24-1436-cv(L), 24-1567-cv(XAP)

United States Court of Appeals

for the

Second Circuit

ESTHER WILDER,

Plaintiff-Appellant-Cross-Appellee,

– v. –

SARAH HOILAND,

Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT-CROSS-APPELLEE

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STATEMENT OF JURISDICTION

This case involves a claim of copyright infringement brought by Dr. Esther Wilder against Dr. Sarah Hoiland pursuant to the Copyright Act, 17 U.S.C. §§ 101 *et seq*. The district court had subject matter jurisdiction under 28 U.S.C. § 1331, & 28 U.S.C. § 1338. The district court entered judgment disposing of all of Wilder's claims on February 2, 2024. SPA-46. That judgment became final upon the district court's disposition, on April 24, 2024, of Wilder's motion to alter or amend judgment and Hoiland's motion for attorney fees. SPA-47. Wilder filed a timely notice of appeal on May 23, 2024. JA-718. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in granting summary judgment to Hoiland based on Hoiland's fair use defense.

2. Whether the district court erred in denying summary judgment to Wilder with respect to Hoiland's fair use defense.

3. Whether the district court erred in denying summary judgment to Wilder with respect to Wilder's claim of ownership.

STATEMENT OF THE CASE

This is a copyright infringement action brought by Dr. Esther Wilder against Dr. Sarah Hoiland. The district court (Hon. P. Kevin Castel, J.) granted Hoiland's motion for summary judgment on her affirmative defense of fair use. The district court denied Wilder's motion for summary judgment on Hoiland's affirmative defense of fair use and on Wilder's claim of ownership.

I. Background.

A. The importance of quantitative reasoning, faculty development, and learning assessment.

Drs. Esther Wilder and Sarah Hoiland specialize in a field called quantitative reasoning, or QR for short. The field is also known as "numeracy," which readers might find a more intuitive term. Literacy is about knowing how to use letters and words; numeracy is about knowing how to use numerical data. JA-246; JA-177.8. Teach people to read and write and you are teaching them literacy. Teach people to understand numbers and data—and to create logical arguments *out of* that data—and you are teaching them numeracy. JA-177.8; JA-65. You are teaching them to reason quantitatively. You are teaching them, in what will be the vernacular of this case, "QR."

But the professors involved in this case don't merely teach QR to their students. They also teach *how* to teach QR. They do that by running faculty development programs in which the teachers themselves become the students. These faculty development programs are essential because the teaching of QR, just like the studying of it, is its own special skill. QR is tied to upward social mobility, JA-247, but it can often be tricky for students to navigate—particularly those from underrepresented minority populations. JA-180. Teachers in the field must understand the unique needs of those underrepresented minorities—and must develop culturally responsive methods to address those needs. JA-110. For many in the academic world, it does not come naturally.

And the professors involved in this case don't stop at teaching how to teach QR. They also teach faculty members how to *assess* their teaching. Faculty development programs in all fields require training on the front end and evaluation on the back end. JA-110. That is known as "learning assessment." JA-167. Academics who teach in any field have to know whether all their teaching is bearing fruit. Assignments, quizzes and exams will give some hint of it. But there are more rigorous ways to discover what works and what doesn't work—all of which should be

components of a well-run faculty development program. And that—the training to do that very assessment—is at the core of this case.

B. Wilder creates a learning assessment plan for quantitative reasoning.

1. Dr. Esther Wilder is a tenured professor in the Department of Sociology at Lehman College, The City University of New York. JA-46. A major focus of her academic research for the past two decades has been the development of methods for faculty to teach QR effectively to college students. JA-47. Many of her scholarly papers and other publications, projects and presentations have been related to this research. JA-47.

2. In 2011, Wilder was awarded a National Science Foundation grant of $600,000 for a faculty development project known as "NICHE," an abbreviation for "Numeracy Infusion Course for Higher Education." JA-47; JA-288. The grant money was funneled through the Research Foundation of the City of New York, but Wilder directed the project. JA-288; JA-47. The NICHE program was designed to teach faculty at CUNY about best practices for infusing quantitative reasoning into their own courses. JA-47; JA-223. Wilder developed and created most of the instructional material in the NICHE program. JA-47.

Wilder and her team created a faculty development program with eight different modules. JA-71; JA-110. Each module was designed so that it could be completed by faculty enrollees online in approximately five to six hours. JA-256; JA-395. Over the course of those eight modules, faculty members learned to articulate QR learning goals, to identify and implement best practices for teaching QR, and to develop strategies for incorporating QR into their own course instruction. JA-289. But the apex of the program was the assessment module. At that stage of the course, faculty members learned to evaluate their *own* QR teaching results—what worked, what didn't work, and what could be improved in the future. JA-289.

Wilder wrote this assessment portion—a component of the overall program that has frequently been referred to in this case as "Unit 7H." JA-48; JA-474. That component—by all accounts a key deliverable of the program, JA-73—is what Wilder named the "QR Assessment Plan/Instrument." JA-62. The genius of this component of the program is that it did not simply teach faculty members how to assess their work. It taught faculty members how to create their own *individualized* assessment plans—hand-tailored, literally, around their own subject

matter expertise and their own teaching priorities. JA-62. The assessment phase was the capstone to the program, JA-51, but it was also much more. It gave the program a life beyond the eight online sessions—one that faculty members could use to improve their QR teaching skills, and to evolve and adapt their QR teaching methods, over a lifetime of instruction.

Wilder's learning assessment component taught faculty members how to create this individualized plan. It began by asking them to think back to the learning goals they articulated in an earlier phase of the program. JA-62. It then asked them to articulate a set of questions and scoring formulas—"rubrics," in Wilder's phraseology—that would give feedback on whether they met each of their goals. JA-62. Finally, it guided faculty members through a set of questions designed to help sharpen their assessment instrument. For example: Are the assessment questions clear and straightforward? Do the skills assessed in the assessment instrument correspond to the instructor's own QR learning goals? What are the strengths and weaknesses of the QR assessment plan? Is the plan valid and sound? JA-63. In this way, Wilder's assessment plan explained, faculty members were trained to assess their

work "in a way that makes sense for [their] course and for [their] learning objectives." JA-63.

3. The NICHE program was a success—enough so that the NSF asked Wilder to continue her work. JA-48. The follow-on program bore a slightly altered name—NICE, or Numeracy Infusion for College Educators—and was limited to faculty and students at three Bronx-based Hispanic-serving institutions within the CUNY system. JA-49-50; JA-109. But while the name and target audience varied, the programs were in substance identical. The follow-on program used the same eight modules, and—most importantly—essentially identical text in Unit 7H. JA-52. For the purposes of this case, NICHE and NICE can be considered the same.

4. The NICHE program was a success in another way—it led to substantial publication opportunities for the academics involved in it. Wilder, for example, published several papers on the information learned from the NICHE assessment data and presented the research results of the NICHE program at academic conferences. JA-49; JA-123. One of those publications, a paper she co-authored with a colleague about "cognitive illusions," drew on just one of the eight modules (module three,

covering "cognition and QR") in the NICHE program. JA-123; JA-71. Wilder has also considered commercializing the entire NICHE plan of study, including Unit 7H, in a textbook. JA-60.

C. Hoiland publishes Wilder's learning assessment plan under her own name.

1. Dr. Sarah Hoiland is a professor at Hostos Community College, a two-year community college that is part of the CUNY network. JA-245. Like Wilder, she is also dedicated to teaching QR to disadvantaged students. Though Hoiland was not an original member of NICHE, she agreed—at Wilder's invitation—to join the follow-on NICE program. JA-50. Wilder and Hoiland made two presentations together in the early years of the NICE program: one at the National Numeracy Network annual meeting and another at the Mathematical Association of America Metropolitan New York section Meeting. JA-54. At those conferences, Wilder and Hoiland presented an overview of the NICHE and NICE programs, shared research results, and highlighted plans to adapt NICHE to NICE. JA-54. At neither of these conferences did either present the text of Unit 7H—or of any of the NICHE/NICE training materials—to the attendees. JA-54.

2. In June 2018, right as the follow-on NICE program was scheduled to conclude, Hoiland applied to make a presentation at the February 2019 Community College Conference on Learning Assessment. JA-405. Hoiland, who has described the CCCLA as a "great conference" with a "semi-competitive proposal selection process," had been part of a team that tried and failed to present several years earlier. JA-408. The conference offered, in Hoiland's words, "an opportunity for community-college educators and administrators to improve their pedagogical skills." JA-261. Hoiland applied to present at the program because, she believed, "a conference on learning assessment for community faculty fit very well within the overarching project goals." JA-186.

3. Hoiland proposed to present at a session entitled "Assessing Numeracy in a Faculty Development program." JA-405. That session, Hoiland proposed, would "focus attention on strategies for assessing quantitative reasoning (QR) at community colleges." The audience for that session, Hoiland proposed, would be "Teaching Faculty." JA-405; JA-262. And of the three "primary learning objectives" Hoiland listed on her proposal, the first was: "To share best practices in faculty development

related to assessment." JA-405. Hoiland's application was accepted a month later. JA-167.

4. Hoiland created the very presentation she promised. JA-65. Her 23-page PowerPoint—which contained only her name and not Wilder's—was entitled "Assessing Numeracy in a Faculty Development program." JA-65. The cover page was followed by two pages of photographs, three pages that described the program in general terms, and one page with assessment data generated by the program. JA-66-71. The PowerPoint then arrived at what Hoiland termed its "key deliverable": Six pages about how to develop a QR assessment instrument. JA-73; JA-266.

The six-page deliverable on QR assessment walked faculty members at the conference through the steps required to create an assessment instrument. The first page gave a summary. JA-72. The next page asked faculty members to think back to the learning goals they articulated in earlier phases of the program. JA-73. The next page asked them to articulate a set of questions and scoring formulas—"rubrics," in the presentation's phraseology—that would give feedback on whether they met each of their goals. JA-74. The next three pages guided them through a set of questions designed to help sharpen their assessment

instrument. For example: Are the assessment questions clear and straightforward? Do the skills assessed in the assessment instrument correspond to the instructor's own QR learning goals? What are the strengths and weaknesses of the QR assessment plan? Is the plan valid and sound? JA75-JA76. In this way, Hoiland's PowerPoint made clear, faculty members would be trained to assess their work "in a way that makes sense for [their] course and for [their] learning objectives." JA74.

If the description of Hoiland's QR assessment "deliverable" sounds familiar to the reader, there is a good reason: it was copied nearly word for word from Wilder's copyrighted Unit 7H. Hoiland acknowledges this. JA-197-203. In fact, of the 19 pages of text in Hoiland's PowerPoint (excluding the four pages of photos), language pulled from Wilder's Unit 7H makes up five of those. Here is a comparison of the two works, with the identical text highlighted in yellow (an identical typographical error is also highlighted in red):

Wilder's Unit 7H, Page 1 (JA-62)

QR Assessment Instrument

Please restate your revised QR learning goals that you developed in this blog along with your QR assessment instrument. We ask that your QR assessment be simple and consist of 3 questions (or scoring rubrics) that directly correspond to the 3 learning goals you have articulated (if you are undertaking a pre-test/post-test design, you may want to develop two versions of the instrument). PLEASE KEEP YOUR ASSESSMENT INSTRUMENT SIMPLE and include only 3 questions/scoring rubrics, etc.!

