Variations2 and Fair Use:
Copyright, the Digital Music Library, and
Possibilities for Application of Fair Use

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I. Introduction
The law of copyright plays an important role in determining the design, management, function, and overall use of university-based digital music libraries. The viability of these digital libraries may depend on the doctrine of fair use; a fair use of a copyrighted work is not an infringement of copyright law. Fair use is therefore an important source of authority for the creation and management of Variations2: Indiana University’s digital music library project (hereinafter “Variations2”). Making fair-use determinations for Variations2, however, is a complex matter. The use of multiple works, the diverse needs of the end users, the increased ability of students to access copyrighted works, and the recent growth of online music services marketed to students and universities are but a few of the circumstances that add to the complexity of applying fair use to Variations2. Conducting fair-use determinations therefore requires careful consideration and analysis of these, and other, relevant facts.

Variations2 allows music students and faculty of Indiana University to quickly and easily access and work with sound recordings and print music for the purposes of education, scholarship, and research. To do so, the sound recordings and their corresponding musical scores are reproduced in digital format, stored on a local network server, and distributed via digital transmissions to the end users at designated listening carrels, classrooms, and other workstations. Fair use may offer the possibility of allowing all or some of these planned uses of copyrighted works.

This paper will examine many court rulings on fair use that are relevant to the use of copyrighted works in conjunction with Variations2. It will analogize and distinguish the circumstances surrounding Variations2 with the facts that surrounded instances for which courts have given fair-use determinations, thereby promoting a better understanding of fair use and how it should apply to Variations2. This paper will also provide suggestions that, if implemented, may bolster the claim of fair use for Variations2. This paper is an objective examination of the law of fair use and should not be construed as a legal opinion concerning whether the use of copyrighted works in conjunction with Variations2 falls within, or outside, the purview of fair use.

II. The Law of Fair Use

Under the U.S. copyright law, copyright owners have the following exclusive rights: (1) to reproduce the copyrighted work; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute reproductions of the copyrighted work to the public; (4) to perform literary and musical works publicly; (5) to display literary and musical works publicly; and (6) to perform sound recordings publicly by means of a digital audio transmission. Copyright owners’ exclusive rights however are subject to a number of exceptions, including the law of fair use:

[T]he fair use of a copyrighted work … for purposes such as criticism, comment, news reporting, teaching (including multiple copies for

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1 For more information about Variations2 and related research on copyright issues, see: http://www.dml.indiana.edu/ and http://www.copyright.iupui.edu/.  
classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.³

The fair-use doctrine is an equitable rule of reason, and therefore no generally applicable definition is possible. Fair-use determinations “are not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”⁴ The factors cannot be treated in isolation from one another and must be explored and weighed together, in light of the purposes of copyright.⁵ Case law further shapes the bounds of fair use. Accordingly, when determining whether a use is fair, one must compare and contrast the set of facts surrounding the use in question with the facts in cases decided by courts.

Furthermore, each copyrighted work enjoys independent protection. For projects involving the use of multiple copyrighted works, a fair-use determination should ideally be conducted for each individual work.

a. Factor One: The Purpose and Character of the Secondary Use

The first factor that must be considered when making fair-use determinations is the purpose and character of the secondary use. In their analyses, courts often inquire as to: (1) whether the use is of a commercial nature or for nonprofit education; and (2) whether the secondary use is transformative.

i. Inquiry: “Nonprofit Education” or of a “Commercial Nature”

Nonprofit education supports fair use. A common misconception, however, is that any use of copyrighted works in conjunction with nonprofit education constitutes fair use. In truth, “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.”⁶ The first factor “does not establish an either/or choice with commercial uses banished and nonprofit educational uses allowed. The central inquiry ‘is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of

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⁵ Campbell, 510 U.S. at 578.
⁶ Campbell, 510 U.S. at 584.
the copyrighted material without paying the customary price.”’ 7 It stands to reason that the use of copyrighted works in conjunction with nonprofit education can be of a commercial nature.

The absence of a “direct” financial benefit does not preclude a finding of commercial activity. Courts frequently look to the effect that the secondary use has on the market of the original works to determine the commercial nature of the secondary use. 8 “Repeated and exploitive copying of copyrighted works … may constitute a commercial use.” 9 A secondary use may be construed as profitable, and therefore of a commercial nature, if the user indirectly benefits by negating a need to buy original works or circumventing an obligation to pay licensing fees. 10 The following case summaries underscore key aspects about the first factor of fair use.

The secondary use of copyrighted works for educational purposes is not inherently a fair use.

