Educational Fair Use in Copyright: Reclaiming the Right To Photocopy Freely

Ann Bartow, University of South Carolina School of Law

Available at: https://works.bepress.com/ann_bartow/34/
"The right of fair use is a valuable one to scholarship, and it should not be allowed to
decay through the failure of scholars to employ it boldly."


I. Introduction

You open a prestigious daily newspaper, and read a fascinating account of a current
controversy embodying an issue you were just discussing with your Torts class yesterday.
Risking the enmity of anyone down the periodical distribution list, you whip out a pair of
scissors, cut out the article, and arrange to have eighty copies made, one for each student
in your section of Torts. You distribute these copies the next day with a flourish, eager to
illustrate how an interpretive dispute you discussed in the context of sixty year old cases
is still raging. You are also sending an important secondary message: Your course is
important and you are teaching things that will be meaningful to the students' lives as
practicing attorneys long after their exams are graded.

Eleven months later you are preparing to teach the same Torts materials to a new crop of
first year students. You find the now yellowed article jammed into your lecture notes, and
you remember the beneficial effect this piece had upon the enthusiasm and level of
preparation of last [*150] year's students. This time you can actually distribute the
article before you cover the issue in class, so you arrange for the photocopying and
dispersal of eighty more copies post haste.

You are a copyright infringer. You are not in compliance with the Guidelines, ¹ so you do
not have a persuasive "educational fair use" defense. ² You are not in compliance with
your law school's internal photocopying policies, so you will have to pay for your own
attorney, and will be personally liable for any damages. Because your employing
educational institution has these internal photocopying policies, of which your awareness is
presumed, you will have difficulty demonstrating a good faith belief that your copying
was fair use, and you may be liable for statutory or actual damages, whichever is greater.
If your acts of infringement are found to be willful (because, perhaps, having read this
article you should have known better) you could also be liable for enhanced damages and
attorney's fees. ³ You could also be enjoined from photocopying in the future. ⁴

With few exceptions, ⁵ written works created within the last twenty years are copyrighted,
and these copyrights will not expire until long after every educator reading this Article
Copyright owners have the exclusive rights to reproduce their copyrighted works, and any unauthorized photocopying of a copyrighted work is an act of copyright infringement unless this photocopying is a "fair use" of the copyrighted work. Students and educators are among the primary beneficiaries of fair use, which, from an educator's perspective, is the "most vital piece of the law that fulfills copyright's constitutional man date." However, over the past decade the scope of educational fair use has been dramatically compressed by judges who ignore the external benefits of fair use, and respond only to the lost dollars publishers ascribe to the doctrine. Publishers in turn have used favorable court decisions and the threat of expensive litigation to coerce commercial photocopiars to pay permission fees for the privilege of making any copies at all, whether or not the use might be a fair one, and in some cases even when the work is not eligible for copyright protection. Fearful and litigation averse educational institutions attempt to simultaneously mollify publishers and protect themselves by adopting copyright policies that define a minimal scope of educational fair use, and make individual faculty members liable for any infringing photocopying activity outside of this petite orbit.

The incredible shrinking affirmative defense of educational fair use is being compacted into ineffectuality by profit minded copyright owners, whose "neutral" desire to maximize revenues fosters intense opposition to the doctrine of fair use. Diminution of educational fair use renders educators susceptible to liability for copyright infringement for engaging in unremarkable acts of duplication and distribution of idea-bearing materials for educational purposes. The ability of educators to use and disperse information, and to expose students to a wide range of perspectives on any given subject, is threatened by the ongoing contraction of the scope of educational fair use. However, decompression of the doctrine will likely only be effectuated by appropriate Supreme Court action.

Copyright owners who are affirmatively engaged in diminishing the scope of educational fair use are overwhelmingly publishers, rather than authors. These publishers attack educational fair use in several different, somewhat internally inconsistent ways. First, they argue that fair use reduces the profitability of their publications, and thereby reduces monetary incentives to undertake the publication of new works. In this way they characterize educational fair use as a threat to the creation and dissemination of future works of scholarship, rather than an escape valve through which current knowledge embodied in prohibitively expensive books and periodicals can leak to the impoverished. Publishers make this argument despite clear evidence that academic writers do not require monetary incentives to produce scholarly works. In fact, many academic writers prefer a broad definition of fair use, which makes others' works available to them, and perpetuates wide dissemination of their writings, even if it costs them royalty payments.

Secondly, publishers like to cloak their self-interest by regularly and hypocritically raising the specter of the impoverished author, starving in a garret because educational fair use deprives her of the royalties she needs to live on. However, if authors are underpaid, it is usually because publishers use their strong bargaining positions to
negotiate publishing contracts that are unfavorable to authors. Publishers have not demonstrated that the photocopy royalties they collect brighten the financial picture of individual authors in any significant way.

Third, publishers like to characterize their profits as rewards for risk taking. Whether publishers actually take a lot of risks in the field of academic publishing is questionable. Nonprofit academic publishers are often subsidized. Commercial publishers are free to undertake only projects that are likely to be profitable. They can recruit "name" scholars to author or co-author textbooks; they can reissue popular textbooks in "new edition" formats to prevent competition from "used" book sales. They can heavily market a tome, or decline to do so. The same work that is marginal with respect to book sales is likely to be similarly marginal with respect to permission fees. Books that sell a lot of copies are the books that are most likely to generate significant permission fees, unless a publisher chooses to deny permission to photocopy excerpts in order to maximize the number of students who are required to purchase the entire book.

An author who has devoted two years of her life to a manuscript has arguably invested a lot more in a book than her publisher, even though her time does not intuitively convert into high dollar figures. Yet, any preference she may have with respect to maximizing dissemination of her work, rather than its profitability, will largely be ignored, or even contravened.

II. Definition and History

The doctrine of fair use was codified in § 107 of the Copyright Act of 1976, which states in pertinent part:

The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified [in §§ 106 and 106A], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 11

The omissions from § 107 are immediately apparent. Fair use is not defined, and no guidance is offered with respect to an ordering of priorities in the application of the four articulated factors to be considered.

Fair use has been called an equitable rule of reason with no real definition. 12 Fair use is, however, widely recognized as a doctrine under which a copyrighted work can be used
without permission from, or even against the express wishes of the copyright owner, in certain circumstances. Fair use doctrine embodies a policy against freighting ideas and information with proprietary rights. Although one of the bedrock principles of copyright law is that only the expression of ideas is copyright able, and not the ideas that are expressed, as a practical matter it is often very difficult to separate the two. If, for example, a unique idea is expressed in a highly original, copyrighted book, unless one is prepared to "re-express" the idea, thereby rewriting the tome in one's own words (and preferably in a manner that does not induce the book's author to sue for copyright infringement, while still retaining the "essence" of whatever makes the work unique and valuable), monopolistic control over the idea contained in the work is essentially ceded to the work's copyright owner. Though ideas are part of the public domain, one requires words ("expression") to convey them. When an idea is complex, it will be onerous, if not impossible, for another person to communicate using other words without slanting or shading underlying concepts. Preservation and accurate transmission of an elaborate original idea compel use of intact, original expression.

The Copyright Act does not bestow absolute exclusive rights upon a copyright owner, but rather confers a limited monopoly with respect to use of the copyrighted work. A copyright is intangible (or "intellectual") property that is vested with a public interest, intended to achieve an "important public purpose." There is a societal bargain implicit in the copyright law. Copyright owners are given tools in the form of exclusive rights with which to exploit creative endeavors financially, but this gift is conditioned upon an understanding that the ultimate goal of copyrights is to maximize the number of creative works available to the public, and not to benefit individual copyright owners. Alternatively expressed, "copyright is a bargain between the public and publishers, in which the public consents to restrict its rights as a kind of bribe to publishers." To effectuate this bargain, copyrights should be no more restrictive than is necessary to create incentives for the promotion of knowledge and learning. Where public interests conflict with those of copyright owners, the public interests should prevail.

Fair use therefore represents an amplitude of control that is withheld from a copyright owner when a grant of copyright is made, rather than a right or privilege copyright owners earn or acquire that is subsequently "taken." Fair use is the "only limitation on copyright that applies to all rights of the copyright owner and to all copyrighted works." The public's statutorily circumscribed right to the fair use of copyrighted works can be justified in several ways. Fair use access to copyrighted works may be grounded in recognition that no newly created, copyrighted work can be truly original. All authors are consciously or unconsciously, directly or indirectly exposed to, informed and inspired by the earlier works and thoughts of others, and are therefore obligated to contribute "free samples" from their own works to the marketplace of ideas. In this construction, fair use functions almost as a tax or fee that is levied upon individual copyright works for the common welfare, and justified by the copyright owner's consumption of common or public knowledge.

Fair use may also be perceived as a tax perhaps paid as partial reparation for the costs
to society of the "copyright infrastructure" comprised of the Copyright Office, the federal court system (which has subject matter jurisdiction over copyrights), law enforcement agencies, and other governmental entities dedicated to delineating, allocating, and protecting copyrights. Fair use thus functions as a burden on intellectual property that reciprocally accompanies the benefits provided by the copyright infrastructure.

Fair use can also be viewed as somewhat similar to an easement. The recent publisher-propelled rush to expand the scope of copyright protections has been aptly analogized to "a land grab the likes of which we have not seen since the Government opened up the Northwest Territory for settlement." Fair use may be seen as society's easement across "servient" creative works. Under this construction authors create and publish new works subject to the burden of fair use, and should consider the possible impact of the doctrine just as a landowner would factor in the ramifications of an easement when deciding whether and how to develop land. Unlike the typical effect of an easement on land, however, an easement doesn't necessarily burden or devalue intellectual property. A book can be equally valuable to each in a series of new readers no matter how many times it is read, with no diminution in the quality of the work. As Thomas Jefferson stated: "He who receives an idea from me, receives instructions himself without lessening mine; as he who lights his [157] taper at mine, receives light without darkening me." Fair users don't erode the desirability of a work, and may actually augment royaltygenerating demand for it by increasing its visibility or elevating its prominence.

Fair use has also been justified as a response to market failure, based on the premise that the public ought to have free access to information and ideas manifested in copyrighted works which could not be purchased with reasonable ease or efficiency. Under this notion of fair use, the availability of a work or portion thereof has an inverse relationship with the prospective scope of its fair usability. The scope of fair use would therefore be broader with respect to a book that was out of print, and narrower for a book that was inexpensive and widely distributed. Where there was no market failure, there could be no fair use.

The idea that there was a fair use right to use a copyrighted work without the copyright owner's permission was first raised in 1841 in Folsom v. Marsh. The plaintiffs in this case owned a copyright in a multivolume autobiography of George Washington, which defendants were accused of infringing when they copied 353 pages of the treatise. Though this sounds like an appallingly extensive appropriation, it actually amounted to less than 6% of the original lengthy work. Defendant's fair use claim failed because the court concluded that the most important parts of the work had been copied in an attempt to supplant uses (and presumably purchases) of the original work. In Folsom, Justice Story articulated the underpinnings of the modern test of fair use, subsequently incorporated into § 107 of the Copyright Act, which comprised a review of "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the [158] sale, or diminish the profits, or supersede the objects, of the original work." Justice Story was most concerned about the market effect of the accused infringing usage, presaging the extensive (though misdirected) focus by modern courts on the profitability implications of nonpermissive
uses asserted to be fair.

It has been argued that rather than being "a typical statutory provision representing Congress's creation of new law and establishment of rules for the courts to apply [§ 107] is instead a direction to the courts to continue to develop the common law." 42 Under this view, § 107 is not a codification of the doctrine of fair use, but rather "statutory recognition of a judge-made rule of reason." 43 One commentator has referred to fair use as a "paradigmatic 'catch-all'," and asserted that "the doctrine has no crisp outlines, no precise standards, and no obvious center or core. Its flexibility allows judges to adjust the contours of copyright protection to fit individual circumstances as they arise, in the true common law tradition." 44 In any event, though § 107 has not been legislatively altered with respect to the fair use of published works since it went into effect in 1978, 45 the scope of fair use that it delineates has been steadily shrinking. 46 [*159]

III. The Guidelines: A Restrictive, Microscopic Safe Harbor for Multiple-Copying Educators

While the Copyright Act of 1976 was being debated and drafted, a coalition of twenty-five educational associations (the "Ad Hoc Committee on Educational Organizations on Copyright Law Revision") advocated a blanket exemption from infringement liability for copying done for non-commercial educational purposes. 47 Not surprisingly, this proposal was vigorously opposed by publishing interests, 48 and was ultimately rejected, but § 107 was amended to include a specific reference to "multiple copies for classroom use." 49 The first prong of § 107's four part test for fair use was also amended to direct consideration of whether a use was commercial or non-profit educational in nature. 50

Due to the contentiousness of the educational photocopying issue, an allegedly representative triumvirate of authors, publishers and educational institutions came together to reach some understanding on the issue. These groups, the American Association of Publishers, the Ad Hoc Committee on Educational Organizations on Copyright Law Revision, and the Author's League of America, Inc., were charged with finding common ground on the issue of educational photocopying. 51 Together they ostensibly negotiated the minimum scope of fair use with respect to photocopying by or on behalf of teachers for classroom purposes. 52 These "minimum standards of educational fair use," 53 were denominated the "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals," [hereinafter "Guidelines"] and were controversial even when "adopted." 54 Both the American Association of University Professors and the Association of American Law Schools (A.A.L.S.) denounced the Guidelines as "too 're strictive' of copying at the university level." 55 The A.A.L.S., which was excluded from the negotiation of the Guidelines, presciently argued that the Guidelines "restrict the doctrine of fair use so substantially as to make it almost useless for classroom teaching purposes." 56 The Ad Hoc Committee answered these objections by emphasizing that the Guidelines were only minimum standards for educational photocopying, and expressed "hope that the interested parties would meet in the future to develop new guidelines for areas where the Guidelines did not apply or were inappropriate." 57 This has not happened. 58 As is
discussed below, these "interested parties" are primarily meeting on the litigation battlefield, and publishers have been winning decisively. 59

Though Congress specifically declined to incorporate these Guidelines into the Copyright statute, courts have generally held (and publishers have gleefully conceded) that educational photocopying that meets the Guidelines constitutes fair use of copyrighted works. 60 Described by some academics as "a publishers' wish list of restrictions," 61 the Guidelines authorize teachers to make a single copy of a chapter from a book, article from a periodical or newspaper, short story, short essay, short poem, or chart, graph, diagram, drawing, cartoon, or picture from a book, periodical or newspaper "for his or her scholarly research or use in teaching or preparation to teach." 62

The "Guidelines" for making multiple copies are much more restrictive. Copies must be limited to one per student, and the reproductions must be brief. 63 Complete works can be reproduced only if they are comprised of less than 2,500 words. 64 With respect to longer works, only 1,000 words or ten percent of the work, whichever is less, may be reproduced, though copying up to 500 words is always permissible. 65

The decision to photocopy these short works or excerpts must also be spontaneous. 66 "Spontaneity" under the Guidelines requires that the photocopying be at the "instance and inspiration of the individual teacher," and that the time span between the decision to use the work and the actual use be "so close in time that it would be unreasonable to expect a timely reply to a request for permission." 67 According to at least one court, providing photocopies of copyrighted materials at the beginning of a semester that will not be assigned until later in the semester is a violation of the spontaneity requirement. 68

The Guidelines restrict "cumulative" photocopying by limiting the use of a brief or excerpted work to one course per school, and, with the exception of works contained in newspapers and "current news periodicals," confine a teacher to nine or less "instances of such multiple copying" per course. 69 Teachers are further limited to copying only one short work or two excerpts per author, and only three works or excerpts per collective work or periodical volume per class term. 70

The Guidelines also set forth the following additional restrictions. Photocopies cannot "be used to create or to replace or substitute for anthologies, compilations or collective works." 71 No copies can be made from "consumable" works that students could otherwise be required to purchase, such as "workbooks, exercises, standardized tests and test booklets and answer sheets." 72 Copying cannot "substitute for the purchase of books, publishers' reprints or periodicals[,] be directed by a higher authority[, or] be repeated with respect to the same item by the same teacher from term to term." 73 "No charge shall be made to the students beyond the actual cost of the photocopying," 74 and all photocopies must carry a copyright notice. 75

This is what adherence to the Guidelines' construction of "fair use" [*162] means in practice: First, a professor makes the "spontaneous" 76 decision to use a portion of a copyrighted work that is in no way "consumable" or a substitute for a reprint or other
publication that she could have required students to purchase. Then, the Guidelines: dictate that the professor may photocopy only excerpts of about three pages or less from any copyrighted work (and less than two pages if the underlying work is a short one); require that the professor copy and distribute no more than nine of these diminutive excerpts during the entire semester; and compel the professor to ensure that she is the only person in the entire school who multiple-copied each excerpt that term. The professor must additionally warrant that, in totality, the photocopied excerpts do not take on the appearance or function of an anthology or compilation. Finally, the professor must never use the excerpt again.

While compliance with the Guidelines almost automatically renders educational photocopying fair use, failure to comport with the Guidelines does not (yet) automatically constitute copyright infringement. Educational photocopying that does not meet the Guidelines is evaluated under the general fair use four part test set out in § 107. As is discussed below, under the analysis used by the courts in the Basic Books, Inc. v. Kinko's Graphics Corp. and Princeton University Press v. Michigan Document Services, Inc., teachers cannot be confident that any copying beyond what is permissible within the Guidelines will be deemed fair. The Guidelines are so restrictive that compliance, especially with the "brevity" and "cumulative" restrictions, virtually precludes beneficial usage of a lengthy work for classroom purposes. However, due to uncertainty, and the fear of litigation, educational fair use is becoming circumscribed by the Guidelines because educational institutions increasingly urge or require faculty members to comport with them. Simultaneously, evolving educational fair use jurisprudence is rendering meaningless the plain words of § 107 of the copyright statute, which clearly and unambiguously designate the making of multiple copies for classroom purposes an exemplar of the fair use of copyrighted works.

IV. Section 107's Four-Part Test

Section 107 sets out a non-exhaustive list of factors a court must consider when deciding whether non-permissive utilization of a copy-righted work is "fair use." In the context of educational photocopying, § 107's four-part test was intended to be the arbiter of fair use for photocopying.