You assessment instrument should be designed to measure whether or not (or the extent to which) your QR lesson/assignment succeeded in teaching students the 3 learning goals you put forward. The assessment should be designed to give feedback to you as an instructor! Please indicate when and how you plan to administer your assessment instrument.



Hoiland's Conference PowerPoint, Page 9 (JA-73)

QR Assessment Instrument

Please restate your revised QR learning goals that you developed in this blog along with your QR assessment instrument. We ask that your QR assessment be simple and consist of 3 questions (e.g., multiple choice questions or problems with accompanying scoring rubrics similar to the CAT) that directly correspond to the 3 learning goals you have articulated (if you are undertaking a pre-test/post-test design, you may want to develop two versions of the instrument, although we recognize that given where we are in the semester you may be unable to administer a pretest assessment at this point in time).

PLEASE KEEP YOUR ASSESSMENT INSTRUMENT SIMPLE and include only 3 questions/problems with scoring rubrics, etc.!

You assessment instrument should be designed to measure whether or not (or the extent to which) your QR lesson/assignment succeeded in teaching students the 3 learning goals you put forward. The assessment should be designed to give feedback to you as an instructor! Please indicate when and how you plan to administer your assessment instrument in your blog post!

Wilder's Unit 7H, Page 2 (JA-63)

Please note that there are examples of course-specific assessment instruments on our instructional materials from NICHE webpage.

Assessments can take a huge variety of forms and we encourage you to assess in a way that makes sense for your course and for your learning objectives. However, we also strongly encourage you to assess narrowly, specifically focusing on your QR lesson/assignment, rather than the course as a whole or the college experience as a whole.

Your assessment instrument should correspond to the learning goals that you have articulated and evaluate whether or not your course and/or your QR assignment/exercise effectively taught the QR skills you set out to teach. Since you have articulated 3 learning goals [in each of three areas, e.g., (a) Knowledge and conceptual understanding; (b) thinking and other skills; and (c) attitudes, values, dispositions and habits of mind], we ask you to develop a simple 3-question assessment instrument that gets at these 3 learning goals. In addition, a pre-test and post-test design may be helpful in assessing the effectiveness of your instruction.

Hoiland's Conference PowerPoint, Page 10 (JA-74)

Please note that there are examples of course-specific assessment instruments on our instructional materials from NICHE/NICE webpage.

Assessments can take a huge variety of forms and we encourage you to assess in a way that makes sense for your course and for your learning objectives. However, we also strongly encourage you to assess narrowly, specifically focusing on your QR learning goals, rather than the course as a whole or the college experience as a whole.

Since you have articulated 3 learning goals [in each of three areas, e.g., (a) knowledge and conceptual understanding; (b) thinking and other skills; and (c) attitudes, values, dispositions and habits of mind], we ask you to develop a simple 3-question assessment instrument that corresponds to those 3 learning goals.

Wilder's Unit 7H, Page 2 (JA-63)

Guidelines for Developing and Providing Feedback on QR Assessment Instrument

(1) Does the assessment instrument (or instruments if there are two versions) include 3 questions (or scoring rubrics, etc.) that are clear and straightforward?

(2) Can (and how will) the results of the assessment plan and instrument be used to evaluate whether the instructor effectively taught specific QR skills and/or achieved his or her QR learning goals? How do the skills assessed in the instrument correspond to the QR learning goals articulated by the instructor as well as those taught in the QR lesson plan in terms of (a) knowledge and conceptual understanding; (b) thinking and other skills; and (c) attitudes, values, dispositions and habits of mind?

Hoiland's Conference PowerPoint, Page 11 (JA-75)

Guidelines for Developing and Providing Feedback on QR Assessment Instrument

(1) Does the assessment instrument (or instruments if there are two versions) include 3 questions (or scoring rubrics, etc.) that are clear and straightforward?

(2) Can (and how will) the results of the assessment plan and instrument be used to evaluate whether the instructor effectively taught specific QR skills and/or achieved his or her QR learning goals? How do the skills assessed in the instrument correspond to the QR learning goals articulated by the instructor as well as those taught in the QR lesson plan in terms of (a) knowledge and conceptual understanding; (b) thinking and other skills; and (c) attitudes, values, dispositions and habits of mind?

Wilder's Unit 7H, Page 2 (JA-63)

(3) What are the strengths and weaknesses of the QR assessment plan and instrument? Please indicate at least one way in which the assessment instrument could be improved. In responding to this question, please consider the following:

(a) Will the assessment plan be able to evaluate the effectiveness of the QR lesson plan (including assignments, readings, etc.)? For example, does the instructor plan to use a pre-test/post-test design, is there a comparison group, etc.

(b) Does the QR assessment instrument extend beyond just being a math skills test and emphasize the ability to reason with quantitative information?

(c) Is the assessment instrument valid (i.e., does it get at what the instructor is trying to measure)?

(d) Is the instrument sound? For example, if the instrument relies on multiple choice questions, are the response options mutually exclusive and is the correct answer clearly identifiable? If the assessment instrument (or a specific question) relies on a rubric, do the scoring criteria make sense and will the exercise authoritatively assess a QR skill (or skills)?

Hoiland's Conference PowerPoint, Page 12 (JA-76)

(3) What are the strengths and weaknesses of the QR assessment plan and instrument? Please indicate at least one way in which the assessment instrument could be improved. In responding to this question, please consider the following:

(a) Can the assessment be used to evaluate the effectiveness of the QR lesson plan (including assignments, readings, etc.)? For example, does the instructor plan to use a pre-test/post-test design, is there a comparison group, etc.

(b) Does the QR assessment instrument extend beyond just being a math skills test and emphasize *the ability to reason with quantitative information?*

(c) Is the assessment instrument valid (i.e., does it get at what the instructor is trying to measure)?

(d) Is the instrument sound? For example, if the instrument relies on multiple choice questions, are the response options mutually exclusive and is the correct answer clearly identifiable? If the assessment instrument (or a specific question) relies on a rubric, do the scoring criteria make sense and will the exercise authoritatively assess a QR skill (or skills)?

Wilder's Unit 7H, Page 2 (JA-63)

(4) Is the assessment instrument independent of the course QR lesson(s)/assignment(s)? In other words, can it be used to evaluate the effectiveness of the QR lesson(s)/assignment(s)?



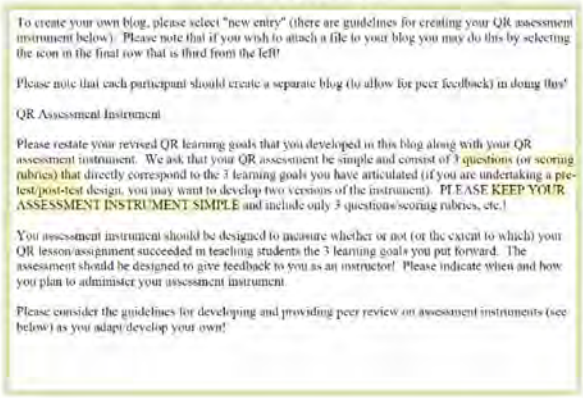
Hoiland's Conference PowerPoint, Page 13 (JA-77)

(4) Is the assessment instrument **independent** of the course QR lesson(s)/assignment(s)? In other words, can it be used to evaluate the effectiveness of the QR lesson(s)/assignment(s)?

5. In making her derivative of Wilder's document, Hoiland took pains to highlight the elements of Wilder's work that she found especially valuable. Hoiland did this by clipping out certain phrases and copying them into the bottom of some of her slides. JA-191; JA-199. She did this, in her words, to provide "specific advice" to faculty attendees regarding "creation of the assessment instrument" and "giving feedback on [those] assessment instruments." JA-267. This "advice" consisted, for all intents and purposes, of Wilder's own words. For example, on the left side of the box below is an excerpt from page 2 of Wilder's Unit 7H with the following phrases highlighted for the reader: "keep your assessment instrument simple," "3 questions," "scoring rubrics," and "pre-test/post-test." On the right is page 10 of Hoiland's PowerPoint, which has essentially scissored out the same phrases and pasted them into a purple-highlighted section at the bottom: "Keep it simple: pre/post, three questions, and a scoring rubric."

Wilder's Original

Page 1 (JA-62)



To create your own blog, please select "new entry" (there are guidelines for creating your QR assessment instrument below). Please note that if you wish to attach a file to your blog you may do this by selecting the icon in the final row that is third from the left!

Please note that each participant should create a separate blog (to allow for peer feedback) in doing this!

QR Assessment Instrument

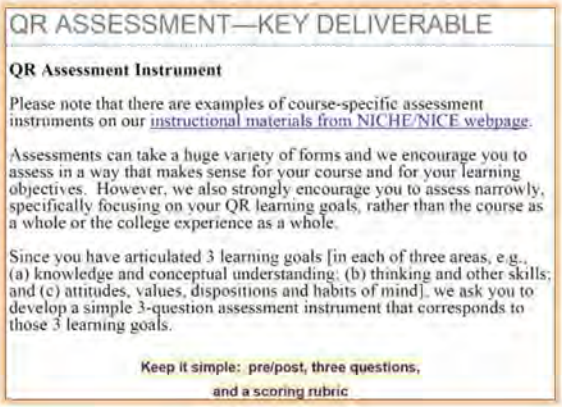
Please restate your revised QR learning goals that you developed in this blog along with your QR assessment instrument. We ask that your QR assessment be simple and consist of 3 questions (or scoring rubrics) that directly correspond to the 3 learning goals you have articulated (if you are undertaking a pre-test/post-test design, you may want to develop two versions of the instrument). PLEASE KEEP YOUR ASSESSMENT INSTRUMENT SIMPLE and include only 3 question/scoring rubrics, etc.!

You assessment instrument should be designed to measure whether or not (or the extent to which) your QR lesson/assignment succeeded in teaching students the 3 learning goals you put forward. The assessment should be designed to give feedback to you as an instructor! Please indicate when and how you plan to administer your assessment instrument.

Please consider the guidelines for developing and providing peer review on assessment instruments (see below) as you adapt/develop your own!

Hoiland's PowerPoint

Page 10 (JA-74)



QR ASSESSMENT—KEY DELIVERABLE

QR Assessment Instrument

Please note that there are examples of course-specific assessment instruments on our instructional materials from NICHE/NICE webpage.

Assessments can take a huge variety of forms and we encourage you to assess in a way that makes sense for your course and for your learning objectives. However, we also strongly encourage you to assess narrowly, specifically focusing on your QR learning goals, rather than the course as a whole or the college experience as a whole.

