

# TOO MUCH, TOO LITTLE, OR JUST RIGHT? BEYOND THE PERCEPTION (OR REALITY) OF LAW SCHOOL RIGOR IN TEACHING UNDERGRADUATE COPYRIGHT LAW

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## INTRODUCTION

Journalism law was a required course within my undergraduate journalism-communications curriculum and served as my introduction to the law. Therein I learned about free speech generally, discovered that one is not free to yell “Fire!” in a crowded theatre, and ascertained Supreme Court Justice Stewart’s famous “I know it when I see it” yardstick memorialized in *Jacobellis v. Ohio* concerning recognizing obscenity.<sup>1</sup> Memorable content, taught meaningfully, to a student who was intimidated by the very idea of taking a class about the law. Upon entering the professoriate as an entertainment and intellectual property attorney, those recollections were instinctively transformed into pedagogical inquiry. The questions: how would copyright law’s memorable content be identified? Would students be as intimidated by the law as I had been? Would I teach similar to the way I was taught in law school in terms of both method and substance? This article suggests that answers to those questions can be addressed through the concept of academic rigor.

The law of copyright – with its Constitutional origins, statutory framework, and case law interpretations – has many layers and complexities, even for the seasoned legal practitioner. Yet it is not uncommon for undergraduate entertainment business programs,<sup>2</sup> arts,

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<sup>1</sup> *Jacobellis v. Ohio*. 378 U.S. 184, 197 (1964).

<sup>2</sup> The term “entertainment business program” is used here to refer to an undergraduate program of study in the administrative and operational, non-artistic aspects of the entertainment industries (including but not limited to music, theatre, television, film, literary publishing, and visual art), without regard to whether the program is offered within the context of a business school, or whether such a program confers a Bachelor of Business Administration. Likewise, the term

film and media studies, business, and other undergraduate curricula to incorporate a course covering the subject, as copyright law defines the rules for business transactions involving creative products. The complexities of the substantive law offer opportunities to sharpen critical thinking skills that are desirable to employers and enhance career readiness. Yet those complexities, when combined with critical thinking pedagogy, can pose challenges for the copyright law instructor, surfacing student reticence that may be pedagogically framed (if the student were doing the framing) as *“you seem to be using a law school approach when I am an undergraduate, not law school, student.”* These are patterned objections observed through teaching the course in an undergraduate entertainment business program through instructing over 1500 students over a period spanning nearly thirteen (13) years. The objections are raised despite the fact that none of the students instructed has ever attended law school or has any experiential knowledge of it. They form their view of the pedagogy through the lens of their own experiences with what they perceive and have labeled as a difficult course, expressed primarily through course evaluations. That “difficulty” is a proxy, from the student’s and instructor’s perspective, for rigor.

This article examines and asks: (1) What is rigor? (2) What level of rigor – expressed through student nomenclature as “difficult” and “challenging” – is appropriate for teaching undergraduate copyright law? (3) What teaching strategies contribute to delivering a balanced course that offers neither too little nor too much rigor for the undergraduate student and for the topic? Examining the historical

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“entertainment business” as used in this article includes the operational, administrative aspects of the entertainment industries defined above.

literature concerned with the general teaching of law to undergraduate students offers a framework for exploring how much legal particularity is helpful, necessary, or superfluous for the non-law school student. Though there are distinctions between teaching a copyright law versus business or other law course in the undergraduate business curriculum, the historical and pedagogical insights are generally transferable. This article explores these issues in five (5) sections: Part I reviews the pedagogical history of teaching law in the undergraduate setting as a framework for considering the role of rigor. Part II examines particular challenges of teaching undergraduate copyright law. Part III describes the Draeger et al. 4-Factor model of rigor. Part IV defines an appropriate level of rigor for teaching undergraduate copyright law through application of the Draeger et al. 4-Factor model. Part V summarizes the findings explored.

### **I. Teaching Undergraduate Law: An Historical Examination**

As the body of law that governs creative product transactions, copyright law is recognized as integral to the entertainment business curriculum and is now a staple and foundational course in such curricula and other arts and business programs. Yet an examination of the evolution of teaching undergraduate law helps illustrate that the role of rigor in distinguishing teaching undergraduate law from law school instruction has not been a focal point. The literature examined here explores the history in two contexts: teaching undergraduate law in liberal arts programs and in business administration curricula. Neither context focuses on undergraduate copyright law, as there is insufficient literature to support such an examination. Nevertheless,

these contexts offer historical insights on the evolution of teaching law to undergraduate students versus teaching law to prospective practitioners, a distinction my students have suggested should be sharply drawn.

In the United States, law as a subject for academic consumption was originally taught in undergraduate schools until a shift toward the establishment of undergraduate law professorships, the first in 1790 at the College of Pennsylvania.<sup>3</sup> Harvard College instituted the Royall Professorship of Law in 1815,<sup>4</sup> and two years later established the nation's first university law school,<sup>5</sup> ushering in the current era of institutions dedicated solely to teaching the law for the purpose of educating and training attorney practitioners. Despite this transition, a survey conducted as early as 1891 found that some institutions continued to offer undergraduate law courses as electives after the transition to dedicated law schools.<sup>6</sup> A later study in 1967 by Hollis Martin, Associate Professor of Management at the University of Arizona, examined the nature and prevalence of undergraduate law course offerings in light of the transition. Surveying 98 colleges and universities – all members of the American Business Law Association – Martin's study examined enrollment figures for business, liberal arts, and vocational law courses. Of the 98 schools surveyed – producing 88 respondents – only 17 had undergraduate law departments and all

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<sup>3</sup> Hollis K. Martin, *Law for the College Undergraduate: The Past, The Present and A Proposal*, 6 Am. Bus. L. J. 459, 460 (1968).

<sup>4</sup> *Id.*

<sup>5</sup> Philip Lader, *Experiments in Undergraduate Legal Education: The Teaching of Law in the Liberal Arts Curriculum of American Colleges and Universities*, 25 J. Legal Educ. 125, 128 (1972).

<sup>6</sup> Martin, *supra* note 3, at 460.

of them were in business law.<sup>7</sup> In 1973 Philip Lader, a private practice attorney, chronicled the Law-in-the-Liberal Arts Movement, a study conducted as a report to the presidents of Harvard University and Newton College of the Sacred Heart. The Movement, which reached its pinnacle in 1968, represents a number of efforts to encourage undergraduate study in liberal arts programs. The two most notable efforts were undertaken by Harvard Law School, which instituted the Harvard Liberal Arts Fellowships, and the American Association of Law Schools (AALS) Committee on the Teaching of Law Outside of Law Schools.<sup>8</sup> The movement, and these efforts, was premised on the then prevalent conviction that understanding the law is important to a liberal arts education and not to be reserved for law school alone. These movements extolled the benefits of teaching law to undergraduates by referencing the English system, where undergraduate law is an integral aspect of a college education.

The very structure of the English university system places the study of law on the undergraduate level, with the career lawyer

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<sup>7</sup> *Id.* at 467. His findings indicated that 57% of the total enrollments were in business law courses (e.g., a contracts-based traditional business law course), with liberal arts courses (e.g., Constitutional Law, Philosophy of Law, and Jurisprudence) having the second highest enrollments, and vocational courses (e.g., Criminal Law, Communications Law, Pharmacy Law) having the lowest enrollments. Every school surveyed offered a course in Business Law. *Id.* at 463.

<sup>8</sup> The purpose of the Harvard Fellows Program was to bring “mature scholars in the humanities and social sciences for . . . ‘basic training’” in law to fill the gap caused by the transition of law coursework to law schools. Lader, *supra* note 5, at 136-7.

achieving that status by postgraduate formula. This is not surprising since the renowned Blackstone took the position that a competent knowledge of English law was “the proper accomplishment of every gentleman and scholar; a highly useful...essential part of liberal and polite education.”<sup>9</sup>

These studies in undergraduate law for liberal arts programs are not dispositive, as the objectives of those efforts differ from objectives for offering undergraduate business law. Likewise, there is a correlation between learning objectives and benefits to be derived. For example, the experiments in undergraduate legal education chronicled by Lader meld benefits with objectives, wherein some of the benefits identified include:

- Preparation of knowledgeable clients and introduction of potential law school students to law study and the legal profession;
- Understanding the relation of law and the social order;
- Clarification of the individual’s role in society;
- Training through legal reasoning as a method of cultivating disciplined thinking.<sup>10</sup>

Another study found similar and additional benefits, namely,

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<sup>9</sup> Albert E. Harum, *The Case for an Undergraduate Law Elective in Liberal Arts*, 12 *J. Legal Educ.*, 418, 422 (1959).

<sup>10</sup> Lader, *supra* note 5, at 147.

that such liberal arts law courses contribute to well-rounded scholarship and:

- Illuminate other disciplines such as philosophy, political science, economics, and others;
- Cultivate an understanding of the role of lawyers, judges, juries, and administrators;
- Develop “the complete man” (person), i.e., a well-roundedness achievable through legal study may motivate social leadership.<sup>11</sup>

These liberal arts objectives and benefits differ from than those sought through the offering of business law courses. Notes Lader: “Some law courses are designed to consider *rules and standards relevant to the businessman*... [whereas] the introductory law course in the liberal arts curriculum might serve a broader purpose of client preparation by conveying insights into how law is derived, familiarity with where it is recorded, and...enforcement.”<sup>12</sup>

The prevalence of offerings in business law identified in the Martin survey points to a number of purposes for teaching business

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<sup>11</sup> Harum, *supra* note 9, at 420-21. He suggests that business law studies actually do not contribute to “the complete man,” but to the complete business major. This is the goal of a business program, which thereby creates “the complete businessman.”