- Encyclopaedia Britannica Educational Corp. v. Crooks: A nonprofit educational organization made copies of nineteen education-based audiovisual works of the copyright owner without permission. 11 The court held that “although the purpose and character of the use was clearly educational and noncommercial, the massive scope of the videotape copying and highly sophisticated methods used by the [organization] in producing and distributing these copies could not be deemed reasonable, even under the most favorable light of fair use for non-profit educational purposes.” 12

- Antioch Co. v. Scrapbook Borders, Inc.: The secondary user reproduced a set of copyrighted stickers, maintaining that the use was for the sole purpose of teaching. 13 The court held that even if the defendant had a legitimate educational purpose in mind, it capitalized on the use of the copyrighted works without paying any licensing fee. 14 The court found that the first factor in this case, “weigh[ed] heavily” against fair use. 15

- Marcus v. Rowley: A public school teacher copied and incorporated a substantial portion of another teacher’s copyrighted education-based work into her own booklet for the purpose of teaching. 16 The court held that the educational purpose of the secondary use was outweighed by the fact that the original work was also designed

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8 This analysis is often similar to the fourth-factor analysis.
10 See Worldwide Church of God v. Philadelphia Church of God, 227 F.3d 1110, 1118 (9th Cir. 2000) (stating that church that copied religious text for its members “unequivocally profit[ed]” from the unauthorized “distribution and use of [the text] without having to account to the copyright holder”); Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679, 687 (N.D.Cal.1994) (finding commercial use when individuals downloaded copies of video games “to avoid having to buy video game cartridges”).
12 Id. at 1175.
14 Id. at 993.
15 Id.
16 Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983).
for educational use, and therefore the first factor weighed against a finding of fair use.\textsuperscript{17}

The educational purpose of a secondary use can however carry considerable weight favoring fair use, even if the use is also commercial in nature.

- \textit{Rubin v. Brooks/Cole Publishing Co.}: The copyright owner’s psychological instrument, the “Love Scale,” was reproduced without permission in the secondary user’s psychology textbook.\textsuperscript{18} The court held that the productive purposes of scholarship and teaching of the secondary use weighed the first factor toward fair use.\textsuperscript{19} The court took into account that the textbook criticized and commented upon the Love Scale by asking readers to question its validity.\textsuperscript{20}

The lack of direct financial gain does not preclude a finding that the secondary use is commercial in nature.

- \textit{A&M Records, Inc. v. Napster, Inc.}: Secondary users of sound recordings received no financial gain from their reproduction and distribution of copyrighted works.\textsuperscript{21} The court held, “[C]ommercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies.”\textsuperscript{22}

- \textit{American Geophysical Union v. Texaco Inc.}: Researchers at a for-profit business were regularly making unauthorized copies of purchased scholarly journal articles.\textsuperscript{23} The court held that the laboratory for which the researchers worked acquired an unfair indirect economic advantage by photocopying the copyrighted articles without paying the necessary licensing fee.\textsuperscript{24}

\textit{Application to Variations2:}

Variations\textsuperscript{2} serves as a valuable educational tool, yet such a system should be carefully managed in order not to diminish the strength of the fair-use claims. The main purpose of Variations\textsuperscript{2} is for nonprofit education, research, and study. The use of sound recordings and print music in conjunction with the project is intended to benefit only the students and instructors of the university, and is intended only to meet their educational needs. The fact that students may listen to music, usually an aesthetic or entertaining experience, does not, by itself, subvert the claim that the project’s purpose is purely educational and not for other purposes.\textsuperscript{25} Taking additional measures to ensure Variations\textsuperscript{2} is used solely for educational purposes will, however, strengthen the fair-use claims.

Nonetheless, one could argue that for at least some sound recordings and print music, the university has received an indirect financial benefit by avoiding licensing fees. This

\begin{itemize}
  \item Id. at 916-917.
  \item Id. at 1175-1176.
  \item Id. at 916-917.
  \item Id. at 916-917.
  \item A&M Records, 239 F.3d 1004.
  \item Id. at 1015.
  \item American Geophysical Union, 60 F.3d 913 (2d Cir. 1995).
  \item Id. at 922.
\end{itemize}
argument may gain more strength as online music services market their products to universities for educational use.

Possibilities for Strengthening Fair-Use Claims:

The changing availability of licenses to use copyrighted works within Variations2 will affect fair-use determinations. Although it is unlikely that the university would be able to secure licenses for all copyrighted works necessary to the project, the university may be able to secure licenses to use some of these works. The availability of licenses to use works may affect the fair-use analyses; the use of these works without securing necessary licenses may be construed as commercial in nature. Ultimately, Variations2 may consider a hybrid approach of obtaining licenses for the use of some works and claiming fair use for the use of others.

Limiting access to works may strengthen fair-use claims. Traditionally, access to sound recordings placed on reserve and to print music in the music library was limited. Access to sound recordings was often limited to locations where students could listen to the recordings (i.e., the music library, faculty offices, and the music classrooms). Access to these works was also limited by the amount of time students could retain possession of both sound recordings and print music. Expanding the availability of the sound recordings and print music beyond these limited locations and periods of time increases students’ ability to use Variations2 for purposes other than education. This fact may weaken fair-use claims regardless of the intended educational purpose of the project.