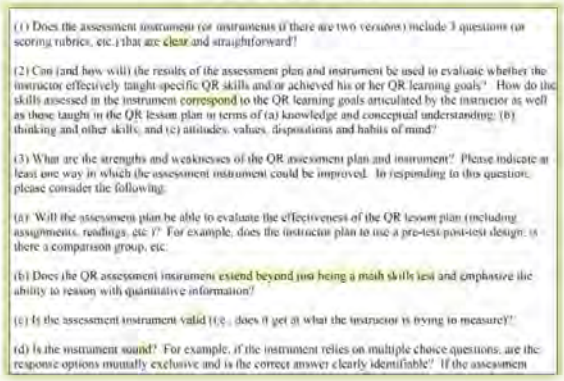
Since you have articulated 3 learning goals [in each of three areas, e.g., (a) knowledge and conceptual understanding; (b) thinking and other skills; and (c) attitudes, values, dispositions and habits of mind], we ask you to develop a simple 3-question assessment instrument that corresponds to those 3 learning goals.

Keep it simple: pre/post, three questions, and a scoring rubric

Hoiland did the same just a few slides later. On the left side is an excerpt from page 2 of Wilder's Unit 7H with the following words and phrases highlighted for the reader: "clear," "correspond," "extend beyond just being a math skills test," "valid," and "sound." On the right is page 13 of Hoiland's PowerPoint, which has again scissored out the same words and phrases (with only minor alterations) and pasted them into a green-highlighted section at the bottom: "Clarity, alignment, generalizability, validity, and soundness."

Wilder's Original

Page 1 (JA-62)



(1) Does the assessment instrument (or instruments if there are two versions) include 3 questions (or scoring rubrics, etc.) that are clear and straightforward?

(2) Can (and how will) the results of the assessment plan and instrument be used to evaluate whether the instructor effectively taught specific QR skills and/or achieved his or her QR learning goals? How do the skills assessed in the instrument correspond to the QR learning goals articulated by the instructor as well as those taught in the QR lesson plan in terms of (a) knowledge and conceptual understanding; (b) thinking and other skills; and (c) attitudes, values, dispositions and habits of mind?

(3) What are the strengths and weaknesses of the QR assessment plan and instrument? Please indicate at least one way in which the assessment instrument could be improved. In responding to this question, please consider the following:

(a) Will the assessment plan be able to evaluate the effectiveness of the QR lesson plan (including assignments, readings, etc.)? For example, does the instructor plan to use a pre-test/post-test design; is there a comparison group, etc.

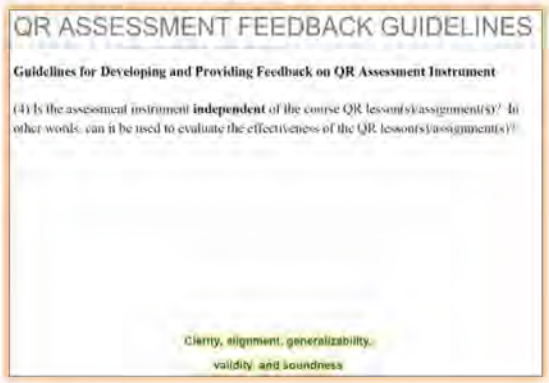
(b) Does the QR assessment instrument extend beyond just being a math skills test and emphasize the ability to reason with quantitative information?

(c) Is the assessment instrument valid (i.e., does it get at what the instructor is trying to measure)?

(d) Is the instrument sound? For example, if the instrument relies on multiple choice questions, are the response options mutually exclusive and is the correct answer clearly identifiable? If the assessment

Hoiland's PowerPoint

Page 13 (JA-77)



Hoiland's PowerPoint differed from Wilder's copyrighted document in other ways. For example, in one place, the PowerPoint italicized the phrase "the ability to reason with quantitative reasoning." In another place, the PowerPoint bolded the word "independent." Hoiland did not actually make these changes herself; rather, she borrowed them from a version of Unit 7H that Wilder had slightly updated from the original NICHE materials. JA-268; JA-51) Hoiland's version also contained small variations from the wording to the copyrighted text, mostly additions or deletions in parentheticals or variations in line spacing. Again, this was a byproduct of the fact that she borrowed from a slightly later version of Unit 7H—she did not make these changes herself. *Supra* at 19.

6. But Hoiland did more than reproduce (and make a derivative of) Wilder's work. She also authorized the *distribution* of Wilder's work. When Hoiland signed up to present at the Orlando conference, she signed an intellectual property license and release. In doing so, she purported to grant the conference organizers a license to "use, copy and distribute" her written PowerPoint presentation. JA-165. The license specifically acknowledged that the conference organizers would be "posting [the PowerPoint] online for downloading on the [c]onference website and mobile application for [c]onference participants." JA-165. (The conference organizers also made the same thing clear to Hoiland by email. JA-167.) Hoiland complied with this obligation by providing the PowerPoint in advance. JA-269.

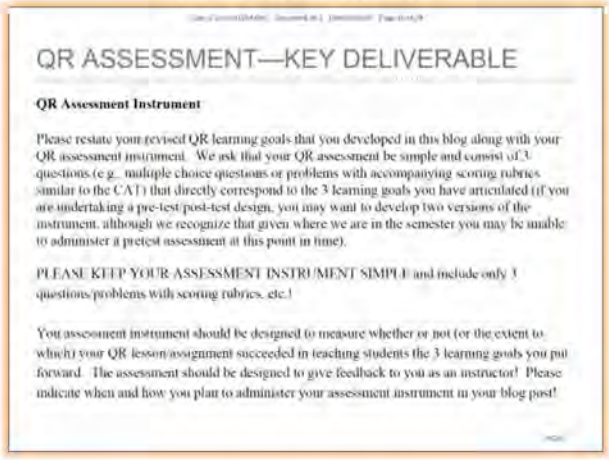
Consistent with this purported license, the conference organizers then published Wilder's work to all 237 conference attendees by posting it on the website of the conference. JA-172; JA-238; JA-492. The conference organizers also continued to maintain the "official copy" of the presentation in their files well after the conference was done, JA-172—enabling them to at any time reprint that work, share it with other

scholars, or even market it as a part of a scholarly monograph or edited volume.

7. In preparing for the conference, Hoiland made one last-minute change to her written presentation. At the request of the conference presenters, she changed the font of slides 9-13 (the ones that she had copied from Wilder) to make the font bigger so that it could be more easily read by the conference attendees. JA-216-217. Hoiland's change in font size ensured that the copied text would be the same size as the other slides. Of the 14 pages of text not copied from Wilder, seven of them—or half—were the same size as page 10. A comparison is presented below, with page 9 of the PowerPoint (copied from Wilder) on the left and page 14 of the PowerPoint (not copied from Wilder) on the right. Pages 15, 16, 17, 18, 19, 20 have text that is the same size as the text of Page 14. JA-79; JA-80; JA-81; JA-82; JA-83; JA-84.

Hoiland's PowerPoint

Page 9 (JA-73)
(copied from Wilder)



QR ASSESSMENT—KEY DELIVERABLE

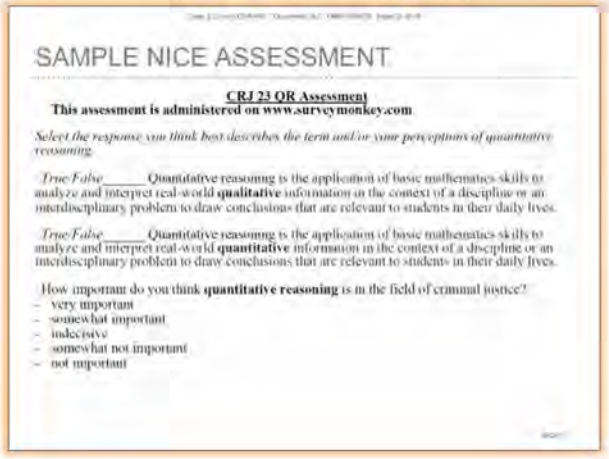
QR Assessment Instrument

Please restate your revised QR learning goals that you developed in this blog along with your QR assessment instrument. We ask that your QR assessment be simple and consist of 3 questions (e.g., multiple choice questions or problems with accompanying scoring rubrics similar to the CAT) that directly correspond to the 3 learning goals you have articulated (if you are undertaking a pre-test/post-test design, you may want to develop two versions of the instrument, although we recognize that given where we are in the semester you may be unable to administer a pretest assessment at this point in time).

PLEASE KEEP YOUR ASSESSMENT INSTRUMENT SIMPLE and include only 3 questions/problems with scoring rubrics, etc.!

You assessment instrument should be designed to measure whether or not (or the extent to which) your QR lesson/assignment succeeded in teaching students the 3 learning goals you put forward. The assessment should be designed to give feedback to you as an instructor! Please indicate when and how you plan to administer your assessment instrument in your blog post!

Page 14 (JA-78)
(not copied from Wilder)



SAMPLE NICE ASSESSMENT

CRJ 23 QR Assessment
This assessment is administered on www.surveymonkey.com

Select the response you think best describes the term and/or your perceptions of quantitative reasoning

True/False _____ Quantitative reasoning is the application of basic mathematics skills to analyze and interpret real-world **qualitative** information in the context of a discipline or an interdisciplinary problem to draw conclusions that are relevant to students in their daily lives.

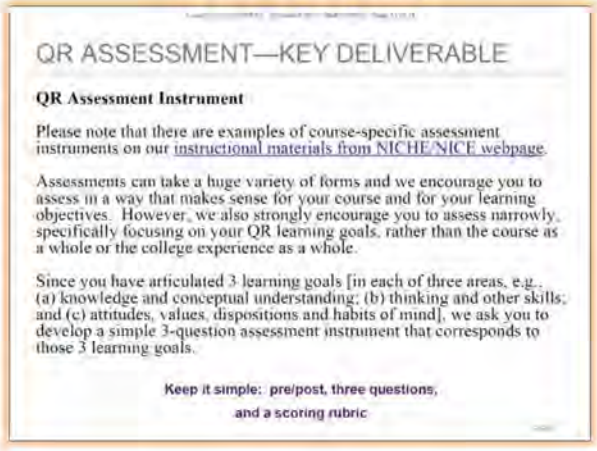
True/False _____ Quantitative reasoning is the application of basic mathematics skills to analyze and interpret real-world **quantitative** information in the context of a discipline or an interdisciplinary problem to draw conclusions that are relevant to students in their daily lives.

How important do you think **quantitative reasoning** is in the field of criminal justice?
- very important
- somewhat important
- indecisive
- somewhat not important
- not important

In expanding Wilder's text right before her presentation, Hoiland also made the choice to blow up one page even more than the others. Text copied from Wilder made up pages 9-13 of the PowerPoint. JA-73-77. But Hoiland chose to make page 10—the second page taken from Wilder—even larger than others. The text on that page, as a result, all but dwarfed the text not taken from Wilder:

Hoiland's PowerPoint

Page 10 (JA-74)
(copied from Wilder)



QR ASSESSMENT—KEY DELIVERABLE

QR Assessment Instrument

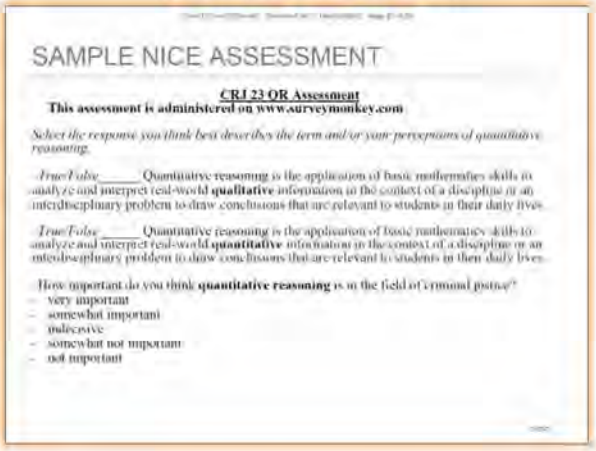
Please note that there are examples of course-specific assessment instruments on our instructional materials from NICHE/NICE webpage.