1. "The purpose and character of the use including whether such use is of a commercial nature or is for nonprofit educational purposes:" If the reproduction is made for profit, with commercial gain as its primary goal, it is unlikely to fall within the fair use doctrine. The phrase "including whether such use is of a commercial nature or is for nonprofit educational purposes" was added to this first prong of § 107's four-part fair use test by the House Judiciary Committee shortly before passage of the Copyright Act of 1976 "in order to mollify educators who had lobbied unsuccessfully for an across-the-board exemption for nonprofit educational uses." While it would seem obvious that the purpose and character of photocopying multiple copies for classroom use is educational and nonprofit in nature, courts have held that educational copying by a commercial photocopy business was a commercial undertaking because the actual photocopying of work selected by educators was performed by for-profit vendors.
2. "The nature of the copyrighted work:" In applying this prong of the fair use test, courts have considered the originality, informative nature, intended use, and availability of the work. In an educational context, courts are less likely to find fair use where textbooks and other materials prepared for educational markets are copied than when works created for general public distribution are reproduced for classroom use.

Additionally, in part because facts cannot by copyrighted, use of informational works is more likely to be considered fair than use of creative works. Courts sometimes have difficulty classifying a copyrighted work as distinctly informational or distinctly creative. For example, on one occasion the Ninth Circuit decided that it could not categorize a cake decorating booklet which had both informational and creative aspects. As one observer uncharitably put it, "If cake decorating booklets can stump the Ninth Circuit, then the ability of courts to classify more complicated materials photocopied by educators and scholars at universities is doubtful."

3. "The amount and substantiality of the portion used in relation to the copyrighted work as a whole:" Photocopying small excerpts of a copyrighted work for educational purposes is more likely to appear fair than photocopying large portions of an article or book. Once the quantities set out in the Guidelines are exceeded, there is no bright line number of pages or percentage of a work one can confidently assume will be deemed fair or unfair. If the amount of copying is substantial enough, some courts will not find fair use regardless of the outcome of the other test factors.

In addition to doing a quantitative assessment, courts will also do a qualitative assessment of the portion of the work that was reproduced. Photocopying the "heart" or critical parts of a work may be deemed unfair even if the number of pages or actual percentage of the work copied is insubstantial. When a work is excerpted for educational usage, the very fact that certain portions of a work are chosen by a faculty member will probably be sufficient to implicate them as "critical parts," which will weigh against a finding of fair use.

4. "The effect of the use upon the potential market for or value of the copyrighted work:" This factor echoes aspects of the second and third factors, as both the nature of the work and the amount and substantiality copied will be partially determinative of whether a copyright owner has been economically injured. Market effect has been called "undoubtedly the single most important element of fair use" by the Supreme Court in a non-educational context. However, the exact extent of its preeminence among § 107's four factors has not been delineated, leading two commentators to inquire:

How are courts (or juries) to weigh all four factors in light of the importance of the fourth? Is the fourth factor to be given 51% of the total fair use weight? If so, fair use effectively becomes a one-factor doctrine. Is the fourth factor instead to be given more weight individually than each of the other three factors--i.e., 26% or more? And what happens when factors beyond the four set forth in the statute are added to the mix?
It has been argued that courts find fair use under this prong "only when the secondary use does not act as an economic market substitute for the original." This part of the test also makes explicit the tension between fair use and commerce. Photocopying likely to divert money away from copyright holders will be considered less fair than photocopying that will not "steal profits" away from copyright owners. Copying from a textbook students otherwise might be required to purchase would be construed as less fair than photocopying from a work aimed at a general rather than educational audience. However, as the scope of fair use shrinks, emboldened mainstream media copyright owners have increasingly asserted the right to royalty payments for even nonprofit educational uses of their publications. If copyright owners of general publications can demand or expect permission fee revenues from any photocopying activity beyond the Guidelines, even nonprofit educational copying may be deemed to have a deleterious effect upon the "potential market for or value of" the work, and therefore a proper subject of photocopy permission fees.

V. Fair Use, Photocopying, and the Courts

Advances in photocopying technology in the 1960s and 1970s lead inexorably to the widespread use of photocopied teaching materials. Energetic faculty members began to create their own course materials, and to develop "unbound textbooks" without the constraints of time, content and marketability typically imposed by publishers. These course materials could be precisely tailored to the faculty member's teaching interests, and could be easily changed or adapted from semester to semester, or even day to day. There were undoubtedly abuses, photocopying binges that surpassed even a broadly construed fair use, but perhaps not too many. Large sections of textbooks or scholarly works were likely incorporated into course packets only when the original work was out of print, prohibitively expensive or otherwise inaccessible. The per page self-copying fees charged by most copy centers during that era (often ten cents per page or more) would have rendered it cheaper (as well as more convenient and aesthetically satisfying) for students to purchase most texts than to buy large photocopied portions of them. In addition, there are reasons related to professional advancement that may have motivated faculty members to require students to purchase the books of friends, colleagues, and people prominent in their fields where appropriate.

Despite the uncompensated use of copyrighted works in course packets during this interval, there is no evidence that fewer scholarly works were created or published due to a course pack generated depression of economic incentives. However, as photocopiers proliferated, academic publishers grew increasingly concerned about the sorts of copyright infringements these machines made possible. With few exceptions, the federal courts have been persuaded by publishing interests to take an active role in circumscribing the scope of educational fair use, by focusing on (potentially) lost revenues to the exclusion of all else.

Although there have been a number of high profile fair use copyright infringement court
decisions handed down in the past fifteen years, only a few addressed issues of fair use in an educational context, and none of those that did were reviewed by the Supreme Court. The Supreme Court has issued opinions in fair use cases three times, deciding twice in favor of fair users and once against. None of those cases involved educational fair use issues, and all had highly unique fact patterns. Each case divided the Court, and each majority opinion was lengthy and chock full of sweeping dicta. The Supreme Court, like other legislative and judicial entities, exhibited difficulty defining and applying the fair use doctrine. In testament to the confounding nature of these cases, dicta excerpted from the two "pro fair use" opinions, Sony and Campbell, has been used with stunning effectiveness by publishing interests to compress educational fair use. Below, cases on educational fair use in the lower courts are juxtaposed chronologically with the three "non-educational" fair use opinions issued by the Supreme Court.

A. Macmillan v. King

In 1914 the Macmillan Company, a publishing company, sued a private tutor for infringing the copyright of a Harvard University professor's economics textbook. The tutor had prepared typewritten outlines of weekly lessons that mirrored the organization of the economics textbook and incorporated quotations from it. Though the outlines were not sold, the court concluded that an infringing appropriation of the textbook's ideas and language had been made.

B. Wihtol and Marcus

In 1962 (before fair use was codified), in Wihtol v. Crow, Crow, a music teacher, was sued for copyright infringement after adapting a musical composition for choir use and distributing 48 copies of his arrangement to his students for use in music class. Though the district court found Crow's use had been fair because he was acting only to further his students' education, the Eighth Circuit held that copying all or a substantial part of a copyrighted song without permission could not be fair use, regardless of the intent of the copier or the context in which the copies were used.

Similarly, in 1983 (after implementation of the Copyright Act of 1976) in Marcus v. Rowley, the defendant, a high school home economics teacher, was alleged to have infringed a copyright. The defendant made fifteen copies of an eleven page excerpt of a thirty-five page cake decorating booklet for her students. The court found that the defendant infringed the booklet's copyright. The Ninth Circuit determined that this was not fair use because the copying did not comport with the Guidelines, was of significant portions of the booklet, was used over several academic years, and the learning activity package the excerpt was incorporated into did not credit the excerpt's author nor acknowledge the copyrighted status of the material.


In 1980 members of the Association of American Publishers, a trade group, sued Gnomon Corporation, a photocopying company that operated retail copy shops near
college campuses, for copyright infringement arising out of Gnomon's reproduction and sale of course packets in Connecticut. Asserting that it could not afford the costs of litigation, Gnomon entered into a consent decree enjoining the company from making multiple copies of copyrighted materials for course packets unless the works or excerpts were accompanied by either written permission from the copyright owner, or a statement from the faculty member requesting the copies that the copying complied with the Guidelines.

In 1981, also in Connecticut, publisher Harper & Row brought suit against Tyco Copy Services. Harper & Row obtained a favorable settlement from Tyco on terms similar to those obtained by the Gnomon plaintiffs.[*170]

D. Addison-Wesley Publishing Co. v. New York University

In the early 1980s, nine publishers, all members of the Association of American Publishers (A.A.P.), sued nine N.Y.U. faculty members and a photocopy shop for copyright infringement based on course packet production and distribution. The case settled in 1983 when N.Y.U. adopted a University-wide photocopy policy which directed faculty members to obtain written permission from copyright owners before engaging in any photocopying activities which did not comply with the Guidelines. Any uncertainties were to be resolved by the University's general counsel, and faculty members who instigated photocopying beyond the scope of the Guidelines without the general counsel's permission would be personally liable for any damages arising out of successful copyright infringement suits. N.Y.U. agreed to distribute this photocopy policy, and "to take measures designed to ensure compliance." After N.Y.U. capitulated to the plaintiff publishers' demands, the American Association of Publishers broadcast the settlement terms and began to campaign for similar photocopying policies at educational institutions across the nation. In this regard, the A.A.P. has been successful. Soon a significant number of universities had similarly restrictive Guidelines driven photocopy policies in place.

E. Encyclopaedia Britannica Educational Corp. v. Crooks

In 1982, in Encyclopaedia Britannica Educational Corp. v. Crooks the Western District of New York determined that the noncommercial videotaping of educational television programs by a nonprofit educational services cooperative was beyond the scope of fair use, and therefore infringing. Though the Crooks court acknowledged the educational purpose and character of the videotaping, it found the extent and regularity of the copying (the cooperative kept a library of 4,500 videotaped programs) to be unreasonable and unfair. This case predated Sony (dis [ *171 ] cussed immediately below), and the Crooks court rejected the argument that this taping of educational programs televised when classes were not in session or at times that did not coincide with coverage of the subject in a particular course of study constituted permissible "time-shifting," even though done for nonprofit, scholastic purposes. The court was additionally unpersuaded by the fact that most of the taped television programs had been broadcast by
a public television station that had purchased the programs with state funds specifically allocated to provide instructional broadcasts for public schools. 140

F. Sony, the VCR case

In Sony Corp. of America v. Universal City Studios, Inc., 141 the United States Supreme Court concluded that the "noncommercial" recording of television programs with VCRs by private individuals was fair use, since the people doing the recording were simply copying the programming in order to "time-shift[]" their viewing. 142 The Court emphasized that the copyright laws reward copyright owners not because they are inherently entitled to financial remuneration but to motivate creativity, in order to benefit the public. 143 The rewards reaped by individuals are therefore only a secondary consideration, the Court held, and fair use limits the scope of copyrights where denial of access to the work frustrates the progress of the useful arts, the ultimate justification for having a copyrights system. 144 The Court stressed that the nature of the fair use doctrine was "an equitable rule of reason," 145 that no bright line approach to fair use was possible, and that each case needed to be decided on its own particular facts. 146 In short, the Court offered little specific guidance with respect to application of the § 107 fair use factors. In fact, it barely considered the third factor (amount taken) and ignored the second prong of § 107 (nature of the work) altogether. 147

Sony marked the first time that the Supreme Court addressed fair [*172] use in copyright. 148 As of this writing the Court only ruled on fair use in two additional cases (Harper & Row and Campbell, discussed below). For these reasons, Sony has been cited extensively by commentators 149 and lower court judges 150 for a wide range of often contradictory propositions related to fair use. 151 Sony was an unusual case, in which a divided Court (5-4) decided the fate of the entire home videocassette recorder industry, and the Sony facts are not easily analogized to other fair use disputes. This has not, however, dissuaded attorneys or judges on all sides of the issue from parsing language from Sony and inserting it into controversies concerning "multiple copying" educational fair use. This use and abuse of Sony is discussed below.

G. Harper & Row, the unpublished Ford Memoir case

In Harper & Row, Publishers, Inc. v. Nation Enterprises 152 the Court held that an article in The Nation which quoted less than 300 words from former President Ford's soon-to-be-published memoir A Time to Heal: The Autobiography of Gerald R. Ford did not qualify as fair use. 153 Though The Nation argued that the historical recollections of an exPresident qualified as news, the Court focused on the (then) unpublished nature of the memoir and the detrimental effect that The Nation's unauthorized usage of a seemingly miniscule portion of the work had upon the monetary value of the autobiography. 154

The Court concluded that The Nation's unauthorized use of less than 300 words of the Ford memoir was rendered most unfair by the unpublished nature of the work at that temporal juncture, 155 stating that "under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a
claim of fair use." The Court also decided that The Nation's exceedingly brief excerpts of the memoir were unfair because, though tiny in relation to the size of the entire work, were "essentially the heart" of the book. The material "taken" by The Nation was drawn exclusively from the chapters on the Nixon pardon.

Damage to the potential market of the memoir was demonstrated to the Court's satisfaction by evidence that Harper & Row, the publisher of the Ford memoir, had contracted with Time Magazine to publish a 7,500 word excerpt of the memoir before it was released in book form; The Nation piece, made possible by a "purloined" manuscript of the memoir, was intended to "scoop" the Time article. After The Nation article containing the appropriated quotes appeared, Time cancelled its planned publication of a 7,500 word excerpt from the memoir and refused to pay Harper & Row (owners of the memoir's copyright) $12,500.

Should a former U.S. President, salaried and generously pensioned (though of course in Ford's case, not elected) by the American public, be able to copyright his record of his activities as President, thereby not only profiting from but also controlling the dissemination of his account of historically important governmental events? Although not technically within the definition of an uncopyrightable "government work" promulgated by § 105 of the Copyright Act, one might assert that Gerald Ford's explanation for why he decided to pardon Nixon is a historical fact that ought to be freely accessible to American citizens as an important aspect of our shared history. However, a response to this argument was made by Justice O'Connor, who wrote for the majority in Harper & Row, that without the possibility of financial gain, "there would be little incentive to create or profit in financing such memoirs, and the public would be denied an important source of significant historical information." In other words, had he not been well paid specifically to do so, Ford would not have disclosed why he pardoned Nixon. By paying Ford to disclose his reasons for pardoning Nixon, Harper & Row and Time Magazine acquired enforceable proprietary rights in this information. While the "facts" Ford disclosed were not copyrightable, how (or if) The Nation could have uninfringingly extracted and reported these facts in a manner that still augmented the public's knowledge about the pardon is not explained in the Court's opinion.

The Court concluded that The Nation stole the "heart" of Ford's memoir, and that reproduction of those 300 words of quotation would supplant the market, if not for the entire book, then at least for Time's planned, "authorized" publication of a 7,500 word excerpt, despite the fact that the quotes were drawn from "isolated passages in disparate sections of the work." A remarkable subtext of the Supreme Court's decision is that, in a 200,000-plus word memoir, Gerald Ford only had about 300 words to say of interest. Time apparently cancelled publication of its planned excerpt out of concern that having read 300 of Ford's words, the public could not be induced to spend an additional two or three dollars to gain access to the remaining 7,200 words that Time had purchased and The Nation had not made public.

The Harper & Row decision raises some lingering questions that are pertinent in the context of educational fair use. If Time had gone ahead with publication of the contracted
for 7,500 word excerpt even after The Nation piece, could Harper & Row have been deemed damaged? If so, how would that damage have been quantified? What if The Nation could show that its article had boosted rather than depressed demand for the Time excerpt by increasing the visibility of, and interest in the excerpt? What if Time hadn't contracted to publish an excerpt of the memoir? Would The Nation's 300 word excerpt and publicity generating article have been deemed to damage the market for the memoir itself, despite the free exposure it provided to a book buying demographic?

Justice Brennan wrote a dissenting opinion in which he argued that the breadth of the property right asserted by Harper & Row in ideas and information could "stifle the broad dissemination of ideas and information copyright is intended to nurture." 167 Justice Brennan lamented the fact that the Harper & Row majority failed to distinguish between the facts presented and those in Time Inc. v. Bernard Geis Associates, 168 an earlier district court opinion. 169 The Geis dispute arose when Josiah Thompson, an assistant professor at Haverford College, wrote a book entitled Six Seconds in Dallas. 170 His book incorporated photographs of portions of the famous Zapruder film of the assassination of President John F. Kennedy, without permission from Time Inc., which owned the film's copyright. 171 Time asserted that the Zapruder film was "an invaluable asset of [Time Inc.],' and that "its use would be limited to [Time's] publications and enterprises." 172 Thompson and his publisher, Bernard Geis Associates, argued, and the court ultimately held, that use of the photos was fair, even though Thomson had wrongfully obtained the photos by taking them after hours with his own camera while working for Time. 173 Relying heavily on the second, "nature of the work" prong of the § 107 four part fair use test, the court determined that the use was fair in part because there was a high degree of public interest in the dissemination of information on the Kennedy assassination. 174 The Harper & Row Court, however, apparently ascribed little importance to the manifest public interest in the Nixon pardon.


In 1989, eight academic publishers sued Kinko's, a retail photocopy company, in the Southern District of New York. 175 In March of 1991, seven years after the Supreme Court's decision in Sony and six years after the Harper & Row ruling, the Basic Books, Inc. v. Kinko's Graphics Corp. (hereinafter "Kinko's") decision was handed down by Judge Constance Baker Motley. 176 Kinko's, a nation wide photocopying company, generated substantial profits by soliciting syllabi from college teachers, photocopying materials from these syllabi, and compiling course packets, which it then sold to students. 177 Kinko's called this service "Professor Publishing." 178 As part of its marketing campaign, Kinko's asserted that its "copyright permissions staff" would provide free copyright permission assistance as a service to its customers. 179 The company's copyright permissions staff apparently concluded that permission was not necessary when excerpts of copyrighted works were duplicated for incorporation into course packets that Kinko's sold for a profit, but that were ultimately used by teachers and students for nonprofit, educational purposes. 180

The course packets at issue in the litigation, prepared for faculty members at the New
School for Social Research, New York University, and Columbia University, contained excerpts from a total of 12 copyrighted works. Three of these works were out of print, and a fourth was in print but out of stock; the other eight were in print and available for purchase. The size of the excerpts copied from these works ranged from 14 pages (about 8% of the copied work) to 110 pages (about 27% of the copied work). The four largest excerpts on a percentage basis came from works that were either out of print or out of stock.

Prices for the disputed course packets ranged from $11.00 to $24.00, calculated on the basis of a per-page copying charge plus the cost of binding. For example, one of the packets, assembled for a course with an enrollment of three students, included 388 pages of copied work taken from twenty-five books, and an unspecified quantity of pages of original work prepared by the instructor. Excerpts of six of the twenty-five books represented in the packet were challenged by plaintiffs. Kinko's sold the course packet for $24.00, which included $21.75 for copying and $2.25 for binding. Had Kinko's asked for permission to copy, the fees assessed would have ranged between fifty cents and five dollars per copy, depending on the number of pages copied, thus increasing the cost of each packet by a minimum of $12.50 and possibly as much as $125.00 or more.