<sup>12</sup> Lader, *supra* note 5, at 148. (emphasis added)

law to undergraduate students, as identified by Donohue and Martin, including:

- Understanding the structure by which the American economy is governed;
- Sufficient exposure to legal processes to recognize a legal problem, and to be able to timely confer with legal counsel;
- Ability to articulate legal (and other) issues clearly;
- Development of analytical skills through learning the case method;
- Establishment of a foundation for determining career aspirations (for example, an introduction to law may stimulate an interest in becoming an attorney);
- Understanding the technical details affecting business transactions.<sup>13</sup>

Some of these are similar to benefits seen in the liberal arts experiments but are distinguishable in that commercial law has more practical objectives. A study by Professor Williston conducted for the American Bar Association in 1893 – supported by President Woodrow Wilson when he served as a Professor of Law at Princeton – found that:

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<sup>13</sup> James L. Donohue, *The Case for Teaching Law to Undergraduate Business Students*, 4 *Am. Bus. L J*, 162, 163-166 (1966).

Commercial law...was treated in a different manner than constitutional, international or public law courses. The latter were approached from the historical point of view with the objective of general instruction in the principles of law. Whereas the former course, commercial law, had entirely practical objectives: to inform the business student of technical laws affecting business transactions.<sup>14</sup>

Copyright law is the business law course equivalent in an entertainment business curriculum in terms of laying a foundation for entertainment business transactions.<sup>15</sup> Accordingly, in identifying the benefits of teaching copyright law that influence pedagogy, objectives sought are akin to those cited for teaching undergraduate business law.<sup>16</sup> For example, teaching business law has been found to be essential for undergraduate business students, wherein “to be lacking in the knowledge of the fundamental principles of business law is to be lacking in a knowledge of business.”<sup>17</sup> So it is with copyright law and the entertainment industry. Integrating this practical objective with insights from the historical analysis suggests that teaching law to

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<sup>14</sup> Martin, *supra* note 5, at 461.

<sup>15</sup> This statement is not intended to suggest that it replaces a business law course, as it clearly does not, but lays an essential foundation that is analogous but more specifically contextual.

<sup>16</sup> “Undergraduate business law” is used here to denote the teaching of business law in the undergraduate setting. The same is true with references throughout to “undergraduate copyright law.”

<sup>17</sup> Donahue, *supra* note 13, citing to Smith, Len Young and Robertson, G., *Business Law*, West Publishing Co., St. Paul, 1962, p. 1.

undergraduates provides an opportunity to teach analytical and critical thinking skills, and to integrate lessons about public policy, the workings of government, preparation for consultation with legal counsel, the role of the Constitution, interplay between disciplines, e.g., philosophy (John Locke) and economics, the individual's role and society, and contemplation of the study law as a career. A pedagogy of rigor applies to teaching any of these subjects to undergraduates through law, yet it is not invoked by early proponents of undergraduate legal study.

Therefore, this examination of the historical evolution of teaching undergraduate law provides four (4) insights relevant to an inquiry concerning the contemporary application of rigor: (1) the early separation of teaching law in an undergraduate setting from a law school context is a corroborating reminder of the need for clear distinctions in pedagogy and learning objectives. The historical purposes of teaching undergraduate law have many benefits, from the well-rounded goals related to teaching law in a liberal arts program to providing business students with an understanding of the laws that govern the commercial marketplace, for example, as with the rules of copyright. These objectives offer learning outcomes<sup>18</sup> that are historically distinct from law school objectives, and require intentionality and relevant methodology; (2) In addition to offering knowledge of substantive law, teaching undergraduate law was historically offered to deliver skill-based benefits, e.g., critical thinking

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<sup>18</sup> The terms "learning outcomes" and "course outcomes" are used interchangeably in this article, as the learning takes place within the context of a course, to be interpreted as "by the end of this course, the student should know X and be able to X."

and analytical skills, that are important to employers and students alike; (3) There has been little intentional examination of pedagogies relative to undergraduate copyright law, and correspondingly few pedagogical models focused specifically on the application of rigor to the subject; (4) A pedagogy that (a) recognizes historical learning objectives of undergraduate law while (b) introducing contemporary learning outcomes is needed to distinguish teaching copyright law at an undergraduate level. Such a pedagogy is an appropriate next phase in the modern development of undergraduate law pedagogy for copyright law.

## **II. Challenges of Teaching Undergraduate Copyright Law**

Despite the historical benefits of teaching law in the undergraduate setting, there are challenges that can impact effective teaching of copyright law. Specifically, they include: (1) the development of relevant learning outcomes; (2) establishing an appropriate level of rigor; and (3) unique aspects of teaching substantive copyright law. A brief description of each provides context for the use of rigor in addressing challenges.

***Appropriate Learning Outcomes.*** Developing learning outcomes is necessary for every course and is implicit in student comparisons to law school pedagogy. Since Juris Doctor degree holders often serve as the primary instructors for undergraduate law

courses and are the product of law school outcomes, law school is a pedagogical point of reference<sup>19</sup> and thereby influences undergraduate instruction. Specifically, this translates into the conscious or unconscious use of law school learning outcomes, even though an examination of the American Bar Association objectives and learning outcomes for law schools reveals that they are clearly intended for that context. Section 301 of the American Bar Association *Standards and Rules of Procedure for Approval of Law Schools* identifies the overriding objective for a program of legal education:

- (a) A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.
- (b) A law school shall establish and publish learning outcomes

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<sup>19</sup> Stephen Arnott, writing on undergraduate instruction of evidence law, referred to his initial experience with teaching the subject as “law school lite.” Stephen Arnott, *Evidence Beyond the Rules: A Critical Thinking Approach to Teaching Evidence Law to Undergraduate Students*, 18 J. Scholarship Teaching and Learning 151, 152 (2018). “I rather prided myself on the fact that I was teaching a rigorous course in a rigorous way; that I was challenging to students to think like legal professionals; and that I was helping them to become thoroughly familiar with the rules. However, I now believe that my initial approach was mistaken and that I was treating the undergraduate evidence course as ‘law school lite.’ This meant focusing very closely on the Federal Rules of Evidence to the exclusion of a more rounded, theoretical, and holistic understanding of why we have evidentiary rules in the first place and of how they operate.”

designed to achieve these objectives.<sup>20</sup>

We quickly recognize the inappropriateness of Section 301 as an overriding objective for undergraduate teaching. The specific learning outcomes derived from Section 301 and set forth at Section 302<sup>21</sup> that relate to the development of attorney competency would also be rejected outright by undergraduate law professors as inappropriate objectives for the undergraduate setting. However, the guidance from Section 302 on establishing learning outcomes contains two requirements that are general in nature, namely, “a law school shall establish learning outcomes that shall, at a minimum, include competency in the following: (a) Knowledge and understanding of substantive and procedural law; (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication

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<sup>20</sup>**ABA Standards and Rules of Procedure for Approval of Law Schools**, § 301, **2019-2020** A.B.A. Sec. Legal Educ. and Admissions Bar.

<sup>21</sup>*Id.* at § 302.

Standard 302. LEARNING OUTCOMES

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.

in the legal context.”<sup>22</sup> The suitability of these particular outcomes is less clear, as they pertain to the substantive law which is the same in either setting. Undergraduate instruction appropriately endeavors to impart substantive knowledge of the law, but how detailed should it be, and to what end? How does one teach the substantive law without also teaching to the analytically-focused and legal context-driven outcomes represented in Standard 302(b), even though these are not outcomes that may be consciously adopted or even considered by undergraduate copyright law instructors? What alternative pedagogies are in play and where would they come from, if not influenced by law school education?

In addition to teaching the substantive law there is the question of teaching professionalism. Even though preparation for the practice of law is not pertinent to undergraduate law, a view toward professionalism and career readiness is not limited to ABA standards for prospective attorneys. Career readiness skills to facilitate employability for undergraduate students is of real significance to students and employers alike and is the motivator for a college education for many.<sup>23</sup> But how does a copyright law instructor integrate these requirements into learning outcomes and a responsive pedagogy?

Institutions may not have resources in place to support the teaching of a course typically taught in a professional school, and may not fully appreciate the challenges of doing so, which may account for

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<sup>22</sup>*Id.*

<sup>23</sup> Stephen Rose, *The Value of a College Degree*, 45 *Change: The Magazine of Higher Learning*, 24, 27 DOI: [10.1080/00091383.2013.842101](https://doi.org/10.1080/00091383.2013.842101), (2013).

the dearth of pedagogical models for undergraduate copyright law. A 20-year study found a scarcity of undergraduate law departments, deeming undergraduate law as a “service” area that has not earned the level of import to merit departmental status. According to the study, this trend presents challenges in terms of environmental support and can relegate faculty to the experience of an academic “no-man’s land.”