Assessments can take a huge variety of forms and we encourage you to assess in a way that makes sense for your course and for your learning objectives. However, we also strongly encourage you to assess narrowly, specifically focusing on your QR learning goals, rather than the course as a whole or the college experience as a whole.

Since you have articulated 3 learning goals [in each of three areas, e.g., (a) knowledge and conceptual understanding; (b) thinking and other skills; and (c) attitudes, values, dispositions and habits of mind], we ask you to develop a simple 3-question assessment instrument that corresponds to those 3 learning goals.

Keep it simple: pre/post, three questions, and a scoring rubric

Page 14 (JA-78)
(not copied from Wilder)



SAMPLE NICE ASSESSMENT

CRJ 23 QR Assessment
This assessment is administered on www.surveymonkey.com

Select the response you think best describes the term and/or your perceptions of quantitative reasoning.

True/False _____ Quantitative reasoning is the application of basic mathematics skills to analyze and interpret real-world **qualitative** information in the context of a discipline or an interdisciplinary problem to draw conclusions that are relevant to students in their daily lives.

True/False _____ Quantitative reasoning is the application of basic mathematics skills to analyze and interpret real-world **quantitative** information in the context of a discipline or an interdisciplinary problem to draw conclusions that are relevant to students in their daily lives.

How important do you think **quantitative reasoning** is in the field of criminal justice?
- very important
- somewhat important
- indecisive
- somewhat not important
- not important

8. Hoiland displayed her PowerPoint onscreen, one page after the other, to the attendees of her presentation. JA-269. Hoiland's display of the work—including the portion she took from Wilder—was substantial. She displayed pages of Unit 7H specifically to show attendees what the course materials looked like "and the types of questions Faculty Participants were asked to answer in preparing their assessment materials." JA-268. The 75-minute presentation covered roughly 45 minutes for the slides and 30 minutes for follow-up questions and answers. JA-167-68; JA-210. During her presentation, as Hoiland has explained, she discussed with attendees "how faculty participants both create and revise a QR assessment instrument[] and provide feedback to at least one other faculty participant on that participant's QR assessment

instrument." JA-267 (capitalizations removed). She also showed attendees "the types of questions faculty participants were asked to answer in preparing their assessment materials." JA-267 (capitalizations removed).

9. Hoiland has not hesitated to leverage the value of this presentation to her academic career. She has listed her presentation at the conference on her CV and in her applications for grants and awards. JA-294. Wilder, meanwhile, is fearful that if she publishes her own work under her own name now, "it may appear to others that I had plagiarized [Hoiland's] work, rather than the other way around." JA-60.

D. Wilder sues Hoiland for copyright infringement.

Wilder registered her copyright in the version of Unit 7H that she drafted for the NICHE program and then filed this lawsuit on February 9, 2022. Hoiland, acting *pro se* at the time but with the assistance of counsel, answered the complaint on April 8. JA-14-JA-20 Hoiland's answer brought what it termed the "defenses" of implied license and fair use. JA-16; JA-20. The answer also asserted, as a "defense," that Wilder could not "establish that she created or was otherwise the owner" of the work at issue or that such materials were "sufficiently original" to

warrant copyright protection. JA-20. The answer made no mention of the affirmative defense of work for hire. Hoiland did not at any time amend her answer.

After discovery, both parties moved for summary judgment. Wilder's motion sought summary judgment on the copyright infringement claim on the grounds that she owned the copyright in Unit 7H, that Hoiland copied that work, and that Hoiland's copy was substantially similar. JA-21. Wilder also sought summary judgment in her favor on Hoiland's defense of lack of ownership, arguing that Unit 7H was sufficiently original to be copyrightable and that she owned the copyright in that work. JA-38. Finally, Wilder sought summary judgment in her favor on Hoiland's defenses of implied license and fair use. JA-38-44.

Hoiland responded to Wilder's summary judgment motion and simultaneously cross-moved for summary judgment in her favor. JA-454. Hoiland's briefing papers opposed summary judgment in Wilder's favor only on the grounds of implied license and fair use. JA-476-481. The briefing papers therefore conceded (by not addressing the issues) Wilder's claims of authorship, originality, and ownership. As to Hoiland's own

motion, she sought summary judgment in her favor solely on the grounds of the affirmative defenses of implied license and fair use.

II. Proceedings Below.

The district court (P. Kevin Castel, J.) granted Hoiland's summary judgment on the ground of fair use and denied Wilder's summary judgment on the same issue. SPA-1. The court also denied Wilder's summary judgment on the issue of ownership. SPA-1. The court did not rule on the issue of implied license.

The district court first addressed Wilder's summary judgment motion on the issue of ownership. The court took it for granted that Wilder was the author of the text and assumed, without deciding, that her work was original. SPA-20. Nonetheless, the court denied the motion. SPA-20. The court identified two principal grounds for doing so. First, the court found, although the NSF "normally" allows grantees to retain the rights to intellectual property generated under their grants, Wilder had not shown that this policy was specifically in effect for the NICHE grant. SPA-24. Moreover, the court reasoned, the grantee in this case was technically CUNY and not Wilder—and Wilder had not explained "by

what path copyright ownership would pass, under this scenario, from []CUNY as the NSF grantee to her as the 'author' of the work." SPA-25.

The district court then turned to the issue of fair use. The court found that the first fair use factor, the purpose and character of the use, tilted in Hoiland's favor because she used it in a non-commercial, educational setting and because she made a "transformative" use of the work. SPA-29. Hoiland made a transformative use, the court reasoned, because there was a "larger story" that Hoiland was telling in her presentation. SPA-30. In addition to talking about best practices in faculty development relating to assessment, the court found, Hoiland also used her PowerPoint to disseminate assessment results and discuss "the challenges and successes related to assessment in the community." SPA-30. The court also reasoned that Hoiland had shown transformative use because the PowerPoint slides were not the "focus" of her presentation, the audience members asked questions "almost wholly unrelated to the slides themselves," Hoiland omitted some of Wilder's text and made minor changes to the rest of it, and Wilder would have objected to Hoiland's use of her materials. SPA-30-33.

The district court found that the rest of the factors, taken collectively, supported a finding of fair use. The court found that the second factor, the nature of the copyrighted work, weighed in favor of Hoiland because Wilder's work was "not a work of fiction." SPA-36. The court found that the third factor, the amount and substantiality of the portion used, weighed in favor of Wilder because Hoiland took about two-thirds of her copyright materials. SPA 39-40. However, this factor weighed only "slightly" in favor of Wilder, the court found, because Hoiland cut out much of the copyrighted text that "would have been 'essential' or the 'heart' of the work." SPA-39. Finally, as to the fourth factor, effect on the market, the court found that Wilder had not established that the infringement caused a "detriment" to her own "publications, promotions, or incentives to continue her scholarly research." The court reached this conclusion because it found that Hoiland used the work only one time in front of a small audience and because the potential market for Wilder's work, standing alone, would be limited. SPA-41-42.

The district court then denied Wilder's motion to alter or amend the judgment. SPA-47. The district court's opinion this time downplayed the

question of whether Hoiland's work was transformative, noting that "whether a use is transformative is not dispositive to the fair use analysis." SPA-50. Thus, the court held, even if Hoiland did not make a transformative use of Wilder's work, "her non-commercial, educational use weighed in her favor." SPA-51. As to the fourth factor, the court rejected Wilder's argument that it had erred by "placing the burden on Wilder to show market harm." SPA-51. Here, the court found, the fourth factor weighed in Hoiland's favor because there was "essentially unrebutted" evidence in the record that showed that Wilder's claimed harm was speculative or unlikely. SPA-51. The court also declined to alter its conclusion that Hoiland's use of Wilder's work was transformative, rejecting Wilder's contention that it had erred by focusing only on Hoiland's display of the slides instead of examining the written work. SPA-51-52.

SUMMARY OF ARGUMENT

This case involves a straightforward application of the fair use doctrine. Wilder wrote a lesson plan to train faculty members how to assess their effectiveness in teaching quantitative reasoning, or QR. Hoiland purloined that lesson plan, put her own name on it, combined it

with other documents in a PowerPoint, and published it to 237 other academics who participated in a prominent national conference on learning assessment. It should have been a straightforward case of copyright infringement. But the district court mistakenly found that Hoiland was entitled to the defense of fair use. The decision should be reversed.

Hoiland's use of Wilder's lesson plan was not transformative. Under *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), a secondary work is transformative if it has a fundamentally different purpose from the original. That usually requires some *justification* for the appropriation. Hoiland had none. She did not comment on Wilder's paper, criticize it, parody it, report on it, or do any of the other things that are at the core of fair use doctrine. Her PowerPoint gave no hint that the work belonged to someone else at all. If she needed to include a lesson plan in her presentation, she could have simply written her own. But instead, she tried to avoid "the drudgery in working up something fresh." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994). That does not qualify as a fair use.

And it does not matter that Hoiland made a non-commercial and academic use of Wilder's work. "The mere fact that a use is educational and not for profit does not insulate it from a finding of infringement." *Campbell*, 510 U.S. at 584. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but "*whether the user stands to profit* from exploitation of the copyrighted material without paying the customary price." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985). Hoiland profited by gaining valuable publication opportunities, grant opportunities, and career recognition as a result of her presentation. That might not have mattered if her PowerPoint had been a transformative use of Wilder's work. But there was no transformative use here. Hoiland cannot escape liability just because she works in academia. Binding authority in this Circuit—and two others, at least—make that clear. The district court ignored, or misread, that authority.

None of the other fair use factors excuse Hoiland's taking here. Wilder's work was indeed nonfictional, but the second factor has never played a meaningful role in fair use analysis. Some two-thirds of Wilder's work was copied into Hoiland's—tilting the third factor decidedly against

fair use. As to the fourth factor, effect on the market, it has been the authority in this Circuit for over three decades that in cases of academic misappropriation like this one, the plaintiff need not show market effect to defeat a fair use defense. *Weissmann v. Freeman*, 868 F.2d 1313, 1325-26 (2d Cir. 1989). If anything, that doctrine applies with even more force today.

The facts of this case are so clear—and in almost every respect undisputed—that this Court should not stop at reversing the grant of summary judgment on fair use to Hoiland. This Court has the authority not only to reverse the grant of Hoiland's motion but to find as a matter of law that Hoiland's use does not qualify as a fair use work. *Harper & Row*, 471 U.S. at 506. That should be the case here. There is no set of facts that a jury could reasonably find that would establish that Hoiland's use met the standard—when properly applied—for fair use. Wilder is entitled to summary judgment in her favor.

