guidelines").<sup>30</sup> Finally, if nothing else, the

25. U.S. CONST. art. I, § 8, cl. 8.

26. *Georgia State*, 863 F. Supp. 2d at 1190.

27. Jaszi, *supra* note 19, at 33.

28. *Cambridge Univ. Press v. Becker*, 2012 U.S. Dist. LEXIS 123154, at \*22–23 (N.D. Ga. Aug. 10, 2012); see also Jeffrey R. Galin, *A Big Win for Georgia State for Online Reserves*, CONFERENCE ON COLLEGE COMPOSITION AND COMMUNICATION (January 28, 2013), <http://www.ncte.org/cccc/committees/ip/ipreports/bigwin>; Rick Anderson, *Final Score in the Georgia State Game: Library 94, Publishers 5*, THE SCHOLARLY KITCHEN (May 17, 2012), <http://scholarlykitchen.sspnet.org/2012/05/17/final-score-in-the-georgia-state-game-library-94-publishers-5/>; Jonathan Pink, *Fair Use Found in Georgia State University Copyright Infringement Suit*, HOT TOPICS IN INTELLECTUAL PROPERTY AND ENTERTAINMENT LITIGATION (May 15, 2012), <http://www.jonathanpinkesq.com/fair-use-found-in-georgia-state-university-copyright-infringement-suit>.

29. *Georgia State II*, 769 F.3d at 1263 ("Although an electronic reserve system may facilitate easy access to excerpts of Plaintiffs' works, it does nothing to transform those works."); *id.* at 1289 (Vinson, J., concurring) ("The use of the works in this case, as the majority opinion notes and the Defendants have not really contested, was obviously non-transformative."); *Georgia State*, 863 F. Supp. 2d at 1232 ("Taking into account the fact that this case involves only mirror-image, nontransformative uses, the amount used must be decidedly small to qualify as fair use."); see also *infra* note 41 and accompanying text.

30. H.R. REP. NO. 94–1476, at 68 (1976), *reprinted in* 1976 U.S.C.A.N. 5659, 5681; see also sources cited *infra* notes 45–56 and accompanying text.

lesson that the Georgia State decisions teach is that any fair use victory for an educational institution defendant cannot be relied upon as either a prospective guide for institutions seeking to avoid copyright litigation or as binding precedent in later disputes.<sup>31</sup> The remainder of this section considers these three glaring problems as they are presented in the Georgia State decisions.

A. *The "Purpose and Character" of Educational Uses: Non-Profit May Lean Toward Fair But Educational Does Not Equal Transformative*

There are a number of points of convergence between the Northern District of Georgia and Eleventh Circuit's Georgia State opinions. None of them bode well for the educational institution seeking to navigate the morass that is educational fair use.<sup>32</sup> Of these, the one most troubling for Jaszi's prescription is the courts' treatment of the first fair use factor.<sup>33</sup> In analyzing the first fair use factor, the district court stated:

The language of § 107 itself and the Supreme Court's opinion in *Campbell* compel the decision that the first fair use factor favors Defendants. This case involves making copies of excerpts of copyrighted works for teaching students and for scholarship, as specified in the preamble of § 107. The use is for strictly nonprofit educational purposes as specified in § 107(1). The fact that the copying is done by a nonprofit educational institution leaves no doubt on this point.<sup>34</sup>

The majority opinion out of the Eleventh Circuit arrives at the same conclusion,<sup>35</sup> though its analysis is more thorough, touching upon the references to educational uses within the fair use provision of the statute, as well as the legislative history associated with the fair use provision.<sup>36</sup> By far, the opinion that demonstrates the

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31. See, e.g., *Georgia State*, 863 F. Supp. 2d at 1210, 1232; *Georgia State II*, 769 F.3d at 1269, 1277–84; Jaszi, *supra* note 19, at 34–36; see also sources cited *infra* notes 57–70 and accompanying text.

32. Jaszi treats the existing state of the jurisprudence concerning educational fair uses prior to the Georgia State decisions on pages 36 to 44 of his piece. Jaszi, *supra* note 19, at 36–44. Rather than revisit that jurisprudence, this piece will seek to place the Georgia State decisions in the larger contexts of the state of higher education and the existing political climate.

33. See Jaszi, *supra* note 19, at 38–39; *Georgia State*, 863 F. Supp. 2d at 1224–25; *Georgia State II*, 769 F.3d at 1261–68.

34. *Georgia State*, 863 F. Supp. 2d at 1224.

35. *Georgia State II*, 769 F.3d at 1263.

36. *Id.* at 1263–68.

least deference towards educational uses as fair uses is the concurrence to the Eleventh Circuit's opinion, written by Judge Vinson.<sup>37</sup>

Judge Vinson's derisiveness toward the notion of educational exceptionalism leaps off the page. In characterizing the treatment of this factor by the majority and the District Court, Judge Vinson says:

While I agree that educational use is an important factor to consider, and there is much to recommend in the majority's thoughtful analysis and detailed consideration of this issue—which stands in stark contrast to the District Court's perfunctory (two page) analysis—I simply cannot agree that the first factor weighs in favor of fair use just because the works are being used for educational purposes at a non-profit university.<sup>38</sup>

Vinson decrees: “Neither churches, charities, nor colleges get a free ride in copyright, however. The test is ultimately the same for them as it is for everyone else: is the use ‘fair’ under the specific circumstances?”<sup>39</sup>

Judge Vinson's estimation of educational use under this factor certainly supports Jaszi's argument that educational institutions are afforded no greater fair use rights than anyone else.<sup>40</sup> Unfortunately, the solution Jaszi proposes takes a hit from the treatment of factor one in the Georgia State decisions which are, after all, the first comprehensive decisions on fair use by a higher education institution.<sup>41</sup> All of the opinions agree that the use in question is non-transformative.<sup>42</sup> Both the Northern District of Georgia and the Eleventh Circuit rely upon language from the Supreme Court's decision in *Campbell v. Acuff-Rose*,<sup>43</sup> for the notion that verbatim uses are not transformative:<sup>44</sup> “[t]he obvious statutory exception to this

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37. *Id.* at 1284–91 (Vinson, J., concurring).