1. Purpose and Character of the Use Found to be Commercial

Judge Motley analyzed Kinko's production of course packets under the four-part fair use test set out in §107 of the Copyright Act. In considering the "purpose and character of the use," the court found that Kinko's use of the copyrighted works was for profit, and therefore commercial. The court separated Kinko's intermediate use of the copyrighted works, from which it derived revenues, from the ultimate use to which the course packets were put, which was clearly educational and nonprofit in nature. Analytically this leads to a curious result. The court seemed to conclude that though students who purchased course packets from Kinko's irrefutably put the materials to nonprofit, educational use, because they purchased the course packets from commercial photocopiers, students should have been forced to pay permission fees anyway, once they were predictably incorporated into the course packet purchase price. Judge Motley never addressed the fact that any permission fees assessed during the duplication process, which she characterized as an intermediate, for-profit use of the works, would invariably be passed along to nonprofit, educational users, in a word, students. Students would have no way to avoid paying permission fees short of compiling and reproducing the course materials themselves after somehow obtaining access to all of the course materials.

2. Purpose and Character of the Use Held Nontransformative

One of the remarkable facets of Judge Motley's analysis under the first prong of the §107 fair use test is that she chastises Kinko's for not making a "transformative use" of the excerpted works. A transformative or productive use is typically one in which a copyrighted work has been used "in a different manner or for a different purpose from the original." While she quite correctly asserted that transformative uses of copyrighted
works are usually accorded broader fair use protection. Judge Motley failed to grasp the incongruity of applying transformative use analysis to the context of course packet duplication. If an educator affirmatively "transforms" the works of other scholars before distributing them to a class, the unique voices of these scholars will be muffled or lost. One of the primary purposes of a course pack is to expose students to a variety of viewpoints, which are arguably most pedagogically useful when unadulterated. Professors compiling course packets inevitably make editorial, if not transformative, choices when they excerpt works. Kinko's designated role in the production of the disputed course packets was to duplicate, collate and bind pieces of paper, in effect to function as a photocopy machine. Of course "there was absolutely no literary effort made by Kinko's to expand upon or contextualize the materials copied." What self-respecting teaching professional would want a copy shop to independently "expand upon or conceptualize" the materials she has selected for her students? To suggest that Kinko's could have made a more persuasive fair use argument if the copy shop itself selected and excerpted teaching materials for its faculty clients is patently absurd. If Kinko's had insisted upon choosing the content of each course packet it duplicated and bound, Kinko's wouldn't have needed to avail itself of the fair use defense, because it wouldn't have had any academic customers. If making a transformative use is required to win the first prong of the fair use test of § 107, no copy shop could ever prevail, not even a noncommercial one, because transformation is simply not the nature or role of photocopying. This was explicitly recognized by the Supreme Court, but in a case decided after Kinko's. The only person who could have reasonably "transformed" any work excerpts was the faculty member who assembled the course packet that included them. However, the professors apparently preferred to preserve the original content and voice of each excerpt.

3. Nature of the Copyrighted Work

The court actually concluded that the second factor, which considers the nature of the work, favored Kinko's, because the copied extracts were factual in nature. The scope of fair use is usually deemed broader for factual works because facts themselves are not copyrightable. The court observed that the reason that copyright protection for factual works is "less" than that for works of fiction is because policy favors the broad distribution and accessibility of facts. Certainly one logical extension of this argument is that sound public policy would especially favor the broad distribution of factual material in a nonprofit, educational context, but the court did not address this. Instead, the court treated this factor cursorily, without discussing the role that course packets might have in the dissemination of facts, or the effect that denials of permission could have upon the content of course packets, the de facto censoring of facts, and the educational process in general.

Particularly egregious was the court's failure to discuss the beneficial role that course packets duplicated by Kinko's played in disseminating the facts contained in out of print and out of stock publications. The court declined to find that the inaccessible nature of out of print works favored a finding of fair use when excerpts of these books were beneficially made available through course packets. Instead, in the context of its "amount and substantiality" analysis the court evidenced its obsession with "lost" permission fees,
concluding that Kinko's may have "damaged" out of print works even more than available ones "since permissions fees may be the only income for authors and copyright owners." Judge Motley thus rejected the idea that the availability of a work should have an inverse relationship with the prospective scope of its fair usability. Furthermore, she provided publishers with an economic incentive for allowing books to go out of print as rapidly as possible, thus interpreting copyright law in a manner that prevents rather than encourages the broad dissemination of scholarly works.

4. Amount and Substantiality of the Portion Used

With respect to the third factor, amount and substantiality of the material copied, the court found that by reproducing between 5.2% to 25.1% of the copyrighted works, Kinko's had photocopied excerpts that were too long and/or too important. Judge Motley began her discussion of "amount and substantiality" by quoting an earlier Second Circuit decision for the proposition that "there are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use." Remarkably, with respect to length, the court then concluded that the amount of the works copied was "grossly out of line with accepted fair use principles." Just what those "accepted fair use principles" are, and where one might find them, were not articulated. In fact, whether the size of a copied excerpt is fair remains one of the many "I know it when I see it" aspects of judicial fair use determinations made when a putative fair use does not comport with the brevity requirements of the Guidelines.

The court's willingness to hold the "importance" of the excerpts against Kinko's was disconcerting, because as the court had already discussed in the context of transformative use, neither the selection of the works nor the excerpting was done by Kinko's. Nevertheless, Kinko's was penalized because faculty members had purportedly cherry picked when selecting course packet excerpts, and had therefore directed Kinko's to photocopy the "hearts" of the works important to the content of the classes for which the course packets were developed. By reproducing the important sections of the works, certainly the laudable approach from a pedagogical standpoint, Kinko's photocopying had become "more" unfair than it would have been if Kinko's had photocopied an identical number of less interesting, less pertinent pages.

No excerpt chosen by a teacher could ever be fair under this formulation of the "amount and substantiality" prong of the fair use test, because to the court, the very fact of their selection proved that the excerpted pages were consequential. Judge Motley concluded: "The portions copied were critical parts of the books copied, since that is the likely reason the college professors used them in their classes." She further observed that:

In almost every case, defendant copied at least an entire chapter of a plaintiff's book. This is substantial because they are obviously meant to stand alone, that is, as a complete representation of the concept explored in the chapter. This indicates that these excerpts are not material supplemental to the assigned course material but the assignment. Therefore, the excerpts, in addition to being quantitatively substantial, are qualitatively
In other words, the more central the material is to serving an educational function, the less likely it is that non-permissive use of the works will be deemed fair. As a result, the more beneficial a work may be to society, the more power publishers have to restrict and profit from access to it, despite the fact that this outcome contravenes the fundamental goal of copyrights, to promote knowledge and learning.

5. Market Effects

With respect to the fourth factor, effect upon the potential market for or value of the work, Judge Motley cited Harper & Row, a case in which the copying at issue was of a "purloined" unpublished work, for the proposition that market effect was "undoubtedly the single most important element of fair use." The court's overarching position with respect to market effect was that rather than facilitating educational fair use by enabling professors to expose students to a wide range of ideas (and making a tidy profit on its duplication services in the process) Kinko's was usurping royalties that rightfully belonged to publishers in the form of profits on book sales, or permission fees.

Kinko's unsuccessfully argued that being excerpted in course packets actually increased the stature and value of a work. Judge Motley concluded that "while it is possible that reading the packets whets the appetite of students for more information from the authors, it is more likely that purchase of the packets obviates purchase of the full texts." As a result, the court concluded that the impact of Kinko's "unauthorized" copying was detrimental to both sales of books, and collections of per mission fees. Judge Motley characterized the course packets duplicated by Kinko's as being in "competition for "student dollars"" with plaintiff publishers. This assumes, however, that in the absence of Kinko's duplication services, the professors who chose the materials contained in the disputed course packets would have either extracted permission fees from their students, or required their students to purchase between seven and forty-three books (with an average of 24 books) in order to expose their students to about a chapter in each one.

Because the plaintiffs elected to recover statutory rather than actual damages, the court was not required make specific findings concerning the magnitude of either "lost" book sales or "lost" permission fees. The circularity and inappropriateness of tallying "lost" permission fees, that were "lost" only if the use was not fair, for the very purpose of making a fair use determination is therefore discussed below in the context of the Michigan Document Services case, where comparable reasoning was used.

The plaintiffs were found by the court to "derive a significant part of their income from textbook sales and permissions fees." The plaintiffs sought both statutory damages and an injunction to stop Kinko's from anthologizing without the permission of the pertinent copyright owners. Ultimately, the court awarded the plaintiffs $10,000 in statutory damages, plus attorney's fees and costs. They also obtained an injunction against future infringement, both of the works in suit, and of "works which may not now be copyrighted or even in existence but, in the future, may be copied by defendant."
exceptionally broad, this injunctive relief was somewhat short of plaintiffs' request for "an injunction against all unconsented anthologizing." Judge Motley declined to award an injunction this broad because she concluded that "some anthologizing may fall within fair use requirements . . . [such as] uses [*183] which are fair as determined by the Guidelines and set out in the Copyright Act." 233

6. Other Factors

The court characterized Kinko's duplication and distribution of course packets as "a new nationwide business allied to the publishing industry by usurping plaintiffs' copyrights and profits," and rejected the argument that Kinko's activities fell within the fair use doctrine. What seemed to escape the court was the fact that in bringing their suit against Kinko's, plaintiff publishers sought to establish a new nationwide revenue stream of permission fees from copy shops like Kinko's. There is some evidence that they succeeded beyond their wildest expectations. At the time the suit was brought, some of the plaintiff publishers did not even have fully functional mechanisms for processing (and thereby profiting from) permission requests. 235

Kinko's raised a vigorous fair use right to engage in this "nationwide business," hardly new as Kinko's had been duplicating course packets for at least five years prior to suit. 236 Kinko's essential position with respect to fair use was that the course packets it duplicated and bound were of "tremendous importance to teaching and learning," and in "widespread and extensive use in schools throughout the country." The court characterized this as a contention of "fair use by reason of necessity," and rejected this argument on the grounds that Kinko's "failed to prove . . . that enjoining them from pirating . . . copyrights would halt the educational process" or that any professor would be "disabled from teaching effectively if Kinko's could not copy without paying permission fees." This is clearly a standard of proof no photocopier could ever meet, because, as Judge Motley noted, there is always the "option" of seeking and paying for permission to place excerpts of works in course packets. Specifically, the court stated: "Notwithstanding professors' complaints of costly original materials, rapid change in course subject matter, and inadequate current offerings--which are all good reasons for [*184] desiring anthologies--defendant's witnesses did not produce evidence which would explain why they could not seek and pay for permission to create these anthologies." Implicit in Judge Motley's opinion is her view that students should pay for copyrighted works that they consume during the course of their educations, rather than make educational fair use of the materials.

7. The Guidelines

Kinko's did not get any protection from the Guidelines. The court held that (1) the Guidelines were not intended to protect for-profit enterprises such as Kinko's; (2) that the quantities of copyrighted materials photocopied by Kinko's exceeded those specified by the Guidelines; and (3) that in any event by compiling and binding course packets Kinko's was creating anthologies, which was also in violation of the Guidelines. 243
Curiously, Judge Motley simultaneously interpreted the Guidelines as both the minimum and maximum scope of fair use in the context of course packets duplicated by commercial photocopiers. 244 Her assessment that the Guidelines represented the maximum scope of fair use is reflected by her use of the Guidelines to support her conclusion that the length of the photocopied excerpts were unfair. 245 Her conception of the Guidelines and fair use as co-extensive is further illustrated by her intimation that anthologies comprised of excerpts that comply with the Guidelines may be fair use and therefore could not be enjoined. 246 Yet within the same opinion she asserts that the fact that the Guidelines prohibits anthologizing does not dispositively render anthologizing unfair and infringing, stating:

The fact that Congress has set forth a statement in its Classroom Guidelines that anthologizing is prohibited does not require this court to paint with the broad brush plaintiffs suggest. Declaring that all anthologies published without permission is infringement would preclude fair use analysis of any excerpt included in an anthology. If Congress meant for anthologizing to nullify a fair use analysis, it would have expressly said so. The Guidelines state that some instances of copying which exceed its boundaries may in fact "be permitted under the criteria of fair use." 247

[*185] Judge Motley therefore concluded that the Guidelines themselves support the proposition that copying beyond the scope of the Guidelines can still be fair use. 248 This determination did not, however, inure to Kinko's benefit in this case. Instead, Kinko's copyright infringement was held to be willful, despite the court's own acknowledgement that the case raised novel issues. 249

The Kinko's decision reverberated far beyond the Southern District of New York where it was handed down. For example, in 1993, the Association of American Publishers (A.A.P.) cited Kinko's with relish in a letter to a commercial photocopying enterprise in College Park, Maryland. 250 In this letter, the A.A.P. threatened "enhanced monitoring of anthologies at your facility for copyright infringement" and "a suit seeking a substantial recovery like that in the Kinko's case" unless the establishment immediately transmitted $2,500 to the A.A.P. 251 It further urged the establishment to sign an agreement to "cease and desist from copying, without permission, multipage excerpts of copyrighted works for sale to students." 252 Similar letters were probably sent to copy shops across the nation, as publishers used the favorable verdict to establish a photocopy permission fee "market." 253 Indeed, after Kinko's, "many copyshops that had not previously requested permission from copyright holders began to obtain such permission." 254

I. Campbell, the song parody case

Five years later in Campbell v. Acuff-Rose Music, Inc., 255 the Supreme Court concluded that the rap group 2 Live Crew's parody of the Roy Orbison song "Oh, Pretty Woman" 256 might be a fair use of Orbison's work. 257 The Court held that even though commercial in nature, 2 Live Crew's parody could be, like other comment and criticism, a [*186] fair use under § 107. 258 The Court reiterated that determining fair use is not to be simplified by bright line rules, but requires case-by-case analysis. 259 The Campbell opinion,
authored by Judge Souter, criticized the Sixth Circuit Court of Appeals (which had ruled against Campbell and 2 Live Crew below) for attaching too much importance to the commercial nature of the song parody. Souter accused that court of inflating the significance of the for-profit nature of the parody "by applying a presumption ostensibly culled from Sony, that "every commercial use of copyrighted material is presumptively . . . unfair."" 261

Commercial use is not dispositive of the fair use question, the Court held, but rather is "one element of the first factor enquiry into its purpose and character." 262 Ironically, in an effort to illustrate the point that the commerciality of a use should not be controlling, Justice Souter used words that would come back to haunt educational fair users, stating: "The mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness." 263

The Campbell opinion continued:

Sony itself called for no hard evidentiary presumption. . . . Rather, as we explained in Harper & Row, Sony stands for the proposition that the "fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." But that is all, and the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance. 264

Thus, the Court seemed to downgrade the importance of the commercial or noncommercial nature of a use. Rather than being presumptively unfair, a commercial use simply "tended to weigh against a finding of fair use." 265 To what degree "a tendency" carries less weight than "a presumption" was not articulated. 266 Instead, the Court explained that [*187] "even the force of that tendency will vary with the context." 267

The Campbell decision certainly must have been encouraging to copyright attorneys whose potential client pool might have dissipated had the Supreme Court been able to provide some actual guidance to future putative fair users. It did little to dissuade the Sixth Circuit, the very same court that saw its Campbell opinion overturned by the Supreme Court, from again ruling that commercial uses are presumptively unfair a scant two years later, in the context of course packets. 268 The second time around, the ruling held, leaving the fair use world safe for parody, but not for photocopying.

J. Michigan Document Services

In 1994, a copy shop owner attracted the attention of publishers by advertising that professors who used his services would not have any delays from waiting for copyright permission. 269 Three publishers, Princeton University Press, Macmillan, and St. Martin's
Press, brought suit against both the copy shop, Michigan Document Services ("MDS"), and its owner, James M. Smith, who was later described by the Sixth Circuit as "something of a crusader against the system under which his competitors have been paying agreed royalties." 270 The District Court reached a Kinko's-like result, holding that MDS's duplication and sale of course packets constituted willful copyright infringement. 271 The plaintiffs received injunctive relief, $ 30,000 in statutory damages, and attorneys fees and costs of $ 326,318.52. 272

In her strongly worded opinion, Judge Barbara K. Hackett wrote:  [*188]

This court is compelled to see this practice [of the duplication and sale of course packets without remission of permission fees] for what it is. The defendant is taking the property of another without right or permission, and using that property for personal gain. There simply is no excuse for this conduct. 273

With respect to the fair use factors, Judge Hackett found that (1) the purpose and character of MDS's use of the copyrighted works was commercial; (2) the amount and substantiality of the portions of the works used were unfair; and (3) the copying had a detrimental market effect upon the works. 274 Unlike Judge Motley, however, Judge Hackett concluded that the nature of the copied works also "weighed against defendants." 275 This is because where Judge Motley found the copied works to be factual in nature, and therefore subject to a broader scope of fair use, Judge Hackett categorized the works as "original" and "interpretive." 276 "Even though [the works] were historical or educational and not fictional, this factor should not weigh in defendants' favor." 277

Judge Hackett granted injunctive relief of exceedingly broad scope, enjoining Michigan Document Services "from copying any of plaintiffs' existing or future copyrighted works without first obtaining the necessary permission." 278 This prevented MDS from photocopying even excerpts of written works that fit within the Guidelines, reflecting a view that MDS could never make fair use of copyrighted materials. The scope of the injunction was ultimately remanded to the District Court, after the Sixth Circuit mildly admonished that it was "uncertain whether the district court gave any consideration to copying of a sort that could not be anything other than fair use." 279

On appeal, a divided three judge panel of the Sixth Circuit reversed. 280 The court held that the replication of course packets by a commercial copy center such as MDS was within the ambit of educational fair use. 281 However, this decision was withdrawn and ultimately vacated. 282 In November of 1996 the entire Sixth Circuit sitting en banc  [*189] concluded that MDS' commercial production of course packets was copyright infringement, though not willful infringement. 283 The en banc thirteen judge panel was bitterly divided. Eight judges formed the majority, and three of the five dissenting judges wrote separate dissenting opinions. 284

The entire Sixth Circuit faced Michigan Document Services with the benefit not only of the landmark Kinko's decision, 285 but also of a third Supreme Court decision on fair use, Campbell v. Acuff-Rose Music, Inc. 286 Additionally, the Sixth Circuit had reason to
approach Michigan Document Services with caution, having previously tangled with the fair use doctrine and lost: It was out of the Sixth Circuit that Campbell went up to the Supreme Court, and the Sixth Circuit's Campbell holding was reversed. 287

The Sixth Circuit, en banc, decided that MDS was a commercial user of the copyrighted works, and therefore had the burden of proof with respect to the "market harm" issue. 288 Because plaintiff publishers could demonstrate substantial lost permission fees, the court concluded that the photocopying performed by MDS had a detrimental effect upon the market for the copied works, and was therefore not within the scope of fair use. 289 In so doing, the court effectively merged the § 107 fourpart fair use test into one two part question: Was the use commercial, and if so, did it divert revenues from the copyright owner? And even after implementing this abbreviated construction of the test, the court unmistakably contemplated reducing the fair use inquiry to market effect alone, stating:

If we are wrong about the existence of the presumption--if the challenged use is not commercial, in other words, and if the plaintiff publishers have the burden of proving an adverse effect upon either the potential market for the copyrighted work or the potential value of the work--we believe that the publishers have carried the burden of proving a diminution in potential market value. 290

[*190]

The market harm test embraced by the court was, the court claimed, "endorsed by the Supreme Court in Sony, Harper & Row, and Campbell." 291 The articulated test was quite facile for plaintiffs to meet: "To negate fair use . . . one need only show that if the challenged use "should become widespread, it would adversely affect the potential market for the copyrighted work." 292 Not surprisingly, when this inquiry was applied, the court concluded "that the plaintiff publishers have succeeded in negating fair use." 293

The reasoning used by the Michigan Document Services en banc majority in assessing the market effect of educational course packets has been widely and justifiably criticized. 294 Rather than requiring evidence that textbook and periodical sales were subverted by MDS's photocopying of course packets to show detrimental market effect, the court allowed the publishers to present evidence of lost permission fees. As dissenting Judge Ryan characterized it, the publishers were allowed to argue "that they are entitled to permission fees . . . because they are losing permission fees." 295 Of course, publishers would be entitled to permission fees only if the photocopying was not an educational fair use, and whether or not the copying was educational fair use was the ultimate question the court was supposed to be deciding. The court therefore allowed plaintiff publishers a presumption that they would prevail, and to assert damages that didn't conceptually exist until after they won.