<sup>24</sup> For business law, the no-man’s (person’s) land phenomenon has been recognized and addressed through organizations established to support business law faculty, e.g., the Academy of Legal Studies in Business (ALSB) and its regional counterparts. For copyright law, instructors look to a combination of ALSB-type organizations designed to focus on the undergraduate setting, which are increasingly including a broader range of substantive law topics. Academic intellectual property organizations that devote particularized attention to teaching the substantive law offer another source of support. The latter are helpful resources for the substantive law and research but exist to support law school professors and focus on law school pedagogies, outcomes, and students.

The no-man’s land experience can also be addressed through the establishment of workgroups comprised of internal or external undergraduate copyright law instructors. Such a group has been

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<sup>24</sup> Martin, *supra* note 3, at 467. “[A] professor who teaches a...“service” course is too often a man whose deeds are without valor: he is similar to a man without a country, or what may be worse, a department.”

established at my institution. While its members support each other around the development of assessments and resources, agreement on learning outcomes has been the most challenging, elusive and least uniform aspect of the collaboration. The primary obstacles to agreement are: content of the course, e.g., which substantive law topics are appropriate to cover in an introductory copyright law course, and secondly, how challenging the course should be, i.e., what pedagogy should govern. Both issues impact the development of learning outcomes and both issues implicate critical thinking and rigor. For example, if one of the learning outcomes is to develop critical thinking skills, rigor is implicated and becomes part of the pedagogical inquiry.

**Rigor.** The second challenge of teaching undergraduate copyright law is rigor. When students perceive a course as difficult or challenging, as with copyright law and other topics, are those perceptions proxies for rigor? Definitions and constructs of rigor date back to the Truman administration's creation of the Presidential Commission on Higher Education in 1947. The post-World War II Commission was formed to define higher education's social purpose and to examine and shape the impact of education on increasing economic opportunity for servicemen after the war. Since the days of the Truman Commission, rigor continues to defy uniform definition and consensus. Rigor has been defined as "deep, critical, inquiry-based learning that pushes students to new levels of academic accomplishment and recognizes the importance of sufficient scaffolding for all students to reach high standards."<sup>25</sup> It has also been

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<sup>25</sup> Emily Schnee, *In the Real World No One Drops Their Standards for You: Academic Rigor in a College Worker Education Program*, 41 *Equity & Excellence Educ.*, 62, 64 (2008).

defined as “the level of understanding course content requires,” whereby levels of understanding range from a knowledge level of understanding (e.g., recall and recognition) to higher order levels of understanding (e.g., analysis and synthesis). The higher the level of understanding required, the greater the level of academic rigor expected.”<sup>26</sup> The cognitive levels in Bloom’s Taxonomy are the context for the levels of understanding that undergird this second definition. Rigor has also been contextually defined, e.g., a community college or vocational institution would define rigor as “teaching specific skills for a job in the local economy or preparing students through remediation for transition to a four-year institution.”<sup>27</sup>

The purpose of rigor is “to engage students and encourage them to think critically.”<sup>28</sup> Yet according to a study conducted by Draeger, Hill and Mahler, student perceptions of rigor and faculty perceptions are not the same. Their study found that students gauge academic challenge primarily around their ability to meet “reasonable” faculty expectations, which in turn influences their view of the quality of the class. Whereas, faculty focus on higher-order thinking and

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<sup>26</sup> Robert C. Nordvall & John M. Braxton, *An Alternative Definition of Quality of Undergraduate College Education: Toward Usable Knowledge for Improvement*, 67 *J. Higher Educ.*, 483, 486 (1996).

<sup>27</sup> Clay Francis, *Academic Rigor in the College Classroom: Two Federal Commissions Strive to Define Rigor in the Past 70 years*, *New Directions for Higher Educ.*, 25, 26 (2018).

<sup>28</sup> *Id.*, at 26.

student mastery of learning outcomes.<sup>29</sup>

Over the years, undergraduate students in my copyright law classes have intuited that the course will be demanding and have expressed that high levels of challenge are more appropriate in a law school setting. Course evaluations surface assertions that the course is being delivered in the same way it would be if taught in a law school, whereby students resist learning the legal rules and assume the technicalities are superfluous for them as undergraduate non-practitioners.<sup>30</sup> Hence, before a student enters the class or has received any assignments, this perception of law school rigor may confront the professor, whereas, rigor in law school is anticipated (as articulated in the ABA Standards) and deemed appropriate. Therefore, the challenge is to reorient student expectations and teach the substantive law with an appropriate level of rigor, while addressing student apprehensions about successfully completing the course and receiving the academic benefits it has to offer.

***Nature of Teaching Copyright Law.*** The third challenge to teaching copyright law to undergraduate students is the law itself. Its constitutional foundation, statutory framework, and an array of case law interpretations that augment the statute have produced a detailed set of exception-laden rules that constitute the body of law for which instruction must be fashioned. Copyright has been considered

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<sup>29</sup> John Draeger, Pixita del Prado Hill & Ronnie Mahler, *Developing a Student Conception of Academic Rigor*, 40 *Innovative Higher Educ.*, 215, 216 (2015).

<sup>30</sup> This observation is based on my experience in teaching copyright law to approximately 1500 students for nearly 13 years as my primary course of instruction. However, it is worth noting that, fortunately, not every student holds these presumptions.

“arguably the IP right that is the most difficult to understand...The complexities of copyright law are generally underestimated...”<sup>31</sup> Additionally, the international component of copyright law requires teaching treaties that vary the scope of the domestic rights students spend most of their time learning. Specifically, “in some respects IP law is somewhat different from the older legal disciplines. IP laws are an example of a ‘historic’ international harmonization of laws...”<sup>32</sup>

In examining how law is offered in undergraduate business schools (not just those with an entertainment focus), a business law course is typically a survey course that includes contracts, torts, agency, business organizations, the legal system, and other topics<sup>33</sup> all covered in one composite course. Accordingly, a survey course is generally not intended to explore the intricacies of the substantive law for multiple topics in the same way as a course devoted to a singular body of law. However, a course devoted to copyright law alone involves this more particularized study. For example, in teaching students the exclusive rights that comprise copyright and concepts of copyright ownership, the topics of exclusive rights and ownership alone involve a number of technical rules that also include several nuanced exceptions, making it difficult to teach the subject without delving into some technicality. Teaching just one of the exclusive

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<sup>31</sup> Andreas Rahmatian, *Teaching Intellectual Property Law as a Law Undergraduate Course in Scotland*, 3 *Eur. J. L. Educ.*, 85, 87 (2006).

<sup>32</sup> *Id.*, at 85-86.

<sup>33</sup> Carol J. Miller & Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction Without a Difference?* 28 *J L Studies Educ.*, 149, 184 (2011).

rights involves multiple components. For example, the performance right: (a) is actually two rights and requires teaching the distinction of a wholly separate right for digital transmission of sound recordings; (b) requires first teaching what constitutes a performance, including public versus private performance; and (c) has eleven (11) exemptions,<sup>34</sup> i.e., 11 instances in which a performance is not considered an infringement. Eleven! While one need not teach all 11 exemptions (I typically teach 7 of them), one must teach some meaningful number of them to teach this exclusive right. This illustrates the particularity of just one of the exclusive rights. There are four other rights, each with its own nuances and details, along with teaching copyright infringement, ownership concepts, what is protectible under copyright law, and many other topics with intricate sub-topics, rules, and rule exceptions within each. The concepts are intertwined and build on each other, which requires laying foundations upon which to introduce related but new concepts. Therefore, the challenge is to strike a balance between covering the law with brush strokes too broad to be meaningful or clear, without exceeding the bounds of undergraduate learning objectives.

Another unique aspect of teaching the course is “folklore and familiarity,” a term used in this article to describe students’ perceived preexisting knowledge of copyright law. Regular interaction with intellectual property is a natural part of consuming music, books, movies, photographs, and other creative products and introduces students to terminologies and experiences associated with intellectual property. Many consumers also create products and become copyright owners, not just consumers. This familiarity is heightened for students

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<sup>34</sup> 17 U.S.C. § 110 (2020).

enrolled in an entertainment business curriculum who have previously been introduced to copyright law either as artists and creators or from previous coursework, e.g., a survey course that provides an overview of the entertainment industry, including an introduction to copyright law. Although prior course work can provide students with a measure of legitimate familiarity with the subject, this exposure is brief and elementary. Moreover, within the entertainment industry myths and misconceptions abound concerning the sine qua non inquiry undergirding copyright analyses, i.e., whether a particular use of copyrighted material is legal. For example, a widely held belief maintains that the playing or use of thirty seconds or less of audio or video material is permitted under copyright law, so long as the use does not exceed thirty seconds.<sup>35</sup> While each use is subject to a case-by-case analysis, there is no specific rule or basis for such a rule within copyright law to lend validity to this belief.<sup>36</sup> Before the advent of Spotify or other streaming outlets or the widespread use of consumer-friendly downloading options like iTunes and Apple Music, the Recording Industry Association of America, the lobbying arm for major recording companies, launched an entire educational and litigation campaign to stem the tide of illegal downloading owing in

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<sup>35</sup> This issue has surfaced consistently over time in most sections of copyright law I have taught, and is often presented to me as fact from students who are generally incredulous, even skeptical, when they find out the belief is baseless.