38. *Id.* at 1288 (Vinson, J., concurring) (citations omitted).

39. *Id.*

40. Jaszi, *supra* note 19, at 36.

41. *Id.* at 40.

42. *Georgia State II*, 769 F.3d at 1267 (“Defendants’ use of Plaintiffs’ works is nontransformative . . . .”); *Id.* at 1289 (Vinson, J., concurring) (“The use of the works in this case, as the majority opinion notes and the Defendants have not really contested, was obviously nontransformative.”); *Georgia State*, 863 F. Supp. 2d at 1232 (“Taking into account the fact that this case involves only mirror-image, nontransformative uses, the amount used must be decidedly small to qualify as fair use.”).

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

44. *Georgia State*, 863 F. Supp. 2d at 1224 (citing *Campbell*, 510 U.S. at 579 n.11); *Georgia State II*, 769 F.3d at 1268 (citing *Campbell*, 510 U.S. at 579 n.11).



focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.”<sup>45</sup> While nothing in the statute necessarily precludes educational uses from being deemed transformative,<sup>46</sup> successfully making that argument in the face of this seeming consensus to the contrary appears highly unlikely. Meanwhile, relying upon fair use in the educational context likely also means an accused infringer will have to face the Classroom Guidelines, which present their own difficulties.

*B. The Classroom Guidelines are An Albatross*

The legislative history associated with the fair use provision includes a full reproduction of the Classroom Guidelines.<sup>47</sup> These Classroom Guidelines were the result of long and arduous negotiations among representatives of publishers, educational institutions, and other stakeholders.<sup>48</sup> The intention was for the negotiating parties to propose statutory language embodying a fair use provision specific to education.<sup>49</sup> However, the ultimate result was a non-binding document that has been influential in shaping educational fair use jurisprudence.<sup>50</sup>

The Classroom Guidelines were immediately questioned. The House Report states, “[r]epresentatives of the American Association of University Professors and of the Association of American Law Schools have written to the Committee strongly criticizing the guidelines, particularly with respect to multiple copying, as being too restrictive with respect to classroom situations at the university and graduate level.”<sup>51</sup> In discussing these Classroom Guidelines, Jaszi notes:

Perhaps the best that can be said for this approach [of negotiating guidelines] is that it has been tried, and the results have not been pretty. Negotiated guidelines tend (when they can be agreed upon at all) to be strict, narrow, and more focused on

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45. *Campbell*, 510 U.S. at 579 n.11.

46. Of course, transformativeness is not a stated statutory requirement. See *Kienitz v. Scornie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (“The district court and the parties have debated whether the t-shirts are a ‘transformative use’ of the photo—and, if so, just how ‘transformative’ the use must be. That’s not one of the statutory factors, though the Supreme Court mentioned it in *Campbell* . . .”) (parallel citations omitted).

47. H.R. REP. NO. 94-1476, at 68-70 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681-84.

48. H.R. REP. NO. 94-1476, at 47, reprinted in 1976 U.S.C.C.A.N. at 5660.

49. H.R. REP. NO. 94-1476, at 47, reprinted in 1976 U.S.C.C.A.N. at 5660.

50. Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 613 (2001).

51. H.R. REP. NO. 94-1476, at 72, reprinted in 1976 U.S.C.C.A.N. at 5685.

metrics than on the nature of the educational enterprise; worse still, rightsholders have shown an irrepressible tendency to interpret guidelines that were designed to create “safe harbors” for users as outer limits on permissible use.<sup>52</sup>

Jaszi’s insights are borne out in the treatment of the Classroom Guidelines in the Georgia State opinions. Jaszi is exactly right when he notes that rightsholders see the Classroom Guidelines as the limit on fair use rather than the safe-harbor minimum. The district court noted as much, stating:

Plaintiffs assert that the Court should enforce, through an injunctive order, the safe harbor limitations of the Guidelines as maximum permissible use, with the exception of the so-called “spontaneity” requirement which Plaintiffs do not insist upon. Plaintiffs do not explain their decision to seek acceptance of the minimum standards as the maximum standard.”<sup>53</sup>

Thankfully, both the district court and the Eleventh Circuit recognized the Guidelines were intended to state minimum allowable uses rather than maximum uses and refused to read the Classroom Guidelines as a limit on Georgia State’s fair use.<sup>54</sup> Unfortunately, Judge Vinson’s concurrence evidences no such understanding. He writes:

To the extent the majority . . . reject[s] Plaintiffs’ claim that the Classroom Guidelines should further inform the analysis . . . , I disagree. The guidelines—which expressly deal with fair use of copyrighted material in the classroom context and *place limits on not-for-profit educational copying*—are a compromised and negotiated arms-length agreement that Congress had asked for, and was fully aware of and took into account, at the time that Section 107 was enacted. *They provide*, inter alia, *strict word count limits on allowable copying*, such as the lesser of an excerpt from a prose work of not more than 1,000 words or 10 percent of the work. While the majority opinion is correct that the guidelines do not create a hard evidentiary presump-

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52. Jaszi, *supra* note 19, at 36.