Variations2 is currently accessible at the music library by all students enrolled at Indiana University. To strengthen fair-use claims, access could be further limited to a smaller set of students (i.e., music students or students enrolled in courses requiring access to the digital library). Similarly, fair-use claims may be bolstered by limiting student access only to works deemed necessary by course instructors rather than to the entire database—a measure that is currently employed for students accessing Variations2 off-campus.

Another possible limitation that would strengthen fair-use claims for print music would be to prohibit students from printing sheet music available through Variations2 unless deemed necessary for a particular course or purpose. This restriction would reduce students’ ability to obtain and retain print music for purposes other than their education.

ii. Inquiry: Is the Secondary Use Transformative?

When analyzing the first factor, courts will also evaluate “whether the new work . . . merely supersedes the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; . . . in other words, whether and to what extent the new works is transformative.”26 A “transformative use is not absolutely necessary for a finding of fair use,” but “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”27 “[D]ifference in purpose is not quite the same thing as transformation, and . . . transformativeness is the critical inquiry under this factor.”28

27 Id.
The mere reproduction of a copyrighted work with no new or further purpose may not be transformative.

- *Encyclopaedia Britannica Educational Corp v. Crooks:* A nonprofit educational organization used “technological advances” (videotaping) to reproduce multiple copyrighted works in their entirety in order to make the works more accessible to students and teachers.\(^{29}\) The court held that the videotaping was unnecessary; educational ‘access’ to the works was attainable through the copyright owner’s licensing mechanism.\(^{30}\)

- *Infinity Broadcasting Corp. v. Kirkwood:* The secondary user retransmitted the copyright owner’s radio broadcasts over telephone lines.\(^{31}\) The purpose of original broadcasts was to entertain the listeners and the secondary user’s purported purpose of the reproductions was to allow advertisers and radio stations to review commercials and on-air talent. Nevertheless, the court found that the different, and possibly beneficial, purposes of the secondary user’s customers were outweighed by a complete absence of transformativeness of the retransmissions.\(^{32}\) Because the retransmissions over the telephone lines could be used for entertainment purposes, the court held there was no transformation.\(^{33}\)

- *UMG Recordings, Inc. v. MP3.com:* The secondary user reproduced the copyright owners’ sound recordings into MP3 format so that subscribers could listen to the recordings from wherever they had internet access.\(^{34}\) The court held that the retransmission of the unauthorized copies in another medium with no “new aesthetics, new insights and understandings” to the original sound recordings was “an insufficient basis for a legitimate claim of transformation” and that although the services offered may have been innovative, they were not transformative.\(^{35}\)

A secondary user’s new and further purpose may be more likely transformative when assurance is given that the secondary work cannot be used in a way that supersedes the original work’s purpose.

- *Nunez v. Caribbean International News Corp.:* Modeling photographs that had commercial value to the copyright owner were used without permission in conjunction with a news report regarding a topic of interest to the public by a secondary user.\(^{36}\) Although the entire photographs were reproduced, the court determined that the use of the photographs combined with the addition of editorial commentary by the newspaper “did not merely ‘supersede[] the objects of the original creation,’ but instead used the works for ‘a further purpose,’ giving them a new

\(^{29}\) *Encyclopaedia Britannica Educational Corp v. Crooks,* 542 F. Supp. 1156 (W.D.N.Y. 1982).

\(^{30}\) *Id.* at 1176.

\(^{31}\) *Infinity,* 150 F.3d 104.

\(^{32}\) *Id.* at 108.

\(^{33}\) *Id.*

\(^{34}\) *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

\(^{35}\) *Id.* at 351.

\(^{36}\) *Nunez v. Caribbean International News Corp.*, 235 F.3d 18 (1st Cir. 2000).
'meaning, or message.'" The court also took into account that the “newspaper front page is simply an inadequate substitute for an 8” X 10” glossy.”

- **Kelly v. Arriba Soft Corp.**: A secondary user created thumbnail-size, low-resolution reproductions of the copyright owner’s works to use as part of an internet search engine. The court determined that the secondary use was transformative because the secondary user had both a further purpose beyond creating an aesthetic experience for viewers and the use of small, low-resolution reproductions ensured the new purpose, because third party viewers could not use the reproductions in order to supplant the objects of the original.

- **Campbell v. Acuff-Rose Music, Inc.**: A secondary user copied the basic melody and bass line of a copyrighted song in order to parody the original work. A parody’s inherent purpose is to provide commentary and criticism upon the message of the original work, not to compete with the original work’s purpose. The Court held the new message of the secondary use had a different purpose than the original work and was therefore transformative.

This weighed the first factor toward fair use despite the commercial nature of the secondary use.

**Application to Variations2:**

Simply making copyrighted works available to students to further an educational purpose may not be enough to make the use transformative. Providing a higher level of assurance that the secondary use does not supplant the objects of the original works may, however, help make the secondary use transformative. Variations2 may consider implementing procedures that further ensure that the system is used solely for educational purposes.