<sup>36</sup> Fair use could apply but is an intricate analysis that students have not asserted when evoking the existence of the 30-second “rule.”

part to the prevalence of such myths.<sup>37</sup>

Copyright folklore and familiarity is analogous to students' presumed familiarity with other areas of law: for example, believing they understand the Miranda rule because they have heard it repeatedly, or a presumed familiarity with litigation based on having watched *Law and Order* or other televised programs. This kind of "familiarity" is a formidable challenge in teaching the truth of the law, i.e., in teaching the law itself, and involves first "unteaching" misconceptions.<sup>38</sup> To address this, a basis of my instructional approach is to supplement the textbook with excerpts of the law directly from the copyright statute to furnish students with firsthand knowledge of the law, and to facilitate their reliance on it rather than on street knowledge. Since undergraduates are not accustomed to reading statutory language, this can pose yet another hurdle to clear on the path to teaching students to think critically using the law as a point of authority. A related challenge is the scarcity of law textbooks and reading material designed for undergraduate students.<sup>39</sup> Consequently, this led to co-writing a copyright law textbook<sup>40</sup> designed for undergraduates, which is used by my institution.

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<sup>37</sup> Marc Beja, *Copyright-Law Curricula Face Each Other in a Duel*, Chron. Higher Educ. (May 29, 2009), <http://chronicle.com/blogs/wiredcampus/copyright-law-curricula-face-each-other-in-a-duel/7184>.

<sup>38</sup> For another example of the challenge of "unteaching" in law, see Rahmatian, *supra* note 31, at 90-91.

<sup>39</sup> Charles J. Averbook, *Law Students Teaching Undergraduates: A Cornucopia of Opportunity*, 24 J. Legal Educ. 473, 485 (1971).

<sup>40</sup> David J. Moser & Cheryl L. Slay (Carr), *Music Copyright Law*, Cengage Learning (2012).

The preceding challenges compel development of a pedagogical approach to teaching undergraduate copyright law that acknowledges and addresses each. Though the ABA objectives previously outlined were not designed to address undergraduate legal instruction, there is common ground with respect to building a pedagogy that focuses on the development of suitable learning outcomes with academic rigor as the focal point for inquiry.

### **III. Academic Rigor: A 4-Factor Pedagogical Approach**

In 2006, the federal government continued the explorations of higher education started by the Truman Commission through creating the Spellings Commission.<sup>41</sup> While the Truman Commission advocated rigor through the lens of critical thinking and writing with a view toward creating a more contemplative and analytical citizenry, the Spellings Commission looked at educational objectives through a more commercial lens, to create a workforce that could respond to the needs of American businesses.<sup>42</sup> Specifically, they found that “employers report repeatedly that many new graduates they hire are not prepared to work, lacking the critical thinking, writing and problem-solving skills needed in today’s workplaces.”<sup>43</sup> The

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<sup>41</sup> Francis, *supra* note 27, at 29.

<sup>42</sup> *Id.*, at 30.

<sup>43</sup> *Id.*, (citing U.S. Department of Education, *A test of leadership: Charting the future of U.S. higher education*. U.S. Department of Education, Washington, DC: 2006, at 3).

objectives of producing an educated, well-rounded citizenry and objectives to bolster a marketplace of individuals that are prepared to support businesses are complimentary goals. Both commissions looked to rigor as the overarching pedagogical approach to achieve these ends.<sup>44</sup>

Though common notions of rigor limit the concept to difficulty, challenge, and ardor, the Truman and Spelling Commissions recognized rigor as a method of teaching that contains the guiding principles and motivation, foundation, justification, and rationale for student engagement.<sup>45</sup> As such, rigor includes learning outcomes, course objectives, assessments, and other factors related to teaching strategies.

Discerning an appropriate level of rigor for teaching undergraduate copyright law begins with this understanding of rigor as a holistic, comprehensive teaching strategy. This article examines a 4-factor model of rigor developed through a study by John Draeger, Pixita del Prado Hill, Lisa Hunter, and Ronnie Mahler. Draeger et al. found that rigor is comprised of four factors: (1) active learning, (2) higher order thinking, (3) meaningful content, and (4) high expectations.<sup>46</sup> They embarked on a study to increase rigor in their institution based on an institutional mandate to do so.<sup>47</sup> The study began with informal discussions with the institution's faculty members

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> John Draeger, Pixita del Prado Hill, Lisa R. Hunter & Ronnie Mahler, *The Anatomy of Academic Rigor: The Story of One Institutional Journey*, 38 *Innovative Higher Educ.*, 267, 272 (2013).

<sup>47</sup> *Id.*, at 269.

using the National Survey of Student Engagement (NSSE) data as a starting point.<sup>48</sup> Faculty members expressed an intuitive sense that they'd "know rigor when they see it" but lacked a definition.<sup>49</sup> A second aspect of the Draeger et al. study included faculty focus group interviews to identify key features of rigor, including teaching strategies and setting expectations.<sup>50</sup> They subsequently administered a campus survey with streamlined questions from the focus groups to measure indicators of rigor.<sup>51</sup> From there they developed an emerging model and tested it with faculty via workshops.<sup>52</sup> In analyzing the data collected from all sources, they saw intersections and themes<sup>53</sup> that led them to a multidimensional model of rigor that evidenced agreement amongst the four factors across disciplines – from fashion merchandising to statistics for non-math majors (this latter example is analogous to law for undergraduate students).<sup>54</sup>

This section examines each of the factors in the Draeger et al. 4-factor model ("D4 Factors" and "D4 model") generally and with examples relevant to copyright law. Part IV offers examples of how the D4 model would be employed in teaching copyright law by describing and illustrating insufficient, excessive, or appropriate levels

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*, at 270.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*, at 271.

<sup>54</sup> *Id.*, at 275.

of rigor for undergraduate instruction.

***Factor 1: Active Learning as Classroom Engagement.***

Draeger et al. suggest student actions that indicate active learning include “motivation, interest, and effort to come to terms with class material. Attendance, attention to class material, reading the text, and preparing assignments would constitute a minimal level of active learning.”<sup>55</sup> More specifically, Brogt and Draeger found that “learning is active insofar as students are making order-of-magnitude estimates themselves as opposed to simply listening to an instructor lecturing about similar content.”<sup>56</sup> Faculty pedagogies that facilitate active learning include simulations that require real-life problem-solving, service learning, experiential learning, and assignments that require higher order thinking. While an exhaustive discussion of active learning is outside the scope of this article, contrasting an example of active learning that works well with teaching the law with less active learning methodologies helps to answer the question of how students can be actively engaged in learning copyright law. A discussion of active learning strategies with copyright law examples follows.

*Simulations and role plays.* Simulations provide students the opportunity to emulate real-life problem-solving. An example in the context of copyright that I have used: divide the class in half, assigning copyright properties to some students while assigning user interests to the other students, requiring each to role play protecting their own

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<sup>55</sup> *Id.*

<sup>56</sup> Erik Brogt & John D. Draeger, *Academic Rigor in General Education, Introductory Astronomy Courses for Nonscience Majors*, 64 *J. Gen. Educ.: Curricular Commons Human. Sci.*, 14, 25 (2015).

interests throughout the semester through use of copyright law concepts. Teaching the Supreme Court confirmation process through simulation has been found to provide undergraduates with insight into both the legislature and the courts.<sup>57</sup> Even simulations designed for courses outside law or policymaking have been found to be an effective teaching technique when compared with lecturing, when adapted to teaching the law.<sup>58</sup> Therefore, simulations that teach the policymaking role of the legislature and courts in the development of copyright law may provide an opportunity for incorporating rigor through active learning.

*Lecture.* Lecture is notably absent from the list of active learning approaches. Though it has long been a teaching staple, particularly in law school pedagogy,<sup>59</sup> it is considered part of a pedagogy for passive learning.<sup>60</sup> However, it is often utilized as an efficient means of delivering content to large groups of students at one time<sup>61</sup> and is not without benefits. “Active learning techniques are

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<sup>57</sup> Arthur H. Auerbach, *United States Supreme Court Confirmation Simulation: Learning through the Process of Experience*, 46 PS: Political Science and Politics, 808 (2013).

<sup>58</sup> Kristina M. DeNeve & Mary J. Heppner, *Role Play Simulations: The Assessment of an Active Learning Technique and Comparisons with Traditional Lectures*, 21 Innovative Higher Educ., 231, 244 (1997).

<sup>59</sup> Rahmatian, *supra* note 31, at 88.

<sup>60</sup> David Roberts, *Higher Education Lectures: From Passive to Active Learning via Imagery?* 20 Active Learning in Higher Educ, 2019, 63, 64.

<sup>61</sup> Rahmatian, *supra* note 31, at 88.

more effective for achieving some goals, while lectures are more effective for achieving other goals.”<sup>62</sup> Lectures have been used in teaching intellectual property to simplify textbook concepts, to reinforce student comprehension, and to inspire and provoke interest.<sup>63</sup> Therefore, using a combination of methods can positively impact rigor.

*Rote memorization.* The number of rules in copyright law – from the exclusive rights to rules of ownership and exceptions thereto – is ripe for rote memorization. Yet memorization itself is considered passive, rather than active, learning.<sup>64</sup> Therefore, how it is incorporated will impact the course’s level of rigor. For example, memorization can create a vocabulary for discussion of meaningful content as a scaffold to higher order learning.<sup>65</sup> Table 1 provides examples of memorizable content within copyright law.