The en banc majority was particularly concerned that the failure by MDS to assess and collect permission fees from students diverted reve [*191] nues from publishers. 296 Though perhaps an obvious point, it is worth noting that these revenues were "diverted" to students, not to the copy center. The copy center got the same revenue per page
whether a document was copyrighted or not. No allegation was made that MDS charged students permission fees and then pocketed these revenues.

The court concluded that MDS sold more course packets than its copyright compliant competitors because by not assessing permission fees it could charge students less per packet, and this was undoubtedly true. However, in overturning the district court's finding that MDS's actions were "willful," the en banc majority conceded that MDS had declined to charge and remit permission fees because of a good faith belief that they were not appropriate, rather than for any commercial advantage.

The market for a given course packet was presumably determined by the enrollment in the class for which the packet was assigned, and, all costs being equal, the price of a packet would have had far less impact upon demand than one might expect in a "normal" market. Ann Arbor copy shops would not have seen demand decline when course packet prices began reflecting permission fees, because students are a captive market and have little alternative but to scrape together the resources to purchase required course materials. The price differential between course packets that reflected the cost of permission fees, and those sold by MDS, which did not, reflected differing perspectives on educational fair use, rather than an attempt to undercut competitors. Once MDS was required to collect and remit permission fees, it lost its subsidiary "price advantage," but had the court deemed the production of course packets fair use and determined that commercial copy vendors did not have to pay permission fees, this differential would have still disappeared, and students would have benefited from lower course packet prices.

The Michigan Document Services decision not only has compressed educational fair use in the Sixth Circuit, but also can be expected to influence educational fair use jurisprudence in other circuits as well, unless the conclusions of law it manifests are repudiated by other circuits or by the Supreme Court. Three separate dissents accompanied the Michigan Document Services holding. Chief Judge Martin argued that the majority's view contravened the very "essence of copyright" by thwarting the fair use doctrine, which "contemplates the creation and free flow of in formation; the unhindered flow of such information through, among other things, education in turn spawns the creation and free flow of new information." He recounted his own student experiences, when he would "record . . . supplemental information" by accessing materials in a library and copying important parts out long-hand or by typewriter, and stated that course packets were simply "a modern approach to the classic process of education."

Judge Merritt's dissent, joined by Judges Daughtrey and Moore, focused on "the plain language of the copyright statute that allows "multiple copies for classroom use," and asserted that the majority has analyzed and explained § 107 incorrectly, stating:

Except for "teaching," the statute is cast in general, abstract language that allows fair use for "criticism," "comment," "news reporting" and "research." The scope or extent of copying allowed for these uses is left undefined. Not so for "teaching." This purpose, and
this purpose alone, is immediately followed by a definition. The definition allows "multiple copies for classroom use" of copyrighted material. The four factors to be considered, e.g., market effect and the portion of the work used, are of limited assistance when the teaching use at issue fits squarely within the specific language of the statute, i.e., "multiple copies for classroom use." In the present case that is all we have--"multiple copies for classroom use." 303

Judge Ryan's dissent, also joined by Judge Daughtrey, criticized the majority's focus on "lost" permission fees with respect to both market effect and incentives to create and publish new works, and the majority's reliance on the Guidelines to define the scope of educational fair use. 304 Judge Ryan had written the majority opinion, subsequently withdrawn, of the original three judge panel, which had ruled in MDS's favor. 305 In his dissent he conceded, unlike Judge Merritt, that course packs should be evaluated under the four-part test set out by § 107. 306 However, Judge Ryan's fair use analysis followed a vastly different path than the majority's and reached an antipodean outcome. He framed the ultimate issue as "whether that which is a fair use for a student--copying--is not a fair [*193] use if done for the student by another, and for a profit." 307

Judge Ryan argued that the majority erred in concluding that MDS had made commercial use of the copyrighted works, when in fact MDS did not even "use" the works "in the sense primarily addressed in section 107." 308 Rather, he stated that "the use that is to be evaluated for fairness in this case is the use to which the protected substantive text is put, not the mechanical process of copying it." 309 The use of the excerpts by professors and students, Judge Ryan concluded, was not commercial, either within the meaning of the "purpose and character of use" prong of § 107, or the "market harm' language" of the "effect of the use upon the potential market for or value of the copyrighted work" prong. 310

Judge Ryan concurred with the majority that the "nature of the copyrighted work" 311 was close to "the core of intended copyright protection," 312 but said that this simply confirmed that "the works at issue are protected by copyright and may only be used "fairly."" 313 However, he disagreed with the majority's analysis of "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 314 He asserted that when professors assigned excerpts rather than entire works, "it suggested that the excerpts stand separate from the entire work, not that they are central and substantial to the entire work." 315 In other words, when assigning excerpts, professors did not cut out the "hearts" of works--when the heart was important, he asserted, students would be given the entire body of a work. 316 Additionally, Ryan criticized the majority for seeing "no important analytical difference between a 30% excerpt and a 5% excerpt." 317 He concluded that there was no evidence that any of the copyrighted works "were excerpted so substantially that the coursepacks superseded the original works or otherwise exceeded the proper educational purposes that could justify the reproduction." 318 [*194]

With respect to the "effect of the use upon the potential market for or value of the copyrighted work," Ryan reiterated his conclusion that the use made of the works was
noncommercial, and that a proper analysis therefore began with a rebuttable presumption that there had been no market harm. Ryan argued that the plaintiff publishers could not demonstrate either that coursepacks acted as substitutes for purchases of entire works, or that course packets precluded or potentially devalued derivative works that publishers might market, such as bound anthologies.

Judge Ryan further expressed strong disagreement with the majority's view that permission fees provided important incentives to authors and publishers. He pointed out that many academic authors wrote for reasons other than money. He also questioned whether receipt of permission fees would, as the majority asserted, truly prompt publishers to invest in a greater number or variety of scholarly works, stating: "The fact that licensing income provides some welcome income in the aggregate does not mean that it provides an incentive to publishers to act in individual cases."

Finally, Judge Ryan denounced the majority's endorsement of, and reliance on, the "Guidelines." After noting that the language of the Guidelines "did not survive congressional debate and was not enacted into law," he criticized the use of legislative histories as a general matter and specifically with respect to § 107, and asserted that he "subscribed wholeheartedly to Judge Harold Leventhal's observation that "the use of legislative history is the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." He accused the majority of relying on portions of the legislative history of § 107 in order to dodge the rigorous intellectual analysis demanded by that "troublesome" and ambiguous statutory provision.

K. Educational Fair Use in the Supreme Court

It is difficult to predict where the Supreme Court might come out on the educational fair use questions raised by the photocopying of course packets. Though accused infringers prevailed on fair use grounds, the Supreme Court opinions in Sony and Campbell are not altogether encouraging, as both placed a significant emphasis on the effects the allegedly infringing copies would have on the original works. Educational fair use will, at times, reduce sales of books and periodicals, and therefore negatively effect the markets for the works. On the other hand, the Harper & Row decision is not entirely discouraging, as much of its "anti fair use" dicta was driven by (if not overtly linked to) the perceived unfairness of using a stolen, unpublished manuscript to beat a competitor into ink. Neither the language nor the holdings of Sony, Harper & Row or Campbell reveals much about where the current Court might come out on the photocopying of scholarly excerpts for educational purposes. The only precept one can distill from these decisions is that context is everything.

Although § 107 manifestly directs courts to evaluate fair use claims on a case by case basis, the Kinko's and Michigan Document Services courts found the doctrine perhaps too flexible for comfort. In each case, counsel on both sides of the issue divergently directed subsurface mining of the Court's available fair use opinions for ostensibly valuable veins of fair use doctrine. However, what the Kinko's and Michigan Document Services courts found, and subsequently embellished their opinions with, were mostly
tailings.

Consider Sony. The Sony fact pattern bears little resemblance to that presented by photocopied course packets. Only a case about whether the manufacturers and venders of photocopy machines were contributory infringers of written copyrighted works would have been squarely analogous. Yet because the Sony opinion was rife with broad generalizations, dicta from the case was employed to argue and support opposing constructions of fair use. For example, the Sony Court wrote that a use is presumptively fair if its purpose is noncommercial and nonprofit, and concluded that the unlimited private taping of entire television programs for later viewing fit that criteria. Specifically, with respect to the "purpose and character of the use" prong of § 107, the Court wrote:

Although not conclusive, the first factor requires that "the commercial or nonprofit character of an activity" be weighed in any fair use decision. If the Betamax VCR were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity.

This passage created the commercial use presumption that doomed the fair use assertions of commercial copy shops both before the Supreme Court's Campbell opinion and even after Campbell reframed the presumption as a "tendency." Recall that the outcome of Sony was that the non-permissive copying of entire television transmissions was found to be "a noncommercial, nonprofit activity." The copying at issue was held to be nonprofit because the actual copiers were presumed to be end users who did not, for the most part, sell the videotapes on which they recorded programs, or charge anyone to watch them. Publishers in the Kinko's and Michigan Document Services cases were quick to point out that copy shops, the actual copiers, did sell the copies they made, and victoriously argued that this rendered the copying commercial. The defendant copy shops unsuccessfully countered that the end use of the course packets, like the end use of videotaped television programs, was nonprofit and noncommercial. Sony was a case in which the actual copiers were the end users, but a course packet case will not be, and it is anyone's guess how the Court will handle this bifurcation of copying and using.

The Sony Court rejected the argument that the taping of television programs was rendered commercial or infringing simply because there might be ways to charge for the privilege (such as adding royalty fees to the cost of blank tapes or compelling VCR owners to purchase a television recording license). Furthermore, the Court was unpersuaded by potential market harm. The Sony plaintiffs made three market effect arguments: that people watching videotapes of television programs would not be counted as audience members by television rating services, causing ratings and advertising revenues to decline; that live television and movie audiences would decline; and that the audience for television reruns and film rentals would decline. The Sony Court nevertheless found the copying of entire movies and television programs for entertainment purposes to be fair use. Perhaps academic publishers can show greater,
more impressively quantifiable market detriment than the Sony plaintiffs could, and that will make the difference with respect to course packets. The Kinko's and Michigan Document Services cases certainly foreshadow such an outcome. However, defendants asserting fair use can concurrently assert that the social benefits of educational fair use of scholarly works far exceed those of time shifted entertainment.

The Sony Court expressed significant apprehension about the role of copyrights in restricting the free flow of ideas protected by the First Amendment, but seemingly discarded this concern one year later in Harper & Row. It was in Harper & Row that the Supreme Court most clearly articulated the view that fair use is an affirmative defense to claims of infringement, relegating the burden of proof as well as the ultimate burden of persuasion to the purported fair user. It was also in this case that the Supreme Court rejected the argument that the particular uses specifically mentioned in § 107, such as news reporting, were presumptively fair. Abetted by the Second Circuit in American Geophysical, which rejected a fair use defense of photocopying for "research" purposes, this language paved the way for publishers to argue that the words "multiple copies for classroom use" in § 107 did not make course packets presumptively fair either.

In Harper & Row, it was the stealing of the unpublished Ford manuscript and intentional scooping of a competitor that the Court truly, viscerally found unfair, rather than the use itself. While suggesting that the same use of the memoir by The Nation after the memoir's publica...tion would have been held to be fair use, the Court did fair users a great disservice by neither making this explicit nor limiting its holding to the unique facts of that dispute.

In Campbell v. Acuff-Rose, the Court in dicta used "the straight reproduction of multiple copies for classroom distribution" as an example of "the obvious statutory exception to the focus on transformative uses" to illustrate its statement that "transformative use is not absolutely necessary for a finding of fair use." More generally, the Court also downgraded the impact the commercial nature of a use was to have on a fair use inquiry. The Court even warned that: "If . . . commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." This made little difference, however, to the Michigan Document Services court when course packs were at issue. The same emphasis on commercial considerations rejected by the Court in Campbell now reigns supreme in the Sixth Circuit. Context indeed appears to be everything. Despite the possible fair use sympathies of at least two Justices, the Court as an entity aided the compressors of educational fair use by declining the opportunity to consider the issue when it denied certiorari in Michigan Document Services in March of 1997.

Michigan Document Services could have been the case in which the Supreme Court revitalized the doctrine of educational fair use, and at least partially immunized against copyright infringement suits educators who like to freely supplement their required texts. Of course, the Court could instead have circumscribed educational fair use within the
claus [*199] trophobically narrow scope of the Guidelines, expediting a process of educational fair use compression that is already in progress. By declining to hear MDS's appeal, the Court may have abstained from inflicting a death blow to fair use, but allowed permission fee seeking publishers to continue dismantling the doctrine of educational fair use apace. Unless the Supreme Court resuscitates the right to make multiple copies for classroom use, the Guidelines will slowly but surely become the maximum rather than minimum scope of educational fair use, just as publishers desire them to be.

VI. The Bitter Consequences of Fair Use Compression

The analysis used by the Kinko's and Michigan Document Services courts can be summarized as follows:

1. Reproducing copyrighted materials for educational purposes is a commercial use; 2. Commercial uses presumptively result in harm to the potential market for the copyrighted materials; 3. Harm to the market is the single most important fair use factor; so 4. Reproduction of copyrighted materials for educational purposes is not fair use. 352

The Kinko's and Michigan Document Services courts never specifically addressed whether the binding and photocopying of course packets by nonprofit entities such as "in-house" university copy centers would fall within its definition of fair use. 353 If the answer is no, then there is functionally no educational fair use beyond the diminutive scope of the Guidelines. If the answer is yes, "who made the copies?" has become the test of fair use rather than "what are the copies used for?" 354 [*200]

A focus on who makes the copies is a complete abrogation of § 107 and the doctrine of fair use. Additionally, if who made the copies determines whether any given act of copying is a fair use, the effect of Kinko's and Michigan Document Services may be to shift course packet production from "for-profit" to "nonprofit," in-house university copy centers. However, if this transpires, as publishers see their presently lucrative permission fee streams begin to diminish, universities can expect to be the defendants in a "next wave" of course packet law suits. 355 This is why educational institutions and professors need to fight for a more expansive definition of educational fair use now, so that the doctrine is not completely decimated when they are defending themselves from claims of copyright infringement.

A. Professors as Future Plaintiffs

Not all academics support a broad construction of educational fair use. 356 Some apparently agree with Samuel Johnson that "no man but a blockhead ever wrote, except for money." 357 In a transparent attempt to counteract the image of struggling students being victimized by wealthy publishers, during (and arguably, because of) the Michigan Document Services litigation, publishers underwrote the May 1995 formation of an organization called The Author's Registry, Inc., which has a self de [*201] scribed mission of "assisting authors of all genres in collecting royalties for the distribution of their work through photocopying, electronic transmission and other means." 358 The
Author's Registry, Inc., claims that within months of formation it had a membership of "50,000 authors, including . . . thousands of textbooks and academic writers who joined the Registry to get paid for secondary uses of their work." 359

The Author's Registry, Inc., joined with The Author's Guild, Inc., the American Society of Journalists and Authors, Inc., and a previously low profile organization calling itself the Text and Academic Author's Association, Inc., to submit an amici brief to the Sixth Circuit in the Michigan Document Services litigation. 360 The amici brief self-servingly pointed to the "immediate success of the Authors Registry" as evidence that "almost all authors, including academics, want to maximize financial gain from sales of their work." 361 Not even the Michigan Document Services majority found this believable, instead observing that "the fact that a liberal photocopying policy may be favored by many academics who are not themselves in the publishing business has little relevance in this connection." 362 Thus, it was clear to the majority that it was the interests of publishers, and not those of authors, that were at issue, as the majority quoted American Geophysical, with approval, for the proposition that:

It is not surprising that authors favor liberal photocopying; generally such authors have a far greater interest in the wide dissemination of their work than in royalties--all the more so when they have assigned their royalties to the publisher. But [*202] the authors have not risked their capital to achieve dissemination. The publishers have. Once an author has assigned her copyright, her approval or disapproval of photocopying is of no further relevance. 363

The self proclaimed "Authors Groups," however, refused to concede that some academics write for reasons other than money, and instead made snide reference to "some minority of authors whose works might appear in coursepacks who prefer that copyshops profit from their labors instead of their publishers and themselves." 364 Unless photocopied excerpts substitute for the purchase of books, 365 the implication that copy shops somehow divert money from publishers and authors is, of course, a false one. Michigan Document Services was never accused of collecting permission fees and then retaining them. The real issue is not whether copy shops profit "instead" of publishers and authors, but whether copy shops, who make the same per page profit whether they reproduce something that is copyrighted or something that is in the public domain, can be coerced or litigated into collecting permission fees from students on behalf of publishers and authors.