53. *Georgia State*, 863 F. Supp. 2d at 1228.

54. *Georgia State II*, 769 F.3d at 1274; *Georgia State*, 863 F. Supp. 2d at 1228.

tion or carry force of law, they are still important to this analysis . . . and I believe they deserve more weight and consideration than the majority has allowed.<sup>55</sup>

Judge Vinson's treatment of the Classroom Guidelines underscores the issues they present. Judge Vinson certainly is not alone in his treatment of the Classroom Guidelines demonstrating the limits of educational fair use rather than the safe harbor.<sup>56</sup> And while Jaszi clearly recognizes this issue,<sup>57</sup> he seems to disregard the fact that courts considering fair use in the context of educational uses often seem to make reference to the Classroom Guidelines for good or ill.<sup>58</sup> Hitching the future of unlicensed educational uses on the train of fair use and transformativeness necessarily means that we will continue to languish under the weight of the existing Classroom Guidelines. Additionally, relying upon fair use means subjecting educational institutions to the grueling task of defending each and every unlicensed use of anything more than a *de minimis* excerpt as a fair use, with all of the fact-intensive, case-by-case inquiry that implies.

### C. Case-by-Case, Work-by-Work, and No Bright-Line Rules

It has long been held that fair use is an affirmative defense on which the defendant carries the burden of proof.<sup>59</sup> Likewise, fair use determinations are recognized as fact-sensitive, requiring case-by-case analysis.<sup>60</sup> In *Georgia State II*, the Eleventh Circuit ratified the district court's work-by-work analysis, stating:<sup>61</sup>

We understand "case-by-case" and "work-by-work" to be synonymous in cases where a copyright proprietor alleges numerous

55. *Georgia State II*, 769 F.3d at 1290 (Vinson, J., concurring) (emphasis added).

56. See, e.g., *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1536 (S.D.N.Y. 1991) ("There is dispute as to whether the Guidelines represent a maximum or minimum of allowable copying.").

57. Jaszi, *supra* note 19, at 36; see also *supra* note 50 and accompanying text.

58. *Georgia State II*, 769 F.3d at 1290; see also *Princeton Univ. Press v. Michigan Document Serv., Inc.*, 99 F.3d 1381 (6th Cir. 1996); *Basic Books, Inc.*, 758 F. Supp. 1522.

59. *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 561 (1985); for an interesting discussion on the history of how fair use morphed from a right into an affirmative defense, see generally Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135 (2011). Snow argues that fair use began as a right that turned into an excuse for infringement through the mistake of two treatise writers. *Id.* at 154–59. The mistake was then adopted by courts and, eventually, in *Harper & Row*, by the Supreme Court. *Id.* at 159–68.

60. *Campbell*, 510 U.S. at 587; see also, *Harper & Row Publishers*, 471 U.S. at 561.

61. *Georgia State II*, 769 F.3d at 1259–60 ("the District Court's work-by-work approach—in which the District Court considered whether the fair use defense excused a representative sample of instances of alleged infringement in order to determine the need for injunctive relief—was the proper one.").

instances of copyright infringement and a secondary user claims that his or her use was fair. Courts must apply the fair use factors to each work at issue. Otherwise, courts would have no principled method of determining whether a nebulous cloud of alleged infringements purportedly caused by a secondary user should be excused by the defense of fair use.<sup>62</sup>

This is a problem for educational institutions, as it means all educational fair use litigation that concerns an institution's policies and, therefore, many copyrighted works, will necessarily be painstaking and expensive. Given that the works at issue in the Georgia State cases were fact-based works generally understood not to be at the center of the protection afforded by copyright,<sup>63</sup> demonstrating fair use would likely be an even more difficult task for educators engaging more creative works, like works of fiction or visual art. The problem of expense is exacerbated by the fact that the Eleventh Circuit reversed two attempts by the district court to lay down bright-line rules that could guide both educational institutions wishing to avoid potential copyright infringement and future courts considering fair use defenses. What follows is a discussion of those bright-lines, as treated in both the district and appellate courts.

The district court painstakingly considered the *prima facie* case of infringement, and, where such a showing was found, the viability of the fair use defense as to each allegedly infringed work. In an effort to simplify its analysis, the court stated that as to all of the allegedly infringed works, factor two, "the nature of the copyrighted work,"<sup>64</sup> favored a finding of fair use.<sup>65</sup> Likewise, it applied "a 10 percent-or-one-chapter benchmark"<sup>66</sup> under which the third statutory factor, "amount and substantiality of the portion used in relation to the copyrighted work as a whole,"<sup>67</sup> would favor a finding of fair use.<sup>68</sup> The Eleventh Circuit rejected both mechanisms. As to the factor two analysis, the Eleventh Circuit held:

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62. *Id.* at 1258 n.20.

63. *Georgia State*, 863 F. Supp. 2d at 1244–46, 1255–56, 1291–92, 1297–99, 1364.

64. *Georgia State*, 863 F. Supp. 2d at 1225–27.

65. *Id.* at 1226–27.

66. *Georgia State II*, 769 F.3d at 1271.

67. 17 U.S.C. § 107(3) (2015).

68. *Georgia State*, 863 F. Supp. at 1243 ("Where a book is not divided into chapters or contains fewer than ten chapters, . . . copying of no more than 10% of the pages in the book is permissible . . . . Where a book contains ten or more chapters, . . . copying of up to but no more than one chapter . . . will be permissible . . .").