*Interactive Question & Answer vs. Socratic Method.* The Socratic Method traditionally used in law school can be modified with a view towards undergraduates and active learning. A challenge to use of class time in teaching undergraduate copyright law is the student’s propensity to pepper the instructor with questions throughout the semester about whether a particular copyright use is permitted. If the instructor answers the question outright, there is no need for the student to engage in learning. On the other hand, if the professor does not answer the question immediately, the student may view the

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<sup>62</sup> Carlson, J. A., & Schodt, D. W., *Beyond the lecture: Case teaching and the learning of economic theory*, J Econ. Educ., 17, 26. (1995).

<sup>63</sup> Rahmatian, *supra* note 31, at 89.

<sup>64</sup> Draeger et al., *supra* note 36, at 272.

<sup>65</sup> *Id.*

approach as unaccommodating and the instructor as unwilling to be helpful in facilitating comprehension of concepts. In expounding on the purpose of teaching undergraduate law, William Zelermeier addressed this dilemma and speaks to the impediment it produces for learning:

There is a natural curiosity among people, especially when they are concerned with a particular problem, to know the answer... Some are not interested in the method by which an answer is produced; to them, only the answer is important. Thus, in the study of law, curiosity as to results may overshadow the process by which results are obtained. Under such circumstances, the law takes on an appearance of being a collection of rulings or rules having little or no connection with each other, and faltering memory substitutes for reasoning as a method of study. But one who has at his grasp a knowledge of basic legal concepts will more readily find his way through the legal maze, for he has the means by which to recognize and understand the signs that direct him toward the goal of his curiosity.<sup>66</sup>

As Zelemeyer points out, automatic dispensing of answers without engagement does not incentivize “reasoning as a method of study.”<sup>67</sup> To address this dilemma, a distinguishing characteristic of my course has involved substantial use of questions – both in terms of

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<sup>66</sup> Donohue, *supra* note 13, at 165.

<sup>67</sup> *Id.*

questions directed to students, as well as the way in which students' questions are handled. When a student initiates a question, other students in the class (not the questioner) are offered the opportunity to analyze and answer the question. I wrap up the discussion by providing a clear analysis and answer for all, verifying with the initiating student that her question was answered satisfactorily.<sup>68</sup> Questions are directed to students during each class period to create an interactive environment in which students will be engaged and will understand their engagement to be a vital part of class participation and success in understanding course concepts. The questions are intended to be challenging and to provide variation from an all-lecture format. A commitment to memorizing names facilitates routinely calling on all students throughout the semester. Students are informed of this practice on the first day of classes verbally and through the syllabus. The interactivity of modified, Socratic-like dialogues invokes active learning and thereby impacts the level of rigor for the class.

***Factor 2: Meaningful Content.*** Law school instruction focuses on teaching the substantive law, which could be regarded as the *most* meaningful content within that context. Such an emphasis is likewise natural for undergraduate instructors as well, as a familiar pedagogical focus. Yet even if teaching the substantive law was the ultimate objective, which rules, concepts, or principles of the law

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<sup>68</sup> This practice was somewhat controversial when I first began to use it, in terms of whether the initiating student felt the question was answered since the answer was provided after discussion, rather than immediately upon being asked. After some modifications, I arrived at the practice currently in use. Therefore, it is important to provide notice in syllabi and to make sure all students' questions are answered if this practice is elected.

would be most meaningful for undergraduate students? There are several possibilities: 1) Framing meaning in terms of how copyright law affects specific student uses, attitudes, and perceptions of use, i.e., copyright as information literacy skills, an approach covering ethical (not just legal) uses of information that are subject to copyright law;<sup>69</sup> 2) Framing meaning for a specific undergraduate audience, e.g., musicians, could define what is meaningful. For example, protectability, infringement, fair use, the impact of digital technology on copyright law, and criminal copyright have been identified as the most germane business issues for musicians;<sup>70</sup> 3) Meaning can also be framed based on curriculum emphasis. For example, the copyright law course in my institution's undergraduate music business program has traditionally focused on providing a survey of all fundamental concepts of statutory copyright law to anticipate students working as non-artist business professionals. The survey approach has required covering a large swath of content, including: the exclusive rights and limitations on use; ownership – from joint authorship to works made for hire to termination of rights to licensing; duration and the public domain; infringement and its remedies and defenses; the role of the U.S. Copyright Office and formalities; the exclusive rights in the digital context; the history of copyright law; even international copyright law, all a very comprehensive approach. But the question as

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<sup>69</sup> Tammy Ravas, *Copyright for Undergraduates: Lessons Learned While Teaching a Semester-Length Online Course*. *J Copyright Educ. Librarianship*, 1, 2-3, 2016.

<sup>70</sup> Ronnie Cohen, *Business Law for Musicians, an Overview of Legal Topics for Music Students*, 2 *J. Performing Arts Leadership in Higher Educ.*, 4, 6, 2011.

to whether all of these topics are fundamental and meaningful for a student who may have little actual interaction with the law after graduation is an open one and a subject of debate amongst the copyright law faculty within the program; 4) Related to coverage of the substantive law, another possibility for meaningful content is philosophy of law. This focus is on covering the constitutional purpose of copyright law, competing interests (particularly in the arts and entertainment industry), and the tension between copyright owners' rights and consumer/user interests.

The preceding list illustrates four ways of approaching and defining meaningful content. There are many topics and subtopics within substantive copyright law that can be covered. Identifying which aspects of the substantive law are most relevant and how much of those topics to cover is fundamentally important, yet doing so does not fully respond to the meaningful content prong of academic rigor. What is considered meaningful content in a course is directly tied to specific learning objectives.<sup>71</sup> Therefore, in addition to teaching the substantive law there are additional learning outcomes and content that may be meaningful that also incorporate rigor. For example, what is meaningful to employers has become meaningful to students. Therefore, learning outcomes that target career readiness – preparing and equipping students to meet the demands of the workplace – constitute meaningful content that can be adopted to supplement or shape the teaching of the substantive law. Data from the Spellings Commission in 2006 found that employers reported a lack of critical thinking, writing, and problem-solving skills, and overall lack of

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<sup>71</sup> Brogt & Draeger, *supra* note 56, at 20.

preparedness for the workplace.<sup>72</sup> These skills remain important to employers. According to a 2018 report from the National Association of Colleges and Employers (NACE), the following are the top five attributes employers seek in new hires, in order of importance: problem solving, ability to work in a team, strong work ethic, analytical/quantitative skills, and written communication skills.<sup>73</sup>

Intellectual property courses, particularly copyright, have been found to convey transferable skills that make students more employable after graduation.<sup>74</sup> Meaningful content can be adapted to teach career readiness skills in conjunction with substantive law. Such adaptations include use of group projects and assignments that provide students with the opportunity to acquire analytical skills and demonstrate initiative. Content can be meaningful in a variety of ways, and for a number of reasons.<sup>75</sup>

***Factor 3: Higher Order Thinking.*** Higher order learning extends beyond rote recall<sup>76</sup> or even comprehension of facts<sup>77</sup> to

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<sup>72</sup> Francis, *supra* note 27, at 30.

<sup>73</sup> *Key Attributes Employers Want to See on Students' Resumes*, National Association of Colleges and Employers (January 13, 2020) <https://www.nacweb.org/talent-acquisition/candidate-selection/key-attributes-employers-want-to-see-on-students-resumes/>.

<sup>74</sup> Rahmatian, *supra* note 31, at 88.

<sup>75</sup> Draeger et al., *supra* note 36, at 273.

<sup>76</sup> Brogt & Draeger, *supra* note 56, at 17.

<sup>77</sup> *Id.*

manipulation of ideas through analysis, comparison of ideas, problem solving, critical thinking, and deep learning.<sup>78</sup> It “requires students to judge data sources critically, to analyze information and positions, to apply theory to practical problems, and to prepare ahead for class.”<sup>79</sup> Because of its grounding in case law, statutory law, constitutional purpose, and public policy implications, copyright law is a context ripe for teaching analytical and critical thinking skills. Accordingly, the goal of using copyright law as a vehicle for the development of such skills has been a part of my own pedagogy for the class. Because I had long associated teaching copyright law with teaching critical thinking, my conviction was that aiming to incorporate these skills would automatically introduce rigor to the course. Yet the research of Nordvall and Braxton suggests that “higher-order thinking skills are not likely to be developed unless the academic processes in the course are aimed toward the development of such skills and the assessment of learning in the course tests the development of such skills.”<sup>80</sup> In other words, there is a requisite intentionality that begins with incorporating higher order thinking as a learning outcome and extends to adopting a methodology, i.e., an intentional teaching strategy for achieving the outcome. In an examination of teaching undergraduate evidence law, Stephen Arnott concluded that intentionality occurs “when we supplement rule-based learning with logic, general experience, and reasoning processes, we provide important context, without which . . . the law of evidence can seem like a disparate rag-bag of rules with little in common.”<sup>81</sup> Arnott determined that he had been taking a “law

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<sup>78</sup> *Id.*, at 20.

<sup>79</sup> Draeger et al., *supra* note 36, at 272.

<sup>80</sup> Nordvall & Braxton, *supra* note 26, at 493.