Variations2 incorporates several innovative pedagogical tools that may be applied to sound recordings and print music. These tools include the timeline analysis tool—a visual representation of sound recordings that can be viewed as the recordings are played. As sound recordings play, users are able to “bookmark” points along the timeline. Bookmarks can be saved for future use and shared with others to direct them to specific places in the sound recording. This tool allows students and instructors to provide meaningful criticism and comment concerning specific sections of the recording and direct others precisely to the relevant point in the recording.

Another pedagogical feature of Variations2 provides students with previously written criticism and comment specific to sections of the music as the piece of music progresses in time. Listeners may receive multiple comments at different times as the recording progresses. Another tool allows users to select and delineate portions of the music, label them via text and color-coding along a timeline, and provide criticism and comment for each section selected. The criticism and comment can be saved and shared among students and instructors.

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37 Id., at 23 (citing Campbell, 510 U.S. at 579).
38 Id.
40 Id. at 818-819.
42 Id. at 583.
43 Id.
44 Id.
Variations2 also provides a “Shuffle Quiz” tool for use with the sound recordings. Students and instructors can pre-select not only entire pieces of music, but smaller sections of music, to be played at random so that they, or others, may to listen to the selections and perform quizzes concerning the identity of the sound recordings played. Using this tool, students are able to practice for listening tests. Instructors may also use this tool in the classroom or the tool may be modified to provide assessment of student progress in distance education courses in the future.

Variations2 also provides pedagogical tools to be used with the print music available through the system. Users are able to write upon, select portions of, and highlight sections of the print music in different colors. Users’ modifications and comments are capable of being saved and shared among other students and instructors in electronic and print form.

The use of the electronic bookmarks, comments, highlights, and other modifications made by users are made with as little implication of the copyright owners’ rights as possible. The modifications are saved separately from the sound recordings and print music as independent data. When users save their modifications or share them with others, they are saving or sharing only the modifications, not the works themselves. The data saved by users are relatively unusable outside the system. When the modifications are reused in conjunction with the works available through Variations2, the data realign with the corresponding works. In a way, Variations2 reads the stored data and “superimposes” the modifications back onto the original work. This feature helps to ensure that the works, even with the modifications, cannot be used outside of Variations2. The one possible exception to this relatively noninvasive system occurs when students make modifications to print music and then make hard copies of the work by printing it out.

Possibilities for Strengthening Fair-Use Claims:

Despite the immense educational value that the project’s innovative pedagogical tools offer, students may still access the sound recordings and music compositions without having to actually employ the supplemental tools. Employing these tools will help make the secondary use of the works transformative. Because the object of the original sound recordings is normally entertainment, and the object of print music is usually performance or practice, the use of the pedagogical tools should be encouraged (if not required to some extent) among students and instructors to help ensure that the secondary use is educational.

Currently, some sound recordings and print music are available to students at off-campus access points (i.e., personal computers via the internet). The scope of these works is limited. Each student is granted access only to works deemed necessary by each instructor. Access to these works terminates at the end of each semester. Off-campus access stretches far beyond the traditional bounds of the shelf-reserve system. To further ensure the use of Variations2 is transformative in these settings, instructors could be encouraged or required to make use of the pedagogical tools for students who use the off-campus access points rather than just for listening purposes. This would further prevent students from using access to the works for purposes other than education.

b. Factor Two: The Nature of the Copyrighted Work

The second statutory factor of fair use is the nature of the copyrighted work. Courts make two main inquiries under this factor: (1) whether the work is more creative or fact-
based; and (2) whether the original work has been published prior to the secondary use. Some courts also consider the accessibility of the original work. 45

“Works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works.”46 Many courts have used the level of creativity of the original work as their sole basis for determining whether the second factor weighs for or against a finding of fair use (or at least they do not mention any other considerations in their opinion). 47 Using this formula, the fact that the sound recordings are often highly creative will likely tip this factor against fair use.

Yet, other courts have counterbalanced the highly creative nature of original works with the fact that the works had been previously published and made available to the public. 48 “Published works are more likely to qualify as fair use because the first appearance of the artist’s expression has already occurred.”49 “Previously published works ... qualify for ‘far less protection’ against fair use, and therefore, even where the work is ‘creative’ the second factor may not weigh as ‘decisively’ in the copyright holder’s favor where the work has been previously distributed.”50 When weighing the highly creative nature of works together with the fact that the works have been previously published, courts have concluded that the second factor weighs in favor of the copyright owner, but not as heavily as it would if the works were unpublished. 51

Another inquiry made by some courts is whether the secondary user has access to the original works. 52 “A key, though not necessarily determinative, factor in fair use is whether the work is available to the potential user. If the work is out of print and unavailable for purchase [or license] through normal channels, the user may have more justification for reproducing it than in the ordinary case. . . .”53

Another consideration that may affect the second factor is the transformativeness of the secondary use—a consideration most closely identified with the first factor. Several courts have recognized that the second factor may be of less or even of no importance when

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49 Kelly, 336 F.3d at 820 (citing Harper & Row, 471 U.S. at 564).