[W]e find that the District Court erred in holding that the second factor favored fair use in every instance. Where the excerpts of Plaintiffs' works contained evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author's experiences or opinions, the District Court should have held that the second factor was neutral, or even weighed against fair use in cases of excerpts that were dominated by such material. . . .<sup>69</sup>

As to the issue of the amount of each work used, the Eleventh Circuit stated:

[T]he District Court erred in applying a 10 percent-or-one-chapter safe harbor in its [sic] analysis of the individual instances of alleged infringement. The District Court should have analyzed each instance of alleged copying individually, considering the quantity and the quality of the material taken—including whether the material taken constituted the heart of the work—and whether that taking was excessive in light of the educational purpose of the use and the threat of market substitution.<sup>70</sup>

Taken together, these two holdings demonstrate that on remand the district court will have to conduct even more thorough analyses than that contained in its prior lengthy opinion.

While the costs associated with the appeal and the more searching analysis required by the Eleventh Circuit's decision are not yet known, what we do know from the existing decisions is that the district court in *Georgia State* issued an order "awarding Defendants attorneys' fees in the amount of \$2,861,348.71 and costs in the amount of \$85,746.39. . . ." <sup>71</sup> This award was overturned on appeal.<sup>72</sup> But, having it documented in the decisions helps to demonstrate precisely what an institution of higher learning is undertaking in defending a piece of copyright infringement litigation. Given the current state of higher education, it seems difficult to characterize even *Georgia State*, which undoubtedly required the outlay of significant resources, as a victory for most educational institutions.

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69. *Georgia State II*, 769 F.3d at 1270.

70. *Id.* at 1275.

71. *Id.* at 1253.

72. *Id.*

### III. HOW DO YOU SOLVE A PROBLEM LIKE UNLICENSED EDUCATIONAL (FAIR) USE?

#### A. *The Higher Education “Bubble”*

In 2012 Glenn Harlan Reynolds released a book entitled, *The Higher Education Bubble*.<sup>73</sup> In it, he argues that, like housing, higher education in the United States has, as a result of cheap credit and people expecting ever-higher returns on investment, experienced inflation.<sup>74</sup> And, like any bubble, this bubble too, will and must pop.<sup>75</sup> Since Reynolds’ book, a number of scholars have addressed the crisis in higher education.<sup>76</sup> While few agree as to the causes or solutions, most people paying attention will tell you that higher education in America is in trouble. To take just one metric, enrollment at institutions of higher learning in the United States, after a period of growth from 2006 to 2011, dropped in both 2012 and 2013.<sup>77</sup> In May of 2014, *Inside HigherEd* published a piece entitled “Nearing the Bottom,” in which the opening line was, “The decline in overall college enrollment has slowed this spring. . . .”<sup>78</sup> As recently as December 2014, Moody’s Investor Service noted, “[o]ur outlook for the four-year US Higher Education sector is negative.”<sup>79</sup> Many observers expected to see institutions shuttering.<sup>80</sup> And, indeed, some have.<sup>81</sup> In the midst of this uncertainty in the sector, it is truly incomprehensible to think that institutions of

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73. GLENN HARLAN REYNOLDS, *THE HIGHER EDUCATION BUBBLE* (2012).

74. *Id.* at 1–2.

75. *Id.*

76. See, e.g., David A. Smith, *The Subprime Education Crisis*, BIPARTISAN POLICY CENTER, <http://bipartisanpolicy.org/subprime-education-crisis/> (last visited Nov. 17, 2015); Anthony Davies & James R. Harrigan, *Why the Education Bubble will be Worse than the Housing Bubble*, U.S. NEWS AND WORLD REPORT (June 12, 2012 11:30 AM), <http://www.usnews.com/opinion/blogs/economic-intelligence/2012/06/12/the-government-shouldnt-subsidize-higher-education>; Lizzie O’Leary, *Is Student Loan Debt the Next Housing Crisis?*, MARKETPLACE (Aug. 30, 2013, 4:56 PM), <http://www.marketplace.org/topics/your-money/education/student-loan-debt-next-housing-crisis>.

77. U.S. CENSUS BUREAU, COLLEGE ENROLLMENT DECLINES FOR SECOND YEAR IN A ROW, CENSUS BUREAU REPORTS, Release No. CB14–177 (Sept. 24, 2014), <http://www.census.gov/newsroom/press-releases/2014/cb14-177.html?>

78. Paul Fain, *Nearing the Bottom*, INSIDE HIGHER ED (May 15, 2014), <https://www.insidehighered.com/news/2014/05/15/new-data-show-slowing-national-enrollment-decline/>.

79. Kimberly Tuby, et. al., *2015 Outlook—US Higher Education*, MOODY’S INVESTOR SERVICE (Dec. 1, 2014), [https://www.moody.com/researchdocumentcontentpage.aspx?docid=PBM\\_1000311](https://www.moody.com/researchdocumentcontentpage.aspx?docid=PBM_1000311).

80. See, e.g., Alia Wong, *The Downfall of For-Profit Colleges*, THE ATLANTIC (Feb. 23, 2015), <http://www.theatlantic.com/education/archive/2015/02/the-downfall-of-for-profit-colleges/385810/>.

81. See, e.g., Sheryl Gay Stolberg, *Sweet Briar College Is Saved but Is Not in the Clear*, N.Y. TIMES (June 23, 2015), <http://www.nytimes.com/2015/06/24/us/sweet-briar-college-is-saved-but-not-in-the-clear.html>.

higher education are poised to take the risks associated with the type of litigation strategy Professor Jaszi suggests. Academic administrators are known to be a risk-averse lot;<sup>82</sup> no doubt they are even more so in this climate. Given the significant potential cost of defending against copyright infringement allegations, risk aversion seems rational.