The amici brief disingenuously laments the "stark financial reality" that writers earn "remarkably low" incomes, implying that perhaps lost permission fees are somehow at least partially to blame. 366 Strikingly absent is an explanation of why writers earn so little at a time when the sales of academic books are high and immensely profitable for publishers. 367 The credibility of these "Authors Groups" is further undermined by the brief's utterly unsupported assertion that "publishers, which rely on permission fees, will be forced [by a ruling in favor of educational fair use] drastically to curtail their
publishing activities." Not only did the "Authors Groups" fail to name a single academic publisher who "relies" on permission fees or to make any attempt to quantify this reliance, but the so called "Authors Groups" never explained why academic publishers would "drastically . . . curtail publishing activities" at a time when academic markets are so astoundingly lucrative that the American Association of Publishers declared 1997 "A Banner Year for the Textbook Market."

Despite evidence that the "Authors Groups" were contrived and/or flagrantly manipulated by publishing interests, they do count academics among their membership ranks. The amici brief authors eventually found fifty-two academics willing to sign on individually, and numerous others may hold similar views. Many academics aren't particularly well paid, and most invest a lot of time and energy in their publications. Academics who manage to retain ownership of the copyrights in their works may join publishers in bringing infringement suits against multiplecopying colleagues, so that they can better profit from their writings. It is one of the goals of this Article to convince these academic authors that in abetting the compression of educational fair use, they will lose more than they gain.

B. Professors as Future Defendants, or "Users are Losers"

Neither the Kinko's court nor the Michigan Document Services court definitively stated that as a matter of law the reproduction of course packets created by university professors is presumptively infringing, preferring to duck the question just as publishers did while the cases were being litigated. That, however, is the logical extension of those holdings, and in fact the Michigan Document Services court noted: "As to the proposition that it would be fair use for the students or professors to make their own copies, the issue is by no means free from doubt." Chief Judge Martin, in his dissent from the Michigan Document Services' holding, asked: "Would the majority require permission fees of the Professor's teaching assistant who at times must copy, at the Professor's behest, copyrighted materials for dissemination to a class, merely because such assistant is paid an hourly wage by the Professor for this work?" The answer very well may be yes.

Though they are for-profit enterprises, Kinko's and MDS reproduced copyrighted materials at the behest of educators, to meet the needs of nonprofit educational institutions. Kinko's even required professors submitting course packets for duplication to sign an order form that stated: "The materials to be copied . . . are for classroom use of no more than one copy per student, constitute only a small part of the entire work, and are to be solely for non-profit, non-commercial educational purposes in teaching activities. If such copies were not available, I would not require students to purchase the work."

Kinko's and MDS earned the same profit on each page of each course packet whether the material was copyrighted or not, but the courts concluded that both were still benefiting unjustly from acts of copyright infringement. If copy centers that produce course packets are infringers, then the professors who compile course packets and direct copy centers to reproduce and distribute them to students are liable under copyright law.
as joint or contributory infringers. In fact, because it is the teachers who select the copyrighted works to be copied or excerpted, and choose both the quantity and quality of the excerpts, if there is no educational fair use for photocopying outside the circumference of the Guidelines, teachers are more culpable than copy centers.

With the notable exception of the plaintiffs in Addison-Wesley Publishing Co., Inc. v. New York University, academic publishers have so far been hesitant to sue teachers, perhaps fearing a public relations backlash that could negatively impact their textbook sales. Mainstream publishers, however, have less reason to hold back, since their primary markets are unlikely to be effected. If academic publishers litigate in concert, as they did in the Kinko's and Michigan Document Services cases, they reduce the risk that educators will or even can retaliate, as it might be difficult for professors to boycott texts produced by more than a few publishers at a time.

Another reason that copy shops have so far made more attractive defendants than professors is related to damages. Under § 504(c) of the Copyright Act, educators who infringe copyrights with a good faith belief that their acts of infringement are fair use are liable only for actual damages, which are generally nominal. They are not liable for statutory damages, which can range from $200 per infringing act for an "innocent" infringer to as much as $100,000 per infringing act for a willful infringer. Copy shops, unlike educators, are not "protected" by the Guidelines. Nor are they sheltered by § 504(c), and they are there before vulnerable to large damage awards, such as the $1,300,000 award plaintiffs obtained from Kinko's ($510,000 damages plus attorneys fees and costs) and the $356,318.52 award plaintiffs obtained from MDS ($30,000 in damages and $326,318.52 in attorneys fees and costs; later reduced on remand when the trial court's finding of willfulness was overturned).

Moreover, capitulation by educational institutions to publishers' demands may render teaching professionals willful, rather than innocent infringers, thereby increasing their personal liability. As noted above, § 504 of the Copyright Act provides that only actual damages, which would generally be modest, may be collected from multiple-copying educators who have a good faith belief that their uses of copyrighted works are fair. In fact, it has been argued that this is an example of the drafters' intent to favor educational users of copyrighted works. However, as universities increasingly pressure faculty members to conform to photocopy policies limiting non-permissive photocopying to the scope of the Guidelines, and publishers make massive efforts to educate the academic community about the shrinking scope of educational fair use, a professor's ability to assert a good faith belief that photocopying outside the scope of the Guidelines (even within § 107) was permissible fair use diminishes. As a consequence, faculty members become potentially liable for statutory damages. Furthermore, malice does not have to be shown to demonstrate willfulness. Reckless disregard is all that is required, and willfulness has been established simply with evidence that the infringer knew or should have known that copyrights were being infringed.

Trying to avoid liability by staying "below publishers' radar" is unrealistic, even at small schools, in small classes or in geographically remote areas. In the "real world" publishers
ferret out copyright infringement in part by paying disgruntled employees to turn in their employers. \textsuperscript{393} It is not unreasonable to assume that publishers may use the same approach in academia, and pay cash starved students or underpaid support staff to report acts of copyright infringement by professors.

C. Why Risk It?

If educators can rapidly and conveniently obtain permission to make multiple copies of copyrighted works for classroom use by paying a reasonable licensing fee that they can readily pass on to their students, why shouldn't they? Because, among other reasons discussed below, after the fair use doctrine is completely devastated, there is no guarantee that permission fees will stay reasonable. In the wake of Kinko's, photocopy royalty fees have increased. \textsuperscript{394} Additionally, publishers sometimes refuse to grant permission for a copy shop to duplicate an excerpt from a copyrighted work in order to force professors to require their students to purchase the entire book that the excerpt is drawn from. \textsuperscript{395} Toward the same end, publishers may also delay acting on permission requests. \textsuperscript{396}

One of the reasons that textbook prices are so high \textsuperscript{397} is that students \textsuperscript{[208]} are a captive market. \textsuperscript{398} There are few palatable alternatives to purchasing textbooks. One can't make margin notes in reserve copies or take them home or to class, and even at discount do-it-yourself photocopy rates of eight or ten cents per page, it is still usually cheaper (not to mention far more convenient) to buy a text than to reproduce it. \textsuperscript{399} Publishers may assume that they could increase permission fees quite a bit before students would decide not to purchase a course packet or to "infringingly" assemble it themselves. \textsuperscript{400} Publishers could raise permission fees for a given excerpt as high as the retail price of a given book if they believed a professor would view the material as extremely important to the course, or even higher if they wished to encourage book purchases. They could also refuse to grant permission at all, forcing professors to either require book purchases, risk an infringement suit, or forgo the material altogether. If the excerpted book was out of print, permission fees for excerpts of "essential" works could escalate well beyond what the book itself might have cost.

Moreover, the same litigation-inspired esprit de corps that currently unites publishers in their quest to obliterate educational fair use bodes well for their prospects for setting and raising permission fees in a cooperative, mutually beneficial fashion. \textsuperscript{401} Publishers have acted in concert while litigating against educational fair use, \textsuperscript{402} and will certainly continue to do so at some level (just shy of the antitrust laws, one imagines) when setting and raising permission fees. The alternative scenario, in which publishers compete on price, attempting to attract more educational customers \textsuperscript{[209]} by putting certain works of scholarship in fixed packages or "on sale," is also unsettling. It seems far preferable that professors choose teaching materials based on merit and relevance rather than price.

While those who create useful works deserve compensation for their efforts, in the field of academic publishing, permission fees are primarily enriching publishers rather than authors. \textsuperscript{403} In addition, publishers may already charge prices that are artificially elevated
to incorporate profit margins that account for anticipated infringing and "fair" uses. Additionally, by requiring permission fees even in a nonprofit educational context, publishers may be increasing the cost of access to copyrighted material without necessarily advancing the overarching goal of the copyright system: increasing the production of knowledge by publishing a larger number of scholarly books. Publishers may therefore use permission fees as a mechanism to get a higher rate of return on the same rate of investment in scholarly publications, thereby thwarting the goals of the legislative framework of the Copyright Act by rewarding aggressive litigation rather than creativity and innovation.

Academic publishers need monetary incentives to publish scholarly books. This need, however, does not justify absolute hegemony over their libraries of scholarly output. Publishers were profitably selling books before they began collecting permission fees, and are presumably still selling actual books now. In fact, there is strong evidence that the sale of some academic books is highly lucrative. If permission fees become a substantial portion of publishers' revenues, and the anticipated sale of books alone is not enough incentive to publish some works, fewer books [*210] may be published by traditional means. However, this doesn't necessarily translate into less incentive for authors to create new works. With the exception of textbooks, most academics write scholarly works for reasons other than monetary gain. For these authors desktop publishing may already be a viable alternative to academic presses, and can grow to fill any publication gap that opens if publishers actually do distribute fewer works due to shrinking permission fee revenue streams. The same technologies that make reproduction of copyrighted materials fast, cheap and efficient can make publication fast, cheap, and efficient as well. As "self help" publishing increases, alternative channels for the distribution of desk top or electronically published works that are imbued with "prestige" comparable to that of academic imprints will, one hopes, develop as well. 408

It should also be noted that while the promise of permission fees may induce publishers to publish more academic books, the lure of these fees may prompt changes in the content and formulation of the books chosen for publication that do not necessarily "promote knowledge," and may actually hinder its dissemination. If galvanized by permission fees, publishers will have monetary incentives to favor books containing "stand alone" chapters, in which ideas are broken down into easily digestible (and excerptible) segments, at the expense of books embodying more complex concepts that require lengthier elucidation. Additionally, lucrative permission fees will actually provide a disincentive for keeping books in print. Once a popular book is unavailable for purchase, publishers can charge permission fees equal to (or in excess of) the book's retail [*211] cost, and, because they won't have to pay for printing, binding, or shipping, realize a much larger profit margin.

The fair use doctrine is supposed to apply "where the benefit to society of permitting the unauthorized use outweighs the harm to society of reducing the incentive to create new works." If the creation of course packets or making of multiple copies promotes scholarship, and advances the goals of higher education by optimizing access to the ideas contained in the copied, copyrighted works, a broad construction of educational fair use
is more than justified. A robust fair use doctrine can free pedagogy from the supply and demand vagaries of the information marketplace. The alternative is the unwholesome specter of choosing materials for our classes based on price and availability rather than content, and allowing copyright considerations to dictate the breadth and width of the range of ideas that students are exposed to.

The permission fee issue is already impacting upon legal education. A professor at the Notre Dame Law School recently reported that when he asked the A.B.A. for permission to reprint one of its "Formal Opinions" in a casebook, the A.B.A. demanded "$ 60 for the hard copy, another $ 40 if the book is sold as a computer diskette, and they won't give blanket permission for "electronic publication' at any price." This, despite (or perhaps, because of) ABA Standard 302, which explicitly requires instruction of all law students on the ABA Model Rules of Professional Conduct. Other law professors report similar experiences. Some of the model statutes drafted by ABA Committees and Sections are subject to permission fees because the copyrights are owned by profit seeking publishers. Organizations such as the Uniform Commission on State Laws and the ALI may be considering charging for the use of their materials. The price of being (or teaching) an informed attorney is clearly on the rise. Yet few academics are willing to eschew multiple copying for educational purposes. As "Concerned Professors" eloquently stated in their amici brief in support of the petition for writ of certiorari in Michigan Document Services:

Most legal textbooks cannot possibly provide the necessary breadth and depth of material on emerging issues in their fields, and texts that attempt to do so become outdated almost as quickly as they are published. To keep their courses current, [law professors] must constantly gather photocopied excerpts from recent books, articles, and news accounts or risk depriving their students of important information on legal and non-legal developments of significance. Updating their materials on a semester-by-semester basis has become an academic and personal imperative.

Only through expansion and defense of the educational fair use doctrine can the unfettered right to distribute uncensorable supplemental written material to our students be preserved.

D. Censorship

The doctrine of fair use not only frees access to ideas from financial constraints, but also acts as a bulwark against censorship, as "the power to license the use of books is the power to censor those books." Under the copyright laws, tandem with the right to charge for use of a copyrighted work is the right to prevent use of a copyrighted work. As publishers enhance their ability to collect permission fees in an educational context, they simultaneously strengthen their ability to refuse to give permission for a work to be distributed in an educational context, rendering it unavailable for educational distribution beyond the scope of the Guidelines at any price. Because a copyright owner is unlikely to willingly tolerate mockery or criticism, constriction of the fair use doctrine increasingly allows him or her to "veto" such uses. One of the societal benefits of the fair use
doctrines is that it acts as a free speech license for uses of copyrighted works that cannot be "bought." When publishers are allowed to sell access to ideas, they are also empowered to prevent access to ideas, and may do so in an effort to "manage" or preserve the reputation or stature of their "content providers." [*213]

Examples of utilization of the exclusive rights of copyright as a mechanism for censoring scholars in contexts other than educational photocopying are myriad. Biographers have been denied the right to quote private papers, even after the subject of the biography is deceased. Scholars writing about history and culture have been denied the right to reprint racist cartoons and advertisements because they "reflect badly" on the periodicals that published them or the corporations that commissioned them. Opposition by Disney prevented an internationally best selling work of Marxist scholarship entitled Para Leer al Pato Donald (How to Read Donald Duck) from being published in the United States. While the Guidelines permit 500 words of direct quotation of copyrighted prose, "this limit is cumulative, meaning that the total of all quotations taken from one source, even if spread throughout another text, shouldn't exceed 500 words." The Guidelines therefore offer little protection from copyright driven censorship for a scholar endeavoring to write a thorough, detailed, well documented analysis of a copyrighted work. Rather, the Guidelines protect, and therefore encourage, scholarly usage of the written equivalent of sound bites.

E. Loss of Privacy

Another concern is loss of academic privacy. Requiring professors to secure permission in order to use copyrighted materials for teaching and other scholarly purposes forces faculty members to keep publishers continually appraised of the exact content of their courses, and in some instances the focus and scope of whatever scholarly works they have in progress. Professors desiring to avoid accusations of copyright infringement may have no way to avoid this outside monitoring.

F. Overreaching by Publishers

Publishers have a long history of attempting to alter or subvert the copyright laws for financial gain. For example, one aspect of long standing copyright law that publishers have unsuccessfully targeted is the "first sale doctrine," under which copyright owners such as publishers can collect royalties on the first sale of a book embodying a copyrighted work, but not on subsequent sales of that particular physical embodiment of the work. In other words, the copyright laws do not permit publishers to collect royalties on the subsequent sales of a used book, only on the first sale of the book.

Publishers have challenged the first sale doctrine, but (so far) attempts to persuade Congress to modify or abolish it in the context of written works have been largely ineffectual. Publishers have therefore engaged in machinations designed to minimize the impact of the doctrine by shrinking the market for used books. They accomplish this by producing "revised" editions of textbooks with frequencies unwarranted by developments in given subject areas, thereby compelling students to purchase new books,
which, it should be noted, also produces additional royalty opportunities for textbook authors. Simultaneously, publishers collaboratively educate professors about the importance of "making sure students are using [and therefore buying] the instructional materials assigned." Publishers also engage in advertising campaigns aimed at persuading students to retain their textbooks for future reference rather than reselling them, to minimize the number of used texts available for resale.

Ultimately, publishers do not want to passively accept permission fees remitted by copy shops that have collected them from students. The larger goal of many publishers is to usurp the role of copy shops altogether in compiling, reproducing and selling course packets themselves. [*215] At present, even when permission fees are remitted, course packets are usually cheaper than textbooks. [*216] If publishers take over production of course packets, by denying photocopy shops permission to copy their works and reserving that privilege for themselves, one can expect the price differential between textbooks and "printed-on-demand" course packs to diminish. [*217] Moreover, if the contents of course packets change from semester to semester, the market for used course packets will be insignificant, and publishers will not have to fear losing profits on course packets through the first sale doctrine. If they are involved in the duplication and distribution of course packets, publishers will undoubtedly also try to influence educators with respect to the content of the packets, inducing them to use excerpts of works in which they own the copyright, much as they currently try to persuade teachers to adopt the textbooks that they publish.

A culture of requiring permission fees for educational uses enhances the power as well as the profitability of publishers. Allowing publishers dominion over the cost and content of course packets permits them to overreach and charge permission fees that are undeserved even under a narrow construction of educational fair use. Publishers that own copyrights in compilations (such as anthologies or collected works) already wrongly demand permission fees for the right to photocopy works that are clearly in the public domain. [*218] Other copyright owners routinely claim copyright protection that is broader than that to which they are entitled. For example, at the conclusion of every news article posted online, the Associated Press posts the following: "Copyright (c) The Associated Press. All Rights reserved. This material may not be published, [*216] broadcast, rewritten, or redistributed." This statement is a blatant attempt to discourage fair use of Associated Press articles, even under the Guidelines. It also implies expansive proprietary rights in the news that A.P. reports, though news is generally comprised of uncopyrightable facts. [*219] Similarly, Reuters follows its news articles with a statement asserting: "All rights reserved. Republication or redistribution of Reuters content is expressly prohibited without the prior written consent of Reuters." Presumably, that consent comes at a price.