51 See Kelly, 336 F.3d at 820 (“[t]his factor weighs only slightly in favor of Kelly.”); Higgins, 4 F.Supp.2d at 707 (“[T]his factor does not weigh heavily in [copyright owner’s] favor because [owners’ work was previously published by distribution of recordings of it.”).


assessed in the context of certain transformative uses.\textsuperscript{54} For example, in the case of \textit{Campbell}, the Supreme Court held that the creative nature of the original work was “not much help” in the fair-use analysis of a parody of the work “since parodies almost invariably copy . . . expressive works” in order to adequately criticize or comment upon the original work.\textsuperscript{55} Conversely, where secondary uses are minimally transformative, the second factor may remain significant in fair-use analyses.\textsuperscript{56}

\textit{Application to Variations2:}

The sound recordings used in conjunction with Variations2 are, for the most part, of a highly creative nature—a quality that weighs the second factor against a finding of fair use. However, the use of a highly creative work may be somewhat counterbalanced by the fact that the works have been previously published. Courts have consistently held that the use of a highly creative work will weigh the second factor against fair use. Yet, the law is unsettled concerning how heavily this factor will tilt against fair use if the work has been previously published.

Unavailability of the original works may be a consideration. It is unclear however under what circumstances sound recordings used in conjunction with Variations2 would qualify as “unavailable.” Several possibilities exist: (1) the work (\textit{i.e.} CD or LP) or access to the work (\textit{i.e.} via an online music service) is unavailable and a license to use the work as part of Variations2 may also be unavailable; (2) the work or access to the work is unavailable, but a license to use the work as part of Variations2 may be available, or (3) the work or access to the work is available, but a license to use the work as part of Variations2 may be unavailable. Courts that have given consideration to this issue have offered little direction concerning the circumstances surrounding Variations2. It is therefore unclear how each scenario should be weighed for purposes of the second factor.

\textit{Possibilities for Strengthening Fair-Use Claims:}

The availability of alternative methods of access to the works used with Variations2 should be evaluated. This analysis may include the ability to acquire sound recordings or licenses to use works as part of Variations2. The analysis may also include a determination of the availability of works via online music services. Each type of availability may influence the weight of this factor. The more unavailable works are to Variations2 and its users, the more likely the second factor tips towards fair use.

As stated above in the suggestions under the first factor, the V2 project could consider promoting the use of the pedagogical tools, including the incorporation of criticism and comment into the use of the works. Because such uses may be highly transformative, this would lessen the importance of the second factor altogether.\textsuperscript{57}

c. Factor Three: The Amount and Substantiality of the Portion Used

\textsuperscript{54} \textit{Campbell}, 510 U.S. at 586; \textit{Castle Rock Entertainment, Inc. v. Carol Publishing Group}, 150 F.3d 132, 144 (2d Cir. 1998), \textit{Byrne}, 4 F. Supp. 2d at 235-236.
\textsuperscript{55} \textit{Campbell}, 510 U.S. at 586
\textsuperscript{56} \textit{Id.}; \textit{Castle Rock Entertainment, Inc}, 150 F.3d at 144 (2d Cir. 1998), \textit{Byrne}, 4 F. Supp. 2d at 235-236.
\textsuperscript{57} \textit{Id.}
The Supreme Court has held, “The third factor asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole are reasonable in relation to the purpose of the copying.”\(^{58}\) No more of the original work may be used than is necessary.\(^{59}\) This inquiry must therefore draw upon the analysis of the first factor—the purpose and character of the use.\(^{60}\)

The percentage of the original work used is not necessarily determinative. Many courts have found uses of small portions of works to be unfair. In contrast, several courts have held uses of original works in their entirety can be fair.\(^{61}\) The use of entire works does not necessarily preclude a finding of fair use, but the amount is relevant in that “it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth [factor].”\(^{62}\)

Some courts have also considered the length of time of the secondary use as part of the third factor analysis.

- *Infinity Broadcast Corp. v. Kirkwood*: Radio broadcasts were reproduced and made available via the telephone by a secondary user without the permission of the copyright owner.\(^{63}\) The secondary user’s purported purpose of the reproductions was to allow advertisers and radio stations to review commercials and on-air talent. The court held that regardless of the level of benefit to society that the service provided, the secondary user “must still justify potentially providing [users] with access to every radio station [the service] serves, 24 hours a day, seven day a week.”\(^{64}\) The court found that this amount was more than necessary for the given purpose.\(^{65}\) These facts tipped the third factor against fair use.\(^{66}\)

- *Encyclopaedia Britannica Educational Corp. v. Crooks*: A nonprofit educational organization videotaped nineteen education-based audiovisual works without permission from the copyright owner.\(^{67}\) A significant component of the court’s analysis of the third factor included the fact that entire copyrighted works were not only being copied, but had been kept and used for ten years, amounting “to a virtual substitution for the purchase or license of the plaintiff’s works.”\(^{68}\) The court held that such substantial use weighed this factor against fair use.\(^{69}\)

**Application to Variations2:**

The use of entire sound recordings for the purpose of educating music students is ordinarily a necessity. The use of entire pieces of print music may also be necessary. Such

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\(^{58}\) *Campbell*, 510 U.S. at 586 (internal citations omitted).