*B. Copyright Litigation is Expensive*

The American Intellectual Property Lawyers Association (“AIPLA”) conducts an Annual Economic Survey. According to the data AIPLA gathered in 2013, the last year for which data is presently available, litigating a copyright infringement case in which less than \$1 million was at stake through the discovery phase cost approximately \$150,000.<sup>83</sup> Of course, the higher the potential liability, the higher the litigation costs. Litigating a case where liability was up to \$25 million cost \$1.625 million, inclusive of all costs.<sup>84</sup> These are median figures, and AIPLA does not provide data for costs associated with litigating fair use issues or infringement of more than one work. Because multiple works and fair use would likely both be at issue in any case concerning educational institutions’ unlicensed use of copyrighted content, AIPLA’s figures may not even be in the ballpark. Nonetheless, they are the best available figures outside of the anecdotal data of awards for attorney’s fees and costs contained in various opinions.<sup>85</sup> At the very least, this data substantiates the concerns prompted by the Georgia State opinions: the type of litigation Professor Jaszi is suggesting is simply out of reach for all but the most elite institutions in the country. Given Jaszi’s admission that “‘test cases’ in copyright law [are] difficult to frame,”<sup>86</sup> it is hard to see how the strategy he outlines—reliance upon fair use’s transformativeness standard—could be viable.

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82. Ethan Perlstein, *Why are Academics so Risk Averse*, SYMPOSIUM MAGAZINE, Aug. 13, 2013, <http://www.symposium-magazine.com/why-are-academics-so-risk-averse/>.

83. AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION, 2013 REPORT OF THE ECONOMIC SURVEY (2013).

84. *Id.*

85. *See, e.g.*, *Basic Books, Inc. v. Kinko’s Graphics Corp.*, No. 89 Civ. 2807, 1991 U.S. Dist. LEXIS 19930, at \*3 (S.D.N.Y. 1991) (awarding Plaintiffs \$1,365,000 in costs and fees).

86. Jaszi, *supra* note 19, at 40.

C. *Fair Use: Even When You “Win,” It’s Probably Going to Cost You; If You Lose, It Could Cost You Big...*

As mentioned above, the cost for Georgia State to litigate this dispute before the Northern District through the initial decision was nearly three million dollars.<sup>87</sup> Even though *Georgia State* was widely lauded as a victory, that price tag is enough to scare many institutions of higher learning away from such a dispute in the first place. The fact that the award of attorney’s fees and costs was overturned on appeal makes that even more likely. When one considers the fact that the Georgia State defendants were in a privileged position in terms of the potential for damages liability, the idea that a private educational institution would ever seek to press its fair use claims in court seems even less plausible. To begin to understand the potential exposure a private institution might face, considering Georgia State’s exemption from damages liability is instructive.

The plaintiffs in the Georgia State case sued seeking only injunctive and declaratory relief.<sup>88</sup> This is not terribly surprising because sovereign immunity and the Eleventh Amendment usually shield states and state actors from damages liability.<sup>89</sup> Such immunity remains in the context of copyright infringement suits despite Congress’ attempt to abrogate state sovereign immunity in the Copyright Remedy Clarification Act.<sup>90</sup> The Copyright Remedy Clarification Act has been deemed unconstitutional by a number of courts

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87. *Georgia State II*, 769 F.3d at 1253; see also *supra* note 67 and accompanying text.

88. Complaint for Declaratory Judgment and Injunctive Relief at 29–30, *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1201 (N.D. Ga. 2012) (No. 1:08–CV–1425).

89. See generally Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity*, 106 YALE L.J. 1683 (1997).

90. 17 U.S.C. § 511 (2002):

(a) In General. Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal Court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 122 [17 U.S.C.S. §§ 106–122], for importing copies of phonorecords in violation of section 602 [17 U.S.C.S. § 602], or for any other violation under this title.

(b) Remedies. In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State, instrumentality of a State, or officer or employee of a State acting in his or her official capacity. Such remedies include impounding and disposition of infringing articles under section 503 [17 U.S.C.S. § 503], actual damages and profits and statutory damages under section 504 [17 U.S.C.S. § 504], costs and attorney’s fees under section 505 [17 U.S.C.S. § 505], and the remedies provided in section 510 [17 U.S.C.S. § 510].



that have addressed the question.<sup>91</sup> The Eleventh Circuit specifically held it unconstitutional in *National Association of Boards of Pharmacy v. Board of Regents*.<sup>92</sup> While the Supreme Court has not directly addressed the constitutionality of the Copyright Remedy Clarification Act, it has found attempts to abrogate sovereign immunity in both trademark and patent litigation unconstitutional.<sup>93</sup>

Of course, sovereign immunity is entirely irrelevant to private higher education institutions. Such institutions would clearly be exposed to damages liability. Given the Copyright Act's generous statutory damages provisions, this exposure is, in a word, daunting. Even absent allegations or a finding of willfulness,<sup>94</sup> defendants are open to between \$750 and \$30,000 in statutory damages per infringed work.<sup>95</sup> In other words, if the defendant in the Georgia State cases were a private institution, after winning on the fair use question as to all but five of the seventy-four allegedly infringed works, the institution would have been liable for between \$3,750 and \$150,000 in statutory damages. While the statute states that a court "shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that . . . use of the copyrighted work was a fair use . . . if the infringer was . . . an employee . . . of a nonprofit educational institution . . . acting within the scope of . . . employment . . .,"<sup>96</sup> it is important to note that this by no means constitutes blanket immunity from damages liability. First, actual damages remain available.<sup>97</sup> Moreover, the exclusion of statutory damages only applies if the defendant "had reasonable grounds to believe" it was acting within the fair use provision.<sup>98</sup> A thorough search returns no case law construing this statutory language. Further, after the Georgia State decisions, it is difficult to conceive of the precise circumstances (other than strict adherence to the aforementioned Classroom Guidelines) that would

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For a recent scholarly treatment of sovereign immunity and the Eleventh Amendment in the context of intellectual property litigation, see Michael Landau, *State Sovereign Immunity and Intellectual Property Revisited*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 513 (2012).