This inclination by publishers to overreach and claim royalties to which they are not entitled will only be exacerbated by the compression of educational fair use. Copy shops generally lack the resources and expertise in copyright law to oppose overreaching by publishers. Many copy shops actually expedite demolition of the fair use doctrine by adopting a "better safe than sorry" philosophy that disavows fair uses altogether. In one
of the more comic (to this law professor, anyway) passages of the Kinko's decision, Judge Motley castigated the copy shop for not making a good faith effort to educate its employees about the "nuance of the copyright law," observing apparently without irony that Kinko's employees were "provided no hypothetical situations nor any factual summary of the state of the law presently. There was no mention of the facts of the Sony case, . . . the Harper & Row case or others which may illustrate some of the complexities of [the fair use] doctrine." How average copy shop clerks, who, one supposes, are not generally hired for their analytical sophistication, were supposed to absorb and consistently apply a complex legal doctrine that gives federal judges great difficulty was not articulated. Nor did the court explain why copy shop employees would be better equipped than professors to make fair use determinations.

One can experience the implosion of educational fair use first hand by entering the for-profit copy shop of one's choice and asking an employee to reproduce a copyrighted work for personal, scholarly use. Though this photocopying clearly falls within the "Guidelines," most copy shops will refuse to perform it, prudently declining any nonpermissive copying to avoid the ire of publishers. It is difficult to fault them, even though the effect of such litigation-averse behavior is to cede copyright owners far more powerful copyrights than those to which they are entitled. Kinko's and MDS fought the good fight for fair use, and lost in part because educational institutions were unwilling to enter the fray.

G. Creation of Works of Scholarship

The contraction of the fair use doctrine impacts not only upon course pack production but also upon scholarly work and the creation of teaching materials. Modern scholarship inevitably builds on or implicates previous academic works, and constraining a scholar's ability to fairly cite or analyze the works of others will hinder the development of new academic writings. Increasingly, academics are required to ask permission to incorporate even seemingly insignificant aspects of copyrighted works into their scholarly writings. As one commentator noted:

An examination of fair use decisions suggests that even small takings . . . have been held to not be fair use, and therefore scholars are at risk. The difficulty for scholars is the uncertainty of the issue, for even though the scholar makes the initial determination, all those who subsequently follow can stop the work from proceeding. At Northwestern University, the deposit of a recent dissertation of a film scholar was initially rejected by the archiving organization because the scholar had failed to clear the film stills used. The scholarship met the standards for graduation, but the dissertation could not meet the deposit requirement until negotiation with the archive service over the use of the stills was finished. While the archive service eventually accepted the dissertation, it is still restricted to sales only to the author.
This observer pertinently observed that "one can easily imagine similar considerations arising for scholars in various disciplines who want to reproduce copyrighted images in scholarly works; professors of political science who want to use images from political commercials in an article; business professors who want to demonstrate marketing techniques by reproducing stills of advertising commercials; or law professors doing First Amendment--speech analysis." Indeed, these issues arise with alarming frequency. One Vanderbilt faculty member, writing a scholarly book about the culture of country music, had to pay $15,000 in permission fees to be able to quote song lyrics that she subsequently interpreted. Another academic writer faced: a request for $250 to quote seven lines from a work by Irving Berlin (which, he noted, worked out to $5.43 per word); a demand that he allow the "Berlin people" to inspect sales statements for his book; and a contract clause stipulating that if he agreed to pay a higher licensing fee to another company, he had to pay that fee to the Berlin organization.

The difficulty of writing about lyrics without being able to quote them was described by one author who penned a book about rock music:

The oddity of the final manuscript was accounted for by the extensive "unwriting" that I had to undertake. Rewriting in order to eliminate lyric quotations was more than a merely stylistic problem. I really had to reconceive what I was doing in the book. Even in the original "naive" state of the manuscript, I was forced to describe the content of the song, which already abstracts one a step away from the original. It had occurred to me that under ideal conditions, readers of my history would be able to hear the songs while reading. This would remedy the incompleteness caused by the reader's encounter with the mere lyric content of the songs. But the rewriting occasioned by the copyright stance of Oxford [University Press] and the music publishers took the book an additional step away from concreteness. Even fragments of the lyrics could not be presented. I had written a history that was at two removes from its subject. There were no musical sounds and no lyrics, yet I was attempting to document my history and draw responsible, convincing inferences about them. The effect on my manuscript was devastating.

If one were to write a law review article about copyright infringement issues, one very well might like to discuss a case about visual works of art such as photographs. As eloquent as a writer may be in describing the "plaintiff" picture and the photograph accused of infringing it, pedagogically there would be no substitute for reprinting both photographs side by side, so that the reader could do the same sort of comparison that presumably a judge did in reaching the referenced holding. Though free to reprint the judicial opinion because it is an uncopyrightable government document, one would have to ask permission and potentially pay a fee to include the underlying photographs. If the losing party in the litigation is a bad sport, and permission to reproduce the photograph is denied, the reader is arguably precluded from fully comprehending the nature of the dispute and the judge's verdict.
The fair use doctrine hardly optimizes social utility when the rap group 2 Live Crew can freely make, sell, and profit from a parody of a Roy Orbison song, but professors cannot freely photocopy and distribute the lyrics of either song when teaching the Campbell case to a Copyrights class. Contraction of the right of fair use not only disadvantages teachers who want to use copyrighted materials, but also burdens the future creation of teaching materials by educators in order to benefit current copyright owners, who are largely publishers.  

H. The Parallel Universe of Multimedia Teaching Materials

Fair use is also important in the context of multimedia teaching materials that incorporate portions of copyrighted works. Courts have not addressed the question of whether a multimedia compilation used for nonprofit educational purposes is the equivalent of a course packet. While multimedia teaching materials serve the same function as course packets by exposing students to excerpts from a variety of idea-bearing works, they are not generally reproduced and sold or distributed to students. The Copyright Act explicitly grants educators the right to perform or display copyrighted works in the classroom for instructional purposes when engaged in face-to-face teaching, but does not authorize them to make copies or videotapes of these works, or of their own performances, for inclusion in teaching materials. Because teacher-created multimedia works could be comprised of literally hundreds of copyrighted works (graphic works, photographs, music, film clips, performances of written works, etc.), obtaining permission from each copyright owner would be prohibitively time consuming, even in the unlikely event that all of the copyright owners were simple to locate and contact, permission was uniformly granted, and all permission fees were waived. As a result, in 1994 the Coalition of Colleges and University Media Centres spearheaded a negotiation between educational representatives and copyright owners aimed at developing "Multimedia Guidelines" under which educators could use copyrighted works in multimedia teaching materials without asking permission. When the proposed "Multimedia Guidelines" emerged two years later, they were embraced by copyright owners and endorsed by the House Subcommittee on Courts and Intellectual Property, but disliked by educators due to the strict time, portion, copying and distribution limitations promulgated. As with photocopying, whether a multimedia use is fair or infringing depends on the outcome of the four-part § 107 fair use inquiry. Where copyright owners alleging infringement can demonstrate a detrimental market effect, a finding of fair use may be unlikely.

VII. Litigation Avoidance as the Death Knell of Educational Fair Use

One commentator has observed that "fair use is a troublesome privilege because it requires a hideously expensive trial to prove that one's actions come within its shelter." One way for litigation-averse educators to avoid copyright infringement suits is simply to capitulate to publishers and pay (or, more precisely stated, require students to pay) permission fees. This certainly appears to be the cowardly response of many educational institutions. One commentator has observed that "there is a paranoia sweeping those who deal with academics . . . in the wake of . . . Basic Books." A survey of the copyright policies of most of the accredited law schools in the United States reflects
pressure on faculty to either obtain permission to photocopy (presumably by guaranteeing the remittance of permission fees), keep their photocopying within the Guidelines, or assume personal liability for any acts of infringement. 453

After Kinko's and MDS lost so resoundingly in court, copy shops are unlikely to continue to fight for educational fair use. They will simply require faculty members to secure consent to reproduce excerpts of [*221] copyrighted works, 454 collect permission fees from students when course packets are sold, and remit these fees to the implicated publishers. Or, they will decline to reproduce course packets at all. Because educational institutions refuse to challenge publishers on this issue, there is no effective opposition to publishers, and the compression of fair use will continue. 455

VIII. Reclaiming the Right to Make Multiple Copies

A. Multiple Copiers at Public Institutions Potentially Catch a Break: Sovereign Immunity as Fair Use Substitute

17 U.S.C. § 511 (added effective November 15, 1990), titled "Liability of States, instrumentalities of States, and State officials for infringement of copyright" reads in pertinent part:

(a) IN GENERAL. Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner . . . . 456

Dicta in Seminole Tribe v. Florida 457 raises questions about the constitutionality and enforceability of this provision of the Copyright Act. In Seminole the Supreme Court ruled that Congress could abrogate the States' sovereign immunity only if it has "unequivocally expressed its intent to abrogate the immunity' [and has acted] "pursuant to a valid exercise of power." 458 A valid exercise of power, the Court said, would be grounded in something more than an Article I clause. 459 Article I, section 8 of the United States Constitution states, "The Congress shall have [*222] Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," 460 and it is from this clause that Congressional power to regulate copyrights (as well as patents) had been previously assumed to flow. 461 This is the only part of the Constitution that specifically references intellectual property.

In his dissent, Justice Stevens argued that the Seminole majority's decision "prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy,
environmental law, and the regulation of our vast national economy."
Chief Justice Rehnquist responded specifically to this assertion in the majority opinion, writing:

Justice STEVENS understands our opinion to prohibit federal jurisdiction over suits to enforce the bankruptcy, copyright, and antitrust laws against the States. He notes that federal jurisdiction over those statutory schemes is exclusive, and therefore concludes that there is "no remedy" for state violations of those federal statutes.

That conclusion is exaggerated both in its substance and in its significance. First, Justice STEVENS' statement is misleadingly overbroad. We have already seen that several avenues remain open for ensuring state compliance with federal law. Most notably, an individual may obtain injunctive relief under Ex parte Young in order to remedy a state officer's ongoing violation of federal law. Second, contrary to the implication of Justice STEVENS' conclusion, it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of these statutory schemes . . . .

Rehnquist further wrote that while the Fifth Circuit allowed a state university to be sued in federal court for infringing an author's copyright in Chavez v. Arte Publico Press, that court "expressly recognized that its holding was unprecedented." Moreover, Rehnquist noted that the Chavez decision was based upon a case that Seminole overruled. Chavez [*223] was subsequently appealed to the Supreme Court, which remanded the case back to the Fifth Circuit.

On remand the Fifth Circuit concluded that Chavez's claim that the University of Houston infringed her copyright by publishing her book without her consent should be dismissed, because the University of Houston was immune to unconsented-to suits in federal court under the Eleventh Amendment. The Fifth Circuit panel rejected Chavez's assertion that the University of Houston impliedly waived Eleventh Amendment immunity when it entered into a contract with her that concerned the disputed publication. The opinion, authored as the earlier Chavez decision had been by Judge Edith Jones, noted that "Chavez's breach of copyright action against the University of Houston raises "property' problems on several levels. Copyrights are indeed a species of property, but the extent to which they are protectable against the states raises troubling issues." Nevertheless, Chavez's Fourteenth Amendment due process contentions were also rejected.

Conversely, in May of 1998 a three judge panel in the Federal Circuit held in the context of a patent suit that the University of California waived its Eleventh Amendment immunity from suit in federal court and constructively consented to a declaratory judgment action when it threatened to sue the plaintiff for infringement of a state owned patent, thereby interfering with the plaintiff's commercial interests. In June of 1998, another Federal Circuit panel held that the Patent Remedy Act, the patent law version of § 511, was a clear expression of Congressional intent to abrogate the sovereign immunity of the states, and was a valid exercise of legislative power pursuant to the Fourteenth
Amendment. Specifically, Judge Clevenger stated that "such central and historic fixtures in the realm of property as patents, surely warrant protection from deprivation by states." [*224]

The Eleventh Amendment analysis of the Fifth Circuit in Chavez is clearly at odds with the conclusions of the Federal Circuit in Genentech and College Savings Bank, and the Supreme Court will probably grant certiorari in at least one of these cases so that this split in the Circuits can be resolved. If the Court holds that the Eleventh Amendment shields state education institutions from copyright infringement suits, a remaining question would be whether "the narrow exception to the Eleventh Amendment provided by the Ex parte Young doctrine" could be successfully, efficiently and consistently used to enforce a copyright owner's rights under the Copyright Act against educators and "in house" copy centers through injunctive relief, given the constantly evolving nature of course packets. If not, then state institutions would have de facto universal fair use of infinite scope, while private educational institutions could expect to see permission fees escalate dramatically as publishers sought to recoup revenues "lost" through uncompensable uses of copyrighted works at public schools. [*225]

B. Legislative Possibilities

1. Educational Photocopying as Exempted Use

One way to re-inflate the spirit if not the doctrine of educational fair use is to convince Congress to amend § 107 such that multiple copies for nonprofit educational purposes are exempted from the copyright laws altogether. Formulating photocopying for educational uses as an exemption to a copyright owner's exclusive rights rather than a fair use would construct a bright line that would add predictability to the area. [*225] Rather than the four-part fair use test of § 107, the threshold question would become whether a use made of a copyrighted work was for nonprofit educational purposes. If so, it would be an exempted use, not susceptible to royalty demands or infringement accusations. This is the approach the copyright laws take with respect to library and archival copying, as set out in § 108 of the Copyright Act. [*225] Congress explicitly declined to set out a special exemption freeing educational and scholarly copying from copyright control when drafting § 107, [*225] but perhaps it is time for that decision to be reconsidered.

2. A Compulsory "Scholarly" License

One commentator has proposed that Congress formulate a "scholarly license" amendment to the copyright laws that would function as a compulsory license for educators. [*225] Pursuant to this "scholarly license," teachers would have "mandatory access" to works that have been made public, in exchange for "swift payment of a small, fair fee to the copyright holder." [*225] This approach at least guarantees access to copyrighted works for educators with an ability and willingness to pay such fees, minimizing the risk of censorship. However, any compulsory licensing scenario requires concession of the free and unfettered access to copyrighted works that ought to be available to educators and scholars if society is to be best served. Further, it requires establishment of a bureaucratic
entity to set, collect and distribute fees that might not stay "small" for long. The Copyright Clearance Center, which issues and administers photocopy licenses on behalf of its member authors and publishers, charges a premium for its services that is passed along to end users. Any government tribunal that administered compulsory scholarly licenses would probably also impose "user fees."

3. Disavowal or Replacement of the Guidelines

Alternatively, Congress could continue to categorize educational copying within the rubric of fair use, but discard or amend the current Guidelines and promulgate educational fair use with a far wider scope. Any replacement guidelines should permit the compilation and reproduction of course packets in nonprofit educational contexts with very few restrictions.

Legislative action to expand or protect educational fair use is unlikely any time soon. Congress has demonstrated far more interest in seeing that publishers collect taxable royalty revenue than in protecting or broadening fair use access to copyrighted material. Many members of Congress are beholden to copyright owners for campaign contributions, and for this and related reasons are hostile to the very concept of fair use. Congress is unlikely to receive pressure on this issue from the Executive branch. President Clinton has also received substantial financial support from anti-fair use copyright owners, and former Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Bruce Lehman specifically endorsed the judicially driven compression of the fair use doctrine, stating:

I think we can over-react a little bit to fair use. If we attempt to statutorize fair use, we are really going down a very, very dangerous path. The fair use doctrine is a judicial doctrine. It basically has attempted to balance the interests of the First Amendment with those of Article I Section 8 [of the Constitution]. It is best kept for the most part as a judicial doctrine for courts to consider on a case by case basis. Section 107 of the Copyright Act attempted in 1976 to synthesize some of the basic fair use principles that have been developed by the courts and put them into the statute, but to be very careful about not being too specific. I think that has worked very well for the last 20 years or so, and that's the direction that we should continue to go.

4. Judicial Resuscitation

If the Guidelines cannot be legislatively expanded, the Federal Judiciary must be persuaded to de-emphasize them and to focus instead on the plain words and meaning of § 107. The reinvigoration of the educational fair use doctrine further requires judicial abandonment of the interpretation and application of § 107's four-part test found in cases like Kinko's and Michigan Document Services. Rather than analyzing educational uses of copyrighted materials strictly case-by-case, courts need to draw a bright line that pushes the scope of educational fair use far out into the horizon. Any § 107 four-part testing
ought to proceed as follows:

PURPOSE AND CHARACTER OF THE SECONDARY USE: If the works will be used by teachers and students in a nonprofit educational context, there should be a STRONG presumption in favor of educational fair use. By specifically articulating the right to make multiple copies for classroom use, Congress made teaching a preferred fair use, and did so "to prevent copyright from being used to inhibit classroom teaching . . . or the promotion of learning." 47 Courts need to recognize the importance that easy access to information and ideas has to academic freedom and advancement.

Additionally, it is unacceptable that students who purchase course packets from enterprises such as Kinko's or MDS, while uncontrovertibly putting the materials to nonprofit, educational use, are forced to pay permission fees anyway when these fees are passed along by commercial vendors. Copy shops have been coerced into becoming de facto agents for publishers, collecting permission fees from students to which the publishers may not be entitled.

NATURE OF THE COPYRIGHTED WORK: Most academics are authors. Professors don't usually write for money, at least not directly and linearly. 488 Academics write to articulate or rethink ideas, for tenure and promotion, and to enhance professional reputations. They don't generally require financial incentives to be induced to create useful works of scholarship. It is publishers who are far more concerned with turning a profit, and who therefore must be monetarily induced to undertake the publishing and distribution of creative and scholarly endeavors. If the [*228] work is aimed at an educational market and has been produced as a revenue generating endeavor (unlike, say, law review articles), reasonable permission fees should be permissible only if the work is currently in print, and there is an actual, demonstrable market substitution problem. In this situation, educational fair use should function as a compulsory license. Anyone willing to pay (or collect and remit, in the case of commercial copy centers) permission fees should be free to reproduce portions of any educational work, in order to prevent publishers from coercing the purchase of an entire work when only excerpts will be used, and to avoid the possibility of censorship in the guise of copyright protection. Permission fees should be chargeable on a straight per page basis, eliminating the possibility of publisher premiums when the right to photocopy and disseminate the "heart" of a work is exercised.

AMOUNT AND SUBSTANTIALITY USED: As discussed immediately above, if the written material at issue meets the criteria of "educational work" (e.g. a commercial work such as a text book aimed at a strictly educational market), a compulsory per page permission fee could be assessed where use of the material was significant. If the work was not primarily directed at an educational market, however, then any use of it in an educational context should be presumed fair, as satisfaction of the copyright owner's obligation to provide societal benefits coterminous with her exploitable exclusive rights. The presumption that educational uses of mainstream works are fair uses should be rebuttable only if the "non-educational" work is lengthy and available for purchase at a reasonable price, and a substantial portion, perhaps one third or more, of the work is
reproduced, therefore effecting an unequivocal market substitution.