Finally, the district court should also be reversed on the issue of ownership. Wilder wrote the work at issue, making a *prima facie* case of ownership. Hoiland never asserted any reason why Wilder, as the author of the work, should not now own it. She did not even oppose Wilder's

motion for summary judgment on this issue at all. But the district court invented an argument for Hoiland anyway, postulating that perhaps ownership was in the hands of Wilder's employer or the public entity that funded her scholarship. But that was a work-for-hire defense—an *affirmative* defense that Hoiland never once raised and had since waived. And even if it had been properly raised, the defense was Hoiland's burden to prove, not Wilder's burden to disprove. But the district court pulled the defense out of thin air and then asked whether *Wilder* had come forward with the evidence. That, too, was reversible error.

STANDARD OF REVIEW

The district court's grant of summary judgment to Hoiland on her affirmative argument of fair use defense is reviewed *de novo*, construing the evidence in the light most favorable to Wilder and drawing all reasonable inferences in Wilder's favor. *Mullins v. City of N.Y.*, 653 F.3d 104, 113 (2d Cir. 2011).

The district court's denial of summary judgment to Wilder on Wilder's claim of ownership and Hoiland's defense of fair use is reviewed *de novo*, construing the evidence in the light most favorable to Hoiland and drawing all reasonable inferences in Hoiland's favor. *Id.*

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR HOILAND ON HER AFFIRMATIVE DEFENSE OF FAIR USE.

A. The Purpose and Character of Hoiland's Use Weighs Heavily in Wilder's Favor Because Hoiland Did Not Transform Wilder's Work and Because Hoiland Benefitted Professionally From Her Use.

1. Hoiland did not make a transformative use of Wilder's work.

a. Hoiland and Wilder's works served the same fundamental purpose—to help college professors assess their QR instruction.

1. Any fair use analysis must begin with *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023). In that case, Newsweek Magazine hired Lynn Goldsmith to photograph the musician Prince after one of his concerts in 1981. Goldsmith licensed Andy Warhol to make a derivative of her photograph, in his signature silkscreen mesh style, for use in Vanity Fair. But unbeknownst to Goldsmith, Warhol secretly made 15 more derivatives of her work. Thirty-five years later, after Prince's death, the Warhol Foundation licensed one of those derivatives to Vanity Fair for use in a special edition dedicated to the late artist. This Court found that that last use—the licensing to Condé Nast

for use in the special edition—did not constitute fair use. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021) ("Warhol Second Circuit"). The Supreme Court agreed.

The Supreme Court's opinion in *Warhol* emphasized that courts must steer away from "an overbroad concept of transformative use" that would embrace "any further purpose or any different character." *Id.* at 529. The question at the heart of transformative use has been described as whether the use "merely supersedes the objects of the original creation, supplanting the original, or instead adds something new, with a further purpose or different character." *Id.* at 527-28 (cleaned up). But whether a use shares the purpose or character of an original work, or instead has a further purpose or different character, the Court emphasized, "is *a matter of degree*." *Id.* at 528 (emphasis added).[1] Most copying has some further purpose, the Court noted, "in the sense that copying is socially useful ex post." *Id.* at 528-59. Many secondary works,

[1] *Cf. Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) (Leval, J.) ("The word 'transformative' cannot be taken too literally as a sufficient key to understanding the elements of fair use. It is rather a suggestive symbol for a complex thought, and does not mean that any and all changes made to an author's original text will necessarily support a finding of fair use.")

therefore, "add something new." *Id.* at 529. But "[t]hat alone does not render such uses fair," the Court made clear. *Id.* "Rather, the first factor asks "whether *and to what extent* the use at issue has a purpose or character different from the original." *Id.* (emphasis in original).

Central to the transformative use analysis, the Court emphasized, is that the first factor "relates to the *justification* for the use." *Id.* at 532 (emphasis added).[2] A particular use may be justified, the Court explained, "because copying is reasonably necessary to achieve the user's new purpose." *Id.* Parody, for example, "needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[3] *Id.* (internal citation omitted). Similarly, "commentary or criticism that targets an original work may have a compelling reason to conjure up the

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[2] *Cf. Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) ("The question, then, is, whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs."); Leval at 1111 (1990) ("Factor One's direction that we consider the purpose and character of the use raises the question of justification") (cleaned up)..

[3] *Quoting Campbell*, 510 U.S. at 581.

original by borrowing from it." *Id.* (cleaned up). And Warhol's famous Soup Cans artwork, the Court noted, not only had a purpose that was completely unrelated to the original Campbell's tomato soup logo—"orthogonal," in the Court's wording, *id.* at 539—but also specifically "*target[ed]*" that logo. *Id.* at 539-40 (emphasis added). That is, the Court reasoned, the original copyrighted work was, "at least in part, the object of Warhol's commentary." *Id.* at 540.

2. Under this doctrine, the Court found, the Warhol Foundation's use of Goldsmith's photograph was not transformative. *Id.* at 535. Goldsmith created her photograph of Prince in 1981 to accompany a Newsweek story about an up-and-coming musician. The Foundation licensed Warhol's derivative in 2016 to accompany a Vanity Fair tribute edition upon that musician's death. "In that context," the Court reasoned, "the purpose of the image is substantially the same as that of Goldsmith's photograph. Both are portraits of Prince used in magazines to illustrate stories about Prince." *Id.*

In reaching its opinion, the Court emphasized that the first factor does not simply "weigh[] in favor of any use that adds some new expression, meaning, or message." *Id.* at 541. The district court had

found, in words echoed by the Foundation on appeal, that Warhol's derivative "[could] reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure." *Id.* at 545 (internal quotation omitted). But under that reading, the Court noted, "transformative use would swallow the copyright owner's exclusive right to prepare derivative works." *Id.* at 541. "Many derivative works, including musical arrangements, film and stage adaptions, sequels, spinoffs, and others that recast, transform or adapt the original," the Court reasoned, "add new expression, meaning or message, or provide new information, new aesthetics, new insights and understandings." *Id.* Fair use provided breathing space for works that genuinely transform, not "merely repackag[e]," the original. *Id.*[4]

3. *Warhol* dooms Hoiland's claim of transformative use in this case. Wilder created a document entitled a "QR Assessment Plan/Instrument," JA-62, in order to train college faculty members how to assess the effectiveness of their QR teaching, assembled it with other materials into a PowerPoint she titled "Assessing Numeracy in a Faculty Development

[4] *Quoting* Leval at 1111; *see also id.* ("A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test").

program," brought it to a conference of community college faculty members, and used it to train those faculty members in "best practices in faculty development related to assessment." JA-405. "In that context, the purpose of the [PowerPoint] is substantially the same as that of [Wilder's work]. Both are [training materials] used in [training sessions] to [train faculty members about assessing QR]." *Warhol*, 598 U.S. at 535.

Hoiland did not have any justification for using Wilder's work in her presentation. Her PowerPoint did not comment on Wilder's work. It did not criticize Wilder's work. It did not parody Wilder's work. It did not even acknowledge that Wilder had written anything in the PowerPoint *at all*. Hoiland could have, if she had wanted to, composed her own QR learning assessment lesson plan for her PowerPoint—and her PowerPoint could have achieved the same effect. But instead, she merely "repackage[d]" the original, Pierre N. Leval, Toward a Fair Use Standard, 103 Harvard L. Rev. 1105, 1111 (1990) ("Leval"), to save herself the time and effort. That did not remotely transform Wilder's work into "something new, with a further purpose or different character." *Warhol*, 598 U.S. at 528. Rather, her use "merely supersede[d] the objects of the original creation, supplanting the original." *Id.*

4. Hoiland's use of Wilder's work was non-transformative for three other reasons. For one thing, the text of Wilder's Unit 7H made up five out of the 23 pages of Hoiland's PowerPoint. That is of critical importance under this Circuit's doctrine. "The extent to which *unlicensed* material is used in the *challenged* work can be a factor in determining whether [an infringer's] use of original materials has been sufficiently transformative to constitute fair use." *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 611 (2d Cir. 2006) (emphasis added).[5] The court should not have overlooked this use.

This consideration weighs heavily against any claim of transformative use. In *Harper & Row*, a magazine lifted portions of a book. The purloined language made up 13% of the challenged article. The Supreme Court found that this percentage weighed against fair use. 471 U.S. at 548-59. *See also Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) (subsequent history omitted) (fact that purloined letters

[5] *See also Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 551 (S.D.N.Y. 2013) ("In considering whether the second work has transformed the original, it is appropriate to consider the percentage of the allegedly infringing work that is made up of the copyrighted work since this offers some indication of whether the defendant's use of the original materials has been sufficiently transformative.") (cleaned up).

were quoted or paraphrased on approximately 40% of the challenged book's 192 pages weighed against fair use); *cf. Bill Graham Archives*, 448 F.3d at 611 (characterizing the infringement in *Harper & Row* and *Salinger* as "wholesale takings").[6] Here, the purloined language made up 22% of Hoiland's PowerPoint—comfortably within the range of what this Court has defined as "wholesale" infringement. The transformative use factor weighs even more heavily against Hoiland as a result.

And Wilder's work was not only a large portion of Hoiland's PowerPoint in mathematical terms—it was also the *heart* of it. That, too, is critical under this Circuit's doctrine. *See Meeropol v. Nizer*, 560 F.2d 1061, 1071 (2d Cir. 1977) (reversing summary judgment in favor of fair use) ("Although these letters represent less than one percent of [an infringing book], the letters were prominently featured in promotional material for the book."). Wilder's Unit 7H, copied essentially word-for-

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[6] *Bill Graham Archives* cleared up some ambiguity over just what factor this percentage was applicable to. In *Harper & Row* and *Salinger*, the courts considered this figure as relevant to the third factor. But in *Bill Graham Archives*, this Court clarified that the percentage of the challenged work that was made up of the purloined work was relevant to *transformative use* analysis, not third-factor analysis. 448. F.3d at 611 ("We find this inquiry more relevant in the context of first-factor fair use analysis.").

word by Hoiland, was the first substantive section of the PowerPoint, JA-73-77; JA-266—the section that Hoiland herself labeled a "key deliverable" of her presentation. JA-73. It was the only section of the PowerPoint that accomplished Hoiland's primary objective of "shar[ing] best practices in faculty development related to assessment." JA-405. And it was the only portion of Hoiland's PowerPoint that actually taught its readers how to "Assess[] Numeracy in a Faculty Development Program"—the very *title* of Hoiland's work. JA-65. Wilder's work was not merely "prominently featured" in Hoiland's PowerPoint, *Meeropol*, 560 F.2d at 1071—it was the centerpiece of it.

Finally, Wilder's Unit 7H was not merely the key deliverable of Hoiland's PowerPoint. It was also featured as a *distinct* (albeit unidentified) sub-unit in Hoiland's work. That, too, is telling. As Justice Story noted over two centuries ago:

> In some cases, a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; *or they may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy*.

Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (emphasis added); *see also Meeropol*, 560 F.2d at 1070 (adopting doctrine). Wilder's Unit 7H formed just this "distinct and mosaic work" within Hoiland's PowerPoint—and it constituted "the peculiar excellence thereof." There was no transformation here.

b. In finding a transformative purpose, the district court made multiple errors.

i. The district court found a fair use merely because Hoiland sandwiched Wilder's work between other materials.

1. The district court committed a wide range of errors in finding that Hoiland transformed Wilder's work. The first was to inflate a modest difference in purpose into a transformational use. Wilder's original work, the court found, was intended to train faculty members enrolled in the NICHE program to do two things: compose individualize assessment instruments as part of their coursework and, more broadly, to think about "best practices for teaching and assessing QR." SPA-30. By contrast, the court found, Hoiland not only shared best practices for teaching and assessing QR in her presentation but also incorporated materials intended to "disseminate assessment results" of the program and to "discuss the challenges and successes" of the program. SPA-30.

Thus, the court reasoned, Hoiland's overall purpose was broader than Wilder's, as it was aimed at "providing an overview of the NICHE/NICE project to an audience who was previously unfamiliar with it." SPA-34. This was reversible error.

2. The court's analysis was mistaken on many levels. For one, the mere fact that Hoiland had more than one purpose in distributing Wilder's work does not make her use any more fair. If that were the case, anyone could claim fair use by packaging an infringing use with uses that did not infringe. *See, e.g., Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1263 n.21 (11th Cir. 2014) (copying of excerpts of textbooks for use in university courses *non-transformative because it was "for the same purpose*—or one of the purposes, insofar as some of Plaintiffs' works may also be meant for other purposes—as Plaintiffs' original works") (emphasis added). "This kind of mechanical 'transformation' bears little resemblance to the creative metamorphosis [required for transformative use]." *Princeton Univ. Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996). But the district court allowed Hoiland to do just that.

The district court's approach opens the door for endless mischief. A recording artist who samples another work without permission would get away with the infringement because he surrounded it with original content in the same song. *Cf. Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir. 2009) (using classic "Atomic Dog" theme in another song not fair use as a matter of law, even though taking "consisted of relatively small elements of the song").[7] A company that purloins a textbook and markets it as part of a "course packet" would be free to do so as long as it packaged it with other, non-infringing works. *Cf. Princeton*, 99 F.3d at 1389 ("If you make verbatim copies of 95 pages of a 316–page book, you have not transformed the 95 pages very much—even if you juxtapose them to excerpts from other works and package everything conveniently."). A company that assembles infringing musical works into "karaoke packages" for individual crooners to overlay their own renditions would not pay any price for doing so. *Cf. Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 583 (6th Cir. 2007) (rejecting transformative use). A company that assembles real

[7] *See also Warhol*, 598 U.S. at 547–48 ("musician who finds it helpful to sample another artist's song to make his own" does not engage in transformative use)

estate photos into a searchable database would face no consequences. *Cf. VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 741-742 (9th Cir. 2019) (same). And a company that takes footage of a notorious press conference about voter fraud would face no consequence by incorporating it into a broader documentary. *Cf. Lynk Media, LLC v. Peacock TV LLC*, 23-CV-5845 (JGK), 2024 WL 2057235 (S.D.N.Y. May 8, 2024) (no transformative use where NBC took clip of Rudy Giuliani speaking in front of "Four Seasons Landscaping" and used it in documentary about the subsequent effect on the landscaping company).

3. The district court also drew a definition of transformative use that lacked boundaries. It has long been doctrine in this Circuit that "difference in purpose is not quite the same thing as transformation." *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998); *see also Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) (Leval, J.) ("The word 'transformative' cannot be taken too literally as a sufficient key to understanding the elements of fair use. It is rather a suggestive symbol for a complex thought, and does not mean that any and all changes made to an author's original text will necessarily support a finding of fair use."). That was the core holding in *Warhol*. 598 U.S. at

532 ("[T]he first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is *a matter of degree*."); *see also id.* at 529 ("The larger the difference, the more likely the first factor weighs in favor of fair use. The smaller the difference, the less likely.").

The district court found that Hoiland's presentation had a different purpose from the original, but it failed to consider whether her use of the original was "in service of a fundamentally different and new artistic purpose and character." *Andy Warhol Found. for Visual Arts,* 11 F.4th at 42. It was not. Both used the work for academic purposes. Both used the work to instruct college faculty members to assess their teaching of QR skills. Hoiland had some other objectives as well. *See* JA-405 (disseminating "assessment results" and discussing the "challenges and successes" relating to assessment). But this is hardly a "fundamental" difference. The district court did not even attempt to explain how it was.

4. But the district court made an even more fundamental error. What is missing entirely from its opinion is the issue of *justification.* "An independent justification … is particularly relevant to assessing fair use where an original work and copying use share the same or highly similar

purpose." *Warhol*, 598 U.S. at 532; *see also id.* at 549 (noting "this Court's repeated emphasis on justification"); *Warhol Second Circuit*, 11 F.4th 26, 41 (2d Cir. 2021) ("where a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created, the bare assertion of a higher or different artistic use is insufficient to render a work transformative") (cleaned up); *Grant v. Trump*, 563 F. Supp. 3d 278, 284 (S.D.N.Y. 2021) (same). Neither Hoiland nor the district court gave any reason why she needed to use *Wilder*'s work in her presentation rather than undertake "the drudgery in working up something fresh." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994). That should have been fatal to her claim. The district court paid lip service to the importance of justification in other cases. SPA- 32. But the district court failed to ask the question about *this* case. That in itself requires reversal.

ii. The Court mistakenly thought Hoiland's edits to Wilder's work weighed in favor of fair use—when in fact those edits weighed *against* fair use.

1. The Court also erred when it turned its attention to the written presentation. The court found a different purpose and character because

of what Hoiland ostensibly cut out, what Hoiland ostensibly added, and what Hoiland ostensibly edited. None of these support a finding of fair use. In fact, they point the other way.

2. Begin with what Hoiland omitted. The court found it instructive that Hoiland deleted procedural material such as deadlines, instructions for peer review, and the like—material that the attendees of the presentation would not need because they were not enrolled in the NICE curriculum. That misses the point entirely. Scholars in all fields write how-to guides for practitioners. But that does not open their manuals for adaption to a non-practitioner audience. Many a lawyer has written a high court brief, for example, with their trusty copy of *Stern & Gressman* by their side.[8] But the treatise is used by non-practitioners too. *See, e.g.*, *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (citing treatise to make a point about procedure on *certiorari*). That would not give a copier the right to leave in the caselaw analysis and strike out the process points. Or imagine a copy of a Second Circuit practice manual that omits instructions about how to properly format PDFs in a joint

[8] R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice (11th ed. 2019).

appendix. *See* CTA2 Rule 32.1(b)(3) (instructing filers to adjust page numbering to correspond with the PDF reader's numerical search field). Excising that would not make the rest of the practice manual free for the taking.

3. Turn next to what Hoiland edited. The court found that Hoiland made some alterations to Wilder's copyrighted materials—drawing out a short parenthetical, altering a few words, tinkering with fonts. SPA-32. But the record evidence shows that *Wilder*, not Hoiland, made those edits. *Supra* at 19. The edits that Hoiland *did* make, on the other hand, are telling. Most importantly, on the eve of the conference she increased the font size of Wilder's Unit 7H so that it could be more easily read by conference attendees, *supra* at 21-22; JA-216-217—thus *literally* "amplifying, rather than minimizing," *Warhol Second Circuit*, 11 F.4th at 47, Wilder's work. If Hoiland meant to use Wilder's text for a "new and different" function, making it an easier read was an unusual way to do so.

4. The Court especially erred when it evaluated the short phrases Hoiland added at the bottom of certain pages. ("Keep it simple: pre/post, three questions, and a scoring rubric"; "Clarity, alignment,

generalizability, validity, and soundness."). *Supra* at 18-19; JA-74; JA-77. The Court saw these as "her own commentary and takeaways on the course material." SPA-33. But they were nothing of the kind. They were *plucked from very text that she cribbed.* Take the phrase "clarity, alignment, generalizability, validity, and soundness." This is just a five-word extract of the pages that preceded it—which asked whether a QR assessment was "clear and straightforward" (in other words, had "clarity"), whether skills "correspond[ed] to the QR learning goals" (enjoyed "alignment" with them, that is), whether the assessment instrument "extend[ed] beyond just being a math skills test" (that is, had "generalizability"), whether the instrument assessment was "valid" (or did it have "validity," in Hoiland's rewrite), and whether the instrument was "sound" (Hoiland's "soundness").[9] *Supra* at 19. This is no "bona fide abridgment" of Wilder's original work. *Folsom*, 9 F. Cas. 345. It is "the facile use of the scissors," *id.*—the oldest form of copyright infringement in the book.

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[9] The same is true of Hoiland's other supposed summary: "Keep it simple: pre/post, three questions, and a scoring rubric." JA-74. This too was simply harvested word-for-word from Wilder's copyrighted work. *See* JA-62 ("please keep your assessment instrument simple," "pre-test/post-test design," "3 questions," "scoring rubrics"). *Supra* at 18.

iii. It does not matter that Wilder would have objected to the use.

The district court made yet one more error over transformative use. The court found it compelling that Wilder never would have agreed to Hoiland's presentation because it was for "a different audience, context, and purpose than what she had originally intended." SPA-31 (cleaned up). But that has no bearing on transformative use. Authors have every right to reject the use of their works if they do not approve of the context—no matter what the reason. Theodore Geisel's heirs did not endorse the taking of The Cat in the Hat for a schtick about the OJ Simpson trial. ("One knife?/Two knife?/Red knife/Dead wife.") But that did not mean the satire was excused. *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997) (finding no fair use). *See also Harper & Row*, 471 U.S. 539 at 550 n. 3 (1985) ("Perhaps no more precise guide [for fair use] can be stated than Joseph McDonald's clever paraphrase of the Golden Rule: 'Take not from others to such an extent and in such a manner that you would be resentful if they so took from you" (quoting 3 Nimmer § 13.05[A], at 13–66)). Wilder's disapproval of the manner in which Hoiland' appropriated her work does not cut against her at all.

iv. The district court wrongly took into account the way Hoiland talked about Wilder, and how the audience responded to her PowerPoint, in her oral presentation.

The court also erred by failing to distinguish Hoiland's written work from her oral presentation for fair use purposes. Hoiland infringed Wilder's exclusive rights in her work by displaying it without permission during her presentation. *See* 17 U.S.C. § 106(5). But she also *reproduced* Wilder's work, *made a derivative* of Wilder's work, and authorized the *distribution* of Wilder's work to conference attendees—all in the form of her written presentation. Those are separate infringing acts. *See* 17 U.S.C. § 106 (1) (copying), (2) (making derivatives), (3) (distribution); *id.* at preamble (owner has exclusive rights "to do *and to authorize*" any of those enumerated acts) (emphasis added). If Hoiland was to prevail on a fair use defense, she needed to show that *each* of these uses was transformative. But the court intermingled the oral presentation with its discussion of the written presentation indiscriminately, *see* SPA-31-32—making it clear that if Hoiland could show that merely the *display* was transformative, she would be home free on all the other uses as well. That was error.