91. See *Perez v. Piñeiro Caballero*, No. 14-1276 (CVR), 2014 U.S. Dist. LEXIS 118282, at \*10 (D.P.R. Aug. 25, 2014) (collecting cases).

92. *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1312-19 (11th Cir. 2011).

93. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Patent Remedy Act); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (Trademark Remedy Clarification Act).

94. 17 U.S.C. § 504(c)(1) (2010).

95. *Id.*

96. 17 U.S.C. § 504(c)(2).

97. 17 U.S.C. § 504(b).

98. 17 U.S.C. § 504(c)(2).

have to exist in order for an alleged infringer to reasonably believe the requirements of the fair use provision are met.

Given the potential risks associated with asserting a fair use defense in the context of a copyright infringement suit, we would argue that rather than assuming this defensive posture, educators would be best served by articulating the important role of education within copyright as a policy platform. In light of some recent indications that there is some political will to endeavor towards a full-scale revision of the Copyright Act,<sup>99</sup> now might be the time for educators to begin to articulate their vision for a Copyright Act that recognizes the particular role education plays in the copyright paradigm.

#### IV. ASPIRING TO A COPYRIGHT ACT THAT RECOGNIZES THE CENTRALITY OF EDUCATION: ARTICULATING “EDUCATIONAL EXCEPTIONALISM” IN THE PRE-HISTORY OF THE NEXT GREAT COPYRIGHT ACT

Rather than formulating litigation strategies, it might be more productive to aim legal strategizing towards a different audience—Congress. In order to do that with any hope of being effective, educators and educational institutions will have to both articulate a shared platform and locate the resources with which to advocate for that platform. It is important to recognize, of course, that some of this advocacy is already underway,<sup>100</sup> and that content owners have long dominated the conversation around copyright policy and have the money and the entrenched relationships necessary to continue to do so.<sup>101</sup> Although we recognize the immense disadvantage edu-

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99. See, e.g., Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013); see also *infra* notes 112 to 119 and accompanying text.

100. See, e.g., Affordable Higher Education, STUDENT PIRGS <http://www.studentpirgs.org/campaigns/sp/affordable-higher-education> (last visited Nov. 18, 2015).

101. See, e.g., LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 216–18 (2004) (noting, as an example of lobbying efforts of copyright owners, the amount of money spent in the lobbying effort in support of the Copyright Term Extension Act). As an interesting aside, Lawrence Lessig ran for the Democratic nomination for the Presidency on a single-issue platform, getting money out of politics. See *Larry Lessig Announces He is Running for President*, ABCNEWS (Sept. 6, 2015), available at <http://abcnews.go.com/ThisWeek/video/larry-lessig-announces-running-president-33569612>. In an article published late in 2014, it was noted that Lessig's interest in money in politics began with the Copyright Term Extension Act:

Lessig's crusade against money in politics can be traced back to 1998, when Congress passed the Sonny Bono Copyright Term Extension Act, a law that retroactively added twenty years to the copyrights of movies and songs and other work. Lessig visited Capitol Hill to argue that a retroactive extension served no purpose other than to lock down profits for copyright-holders; it could not inspire William Faulkner or George

caters have in this space, ceding legislative reform to content owners leaves educators in the same quagmire they have been in since at least the passage of the 1976 Act—laboring under a fair use provision that fails to recognize that education is, in fact, materially different from filmmaking or music or publishing. This is true not only because education is a largely non-profit enterprise in the United States, but also because without education the IP Clause’s purpose simply cannot be realized. Advances in science, technology, and the humanities all require an educated populace and research facilities. In America, it is educational institutions that fill these needs.

In articulating the centrality of education to copyright, we would define educational exceptionalism a bit differently than Professor Jaszi does. While Jaszi’s definition makes a descriptive claim about the way that educational uses have been treated in “copyright policy and fair use law,”<sup>102</sup> this article makes a claim about the way educational uses ought to be treated in copyright policy and leaves fair use out of it altogether. As such, this article defines educational exceptionalism as a recognition within the copyright statute that educational uses are central to the purpose of copyright, as articulated in the IP Clause of the Constitution, “promot[ing] the Progress of Science and the useful Arts . . . .”<sup>103</sup> Although the statute already contains some provisions that seem to reflect such an understanding,<sup>104</sup> the very structure of the statute in which the rights of copyright owners are broadly stated and exceptions are narrowly tailored demonstrates the extent to which Congressional attention has

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Gershwin to create more work, because they were dead. To his surprise, many law-makers were not entirely opposed to his view. ‘They hadn’t heard it, because it hadn’t had the same access,’ he said. Disney, he noted, had donated to the campaigns of eighteen of the original twenty-five House members who sponsored the Bono act. It was the eleventh time in less than forty years that Congress had extended the term of existing copyrights.