\(^{59}\) *Id. at 589, Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 110 (2d. Cir. 1998).

\(^{60}\) *Id. at 586-587; Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).


\(^{62}\) *Campbell*, 510 U.S. at 587.

\(^{63}\) *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, (2d. Cir. 1998).

\(^{64}\) *Id. at 110.

\(^{65}\) *Id. at 109-110.

\(^{66}\) *Id.*

\(^{67}\) *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982).

\(^{68}\) *Id. at 1179.*

\(^{69}\) *Id.*
uses can be analogized to the use of a copy of an entire painting in an art class; use of anything less than the whole work often may not satisfy the educational purpose. The analysis, however, should not stop there. The use of the copyrighted work should take no more from the original work than necessary to achieve the educational purpose of the project. The systematic reproduction and distribution of multiple copyrighted works for the purpose of replicating the volume of works available in the traditional print reserves system may therefore prove more difficult to fit within fair use than may the reproduction and distribution of only specified works for which an immediate educational need has been demonstrated.

The length of time works are available to students may be important to this analysis. The period of access should not exceed what is necessary to carry out educational purposes. Currently, Indiana University students may access all the works available through Variations2 from limited on-campus access points. Students may continue to access these works for as long as they remain enrolled in courses at the University. Access to the project from off-campus, however, is currently limited to students enrolled in music classes and only for works deemed necessary by course instructors. Student access to these works is terminated at the end of each semester.

Possibilities for Strengthening Fair-Use Claims:

In order to strengthen the fair-use claims, works could be made available to each student for a period of time commensurate with his or her demonstrated educational need. Access to the Variations2 database of works could be limited to students depending upon the courses they are enrolled in and their particular research projects. Once these courses or projects end, access to the works could be terminated.

d. Factor Four: The Effect on the Market for the Original Work

The fourth factor of fair use analyzes the effect of the secondary use on the market for the original works. This analysis “[r]equires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”70 This analysis also includes inquiries into whether an existing licensing regime for the use of the work exists and the level to which the secondary use is transformative.

i. Inquiry: The Extent of Market Harm

When addressing the extent of market harm to original works, courts examine whether a secondary use usurps or substitutes for the market of the original work. In doing so, courts assess the extent to which a secondary use taps any sources of economic profit that would otherwise go to the copyright owner.71 This assessment includes any potential licensing revenues lost due to the secondary use.72 However, if the secondary use does not

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70 Campbell, 510 U.S. at 590. (quoting NIMMER, MELVILLE B. AND DAVID NIMMER: NIMMER ON COPYRIGHT, § 13.05(A)(4)(2004)).
72 American Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994).
“materially impair the marketability of the work which is copied”, this factor may tilt toward fair use.\textsuperscript{73}

\textit{Application to Variations2:}

The market harm to the works used within Variations2 is minimized by restricting access to the works via password protection and limiting the places where the works may be accessed. These protections, however, address only the likelihood that student use of the works will affect the market for the sound recordings and print music. The protections do not address the “front-end” reproduction and distribution of the sound recordings conducted as part of Variations2 and the effect that activity may have on the market for sound recordings.

\textit{Possibilities for Strengthening Fair-Use Claims:}

Two further limits on access and use might strengthen fair-use claims. First, the reproduction and uploading of copyrighted works could done only on an as-needed basis. Limiting the use of these works to instances for which there is a demonstrated educational need may strengthen fair-use claims.

Second, access to works within Variations2 could be limited to students with a demonstrated educational need. The different needs of each music student could be considered separately. For example, some research projects may require a student to search large sections of the database and authorization to do so could be granted accordingly. At the same time, other music students may only need to access more limited portions of the database. Authorization, again, may be granted accordingly.

\textit{ii. Inquiry: Available Licensing Regimes for the Use of the Original Works}

The market for the original work, for purposes of fair-use determinations, includes potential licensing revenues for “traditional, reasonable, or likely to be developed markets.”\textsuperscript{74} A secondary user may not use a work that in effect substitutes for a derivative market that copyright owners “would in general develop or license others to develop.”\textsuperscript{75} The relevant market, however, does not include markets which the copyright owner “has not typically sought to, or reasonably been able to, obtain or capture.”\textsuperscript{76}

The existence of often-used licensing mechanisms to use copyrighted works may tilt the fourth factor against fair use.

- \textit{American Geophysical Union v. Texaco Inc.:} The secondary user reproduced copyrighted journal articles for the purpose of for-profit research.\textsuperscript{77} The court held that the loss of licensing revenues was an appropriate consideration for the market harm, especially because a workable market to obtain licenses existed at that time.\textsuperscript{78}

\textsuperscript{73} Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539, 567 (1985) (citing 1 NIMMER § 1.10[D]).