<sup>81</sup> Arnott, *supra* note 19, at 153.

school lite” approach to teaching evidence through focusing on the substantive law without providing the context that makes for meaningful content as well as higher order learning.

Higher order learning is also associated with Bloom’s familiar taxonomy. Writing in the context of undergraduate business law, Arthur Wolfe suggested that Bloom’s six learning domains – Remember, Understand, Apply, Analyze, Evaluate, Create – all have a place in the legal instruction of undergraduate students. Accordingly, Wolfe asserted that learning outcomes should be framed in behavioral terms.

Business law professors...should search beyond tradition for a systematic method for formulating educational objectives in behavioral terms...phrased in terms of the student behavior or activity which the instructional process seeks...I have proposed that we utilize the systematic classification of student behavior provided in Taxonomy of Educational Objectives, Handbook I: Cognitive Domain, and, Taxonomy of Educational Objectives, Handbook II: Affective Domain.<sup>82</sup>

Wolfe suggested that the Knowledge domain (now the “Remember” domain), the simplest intellectually, is where most

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<sup>82</sup> Arthur Wolfe, *Beyond the Laws: Undergraduate Legal Instruction and the Development of Cognitive Behavior*, 13 Am. Bus. L. J., 239, 241 (1975).

instruction takes place.<sup>83</sup> Exams or assignments requiring memorization and recall of facts and ideas can be simpler to implement for instructors, and easier courses are preferred by some students.<sup>84</sup> He suggests that the appropriate use of this domain is as a stepping stone to the higher learning domains, rather than as an end to itself.<sup>85</sup> In the copyright context, familiarity with the six exclusive rights in the copyright bundle of rights and definitions of work for hire are fundamental candidates for memorization. However, mere recall of these concepts does little to help students understand how they actually work.

Using classifications like those proposed in the taxonomy research recognizes a learning hierarchy, i.e., that learning is a progressive process in which mastery of less complex intellectual skills precedes higher cognitive processes. This is an important and liberating way to think about how to teach copyright law, given its sometimes complex rules. Rather than presuming that undergraduate students cannot grasp the law's technicalities or teaching them primarily memorizable content, teaching strategies and learning outcomes can be developed to make the rules attainable and contribute to higher order thinking, as long as the approach is incremental.<sup>86</sup> Examples of copyright law assignments for each domain are shown on Table 1.

***Factor 4: High Expectations.*** In studying differences between

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<sup>83</sup> *Id.* at 241-242.

<sup>84</sup> D. E. Clayson, *Student Evaluations of Teaching: Are They Related to What Students Learn?* 31 *J. of Marketing Educ.*, 16, 20. (2009).

<sup>85</sup> Wolfe, *supra* note 82, at 242.

<sup>86</sup> Draeger et al., *supra* note 36, at 274.

student and faculty perceptions of rigor, Emily Schnee's definition of rigor suggests that high expectation "pushes students to new levels of academic accomplishment."<sup>87</sup> It is this academic "push" that I had most closely associated with the idea of rigor, setting standards to facilitate an academic challenge that would yield intellectual growth and grasp of concepts.

Faculty expectations have been found to be derived from their own educational experiences, accreditation standards, institutional or departmental cultures, and academic disciplines.<sup>88</sup> Schnee's study revealed that students, like faculty, have expectations concerning rigor. The study found that some students, though not all, want to be challenged and do not want an education that does not prepare them for the real world.<sup>89</sup> In the words of one of the students who participated in the study: "I think teachers who drop their standards to please students are not helping them at all. In the real world, no one drops their standards for you."<sup>90</sup> Faculty in the study juxtaposed rigorous instruction against being uncaring.<sup>91</sup> Examining Schnee's definition of rigor in its entirety reveals that high expectations must offer support to make the challenge achievable for the student. In

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<sup>87</sup> Schnee, *supra* note 25, at 64. "...enriches and stretches them intellectually and provides them with the tools they need to thrive in competitive work and academic settings."

<sup>88</sup> Draeger et al., *supra* note 36, at 273.

<sup>89</sup> Schnee, *supra* note 25, at 65.

<sup>90</sup> *Id.* at 66.

<sup>91</sup> *Id.* at 69.

other words, rigor “recognizes the importance of sufficient scaffolding for all students to reach high standards.”<sup>92</sup> Scaffolding has multiple purposes: 1) it creates a method for students to reach high standards; 2) thereby enables instructors to establish such standards methodically and reasonably; 3) helps address perceptions of rigor as lacking compassion; and 4) moves students toward higher order thinking progressively and incrementally, which is at the heart of scaffolding.<sup>93</sup> For example, Bloom’s taxonomy is a hierarchical model in which each tier requires use of increasingly complex cognitive skills. In the copyright law context, setting expectations could be hierarchical by encouraging students to begin with memorization of exclusive rights and ownership concepts, but progress to analysis of case law, public policy critiques, and application of concepts, as shown in Table 1. However, not all models of critical thinking are progressive; some encourage a more back and forth use of skills.<sup>94</sup> Such a back-and-forth methodology may be effective for teaching higher order thinking, but is not considered a scaffolding approach that supports high expectations.

Establishing expectations also involves clear communication of standards to students. How do students ascertain whether they are expected to process the course content like a law student – as some students in my course believed – or as an undergraduate student learning copyright law for different purposes? My own experience suggests that merely telling them that the challenge is at an appropriate college level is minimally helpful and will fall on deaf ears if their

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<sup>92</sup> *Id.*, at 64.

<sup>93</sup> Draeger et al., *supra* note 36, at 272, 274.

<sup>94</sup> *Id.*, at 274.

actual experience contradicts that message. Rather, Brogt and Draeger suggest that expectations are communicated to students through learning outcomes and assessments.<sup>95</sup> The approach to these two issues is also where students experience a feeling of success in meeting the challenges of the class, or in failing to do so.

(1) *Learning Outcomes.* As previously noted, there is little literature that directly addresses teaching undergraduate copyright law, except to suggest that the subject may need a special approach akin to that taken in traditional undergraduate business curricula, i.e., that it should be taught with specificity, unlike for undergraduate liberal arts law courses.<sup>96</sup> Therefore, it is necessary to construct learning outcomes to target teaching the technical rules of copyright law. In doing so, one question is whether outcomes for a law school course are transferable to the undergraduate context. For example, the ABA Standards Review Committee states that law school learning outcomes must yield competency in “knowledge and understanding of substantive law, legal theory and procedure.”<sup>97</sup> This particular learning outcome can be appropriate for the undergraduate setting, as one cannot alter or arbitrarily omit the rules that comprise copyright law. However, the rules can be taught in a way that recognizes the undergraduate setting without compromising high expectations.

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<sup>95</sup> Brogt & Draeger, *supra* note 56, at 19.

<sup>96</sup> Lader, *supra* note 5, at 128, footnote 13.1a

<sup>97</sup> **ABA Standards and Rules of Procedure for Approval of Law Schools**, § 302(a), *2020-2021* A.B.A. Sec. Legal Educ. Admissions Bar Standards Review Committee, Student Learning Outcomes Subcommittee.

2) *Assessments*. Student perceptions of rigor are shaped by their ability to meet “reasonable” faculty expectations.<sup>98</sup> Therefore, the nature of assessments – the volume, complexity, relevance, and type of assessment used is important in setting high expectations. Within my institution’s music business curriculum, assessments consist of three (3) multiple choice/true false/short answer exams, several credit/no credit quizzes and exercises that require application of legal principles, and one writing and/or presentation assignment which is typically a case brief or case study. This latter requirement is usually implemented as a group project. All exams and most quizzes utilize a combination of questions requiring recall of concepts, as well as hypothetical questions which present a fact pattern containing a copyright problem to be solved through application of the correct rule of law. Hypothetical questions are a particularly distinctive feature of law school courses that can be modified for undergraduate instruction. For example, substituting the law school essay issue-spotting exams with multiple choice exams that vary the range of question difficulty helps to manage student expectations. Essay exams are not ideal for intellectual property courses on the undergraduate level.<sup>99</sup> They do not help to contextualize knowledge or move students toward higher order learning.<sup>100</sup> The purpose and manner in which assessments are implemented contributes to communicating high expectations.

Each factor in the D4 model helps answer the question of whether it is possible for a course to be either too rigorous, lacking in

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<sup>98</sup> John Draeger, Pixita del Prado Hill & Ronnie Mahler, *Developing a Student Conception of Academic Rigor*, 40 *Innovative Higher Educ.*, 215, 216 (2015).

<sup>99</sup> Rahmatian, *supra* note 31, at 97.

<sup>100</sup> *Id.*, at 97-98.

rigor, or appropriately rigorous. The model also offers a methodology for constructing a pedagogy that is appropriate for undergraduates, rather than “law school lite,” in its approach to rigor.

#### **IV. Identifying an Appropriate Level of Rigor: Applying the D4 Factors**

Rigorous academic work should move learners beyond busy work<sup>101</sup> toward higher-order thinking<sup>102</sup> through meaningful content that prepares students for transfer learning.<sup>103</sup> It should also encourage students to take responsibility and ownership for their own learning.<sup>104</sup> The multidimensionality of the D4 model incorporates each of these factors. Moreover, Draeger et al. found that rigor occurs when these elements overlap.<sup>105</sup> Therefore, an “appropriate” level of rigor is realized through a pedagogy that applies all of the Draeger et al. factors, and applies them to achieve rigorous outcomes.