In reaching this conclusion, the district court once again ran afoul of *Warhol*. There, the late pop artist infringed the photographer's exclusive rights in three ways: by reproducing it within his derivative silkscreens, by distributing copies of many of those derivatives to museums and collectors, and by licensing one of those derivatives to Vanity Fair. But the photographer challenged only the commercial licensing to Vanity Fair—not the other two uses. "*We limit our analysis accordingly*," the Court noted. 598 U.S. at 534 (emphasis added). Why? Because whatever difference there may be between the photograph and the silkscreen, "that difference must be evaluated in the context of the specific use at issue." *Id.* at 545.

Elvis Presley Enterprises, Inc. v. Passport Video, 349 F.3d 622 (9th Cir. 2003), brings the error even more into focus. A production company made a 16-hour documentary about the King. But it used video footage without a license. Did it make a transformative use? The Ninth Circuit said, in effect: "it depends." Some of the uses were transformative "because the clips play[ed] for only a few seconds and [were] used for reference purposes while a narrator talk[ed] over them or interviewees explain[ed] their context." *Id.* at 628. But for others the production

company "crosse[d] the line"—"by making more than mere references to these events and instead show[ing] significant portions of these copyrighted materials." *Id.* at 629. One might note the distinct similarities between that case and ours. Hoiland displayed Wilder's work. She also distributed it in written form. Assume what one will about the former. The latter definitively "crosse[d] the line." The context matters.

2. The district court not only failed to consider Hoiland's display in isolation from her other forms of infringement—it also analyzed the *display* incorrectly. In the court's telling, the words on the pages came alive. The slides were merely visual aids for her overall presentation. SPA-30. There was "a much larger story" she was narrating. *Id.* And the audience members asked questions "almost wholly unrelated to the slides themselves" during a lengthy question-and-answer session during the presentation. *Id.* We have only Hoiland's version of what happened at the conference. But let us take it as true. It simply does not matter.

It does not matter because for one thing, Hoiland knew—*anyone* in her situation would have known—that the text on the slides was meant to be read during the presentation. Hoiland dedicated 45 minutes of her

75-minute presentation to going through the slides ("one after the other" in her words, JA-269) in her 23-page PowerPoint—an average of two minutes per page. *Supra* at 23; JA-167-18; JA-210. Wilder's work made up five pages of her slides—the only pages that matched her primary goal of sharing "best practices in faculty development related to assessment." *Supra* at 9-10; JA-65; JA-405. So Hoiland would likely have dwelt on them more than others. In fact she showed the pages specifically so that attendees could see "the types of questions [program participants] were asked to answer in preparing their assessment materials." Supra at 23; JA-268.

Hoiland also deliberately enlarged the text of Wilder's work in order to enable it to be more easily read, *supra* at 21-22; JA-216-217; JA-73-77, and she extracted certain words and phrases from Wilder's work to highlight them even further in a distillation at the bottom of two pages, *supra* at 17-18; JA-190; JA-199—all to provide "specific advice" to conference attendees regarding "creation of the assessment instrument." JA-267. She must have intended—any reasonable person in her position

would have intended—for audience members to read the text.[10] At a minimum, based on the substantial record evidence on point, a reasonable jury *could* have found that she so intended. Summary judgment in Hoiland's favor was therefore not warranted.

It also does not matter because even in Hoiland's own telling, she did nothing to *comment* on Wilder's work. Hoiland has testified—and the court found—that she repeatedly referenced Wilder and her leadership role in the NICHE Project and the NICE Project. JA-265; SPA-8. But for all of this evidence, there is the proverbial dog that does not bark. At no point in the record is there the slightest evidence that Hoiland actually *commented on Wilder's work itself*. She may well have acknowledged Wilder's role in the project. She may well have spoken highly of Wilder. But there is no evidence she offered any criticism, commentary, or analysis of the very work that she copied. That dooms her claim of transformative use.

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[10] And contrary to the district court's opinion, it is irrelevant that the audience asked questions about other subjects. Hoiland's purpose, not the audience's, is what matters. *See Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) ("However, it is Kirkwood's own retransmission of the broadcasts, *not the acts of his end-users*, that is at issue here and all Kirkwood does is sell access to unaltered radio broadcasts.") (emphasis added).

There is one more reason why the display could not qualify as a transformative use: Hoiland has articulated no justification *whatsoever* for pasting Wilder's work into her presentation. Wilder and Hoiland have jointly presented *about* the NICHE/NICE program at two national organizations—but not once did either share the full text of the NICHE/NICE training *materials*. *Supra* at 8; JA-53. Hoiland has articulated no reason why she needed to do so now. In both the oral and written forms of her presentation, the purloining of Wilder's work was unnecessary—and therefore not transformative.

2. Hoiland's non-commercial educational purpose does not outweigh the non-transformative nature of her copying.

The fact that Hoiland used Wilder's work for a non-commercial, academic purpose does not outweigh the non-transformative nature of her use. Hoiland did not gain a monetary benefit from her presentation. But "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain *but whether the user stands to profit* from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562 (emphasis added); *see also Campbell*, 510 U.S. at 584. ("The mere fact that a use is educational

and not for profit does not insulate it from a finding of infringement."); *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 61 (1st Cir. 2012) (Souter, J., on panel) ("removing money from the equation does not, under copyright law, remove liability for transgressing another's works").[11] Hoiland profited handsomely from her use of the work in this case.

Hoiland profited from Wilder's work for a simple reason: she advanced her career by using it in her presentation. As the district court properly recognized, "publication in the academic setting is a special context in which non-monetary rewards are perhaps more valuable than financial earnings." SPA 41. Hoiland earned exactly those non-monetary rewards—both by publishing her PowerPoint to 237 attendees at a conference of specialists in her field and by displaying it to an animated and inquisitive subset of those specialists in an oral presentation. *Supra*

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[11] *See also Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 13–14 (S.D.N.Y. 1992) (Level, J.) *aff'd*, 60 F.3d 913 (2d Cir. 1994) ("Scholarly and scientific writing has no readership except among those who use it in scholarly and productive or educational undertakings. If that fact alone were sufficient to justify the making of superseding copies, the authors and publishers of scholarly, scientific and educational materials could not protect their copyrights and could not survive as against inexpensive copier technology.")

at 23 and 24; JA-165; JA-172; JA-238; JA-492. She also wasted no time in listing her presentation at the conference on her CV. JA-251. That type of benefit, coupled with Hoiland's decidedly non-transformative use of Wilder's work, assures that the first factor remains in Wilder's favor.

Weissmann v. Freeman is the leading case for this proposition. There, a professor at a medical school purloined a colleague's syllabus, deleted the author's name, and prepared it for use in teaching his own class. The district court concluded that because Dr. Freeman received only a $250 honorarium and did not "stand to profit," the first factor cut in his favor. 868 F.2d at 1324. This Court disagreed. When it comes to the purpose and character of the use, the Court found, monetary gain was not the sole criterion:

> Dr. Freeman stood to gain recognition among his peers in the profession and authorship credit with his attempted use of Weissmann's article; *he did so without paying the usual price that accompanies scientific research and writing, that is to say, by the sweat of his brow.* Particularly in an academic setting, profit is ill-measured in dollars. Instead, what is valuable is recognition because it so often influences professional advancement and academic tenure. *The absence of a dollars and cents profit does not inevitably lead to a finding of fair use.*

Id. at 1324 (emphasis added).

Weissmann remains the rule in this Circuit—and it is now the rule in other circuits as well. For example, in *Soc'y of Holy Transfiguration Monastery,* an archbishop and former member of a monastery posted on his website portions of the monastery's translations of ancient Greek religious texts. The court found that the first factor weighed against fair use. *Id.* at 61 (the archbishop "benefitted by being able to provide, free of cost, the core text of the Works to members of the Orthodox faith, and by standing to gain at least some recognition within the Orthodox religious community [as a result]"). *See also Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir. 2000) ("in weighing whether the purpose was for profit, monetary gain is not the sole criterion, particularly in a setting where profit is ill-measured in dollars.") (cleaned up); *cf. Cambridge*, 769 F.3d at 1266 (first factor weighs against fair use where academic gains "[a] measurable, indirect benefit by distributing Plaintiffs' works to students, such as a valuable authorship credit").

B. The Amount and Substantiality of the Portion Used Tilts Heavily in Wilder's Favor.

The district court correctly found that the third factor, the amount and substantiality of Hoiland's infringement of Unit 7H, tilted in Wilder's

favor. SPA-40. But it underplayed just how much. As the court properly noted, Hoiland used about two-thirds of the text in Wilder's deposit copy. SPA-39. The one-third remaining, the court noted, consisted of Wilder's "step-by-step instructions for the faculty participants [in the NICHE program], including deadlines, submission instructions, and discussion of peer feedback." SPA-39. To the court, these omitted instructions were the "heart" of Wilder's work—thus lending the third factor only "slight[]" support for Wilder. SPA-39-40. This was error.

The nature of the court's error follows naturally from one of its fundamental errors in the transformative use section of its opinion—its misapprehension of the central purpose of the two works. *Supra* at 43-48; Wilder's work was intended to teach NICHE participants how to create a personalized QR learning assessment. *Supra* at 5-6. That is a substantive exercise, not an administrative one. Deadlines and "submission instruction[s]" are no more the heart of Wilder's work than ECF filing instructions would be the heart of a Second Circuit practice manual. *See supra* at 49-50. This factor weighed for Wilder—but much more than the district court believed.

C. The Effect on the Market—Or in This Case, the Effect on Wilder's Academic Reputation and Publishing Opportunities—Also Weighs Against Fair Use.

1. The district court wrongly found that the fourth factor, effect on the market, tilted against Wilder. The court correctly acknowledged that in the academic context, the proper question was not whether Wilder lost commercial opportunities but rather whether there was "any detriment to Wilder's own publications, promotions, or incentives to continue her scholarly research." SPA-41. But the court concluded that factor four still tilted in favor of fair use because Wilder had "alleged no harm to that potential market other than speculation." SPA-44. That was error.