Evan Osnos, *Embrace the Irony*, THE NEW YORKER (Oct. 13, 2014), <http://www.newyorker.com/magazine/2014/10/13/embrace-irony>.

102. Jaszi, *supra* note 19, at 36.

103. U.S. CONST. art. I, § 8, cl. 8.

104. 17 U.S.C. § 107 (2015) (“[T]he fair use of a copyrighted work . . . for purposes such as . . . teaching (including multiple copies for classroom use) . . . is not an infringement of copyright.”); 17 U.S.C. § 110 (“Notwithstanding the provisions of section 106, the following . . . [is] not [an] infringement(s) of copyright: (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution. . . .”); 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 under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution . . . .”).

been “captured” by content owners.<sup>105</sup> Educators can and must marshal the tools they have at their disposal to articulate an alternative vision. One way we may begin to do that is to recognize the way in which educational users are, in fact, distinct from other users of copyrighted content.

#### A. *Education is a Public Good*

There is a school of thought that asserts education is a public good, even if not in the strict economic sense,<sup>106</sup> in that there are positive externalities associated with the acquisition of higher education.<sup>107</sup> To the extent that we recognize education as a public good, presumptive exemption of educational uses from the monopoly that is copyright makes sense. In some sense, the Statute of Anne,<sup>108</sup> the predecessor to the first Copyright Act in the United States,<sup>109</sup> recognized this. It was subtitled, “An Act for the Encouragement of Learning.”<sup>110</sup> While the American copyright regime is not nearly as frank about the connection between copyright and education, the Supreme Court recently recognized just such a connection. In *Golan v. Holder*,<sup>111</sup> the Court stated: “[t]he provision of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning. We hold, however, that it is not the sole means Congress may use ‘[t]o promote the Progress of Science.’”<sup>112</sup> While both the district court and the Eleventh Circuit took note of this language in determining that the first fair use factor favored a finding of fair use,<sup>113</sup> here, the suggestion is that this argument would be best raised proactively before Congress rather than reactively before courts. There are some small, hopeful glimmers that, with the right message and messengers, the concerns of educators may meet relatively fertile ground as Congress considers drafting the “Next Great Copyright Act.”<sup>114</sup>

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105. Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 436 (2007) (citing Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 757 (2001)).

106. DOMINIC J. BREWER & PATRICK J. MCEWAN, ECONOMICS OF EDUCATION 68–77 (2009).

107. *Id.*

108. The Statute of Anne, 8 Anne cl. 19 (1710), available at <http://www.copyright-history.com/anne.html>.

109. Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427 (2010).

110. 8 Anne cl. 19.

111. *Golan v. Holder*, 132 S. Ct. 873 (2012).

112. *Id.* at 889.

113. *Georgia State*, 863 F. Supp. 2d at 1240; *Georgia State II*, 769 F.3d at 1282.

114. Pallante, *supra* note 99, at 315.

*B. Some Glimmers of Hope in the Political Sphere*

There appears to be some political will to begin what will undoubtedly be a long and arduous process toward revising the Copyright Act.<sup>115</sup> In 2013, Maria Pallante, the current Register of Copyrights and the Director of the United States Copyright Office, delivered the Twenty-Sixth Horace S. Manges Lecture, an extended version of which was later published, entitled *The Next Great Copyright Act*.<sup>116</sup> In it, Pallante suggests that given the technological advances that have occurred since the 1976 Act was passed, it may be time to consider a wholesale revision of the Act.<sup>117</sup> Pallante's piece specifically notes the potential of the Next Great Copyright Act to more fully address the needs of educators.<sup>118</sup> In addressing the need for Congressional attention directed towards the overlap of copyright and education, Pallante said:

Congressional review of higher education—which is so dynamic—would be beneficial, especially because the legal framework must ultimately support and encourage a variety of copyright objectives. These include: markets that produce quality educational materials, affordable licensing schemes, open source materials, the reasonable application of fair use, library exceptions, academic freedom—including the freedom of faculty to disclaim copyright in their own works—and formats that are accessible to persons with print disabilities.<sup>119</sup>

Likewise, in late 2012, the Republican Study Committee issued a policy memo in which it signaled a need to reconsider copyright.<sup>120</sup> The memo, entitled *Three Myths About Copyright and Where to Start to Fix It*, does not specifically mention education but does list the fact that scientific inquiry is being hampered as evidence that

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115. If the past is any prologue, the legislative history of the 1976 Act suggests that revising the copyright statute is likely to take awhile. See Jessica Litman, *Copyright, Compromise and Legislative History*:

The official legislative history is long, comprising more than 30 studies, three reports issued by the Register of Copyrights, four panel discussions issued as committee prints, six series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills over a period of more than 20 years.

72 CORNELL L. REV. 857, 865 (1987):

116. Pallante, *supra* note 99, at 315.

117. *Id.*

118. *Id.* at 333 (“Higher education activities could also benefit from congressional direction.”).

119. *Id.*

120. Matthew Yglesias, *The Case of the Vanishing Policy Memo*, SLATE MAGAZINE (Nov. 19, 2012, 2:23 PM), [http://www.slate.com/articles/business/moneybox/2012/11/rsc\\_copyright\\_reform\\_memo\\_derek\\_khanna\\_tries\\_to\\_get\\_republican\\_study\\_committee.html](http://www.slate.com/articles/business/moneybox/2012/11/rsc_copyright_reform_memo_derek_khanna_tries_to_get_republican_study_committee.html).

there is too much copyright protection.<sup>121</sup> This, of course, directly implicates the interests of educators and students. The memo serves both as evidence for existing political will to address the problems presented by our current copyright regime and as the beginnings of a platform that might be able to garner bipartisan support. In order for educators to be best positioned to represent their interests and the interests of their institutions and students in the lead up to a wholesale copyright revision, we must first articulate for ourselves the types of policy changes we envision.