\textsuperscript{74} Id.

\textsuperscript{75} Campbell, 510 U.S. at 592.

\textsuperscript{76} Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id. at 930-931.
• *Princeton University Press v. Michigan Document Services, Inc.*: The secondary user used copyrighted works in preparing and selling university coursepacks without permission from the owners.\(^{79}\) The court took note that each of the copyright owners maintained a department that processes requests for permission to reproduce portions of copyrighted works.\(^{80}\) Also, makers of coursepacks could have requested permission to use the works through the Copyright Clearance Center, a well-known and often-used licensing mechanism for book and journal reproduction permission requests.\(^{81}\) The court held that “the potential for destruction of this market by widespread circumvention of the plaintiffs’ permission fee system is enough … to negate fair use.”\(^{82}\)

**Application to Variations2:**

Variations2 may potentially affect two markets for sound recordings and print music: the market that reaches students individually and the market comprising universities. A workable market may exist by which the university may obtain licenses that allow students to access several sound recordings (*i.e.* Ctrax, Napster, Naxos, MusicRebellion.com, Ruckus).\(^{83}\) These services, however, allow mere access to sound recordings and do not allow for the implementation of the pedagogical tools available through Variations2. If use of Variations2 negates the need to pay subscription fees to these services by merely *supplanting* this market, it may adversely affect the market for these works.

Similarly, some works used with Variations2 are available to students individually. Students can buy sound recordings (*i.e.* CDs, LPs) or may obtain or access recordings through a multitude of online music services (*i.e.* Rhapsody, Napster, Walmart.com, Apple iTunes, MSN Music, etc.). None of these services allow for the implementation of the pedagogical tools available through Variations2.

Nevertheless, many of the sound recordings used in Variations2 are out of print and no longer readily available either in hardcopy or through online music services. Also, no licensing mechanism analogous to the Copyright Clearance Center exists that would allow licenses to be easily obtained for use of these works with Variations2.\(^{84}\)

The lack of such a licensing mechanism does not preclude a finding of adverse market effect because licenses can still be sought directly from the copyright owners. The fact that the copyright owners have not taken steps to fill this market for their out-of-print works by adopting a collective rights process may however suggest little or no market harm.\(^{85}\)

The licensing regimes for print music may be different than that of the sound recordings and requires a separate analysis. The secondary use of print music may also affect its market much differently than that of the secondary use of sound recordings. One conspicuous difference between the project’s use of sound recordings and print music is that students are able to make copies of the print music available via Variations2 for their retention. Currently, students may print hardcopies of the music both with modifications

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\(^{80}\) *Id.* at 1384.

\(^{81}\) *Id.*

\(^{82}\) *Id.* at 1386 (internal citations omitted).

\(^{83}\) See *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994).

\(^{84}\) See *Id.*

\(^{85}\) *Id.* at 929-931.
made by the students and in the music’s *original form*. Students could keep these works for a potentially indefinite period of time.

**Possibilities for Strengthening Fair-Use Claims:**

As the online availability of sound recordings becomes increasingly more prevalent and affordable, and in light of the increasing number of universities that provide their students with access to these services, the availability of sound recordings should continually be monitored and assessed. If mere access to the copyrighted works can fulfill some of the music students’ educational needs, obtaining licenses for access to these works through existing services should be considered.

Historically, the recording industry has been reluctant to provide licenses for the use of sound recordings. As the recording industry changes its practices and adapts to new technological advances, it may adopt new license models for projects such as Variations2. Offering such licenses would evidence the desire of copyright owners to participate in this market—a consideration that would affect fair-use determinations.

As fair-use determinations should be made for each sound recording independently, the availability of licensing each work used should be a consideration. Some copyright owners will be willing to license the use of their works while others will not. This dichotomy may suggest the possibility of a hybrid approach of licensing some works and considering fair use for others.

Concerning print music, there is an additional determinant that does not exist for the use of the sound recordings. Students may print the sheet music allowing use after the educational need has passed. This fact weighs heavier against fair use than if the print music were only available for view. One possible solution includes obtaining licenses to use the print music in conjunction with Variations2.

Attempts to seek licenses should be well-documented. Difficulty in obtaining licenses to use copyrighted works may carry weight towards a finding of fair use, evidencing copyright owners’ unwillingness to enter into the licensing market.

**iii. Inquiry: Is the Secondary Use Transformative?**

The level of transformation of the secondary use inquiry relates most closely to the first factor, yet a highly transformative use can also carry a great deal of weight in the fourth factor. When the secondary use is transformative, “market substitution is at least less certain, and market harm may not be so readily inferred.”\(^\text{86}\) In fact, “[t]he more transformative the new work, the less likely the new work’s use of copyrighted materials will affect the market for the materials.”\(^\text{87}\)

Highly transformative works are less likely to supplant the market for the original work.