Applying the model has been shown to be effective in undergraduate contexts that do not engage legal concepts yet bear other similarities to teaching copyright law. For example, Brogt and Draeger applied the 4-factor model to their Astronomy 101 course and consider their findings applicable to other disciplines seeking to apply

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<sup>101</sup> Draeger et al., *supra* note 36, at 269.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*, at 272.

the 4 factors outside an undergraduate science course.<sup>106</sup> Indeed, aspects of their Astronomy course pose similar challenges to those encountered in teaching copyright law. For example, they posited that they could teach the class without teaching the math or physics on which Astronomy is based, without having students in the class who had prior exposure to those subjects, and recognizing that many students hold negative perceptions of science courses. This scenario bears similarities to teaching copyright law to undergraduates in that “students’ experience with undergraduate level intellectual property is normally very limited.”<sup>107</sup> In my experience, students have had little to no exposure to analytical reasoning in the context of the law and have little familiarity with the courts, legislature or policymaking. Like Brogt and Draeger’s Astronomy students’ suppositions about science as complex, students sometimes perceive law as abstract, and tedious,<sup>108</sup> which may lead students to presuppose that law will be a difficult subject to master.

Brogt and Draeger’s goal was to substantiate not only that students without a math or physics background could learn fundamental concepts of Astronomy, but that the course could be rigorous in its approach. To achieve their objectives, they first identified what constitutes rigor for Astro 101, taking into account objectives beyond imparting scientific knowledge. In doing so they considered instruction for non-Astronomy majors versus teaching for majors, which bears similarities to teaching copyright law to law

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<sup>106</sup> Brogt & Draeger, *supra* note 56, at 15.

<sup>107</sup> Rahmatian, *supra* note 31, at 90.

<sup>108</sup> *Id.*

school students versus teaching the subject to undergraduates.<sup>109</sup> This approach led them to design an astronomy course different from one that is rigorous in terms of requiring students to learn complex mathematical computations implicit in astronomy. Lastly, they applied the multidimensional D4 factors using the definition of rigor that “learning is *most* rigorous when students are actively learning meaningful content with higher order thinking at the *appropriate* level of expectation.”<sup>110</sup> This definition suggests that expectations, learning, and rigor can vary along a spectrum of appropriateness, wherein an appropriate level of rigor is one that strikes the balances offered by the D4 model. According to the model, that balance is achieved by embracing an orientation to rigor that upholds the high expectations traditionally associated with rigor, but defines and achieves those expectations through active learning, higher order thinking, and meaningful content.

Many options exist for applying the D4 factors to achieve rigor, with variation depending on instructor implementation. Faculty

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<sup>109</sup> This comparison of undergraduate non-science majors to undergraduate science majors is not wholly analogous to comparing undergraduate students to graduate students in law school. However, what is meaningfully similar is that Astronomy majors would have a heightened commitment to learning both the fundamental and most advanced concepts of Astronomy, just as law school students would have toward learning copyright law, as well as a more developed base of knowledge, openness to instruction, and motivation for taking the class.

<sup>110</sup> Brogt & Draeger, *supra* note 56, at 19 (emphasis added).

assessments of rigor are individual.<sup>111</sup> Therefore, an instructor's perspective or assessment of rigor, referred to herein as "rigor orientation," can influence how the D4 model is implemented. For example, two copyright law instructors could incorporate all four of the D4 factors in their pedagogies yet choose to employ them in different ways, with different emphases. In applying the meaningful content factor, one professor may choose to focus more on teaching the rules of substantive law than on teaching career readiness skills like collaboration, even though both constitute meaningful content. In applying the higher order thinking factor, one instructor might utilize Bloom's taxonomy, which is a progressive cognitive hierarchy. Whereas, another instructor might apply higher order thinking through a critical thinking approach that is not hierarchical. The manner in which the factors are applied can also guide decisions about fashioning learning outcomes, assessments, assignments, selection of course materials, and other teaching strategies. Accordingly, this section offers examples/recommendations for identifying appropriate versus inappropriate levels of rigor in the undergraduate copyright law context. Table 2 provides a matrix of appropriateness levels with specific examples using rigor orientation plus each of the D4 factors.

### *Rigor Orientation*

Every instructor possesses their own perspective, termed here as rigor orientation, of what constitutes rigor. Some professors are more demanding than others, construing high expectations as the most essential component of a meaningful educational experience, whereas another instructor may focus more on meaningful content. While

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<sup>111</sup> Schnee, *supra* note 25, at 66.

these perspectives are shaped by instructors' own individual learning and teaching experiences,<sup>112</sup> rigor orientation is adaptable. Past educational experiences from law school or elsewhere need not serve as the primary influences that shape our approach to rigor. Lessons from the Brogt and Draeger study suggest beginning with an inquiry<sup>113</sup> rooted in the D4 model's definition of rigor that asks: 1) What is expected of copyright law students? 2) What are the fundamental concepts and skills that make the course meaningful? 3) How can students be actively engaged in these topics? An analysis based on these questions can be employed to design the course to the level of rigor the instructor seeks to achieve, and can facilitate achieving a level that is correspondingly appropriate.

*Applying the 4 Factors.*

The D4 factors offer a balanced, multidimensional way to achieve rigor in copyright law. This approach to pedagogical design is (a) directed specifically to an undergraduate audience, and thereby departs from law school pedagogy as a fundamental model, (b) without compromising objectives to teach substantive law, and (c) with a view towards making learning meaningful rather than theoretically abstract. Therefore, this section offers principles for differentiating excessive, insufficient, and appropriate levels of rigor in teaching undergraduate copyright law. Table 2 provides examples of

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<sup>112</sup>*Id.*

<sup>113</sup> Brogt & Draeger, *supra* note 56, at 19.

those principles in action. As the table illustrates, each level applies the D4 model and varies application of the components, based on level of rigor.

**Excessive Rigor.** Excessive rigor places an emphasis on the higher order thinking and high expectation factors without accommodating those demands or providing a clear path for students to be successful in meeting such expectations. The rigor orientation of the instructor is toward providing a high challenge. The D4 model requires high expectations, so long as there is a methodology to help students to achieve them, e.g., through scaffolding, teaching what is expected before expecting it, or other methods of encouraging and facilitating student success. Excessive rigor yields an imbalanced pedagogy in failing to incorporate all of the 4 factors and in the pedagogical approach to implementing any of the factors because of this rigor orientation. For example, use of multiple-choice tests where each answer choice is framed as a plausible correct answer, and the correct answer is distinguished by a technical nuance of the legal rule being tested: this is very close to a law school assessment and orientation. Table 2 offers additional examples of excessive rigor.

**Insufficient Rigor.** Rigor should “move learners beyond the mere memorization of facts and mere busywork.”<sup>114</sup> Therefore, insufficient rigor fails to guide learners in this direction. Insufficient rigor also involves an emphasis on accommodating students through low expectations and little to no emphasis on higher order thinking. The rigor orientation of the instructor is toward caring and accommodation, substituting compassion for rigor. This orientation is

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<sup>114</sup> *Id.*, at 17.

rooted in the perspective that rigor and caring are incompatible, a perspective that Schnee's study found is held by some faculty.<sup>115</sup> However, the D4 model supports compassion by accommodating students' needs and abilities through offering an achievable path of success without compromising student learning. The D4 model also supports compassion by developing students' ability to meet challenges, rather than assuming students either do not desire to learn meaningful content or are unable to do so. Like excessive rigor, insufficient rigor is imbalanced, not only in failing to attend to a holistic pedagogy that incorporates all of the 4 factors, but also in the approach to implementing any of the factors because of this rigor orientation. For example, use of multiple-choice tests where each answer choice is so simplistic that it points to one patently obvious answer that does not require engagement with the topic to yield success. Table 2 offers additional examples.

**Appropriate Rigor.** Brogt and Draeger found that a course can be rigorous along some dimensions and not others.<sup>116</sup> Therefore, an appropriate level of rigor refers to one which seeks a balanced approach, embracing a holistic pedagogy that values both high expectations and compassion and strikes that balance by incorporating all four factors in the D4 model in teaching and course design.

Another aspect of appropriate rigor is related to instructors'

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<sup>115</sup> Schnee, *supra* note 25, at 69.

<sup>116</sup> Brogt & Draeger, *supra* note 56, at 18.

expectations. Teachers' expectations have been found to be linked to educational outcomes.<sup>117</sup> Therefore, teaching with an appropriate level of rigor does not presume upon students' ability or desire to learn. Rather, learning objectives are based on answers to the Brogt and Draeger questions for applying the four factors:<sup>118</sup> What is expected of copyright law students? What are the fundamental concepts and skills that make the course meaningful? How can students be actively engaged in these topics? Table 2 illustrates a range of responses to these threshold questions. Some of these examples may be familiar teaching strategies. Therefore, adopting an appropriate level of rigor involves strategic use of methodologies and assessments, making informed choices about why to use one device over another, as part of a deliberately rigorous pedagogy.