### *C. Some Considerations in Formulating a Platform*

In this article, we hope to begin the conversation around potential organizing and advocating for recognition of the unique role of education in achieving the goals embodied in the IP Clause. In the long term, we envision the drafting of a policy platform that fully articulates the positions educators and educational institutions desire to see reflected in the next copyright act. While setting out a comprehensive platform is beyond the scope of this piece and will require the input of a great many more people than the authors of this article, as well as data that, as far as we can tell, is not yet available,<sup>122</sup> our intent here is to begin to consider the basic concepts which we believe to be essential in shaping such a platform. We offer three fundamental suggestions.

First, it is essential to articulate a definition of education that is, at once, inclusive and precise. While education is mentioned in a number of different places in the current Copyright Act,<sup>123</sup> the statute contains no definition of the term. Any platform intended to center education in the next copyright act will have to include such a definition. We would suggest a definition that includes both K–12 institutions and Colleges and Universities. A modified version

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121. The Republican Study Committee, *RSC Policy Brief: Three Myths About Copyright and Where to Start to Fix it* (Nov. 16, 2012), available at [https://www.publicknowledge.org/files/withdrawn\\_RSC\\_Copyright\\_reform\\_brief.pdf](https://www.publicknowledge.org/files/withdrawn_RSC_Copyright_reform_brief.pdf).

122. The conclusion of this article suggests a number of additional research projects that the authors believe will be necessary in laying the foundation for a comprehensive platform.

123. 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work . . . for purposes such as . . . teaching (including multiple copies for classroom use) . . . is not an infringement of copyright.”); 17 U.S.C. § 110 (“Notwithstanding the provisions of section 106, the following . . . [is] not [an] infringement(s) of copyright: (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution. . . .”); 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 under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution . . .”).

of the definition of “educational organization” provided by the Internal Revenue Service might be a starting point.<sup>124</sup> We would suggest the following preliminary definition: “A not-for-profit entity whose mission is the instruction or training of individuals for the purpose of improving or developing their capabilities.”

The other two essential elements in the platform we are envisioning are related and reflect a recognition of two important facts. First, we are at the very beginning of the process of revising the Copyright Act. Second, some of the problems associated with the treatment of educational uses under the 1976 Act stem from a failure to envision the myriad ways the world would change in the aftermath of the adoption of the Act. In light of these realities, it is essential that any platform educators propound the capacity for flexibility as to developments in technology and an awareness that educators and students engage a multitude of copyrighted materials in the twenty-first century. There is no question that the drafters of the 1976 Act could not have envisioned a world in which online instruction is a growing reality at every level.<sup>125</sup> Likewise, the legislative history of the Technology, Education and Copyright Harmonization Act of 2001 demonstrates a recognition that there was no sense in 1976 of the extent to which non-traditional works would be important materials for academic engagement in the twenty-first century.<sup>126</sup> Any platform that hopes to be relevant at the time of the adoption of a new copyright act, and for any period of time thereafter, must have the capacity to withstand the test of a future we can scarcely envision.

These fundamental considerations are merely the beginning of the process of thinking through the particulars of a policy platform built to advance the interests of teachers and students. What follows are some thoughts on the research projects that could come next.

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124. 26 C.F.R. § 1.501(c)(3)–1(d)(3) (2014).

125. See, e.g., Associated Press, *Online Education Rises in Popularity*, WASH. TIMES (Sept. 1, 2015), <http://www.washingtontimes.com/news/2015/sep/1/online-education-rises-in-popularity/> (discussing the increase in student enrollment in online education at the K–12 level); Editorial, *Online Education Has Made College a Different World*, VERDE INDEPENDENT, (Aug. 20, 2015, 12:51 PM), <http://verdenews.com/main.asp?SectionID=36&subsectionID=1191&articleID=66900>.

126. See generally S. REP. NO. 107–31 (2001), available at <https://www.congress.gov/congressional-report/107th-congress/senate-report/31/1?q=S.+487+%28107%29>.

## V. CONCLUSION: A CODA

Our aim in this article was to suggest that educators consider an alternative to relying upon the existing educational fair use paradigm, which has thus far not served the interests of educational institutions, educators, or, ultimately, students. Rather than resigning ourselves to being on the defensive in seeking to demonstrate the importance of education to the underlying purpose of copyright, we have suggested adopting a more proactive posture and aiming our narrative at Congress, as it appears to be gearing up to look anew at the Copyright Act. The first step in advancing towards the proposal for legislative reform that we have outlined here is to begin the work of collecting some necessary data. This includes data on existing policies and behaviors within educational institutions. The specific research questions, as we see them, include: (1) to what extent do educators utilize copyrighted works without first obtaining licenses; and (2) are the existing copyright policies of educational institutions sufficient to insulate them from copyright infringement liability. This work will require empirical expertise and, more specifically, expertise in studying behavior that is likely to be perceived as wrong. Another important avenue of research will be identifying existing organizations positioned to advocate on behalf of educators in the copyright policy arena.

This article was intended not as the final word on what educators should do with regard to copyright policy but, rather, as a starting place for a move towards organizing and advocating for ourselves, our institutions, and, ultimately, our students. There remains, of course, a tremendous amount of work to be done.