"Substantiality" should not play any role in an inquiry of educational fair use. One can presume that any excerpt chosen for its educational value represents a "substantial" part of the work. Exposing students to the "substantial" facts and ideas imbued in modern publications should be something society encourages and facilitates through fair use, not something it allows publishers to charge a premium for.

MARKET EFFECT: Publishers must not be permitted to assert damages that depend on them winning the fair use issue before they have won, and they shouldn't be able to use the magnitude of "lost" permission fees to demonstrate market effect, because they haven't lost permission fees if they aren't entitled to them. Publishers must be required to prove that they lost income by demonstrating lost sales of books and reprints, and not by tallying "lost" permission fees that necessarily presume success on the ultimate issue before the court prior to its being decided. Moreover, publishers should not benefit from evidence of the willingness of educational institutions to pay "customary" permission fees. Such willingness should be seen for what it really is--capitulation to publishers' demands in order to avoid protracted, expensive litigation with an uncertain outcome. Finally, the significant external benefits of educational fair use must be accorded far more importance when contrasted with any royalty income that fair use prevents publishers from realizing.

If even one circuit court can be persuaded to embrace educational fair use, the doctrinal conflict with the Sixth Circuit's holding in Michigan Document Services ought to propel the issue to the Supreme Court, which at least shows some signs of being a friendly forum for fair use, and a hostile venue for overreaching copyright owners. Unless the Supreme Court deigns to address the issue, however, and can be persuaded to embrace a broad construction of educational fair use, the doctrine will continue to dissipate as publishers relentlessly pursue permission fees for educational copying.

C. You Can Affirmatively Act to Preserve Fair Use

Be subversive. Unless they are directed solely at an educational market and you really, truly need the money, insist that your publisher designate your scholarly works "permission fee free" for nonprofit educational uses following the example of other "cutting edge" educators. Perhaps the low "price" of your scholarship will attract more educational "customers," enhancing your professional recognition and positioning you for an award, raise or promotion.

Exercise your right to educational fair use. Don't ask permission to use a copyrighted work for nonprofit, educational purposes, because to do so would be to tacitly admit that permission is needed. Make multiple copies for classroom use. Encourage your educational institution to fight for educational fair use by establishing in-house photocopy centers (where necessary), and encouraging faculty members to use in-house resources to assemble and duplicate "permission fee free" course packets. While this might attract the ire of publishers and foment litigation, that appears to be the (albeit
potentially exorbitant) price of preserving the doctrine. If we don't fight compression, we will doom ourselves to a scope of fair use that allows law students to make unencumbered videotapes of every episode of Ally McBeal and The Practice, but requires law professors to secure permission and remit royalty payments before distributing a newspaper article concerning an actual trial.

FOOTNOTES:


n2 Though no court has yet specifically concluded that the Guidelines are coextensive with the scope of educational fair use, it is argued in this Article that both courts and educational institutions increasingly perceive them to be. See, e.g., infra Part III.


n4 See 17 U.S.C. § 502; see also Gasaway, supra note 3, at 155.

n5 Copyright protection is not available, for example, for works of the United States Government, pursuant to § 105 of the Copyright Act. See 17 U.S.C. § 105.


n7 17 U.S.C. § 107; see discussion infra Part II.

n8 Ann Shumelda Okerson, Buy or Lease? Two Models for Scholarly Information at the End (or the Beginning) of an Era, Daedalus, Fall 1996, at 55, 63.

n9 See infra notes 362-64, 403, 406-07, 494 and accompanying text.

n10 See infra notes 362-64, 403, 406-07, 433 and accompanying text.


Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.


\[n17\] See generally Keith Aoki, Authors, Inventors, and Trademark Owners: Private Intellectual Property and the Public Domain Part I, 18 Colum.-VLA J.L. & Arts. 1 (1993); James Boyle, A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading, 80 Cal. L. Rev. 1413 (1992); Jessica Litman, The Public Domain, 39 Emory L.J. 965 (1990). Where there are only a limited number of ways of expressing an idea, a court may find "that the idea behind the work merges with its expression and the work is not copyrightable." Merges et al., supra note 16, at 361. It is unlikely, however, that any court would apply the merger doctrine to a complex work of scholarship, because the ideas contained therein usually could be expressed in different ways if adequate time and resources were allocated to the task. See Dratler, supra note
16, at 306-09.

\(^{n18}\) See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); Troy Paredes, Comment, Copyright Misuse and Tying: Will Courts Stop Misusing Misuse?, 9 High Tech L.J. 271, 273-76 (1994).

\(^{n19}\) See *Sony Corp. of America*, 464 U.S. at 429.


\(^{n23}\) See Robert A. Kreiss, Copyright Fair Use of Standardized Tests, *48 Rutgers L. Rev. 1043, 1045 (1996)* ("In many infringement cases, the public interest coincides with that of the copyright owner. If those interests do not coincide, however, the private interests of copyright owners must take second place to the public interest.").


\(^{n25}\) See Litman, supra note 20, at 966-67; see also William F. Patry, The Fair Use Privilege in Copyright Law 4-5 (1985); Aoki, supra note 17, at 14-16; Boyle, supra note 17, at 146668; Friedman, supra note 20, at 184; Debra L. Quentel, "Bad Artists Copy. Good Artists Steal.": The Ugly Conflict Between Copyright Law and Appropriationism, *4 UCLA Ent. L. Rev. 39, 45 (1996)*. See generally Peter Jaszi, Toward a Theory of Copyright: The Metamorphoses of "Authorship," *1991 Duke L.J. 455* (discussing the myth of originality in authorship); David Lange, At Play in the Fields of the Word:

n26 See sources cited supra note 25.


n29 Cf., e.g., Merges et al., supra note 16, at 2.


n31 Mann, supra note 21, at 68 (quoting Thomas Jefferson).

n32 For example, The Grateful Dead attributes a significant increase in its audience and record sales to its policy of allowing fans to record concerts and trade tapes. See id. (citing John Perry Barlow).


n34 See Loren, supra note 30, at 26. See generally Gordon, supra note 33.

n35 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901).

n36 See id. at 343.

n37 See id. at 345.

n38 See id. at 349; see also Michael G. Anderson et al., Market Substitution and Copyrights: Predicting Fair Use Case Law, 10 U. Miami Ent. & Sports L. Rev. 33, 36-37 (1993).

n39 Folsom, 9 F. Cas. at 348; see also John Shelton Lawrence, Copyright Law, Fair Use, and the Academy: An Introduction, in Fair Use and Free Inquiry 9-10 (John Shelton Lawrence & Bernard Timberg eds., 1980) (commenting on the impact of Justice Story's opinion).
n40 See Folsom, 9 F. Cas. at 346-47.

n41 I use the words "permissive" and "non-permissive" rather than the more melodious (and arguably more grammatical) "authorized" and "unauthorized" because "authorized" and "unauthorized" contain the word "author," implying author control over the permission process, which authors typically do not have. Instead publishers decide whether permission should be granted, and they set permission fees. Rather than foist the ungainly "publisherized" and "unpublisherized" upon the discourse, "permissive" and "non-permissive" are used.


n43 Id.

n44 Dratler, supra note 16, at 235.


n46 See, e.g., Bell, supra note 33, at 567-70.


n48 See id. at 683 n.48.


n50 See Brandfonbrener, supra note 47, at 683.

n51 See id. at 685.


n53 Id.

n54 See Brandfonbrener, supra note 47, at 685-87. The Guidelines were included in the House Judiciary Committee's report on the Copyright Act of 1976 as a "reasonable
interpretation of the minimum standards of fair use." Id. at 686 (quoting H.R. Rep. No. 94-1476, at 72 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5689). The Guidelines were accepted by the Act conference committee as "partially reflecting the committee's understanding of the fair use doctrine." Id. at 686 n.63.

n55 Id. at 686.

n56 Id. (quoting letter from Prof. Francis A. Allen to Rep. Robert W. Kastenmeier (May 25, 1976), reprinted in H. Tseng, New Copyright U.S.A. 405 (1979)).

n57 Id. at 687.


n60 See, e.g., id. at 1536.


n64 See id.

n65 See id.

n66 See id.

n67 Id. at 69, reprinted in 1976 U.S.C.C.A.N. at 5682.


n70 See id.
n71 Id.
n72 Id.
n73 Id.
n74 Id. at 70, reprinted in 1976 U.S.C.C.A.N. at 5683.
n76 As one commentator trenchantly observed:

If a professor plans in advance to pass out copyrighted material in her class, she will be prohibited from doing so unless she has received the holder's permission. Since many professors are not sure whom to write to in order to receive this permission and cannot endure the uncertainty in waiting for a reply when planning a syllabus in advance, they usually will choose not to use the material . . . or they will decide to cheat. It's a poorly kept secret in academia that the classroom copying guidelines are often ignored or rationalized away ("well, sure I first thought of using this material last summer, but I just decided to use it today").

n78 See id.
n81 See Brandfonbrener, supra note 47, at 674 & n.21, 708 & n.170.
n83 See Brandfonbrener, supra note 47, at 681 & nn.43-44.
n84 17 U.S.C. § 107(1).
n85 See, e.g., Spalding, supra note 20, at 455.
n87 Patry & Perlmutter, supra note 42, at 678.


n89 17 U.S.C. § 107(2).


n93 See Marcellino & Blakeslee, supra note 12, at 137-152; see also Spalding, supra note 20, at 456.

n94 See Marcus v. Rowley, 695 F.2d 1171, 1176 (9th Cir. 1983).

n95 Brandfonbrener, supra note 47, at 694 n.109.


n97 See, e.g., Spalding, supra note 20, at 458.

n98 See id.


n100 E.g., id. at 564-65.


n104 Patry & Perlmutter, supra note 42, at 697.

n105 Anderson et al., supra note 38, at 34.
n106 See John Holusha, Have It Your Way, Professor: Custom Textbooks on Demand, N.Y. Times, Aug. 21, 1995, at D3.


Fair use is precluded, generally, in those instances when the use would impair the current marketability of the work. This requires an inquiry as to whether, if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work. This can mean sales, interference with marketability, or usurpation of the market.

Marcellino & Blakeslee, supra note 12, at 137-52.

Too broad an interpretation of the potential market . . . presents its own dangers. If taken to a logical extreme, the fourth factor would always weigh against fair use, since there is always a potential market that the copyright owner could in theory license. By definition, once the affirmative defense of fair use is invoked, there has already been a finding of infringement. Accordingly, the defendant's use necessarily falls within the area of the copyright owner's exclusive rights and therefore could have been licensed.

Patry & Perlmutter, supra note 42, at 688.

n108 See, e.g., "Textbook" Anthologies on Campuses Are Curbed by Ruling on Copyrights, N.Y. Times, Apr. 16, 1991, at A14 (quoting Prof. David S. Peterson as stating that anthologies not only are cheaper than textbooks but also offer students "a diversity of points of view" culled from a "broader survey" of writings and documents).


The amount of copying from books that is permissible under the 1976 Act, either as fair use under section 107 and the educational guidelines or under the exemptions in section 108 for library copying, would seem to have no appreciable effect on the economics of book publishing at this time or in the next few years. There will undoubtedly be some copying of books in violation of the 1976 Act that will substitute for the purchase of books. The amount of such copying is probably small, however, and is inhibited by cost factors, in particular, the current frequently higher per-page cost of making copies as compared with the cost of buying the book.

Id.
Do-it-yourself copies cost ten to fifteen cents per page in 1983, according to an informal survey of copycenters performed by the author.

Used book sales were more likely responsible for any decreased demand.

In 1975 in *Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973)*, aff'd, *420 U.S. 376 (1975)*, a publisher of 37 medical journals sued the National Institutes of Health and the National Library of Medicine for copyright infringement based on 200,000 photocopies of articles made over a five-year period. The Court of Claims concluded that the photocopying was fair use. See *id. at 1362*. This holding was based on the nonprofit status of these federal agencies, the fact that limits were placed on the amount of photocopying that would be done for any single patron, the "traditional right" of a scholar to photocopy an article for personal use, the broad scope of fair use for science, the lack of proof of harm to the publisher, and the fear that medicine would be crippled without library photocopying. See *id. at 1352-62*. Commentators have observed that the copying done in Williams & Wilkins would probably not be considered fair use today. See Jayashri Srikantiah, *The Response of Copyright to the Enforcement Strain of Inexpensive Copying Technology, 71 N.Y.U. L. Rev. 1634, 1666-68 (1996)*. In 1978, when the Copyright Act of 1976 went into effect, publishers formed the Copyright Clearance Center, a centralized entity designed to facilitate standardized assessment and collection of permission fees for the photocopying of copyrighted works. Shortly thereafter, members of the A.A.P. began using litigation or the threat of litigation to effect the participation of companies such as American Cyanamid, Squibb Corp., Pfizer, General Electric and Texaco in the Copyright Clearance Center. See Brandfonbrener, supra note 47, 674 n.18.

At least three scholars have asserted that the courts will find fair use only when a "secondary use does not act as an economic market substitute for the original." Anderson et al., supra note 38, at 34. See generally Lemley, supra note 22, at 1077-1083.


See id.

See *id. at 867-68*.

*309 F.2d 777 (8th Cir. 1962)*.

See *id. at 778-79*.

See *id. at 783*.

*695 F.2d 1171 (9th Cir. 1983)*.

See *id. at 1173*. 
n122 See id.
n123 See id. at 1178.
n124 See id. at 1174-78.
n125 See Brandfonbrener, supra note 47, at 673 n.18.
n126 See id.
n127 See id.
n128 See id.
n129 See id. at 669.
n130 See id. at 669-71.
n131 See id. at 671-72.
n132 Id. at 670 n.6; see also Spalding, supra note 20, at 463-64.
n133 See Brandfonbrener, supra note 47, at 672, 674 n.21.
n134 See id. at 674.
n135 See id. at 674 & n.21.
n137 See id. at 1184-85.
n138 See id. at 1175.
n139 Id. at 1176.
n140 See id. at 1180.
n142 Id. at 447-56.
n143 See id. at 429.
n144 See generally id. at 447-55 & n.40; see also Anderson et al., supra note 38, at 38-
rubber.
expression, however, can be difficult. See supra notes 15-16 and accompanying text.


\(\text{n165 Spalding, supra note 20, at 461.}\)

\(\text{n166 Alternatively, Time may have cancelled publication of the memoir excerpt at Harper & Row's urging, as a litigation strategy to insure that plaintiffs could demonstrate financial harm in an efficient and easily quantifiable manner. Had Time gone ahead with publication, proving that The Nation's piece affected Time's circulation might have been difficult and costly.}\)

\(\text{n167 Harper & Row Publishers, Inc., 471 U.S. at 579 (Brennan, J., dissenting).}\)

\(\text{n168 293 F. Supp. 130 (S.D.N.Y. 1968).}\)

\(\text{n169 See Harper & Row Publishers, Inc., 471 U.S. at 593.}\)

\(\text{n170 See Bernard Geis Assocs., 293 F. Supp. at 131-32.}\)

\(\text{n171 See id.}\)

\(\text{n172 Id. at 138.}\)

\(\text{n173 See id. at 131-32, 146.}\)

\(\text{n174 See id. at 146.}\)


\(\text{n176 See id. at 1526.}\)

\(\text{n177 See id. at 1528-29.}\)

\(\text{n178 Id.}\)

\(\text{n179 Id. at 1532.}\)

\(\text{n180 See id. at 1531-32 (discussing Kinko's claim that the use was educational).}\)

\(\text{n181 See id. at 1526.}\)

\(\text{n182 See id. at 1526-28.}\)
n183 See id. at 1526. In percentage terms, the court calculated this to be between 8% and 28% of the work. See id. at 1527-28. Specifically, the court figured that 14 pages of a 175 page book represented 8% of the entire work. See id. at 1527. Similarly, 110 pages of a book in excess of 400 pages represented approximately 27.5% of the work. See id. at 1528.

n184 See id. at 1526-28.

n185 See id. at 1527-28. The per-page copying charge was four cents. See id. at 1539 n.16.

n186 See id. at 1527.

n187 See id.

n188 See id.

n189 See id. at 1539 n.16.

n190 See id. at 1529-35.

n191 Id. at 1530-32.

n192 See id. at 1531.

n193 Cf. id. at 1531.

n194 See id. at 1530-31 (stating that "there was absolutely no literary effort made by Kinko's to expand upon or contextualize the materials copied").

n195 Id. at 1530 (quoting Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1111 (1990)).

n196 See id. (noting that distinguishing "between "productive' and "nonproductive' uses "may be helpful in calibrating the balance [of interests]"") (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984))).

n197 Id. at 1530-31.

n198 See, e.g., Leval, supra note 195, at 1111 (stating that repackaging or republishing a copyrighted work would be unlikely to pass the transformative use test).


n201 See id. at 1532-33.
n202 Id. at 1533.

n203 Id.

n204 See supra notes 33-34 and accompanying text.

n205 See Kinko's Graphics Corp., 758 F. Supp. at 1533-34.

n206 Id. at 1533 (quoting Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1263 (2d Cir. 1986)).

n207 Id. at 1534.

n208 But see Princeton Univ. Press v. Michigan Document Serv., Inc., 99 F.3d 1381, 1394 (6th Cir. 1996) (Merritt, J., dissenting) ("The custom of making copies for classroom use for a fee began during my college and law school days forty years ago and is now well-established."), cert. denied, 117 S. Ct. 1336 (1997).


n211 See Kinko's Graphic Corp., 758 F. Supp. at 1533.

n212 See id. at 1530-31.

n213 But see Michigan Document Serv., Inc., 99 F.3d at 1406 (Ryan, C.J., dissenting) ("There is no evidence to suggest that even the 30% selected from Weiss's book extracted the heart of the work rather than just those portions that the professor deemed instructive for his limited classroom purposes.").


n215 Id.

n216 Id. at 1534.


n220 See id.
n221 See id.
n222 Id.
n223 See id.
n224 Id.
n225 See id. at 1543.

n226 See 17 U.S.C. § 504(c)(1) (1994) (setting forth the provisions concerning the calculation of statutory damages). The Kinko's court did not have to make specific findings because election of statutory damages on the part of the copyright owner allows recovery of a set sum for all infringements. See id.

n227 See infra text accompanying note 278.


n229 See id. at 1526.

n230 See id.

n231 Id. at 1542.

n232 Id.

n233 Id.

n234 Id. at 1534.

n235 Cf. id. at 1539 n.15.

n236 See id. at 1540 & n.17. Indeed, this author recalls purchasing course packets from the Kinko's in Ithaca, New York as early as August of 1981.

n237 Id. at 1535.

n238 Id.

n239 Id.

n240 See id.

n241 Id.
n242 See id. at 1535-37.

n243 See id.

n244 See id. at 1536-37.

n245 See id.

n246 See id. at 1537, 1542.


n248 See id. at 1537.

n249 See id. at 1547.


n251 Id. at 47.

n252 Id.

n253 See, e.g., Groves, supra note 13, at 326-27 (stating generally that publishers have been using these types of letters as "scare tactics" to threaten infringers with copyright suits).


n255 510 U.S. 569 (1994).

n256 "Oh, Pretty Woman" was written by Roy Orbison and William Dees in 1964.

n257 See Campbell, 510 U.S. at 594.

n258 See id.

n259 See id. at 577.

n260 See id. at 583-84.

n261 Id. (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).
n262 Id. at 584.

n263 Id.

n264 Id. at 584-85 (citations omitted) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).

n265 Id. at 585 (quoting Harper & Row, Publishers, Inc., 471 U.S. at 562).

n266 Id. at 584-85.

n267 Id. at 585.


n270 Michigan Document Servs., Inc., 99 F.3d at 1384.


n274 See id. at 909-11.

n275 Id. at 910.

n276 Id.

n277 Id.

n278 Id. at 913.