## V. Conclusion

Teaching undergraduate law has been studied, both in liberal arts and business law contexts and found to provide benefits ranging from being integral to a well-rounded education to producing disciplined thinking, as well as an understanding of the rules of business law. However, previous study has been lacking in two regards: a) in producing pedagogical models for undergraduate copyright law,<sup>119</sup> and 2) in producing models that focus specifically on

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<sup>117</sup> Schnee, *supra* note 25, at 68.

<sup>118</sup> Brogt & Draeger, *supra* note 56, at 19.

<sup>119</sup> Pedagogical models for teaching undergraduate copyright law are scarce, despite the importance and prevalence of teaching the topic in this setting. Scholars have examined teaching approaches for intellectual property generally, but very little addresses pedagogies for the undergraduate setting or for teaching copyright law specifically.

rigor. The history of teaching undergraduate law in liberal arts and business law contexts has deemed such instruction to be useful, necessary, and beneficial for students, but lacked a specific focus on rigor. As a result, copyright law instructors of undergraduate students may have difficulty identifying a pedagogy that is suitably rigorous, that extends beyond memorization of facts, dates, and rules, that is meaningful to students and prepares them for their careers, though not for the practice of law. Moreover, while there is recognition that law school and undergraduate pedagogies differ, the question of how to distinguish an undergraduate teaching pedagogy from law school pedagogy has been recognized but has also been addressed sparingly.

A pedagogical approach centered on rigor offers potential for teaching meaningful content to undergraduate students in ways that contribute to both skill and intellectual development. Rigor is a comprehensive concept that is not limited to common perceptions of how difficult a subject is for students to learn, how difficult they perceive it to be, or how challenging the professor thinks it should be (introduced here as rigor orientation). Rigor is a multifaceted concept, and when applied with balance helps to shape learning outcomes, assignments, and assessments that move away from a law school approach toward an undergraduate model. The Draeger et al. model has been applied in the undergraduate context to distinguish how to take a challenging subject and make it balanced and meaningful for students in that setting.<sup>120</sup> Use of the Draeger et al. 4-factor model

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<sup>120</sup> Brogt & Draeger, *supra* at note 56, at 15.

offers a holistic approach to moving undergraduate copyright law away from a law school lite approach while retaining an appropriate level of rigor.

The D4 model offers benefits to both students and faculty. Students benefit from being fully engaged, having the opportunity to derive meaning and lifelong learning. Faculty benefit from employing a teaching strategy that helps them meet the challenges of teaching copyright law, including student apprehensions concerning perceived rigor, presumed familiarity with the topic, and the development of appropriate learning outcomes. Use of this model offers genuine promise for increasing teaching effectiveness for undergraduate copyright law as well as undergraduate business and other areas of undergraduate law.

APPENDICES

*Table 1. Copyright Law Taxonomy*

*Followed by Table 2. Comparative Pedagogies of Academic Rigor for Undergraduate Copyright Law*

## Copyright Law Taxonomy

Learning Domain	Implementation in Coursework
Remember	Define the 6 exclusive rights ( <i>exam or quiz</i> )
Understand	Describe how copyright ownership is acquired ( <i>class presentation, term paper, Responses to Socratic questions</i> )
Apply	Complete copyright registration form using hypothetical facts ( <i>exercise</i> ); Apply fair use criteria to a set of facts ( <i>assignment</i> )
Analyze	Differentiate between patents, trademarks, and copyrights ( <i>exam, analogy exercises</i> )
Evaluate	Critique <i>Feist v. Rural</i> ; Argue the policy advantages of copy left ( <i>written or oral assignment</i> )
Create	Design a copyright law system that supports technology as well as content owner interests ( <i>class project</i> )

	<i>Excessive rigor</i>	<i>Appropriate Rigor</i>	<i>Insufficient rigor</i>
Instructor's Rigor Orientation	<ul style="list-style-type: none"> <li>• Orientation toward high challenge</li> <li>• Imbalanced emphasis on Higher Order Thinking and High Expectations Factors;</li> <li>• Exclusion or de-emphasis of the remaining D4 factors</li> <li>• Law school "lite"</li> </ul>	<ul style="list-style-type: none"> <li>• Orientation toward a balanced challenge</li> <li>• Strikes balance between student accommodation and high expectations</li> <li>• Balanced application of all D4 factors by identifying (a) expectations for copyright law students; (b) meaningful concepts and skills, and (c) how to actively engage students</li> <li>• Purposeful pedagogy at undergraduate level</li> </ul>	<ul style="list-style-type: none"> <li>• Orientation toward low challenge</li> <li>• Imbalanced emphasis on student accommodation</li> <li>• Exclusion or de-emphasis of the D4 factors</li> <li>• College "lite"</li> </ul>
Student Success Path	Success requires meeting continuous challenges in assignments and assessments with little variation in high expectations; too difficult to achieve success most of the time for most students	Success requires active learning: attendance, engagement, attention to class material, effort, reading, preparing assignments	Success requires little to no effort to achieve due to non-challenging assessments and assignments; too easy to yield learning most of the time for most students
High Expectations Factor	<ul style="list-style-type: none"> <li>• Expect students to push themselves to highest potential</li> <li>• Self-teaching through extensive use and comprehension of statutory and case law is expected</li> <li>• Self-teaching is expected through use of materials, e.g., via case book instead of textbook</li> <li>• Students expected to develop skills and derive comprehension with minimal instructor guidance</li> </ul>	<ul style="list-style-type: none"> <li>• Expect students to explore their own potential</li> <li>• Expectation that students can understand a range of copyright law theories and concepts</li> <li>• Expectation that students can develop career readiness skills</li> <li>• Expectation that students can advance their learning potential and skill development with instructor as facilitator</li> </ul>	<ul style="list-style-type: none"> <li>• Little to no identified expectation of skill or cognitive development</li> <li>• Expect rote memorization of definitions and rules</li> <li>• Expect completion of busywork, e.g., group assignments with little individual accountability</li> <li>• Expectation that students can comprehend only basic legal concepts through "spoon feeding" approach</li> </ul>
Meaningful Content Factor	<ul style="list-style-type: none"> <li>• Learning outcomes resemble ABA outcomes; overarching goal is to teach substantive copyright law through law school-like approach</li> <li>• Emphasis on detailed knowledge of rules and complex nature of copyright law</li> </ul>	<ul style="list-style-type: none"> <li>• Learning outcomes focus on student ownership of learning, not just content</li> <li>• Mixture of case and statutory law</li> <li>• Balanced content that explores rationale to produce meaning, e.g., constitutional rationale of copyright law; significance of public</li> </ul>	<ul style="list-style-type: none"> <li>• Learning outcomes focus on teaching <u>memorable</u> rules of copyright law at an introductory level</li> <li>• Limited coverage of substantive law</li> <li>• Volume: coverage of exclusive rights, fair use, history of copyright law (Statute of Anne,</li> </ul>

	<i>Excessive rigor</i>	<i>Appropriate Rigor</i>	<i>Insufficient rigor</i>
	<ul style="list-style-type: none"> <li>High volume of both statutory and case law</li> <li>Coverage of sections 1 through 7 of Copyright Statute (USC 17)</li> <li>Emphasis on critical thinking and reasoning skills at high level with little <u>nexus</u> to meaning</li> </ul>	<ul style="list-style-type: none"> <li>policy; practical examples of the law's usefulness</li> <li>Balance of substantive law + career readiness skills</li> <li>Content is made meaningful to students through role plays, simulations, other practical vehicles</li> </ul>	<ul style="list-style-type: none"> <li>colonial copyright statutes, etc.)</li> <li>Little emphasis on career readiness skills</li> </ul>
Higher Order Thinking Factor	<ul style="list-style-type: none"> <li>Use of Bloom's taxonomy</li> <li>Pedagogy places primary emphasis on higher cognitive domains: creating and evaluating; challenging analysis</li> <li>Reasoning and critical thinking routinely required</li> </ul>	<ul style="list-style-type: none"> <li>Use of Bloom's taxonomy</li> <li>Progressive pedagogy to purposefully advance students from one cognitive level to the next, up to highest level, through use of all D4 factors – <i>See examples at Table 1.</i></li> <li>Students apply theoretical principles to meaningful content</li> </ul>	<ul style="list-style-type: none"> <li>Use of Bloom's taxonomy</li> <li>Pedagogy places primary emphasis on lower cognitive domains: remembering and understanding</li> <li>Little reasoning or critical thinking required</li> </ul>
Active Learning Factor	<ul style="list-style-type: none"> <li>Primarily lecture</li> <li>Classroom engagement, but limited to Socratic method or equivalent</li> <li>Hypothetical question exams/quizzes are primary assessment</li> </ul>	<ul style="list-style-type: none"> <li>Combination of lecture and student engagement; see also examples under higher order thinking</li> <li>Modified Socratic method</li> <li>Multimedia to prompt student discussions, reasoning, exercises, group interactions</li> <li>Simulations</li> <li>Students develop own hypothetical questions/scenarios + apply rules to facts + small group discussion</li> <li>Students teach legal rule</li> <li>Students create own flow charts or outlines to explain legal rules</li> </ul>	<ul style="list-style-type: none"> <li>Primarily lecture</li> <li>Instructor-created materials</li> <li>Little classroom engagement</li> <li>Use of multimedia with students as spectators</li> <li>Primary assessment is reading and comprehension exams/quizzes</li> </ul>