2. The district court got this factor wrong because, under the unique setting of this case, Wilder had *no duty* to show harm to the potential market. At least two circuits—including this one—have made that clear. The seminal decision in this Circuit, as with the first factor analysis, is *Weissmann*. There, as noted above, one professor took another's course syllabus and distributed it for use in his own class. The district court, finding that the professor's conduct "[did] not impair its market value at all," concluded that the fourth factor weighed in favor of fair use. *Weissmann v. Freeman*, 684 F. Supp. 1248, 1262 (S.D.N.Y. 1988). This

Court reversed, finding that the district court erred in "focusing on sales or dollars received, rather than upon the realities of promotion and tenure in an academic setting." 868 F.2d at 1325. Notably, though, this Court did not remand for further findings. It did not even cite any facts in the record itself. Under the facts of *Weissmann*—which is for all intents and purposes indistinguishable from *this* case—the fourth factor did not change the outcome.[12]

The district court misread caselaw to conclude otherwise. In its order rejecting Wilder's motion to alter or amend the judgment, the court cited *Authors Guild* for the proposition that summary judgment was appropriate in favor of Hoiland on the basis of "essentially unrebutted" evidence showing that the claim of market harm was speculative. SPA-51. But Judge Leval, writing for this Court in that case, had already

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[12] In *Weissmann*, notably, the purloined work in that case was never meaningfully distributed. The professor made 50 copies and passed out nine of them to employees. 868 F.2d at 1316 (50 copies); 684 F. Supp. 1250 (given to nine employees). When the professor was called onto the carpet, he pulled the work from his lecture packet, halted circulation to his students, and fessed up to the nine employees. 868 F.2d at 1316. But the aborted distribution and the post-hoc effort to cure did not save him. He reproduced his mentee's work and made a derivative of it. Even with this minimal distribution, the *Weissmann* court found, the fourth factor weighed against fair use.

concluded that the challenged use—the creation of a full-text searchable database—was "a quintessentially transformative use." 755 F.3d at 97. So that case is not remotely on point. The same is true of *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), the district court's other authority. *See* 803 F.2d at 1260 (challenged work employed the purloined work for purposes of criticism and comment). The two cases bolster, not weaken, the rule Wilder advances here.

Weissmann brought this Circuit into line with caselaw in the Ninth Circuit. In *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983), a teacher purloined another teacher's booklet about cake decoration and used it in her adult education classes. The district court held that this was fair use, but the court of appeals reversed. The court of appeals found that the first and third factors weighed against fair use and that the second factor was neutral. 695 F.2d at 1175-1177. As to the fourth factor, the court found, it simply did not matter. The district court had found no evidence that the copying had any effect on the market for the plaintiff's booklet, and the court of appeals accepted the finding. But that did not change the outcome. "Even assuming that the trial court's finding was not erroneous, and that that finding must be accepted and weighed in

Rowley's favor, it does not alter our conclusion." *Id.* at 1177. "Under these circumstances, neither the fact that the defendant used the plaintiff's booklet for nonprofit educational purposes nor the fact that plaintiff suffered no pecuniary damage as a result of [the] copying supports a finding of fair use." *Id.* at 1179.[13]

4. But even if the district court was right that Wilder needed to show market harm, it still erred on another ground: Wilder *did* show evidence of market harm. The district court committed multiple errors in concluding otherwise.

For one thing, the court wrongly dismissed Wilder's claims that Hoiland's use could hinder her plans to "commercialize the NICHE

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[13] *Weissmann* and *Marcus* are consistent with bedrock fair use doctrine. Judge Leval's seminal article on transformative use, written two years after *Weissmann*, says the following: "[I]f the taking is unjustified under the first factor, it should be considered an infringement, *regardless of the absence of market impairment*." Leval at 1124 n.84 (emphasis added). That is even more true in wake of *Campbell* than it was at the time of this article. "Prior to *Campbell*, the Supreme Court had characterized the fourth factor as "the single most important element of fair use. However, *Campbell*'s discussion of the fourth factor conspicuously omits this phrasing. Apparently abandoning the idea that any factor enjoys primacy, *Campbell* instructs that all four factors are to be explored, and the results weighed together, in light of the purposes of copyright." *Am. Geophysical Union*, 60 F.3d at 926. *Weissmann* and *Marcus* are even more controlling now than ever.

materials" in a textbook. SPA-41. The court found that Wilder encountered a "roadblock" with this argument because the Unit 7H text she authored was only a small portion of the NICHE materials. Thus, "to the extent that Wilder intends to publish the entire NICHE/NICE curriculum together as a textbook … she would first have to hold a valid copyright in each of the units." SPA-41-42. But this overlooks the very basic concept of *licensing*. Wilder need not own a copyright in every unit of the NICHE materials in order to publish the work—she need only obtain a license to those she did not own (or alternatively, license out the portion she did own to another scholar in exchange for a share of royalties). The district court simply got this wrong.

And there is another avenue that Wilder could have exploited if not for Hoiland's infringement: *the very type of conference that Hoiland attended*. Suppose the district court is right (though it is not) that Wilder could not have published Unit 7H as part of a textbook. Even if there is only one market option for a copyrighted work, the fact that a defendant avails herself *of that very option* causes market harm that qualifies under the fourth factor. For example, in *Quinto v. Legal Times of Washington, Inc.*, 506 F. Supp. 554 (D.D.C. 1981), a student wrote an article for the

Harvard Law Review. The Legal Times, a trade journal, reprinted the article in full. The district court found the fourth factor weighed against fair use. "The reprinting eliminated the possibility that plaintiff could sell his article to a legal newspaper such as the Legal Times, and for all practical purposes those newspapers *represented the entire market f*or his article." 506 F. Supp. at 560 (emphasis added); *see also Aitken, Hazen, Hoffman, Miller, P. C. v. Empire Const. Co.*, 542 F. Supp. 252, 260 (D. Neb. 1982) ("[B]y copying the plaintiff's plans and using them for the same functional purpose as that which the plaintiff's plans would have been used for had [the defendant] not copied the plans, [the defendant] destroyed the plaintiff's potential market."). These cases are directly on point. If it is true that Wilder had no publishing outlets in journals or a treatise—and it is not—then she *at least* would have had the ability to publish Unit 7H at academic conferences. But Hoiland availed herself of this market as well. The use was not remotely fair.

The court made one final error in analyzing the fourth factor. The court found that there was no record evidence that the PowerPoint was "actually downloaded or viewed" by attendees or that it was "disseminated outside the conference attendees." SPA-43 But there *was*

such evidence. Hoiland purported to grant the conference organizers a license to copy and distribute the PowerPoint, JA-165, and she specifically acknowledged that the conference organizers would be posting the document online "*for downloading*"—via website and mobile application, no less—by conference participants. JA-165 (emphasis added). *See generally supra* at 20. A reasonable jury could easily have found that the work was, in fact, distributed—and distributed substantially. Summary judgment for Hoiland was wrong for this reason as well.

II. THE DISTRICT COURT ERRED IN DENYING WILDER'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF FAIR USE.

The Court should not merely reverse the grant of summary judgment to Hoiland. It should also *grant* summary judgment in favor of Wilder on the fair use defense. "Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court "need not remand for further factfinding, but may conclude as a matter of law that the challenged use does not qualify as a fair use of the copyrighted work." *Harper & Row*, 471 U.S. at 560. This case merits just such treatment. The Court must give Hoiland all reasonable inferences

in considering Wilder's summary judgment motion. But there are only two facts reasonably in dispute at this point in the case—and neither should affect the outcome.

The first fact in dispute is whether Hoiland actually intended, based on all the evidence, to have faculty attendees read the words of Unit 7H. The evidence is overwhelming that she did. She made it the centerpiece of her presentation; she edited the text to draw out what she considered to be the key points; she blew up the text size specifically so it could be read, and she *admittedly* used it to show attendees "the types of questions faculty participants were asked to answer in preparing their assessment materials." JA-267 (capitalizations removed); *see generally supra* at 23. No reasonable jury could find otherwise. But even if there is a material dispute on this issue—and there is not—it would not change the outcome. Hoiland's display of the PowerPoint was only one element in her infringement of Wilder's work. She also copied it, made a derivative of it, and authorized the distribution of it. *Supra* at 10-21. Hoiland must prove *all* of these uses were fair. She cannot do so under any view of the evidence.

The second fact in dispute is whether the PowerPoint was actually distributed in written form to conference attendees. Once again, there should be no material dispute on this. Hoiland authorized the conference organizers to distribute the work and the conference attendees, following this authorization put it online for attendees to download it on their laptops or mobile apps. *Supra* at 20. No reasonable jury could find they did not. But again—this does not change the outcome. Binding authority in this Circuit make clear that in a case like this, a plaintiff does not need the fourth factor to prevail. *Supra* at 63-69. Wilder should win under either set of facts.

III. THE DISTRICT COURT ERRED IN DENYING WILDER'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF OWNERSHIP.

The district court should also have granted Wilder's motion for summary judgment on her claim of ownership. The claim was straightforward. Under the Copyright Act, ownership of the copyright in any work vests initially in the author. 17 U.S.C. § 201(a). Thus, in order to prove ownership of work, a plaintiff needs only to show that she wrote that work. The burden then turns to the defendant to show otherwise. For example, the defendant might present evidence that the plaintiff

transferred the copyright to a third party after authoring the work. Alternatively, and more relevant to this case, the defendant might present evidence that the plaintiff authored the work as a "work for hire" on behalf of an employer. Importantly, "the party relying on the work-for-hire exception bears the burden of demonstrating that it applies." *Horror Inc. v. Miller*, 15 F.4th 232, 242 (2d Cir. 2021). That is because work for hire is an *affirmative* defense. *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 314 (S.D.N.Y. 2000); *Foster v. Lee*, 93 F. Supp. 3d 223, 229 (S.D.N.Y. 2015). To meet her burden of proving ownership, all a plaintiff needs to do is to establish authorship—period.

The district court confused the burden of proof in this case. The court found that although the National Science Foundation "normally" allows grantees to retain the rights to intellectual property generated under their grants, Wilder had not shown that this policy was specifically in effect for the NICHE grant. SPA-24. Moreover, the court reasoned, the grantee in this case was technically CUNY and not Wilder—and Wilder had not explained "by what path copyright ownership would pass, under this scenario, from []CUNY as the NSF grantee to her as the 'author' of the work." SPA-25. But copyright ownership did not have to "pass" from

the NSF or CUNY to Wilder—nor from anyone. She presumptively owned the copyright as soon as she authored the work. If Hoiland thought otherwise, it was her burden to prove it.

The district's court's rule would lead to boundless mischief. The author of a work could theoretically transfer her rights to any number of people—colleagues, collaborators, exclusive licensees, publishers, family members, to name just a few. By the district court's logic, Wilder would have to *disprove* every one of these to show ownership. The same is true for the work-for-hire doctrine. By the court's logic, any copyright plaintiff who has an employer would have to *disprove* that the employer owns the work.[14] That would make litigating copyright an impossible task. It is not the law.

The court erred in one final way. Because work for hire is an affirmative defense, it is also a *waivable* defense. And Hoiland has done just that here by failing to raise the defense in her answer. "Failure to plead an affirmative defense in the answer results in the waiver of that

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[14] Or for that matter, any independent contractor who created a work within the enumerated factors of 17 U.S.C. § 101. *See id.*, work for hire definition (setting out the types of types of works that can become works for hire pursuant to written agreement with an independent contractor).

defense and its exclusion from the case." *Satchell v. Dilworth*, 745 F.2d 781, 784 (2d Cir. 1984) (cleaned up). She did not even raise a work-for-hire defense in her summary judgment motion. She has not preserved the argument. Ownership should no longer be contested.

CONCLUSION

The Court should reverse the grant of summary judgment to Hoiland on her affirmative defense of fair use, reverse the denial of summary judgment to Wilder on Hoiland's affirmative defense of fair use, and reverse the denial of summary judgment to Wilder on her claim of ownership.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation.

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