- **Campbell v. Acuff-Rose Music, Inc.**: The secondary user of a musical work created a parody of the original work, and in doing so, borrowed heavily from the original.\(^\text{88}\) The Supreme Court held that little or no actionable market harm had been done to the

\(^{86}\) *Campbell*, 510 U.S. at 591.

\(^{87}\) *Elvis Presley Enterprises, Inc. v. Passport Video*, 349 F.3d 622, 631 (9th Cir. 2003).

\(^{88}\) *Campbell*, 510 U.S. at 569.
original because, by nature, parodies usually fill different market functions and therefore their use does not substitute for the use of the original work.  

- **NIXVM Corp. v. The Ross Institute:** The secondary user reproduced excerpts from a manual to criticize and comment upon the manual and the organization that the manual supported. The court found no legally recognizable market harm because “criticism of a seminar or organization cannot substitute for the seminar or organization itself or hijack its market.”

No market harm may be adduced if the secondary use cannot usurp the market or potential market for the original work.

- **Nunez v. Caribbean International News Corp.:** A newspaper reproduced and published a studio photograph in a news report without permission from the copyright owner. The court held that no market harm took place due in part to a “relatively poor reproduction” of the work where the original market required the use of high quality images. The court held that, “a newspaper front page is simply an inadequate substitute for an 8” X 10” glossy.”

- **Kelly v. Arriba Soft Corp.:** The secondary user reproduced the digital works of the copyright owner that were available on the internet for use in its internet search engine. The court held that little or no market harm took place due in part to the low-resolution quality of the reproductions. The court stated that the secondary use did not supplant the objects of the original work because third parties were unable “to view, create, or sell a clear, full-sized image without going to [the copyright owner’s] web sites.”

**Application to Variations2:**

To help tip the fourth factor toward fair use, the use of sound recordings and print music should not “usurp a market that properly belongs to the copyright holder.” By their very nature, highly transformative works are less likely to usurp or replace the market for the original. Therefore, the more transformative the use of the sound recordings and print music reproduced and distributed as part of Variations2, the less market harm can be adduced. The pedagogical tools available through Variations2 may help to make the secondary use of the works transformative. Currently, however, the system offers no assurance that the pedagogical tools will either be employed by the instructors or used by the students.

**Possibilities for Strengthening Fair-Use Claims:**

Strengthening fair use with respect to the transformative secondary use inquiry of the fourth factor may be accomplished with the methods suggested in the discussion of the first factor. Employing the supplemental pedagogical tools provided as part of Variations2 may

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89 Id. at 592.
90 NIXVM Corp. v. The Ross Institute, 364 F.3d 471 (2d Cir. 2004).
91 Id. at 482; See New Era Publications Int’l v. Carol Publishing Group, 904 F. 2d 152 (2d Cir. 1990).
93 Id. at 25.
94 Id.
95 Id.
96 Kelly v. Arriba Soft Corp., 336 F.3d 811, 821-822 (9th Cir. 2003).
97 Id. at 822.
help ensure that the purpose of student use of works is educational, thereby helping to make secondary uses transformative. For more detail concerning this possibility, please refer to the suggestions made as part of the discussion of the first factor.

III. Conclusion

The main difficulty in assessing fair-use claims is the inherent ambiguity and flexibility of the law. These qualities are beneficial in that they allow fair use to be applied to new and different sets of circumstances. Yet, these same qualities also provide frustration when looking for concrete answers about whether certain uses are fair. This frustration becomes especially evident when applying fair use to complex matters such as Variations2.

Hard and fast answers concerning complex fair-use issues do not come easily; in fact, they generally come in the form of court decisions that involve years of patience and expensive litigation. Nevertheless, various steps can help ensure that uses of copyrighted works as part of Variations2 are fair. To that end, this document offers many suggestions for strengthening claims of fair use. Each suggestion, if implemented, can incrementally increase the likelihood that Variations2 conforms with fair use.

Some uses of some copyrighted works in conjunction with Variations2 are most likely to be deemed fair without implementation of any of these suggestions due to the particular facts surrounding these individual works. These uses seem to fall comfortably within fair use. The several safeguards in place within Variations2 help assure the uses of the works are for nonprofit education and not for commercial use and minimize market harm to the original works.

Nevertheless, the possibilities described throughout this document to strengthen fair-use claims may help ensure that more uses of more works will fall more comfortably within fair use. Therefore, prudence dictates that the many possibilities of strengthening fair-use claims be considered and employed if feasible.

Every possible use of every work within Variations2 may not be a fair use. Therefore, a hybrid approach of claiming fair use for some uses of some works and seeking licenses for other uses of works may be necessary. This approach should be continually assessed as the facts surrounding Variations2 and the copyrighted works will change and evolve. Therefore, the fair-use assessments surrounding Variations2 will also change and evolve.

Similarly, changes in the law must also be continually monitored. The contours of fair use evolve over time; they may change with each new relevant court decision. New court decisions concerning fair use continually reshape the boundaries of fair use and may affect how copyrighted works are used in conjunction with Variations2.