The first dissenting judge concluded there was no economic harm to the publishers that outweighed the benefits provided by MDS. . . . This . . . dissent suggested that the majority's strict reading of the fair use doctrine would hinder scholastic progress throughout the nation's universities because of the additional delays and costs that ultimately would be handed down to the students.

The second dissenting judge concluded that the plain language of the statute allowed the copying by copy shops under the fair use doctrine. The dissent also explained that even if the plain language of the statute which allows "multiple copies for classroom use" were
less clear, the majority erred in its analysis of the four factors . . . .

The third dissent judge . . . simply disagreed with the majority's ultimate conclusion . . . .

Ouchi, supra note 269, at 382.


n296 See Michigan Document Servs., Inc., 99 F.3d at 1387.

n297 See id. at 1389.

n298 Id. at 1392.

n299 See infra notes 398-400 and accompanying text.


n301 Id. at 1394.

n302 Id. at 1394 (Merritt, J., dissenting) (quoting 17 U.S.C. § 107 (1994)).

n303 Id. at 1394-95 (quoting 17 U.S.C. § 107).

n304 See id. at 1398 (Ryan, J., dissenting).


n307 Id. at 1400.

n308 Id. at 1401.

n309 Id.

n310 Id. at 1403 (quoting 17 U.S.C. § 107(1), (4) (1994)).

n311 Id. at 1405 (quoting 17 U.S.C. § 107(2)).

n312 Id. (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)).

n313 Id.
n314 Id. (quoting 17 U.S.C. § 107(3)).
n315 Id.
n316 See id.
n317 Id.
n318 Id. at 1406.
n319 Id. at 1406-07 (quoting 17 U.S.C. § 107(4)).
n320 See id. at 1407.
n321 See id. at 1409-10.
n322 See id. at 1410.
n323 Id.
n324 See id. at 1410-12.
n325 Id. at 1411 (quoting Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring)).
n326 Id. at 1411-12.


n329 See Sony Corp. of America, 464 U.S. at 449-50.


n333 Sony Corp. of America, 464 U.S. at 449.
n334 See id. at 425, 449.


n337 Cf. Sony Corp. of America, 464 U.S. at 485 (Blackmun, J., dissenting) (noting that most VCR users would be willing to pay some kind of royalty to copyright holders).

n338 See Sony Corp. of America, 464 U.S. at 451-55.

n339 See id. at 452-53; see also Dratler, supra note 16, at 266.

n340 See id. at 454-55.


n342 See Patry & Perlmutter, supra note 42, at 698.


n344 See American Geophysical Union v. Texaco Inc., 37 F.2d 881, 899 (2d Cir. 1994).


n348 See id. at 580-85.

n349 Id. at 584 (quoting Harper & Row, Publishers, Inc., 471 U.S. at 592 (Brennan, J., dissenting)).

n350 See Quality King Distrbubs., Inc. v. L'anza Research Int'l, Inc., 118 S. Ct. 1125, 1133 (1998) (Stevens, J.) (discussing the "importance of the fair use defense to publishers of scholarly works, as well as to publishers of periodicals" and noting that "the impact of the denial of the fair use defense for the importer of foreign publications . . . "would merely inhibit access to ideas without any countervailing benefit." (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 450-51 (1984)); see


n352 See Patry & Perlmutter, supra note 42, at 706-07.

n353 This has been articulated before as a concern. As one critic has written:

Profit is derived by profit-making businesses from virtually every act of photocopying, regardless of where it takes place. Even photocopy machines located in libraries generate profit for the manufacturer of the equipment, for the lessor if leased, for the paper and toner supplier, and for the servicing contractor. If the fair use focus is shifted from whether the use of the copy is for a profit-making purpose to whether profit is derived by someone in the copyproducing process, the fair use exemption may either be extinguished or become filled with arbitrary distinctions based not on the derivation of profit from the copying process (since some profit is always derived), but rather on where the profit is earned: on-campus or off.


n354 One group of legal scholars specializing in copyright law posed the question as follows: "Do professors who have a fair use right to make multiple copies for classroom use forfeit that right if they have a copyshop make the copies?" Concerned Profs.' Amicus Brief to the Sixth Circuit, supra note 24, at 188.


Traditionally, fair use has not exempted copying designed to substitute for acquisition of the copied work. Substitutional copying is considered detrimental to the copyright owner's rights. However, the United States copyright act of 1976 lists "multiple copies for classroom use" among the uses apparently entitled to assert the fair use exception. Moreover, in conjunction with the 1976 Act's passage, publishers and educators elaborated Guidelines to fair use photocopying. . . . Significantly, the Guidelines declare: "Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works." Thus, preparation of course materials consisting of all
or parts of a variety of works, anthologized without the copyright owners' permission, is not possible under the Guidelines. In essence, under the Guidelines, multiple copying done as a regular part of the course plan is copying that the professor should have anticipated and for which she should have requested permission.

Id. (footnotes omitted).


n358 Brief Amici Curiae of the Authors Guild, Inc., the Text and Academic Authors Association, Inc., the American Society of Journalists and Authors, Inc., and the Authors Registry, Inc. in Support of Plaintiffs-Appellees' Petition for Rehearing and Suggestion of Rehearing En Banc at 4, Princeton Univ. Press v. Michigan Document Servs., Inc., 74 F.3d 1512 (6th Cir. 1996) (No. 94-1778) [hereinafter Authors Guild's Amici Brief in Support of the Petition for Rehearing En Banc].

n359 Id.

n360 There is apparently significant duplication of membership among these organizations, as it is twice asserted in the Motion For Leave To File, and again in the amici brief itself that the groups collectively have 50,000 members, see id. at 12; Motion for Leave to File and Brief Amici Curiae of the Authors Guild, Inc., the Text and Academic Authors Association, Inc., the American Society of Journalists and Authors, Inc. and the Authors Registry, Inc. in Support of Plaintiffs-Appellees' Petition for Rehearing and Suggestion of Rehearing En Banc at 1-2, Princeton Univ. Press v. Michigan Documents Servs., Inc., 74 F.3d 1512 (6th Cir. 1996) (No. 94-1778), which is the same number of "registrants" The Author's Registry, Inc. attributes to itself, see Authors Guild's Amici Brief in Support of the Petition for Rehearing En Banc, supra note 358, at 4.

n361 Authors Guild's Amici Brief in Support of the Petition for Rehearing En Banc, supra note 358, at 7.


n363 Id. (quoting American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992)).

n364 Authors Guild's Amici Brief in Support of the Petition for Rehearing En Banc, supra note 358, at 7.

n365 Kinko's required faculty members submitting excerpts of copyrighted written works for course packets to sign a paper stating that they would not have required purchase of the entire work. See infra note 378 and accompanying text.
n366 Authors Guild's Amici Brief in Support of the Petition for Rehearing En Banc, supra note 358, at 8.

n367 See sources cited infra note 369.

n368 Authors Guild's Amici Brief in Support of the Petition for Rehearing En Banc, supra note 358, at 10.


n370 The Amici Brief was signed and submitted by an attorney at Frost & Jacobs, a Cincinnati law firm that extensively represents publishing interests. See Authors Guild's Amici Brief in Support of the Petition for Rehearing En Banc, supra note 358, at 13. Steven Gillen, a partner at Frost & Jacobs whose clients are mainly publishers, is a member of the Text and Academic Authors Council. See Text and Academic Authors, Authors Asking (visited Mar. 30, 1998) <http://www.winonanet.com/taa/QUESTIONS/questions.html>.

n371 A supplement to the amici brief containing the names was filed three months after the brief itself. See Notice of Additional Signatories to Brief Amici Curiae of the Authors Guild, Inc., the Text and Academic Authors Association, Inc., the American Society of Journalists and Authors, Inc., and the Authors Registry, Inc., Princeton Univ. Press v. Michigan Document Servs., Inc., 74 F.3d 1512 (6th Cir. 1996) (No. 94-1778).

n372 Including Robert S. Smith of Cornell University, see id., whose co-authored Labor Economics text, see Robert J. Flanagan et al., Labor Economics and Labor Relations (1984), this author purchased while an undergraduate at Cornell in the early 1980s, despite the then widespread use of "fair use" course packets.

n373 See infra Part VI.B-H.

n374 See Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1391 (6th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 1336 (1997); Spalding, supra note 20, at 465 ("Judge Motley expressly avoided any consideration of copying performed by "on-campus copyshops, whether conducted for-profit or not' . . . .").


On Wednesday, June 12, Ronald Rauchberg will appear before the full Sixth Circuit in a
case involving whether publishers can lawfully stop a copyshop from creating coursepacks, bound volumes consisting of excerpts from books, and sell them to students.

Rauchberg, a partner at New York's Proskauer Rose Goetz and Mendelsohn, presumably will hope that the experience will be more rewarding for him and for his clients than his argument last September before a three-member panel of the same court. Less than a minute into his argument, he was asked whether a professor, rather than a copyshop, could make the copies in question.

"I don't think that question has to be answered in this case," Rauchberg responded.

"I want the answer to it," the judge snapped back.

A few moments later, Rauchberg was trying to duck a related question, and one of the judges interjected: "No. Pardon me, Mr. Rauchberg. It's customary in this circuit that when one of the members of the court puts question to counsel, counsel attempts to answer the question even if counsel thinks it's a dumb question."

Id.

\[n376 \text{Michigan Document Servs., Inc., 99 F.3d at 1389.} \]

\[n377 \text{Id. at 1393 (Martin, C.J., dissenting).} \]


\[n379 \text{See Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984); Martin, supra note 353, at 381; Merickel, supra note 52, at 720-21. But see Litman, supra note 20, at 40 ("Non-commercial users rarely get sued and, when they do, tend to have powerful fair use arguments on their side.").} \]

\[n380 \text{But see Kinko's Graphics Corp., 758 F. Supp. at 1546 (stating that Kinko's was not an agent of the professors on whose behalf it compiled and duplicated course packs because Kinko's had control over the "determination whether a passage required permission or was fair use; whether permission was sought after the fair use determination; and when and how permission was pursued").} \]

\[n381 \text{No. 82 CIV. 8333 (ADS), 1983 WL 1134 (S.D.N.Y. May 31, 1983).} \]

\[n382 \text{See Copyright Act of 1976, 17 U.S.C. § 504(c)(2) (1994).} \]

\[n383 \text{See id.} \]

n385 See 17 U.S.C. § 504(c)(2) (stating that only employees of non-profit educational institutions, libraries, archives, and public broadcasting entities are sheltered).


n389 See 17 U.S.C. § 504(c)(2).

n390 See Brandfonbrener, supra note 47, at 679 n.37, 683 n.53.


n393 See Jonathan A. Levy, Risky Business: Office Photocopying, Fair Use and Copyright Infringement, Or. St. B. Bull., May 1995, at 9, 11 ("Publishers' groups pay bounties to employees to snitch on their employers. . .").

n394 See, e.g., John Holusha, Have It Your Way, Professor: Custom Textbooks on Demand, N.Y. Times, Aug. 21, 1995, at D3, col. 1 (reporting that permission fee royalties increased from less than 5 cents per page to 7 cents.); cf. Rensselaer Polytechnic Institute Libraries, Copyright Law, "Fair Use,' and How to Obtain Copyright Permission (visited on Oct. 25, 1998) <http://www.rpi.edu/dept/library/html/Policies/fairuse.html#F> ("Royalties for use of copyrighted materials vary greatly depending on the nature of the work to be copied, the intended use, and the amount of the material to be copied. Typical royalty charges for copies of journal articles and book chapters are 10 cent -15 cent per page, but can be as high as $ 2.00 per page.").


n397 Some have argued that fair use has led to elevated journal prices:

Users believe publishers charge a price that reflects what publishers think they are losing because users make fair use (and interlibrary loan) copies; users cancel subscriptions and make more copies because they cannot afford the journals and then publishers charge more because they perceive that fair use and interlibrary loan copies are further displacing subscriptions.

Harper, supra note 28.

n398 See, e.g., Diego Bunuel, Students Wince at Textbook Prices: At Washington U., Some Are Paying $ 400 a Semester, St. Louis Post-Dispatch, Aug. 22, 1997, at C1 ("Students are a captive market,' said Glenn Sanislo, co-publisher of Subtext, a textbook industry newsletter. "They have to buy the books they're assigned."); Former Textbook Salesman Writes Advice Book, Says Industry "Exploits" Captive College Students, Educ. Marketer, Dec. 11, 1995 (reporting that textbook publishing industry is squeezing $ 2 billion per year from captive college students).

n399 Cf. Oxford University Press Becomes First Publisher to Distribute Textbooks Online, Educ. Marketer, Dec. 23, 1996 (quoting Tom Peacock, senior marketing manager at OUP, as stating that "Academics and serious students still like the look and feel of the beautifully bound, hardback book"). But see Jonathan Franklin, Blackboard; The Cost of Being Book-wise, N.Y. Times, Nov. 6, 1988, § 4A, at 7 ("Students respond to the high cost of textbooks by doing everything from sharing books to photocopying them.").

n400 See Kinko's Graphics Corp., 758 F. Supp. at 1536 ("Kinko's is in the business of providing copying services for whomever is willing to pay for them and, as evidenced in this case, students of colleges and universities are willing to pay for them.").

n401 The antitrust implications raised by such cooperation are beyond the scope of this article.

n402 See Concerned Profs.' Amicus Brief to the Sixth Circuit, supra note 24, at 198 (stating that publishers acted in concert to create the Copyright Clearance Center and to further the goals of the Copyright Compliance Office of the Association of American Publishers).


n404 See Glynn S. Lunney, Jr., Reexamining Copyright's Incentives-Access Paradigm, 49 Vand. L. Rev. 483, 654 (1996). Lunney argues that copyright owners should be able
to recover only the cost of creating a work, because to allow the copyright owner to recover something approaching the full value of the work "would establish a legal system that enabled a [copyright owning] individual to recover the value of the resulting good for investments in one sector of the economy, while it enabled an individual to recover only the cost (more or less) of the resulting [non-copyrightable] good in every sector." Id. In other words, strong copyright protection would result in investment returns that were unreasonably high in comparison to those available for investments unrelated to copyrightable works.

n405 See, e.g., At Least Six Companies Are Vying for Times Mirror's College Group, Educ. Marketer, May 6, 1996 (college textbook operation generated higher revenues than previous year for fifth year in a row); Lona O'Connor, Printing Gold; While Schools Are Laying Out Millions of Bucks for Textbooks, Publishers Are Raking in Billions, Sun-Sentinel, Jan. 2, 1998, at 1A ("Kindergarten to graduate school, textbooks bring publishers $5.1 billion a year, or about one-quarter of the $20.7 billion total for book publishing.").

n406 See, e.g., Former Textbook Salesman Writes Advice Book, Says Industry "Exploits' Captive College Students, supra note 398 (stating that textbook publishing industry is squeezing $2 billion per year from captive college students); Avrun D. Lank, Textbook Is Published on the Net: Etext Makes Business School Course Information Available to Virtually Everyone, Milwaukee J. Sentinel, Feb. 16, 1998, at 8 (textbooks usually written for profit). But see Hal Lux, A Nobelist on the Net; Bill Sharpe, Cyberscribbler, Institutional Investor, Oct. 1996, at 27 (reporting that nobel laureate is "happy to trade textbook royalties for the potentially wider audience of the Web").

n407 See, e.g., Bell, supra note 33, at 618 ("Academics themselves suffer scant harm from fair use because they have few licensing fees at risk. In fact, academics typically prefer that others copy, read, and cite their works freely."); Spalding, supra note 20, at 467-68; Lank, supra note 406 ("Professors have an obligation to spread knowledge, no matter what the pay."); Lux, supra note 406. But see Authors Guild's Amici Brief in Support of the Petition for Rehearing En Banc, supra note 358, at 5 ("The thousands of authors we represent, including thousands of text and academic authors, cannot and do not write without the incentives of compensation and their publishers' support.").


n410 Alan Gunn, posting to <less than>lawprof@chicagokent.kentlaw.edu>, Oct. 31, 1979 (on file with author) (quoted with the permission of Professor Gunn).

n411 See American Bar Association, Standards for Approval of Law Schools Standard
n412 See Willian Funk, posting to <less than>lawprof@chicagokent.kentlaw.edu>, Oct. 31, 1997 (on file with author) (cited with the permission of Professor Funk).

n413 See Andrew Beckerman-Rodau, posting to <less than>lawprof@chicagokent.kentlaw.edu>, Oct. 31, 1997 (on file with author) (cited with the permission of Professor Beckerman-Rodav).


Concerned Profs.' Amicus Brief to the Sixth Circuit, supra note 24, at 195; see also Leslie G. Espinoza, The LSAT: Narratives and Bias, 1 Am. U. J. Gender & L. 121, 147 (1993) ("Copyright can be used to monopolize ideas and thus inhibit the exchange of information at a potentially great social cost.").

n416 See McJohn, supra note 13, at 607.

n417 See Patry & Perlmutter, supra note 42, at 688-89.


n419 See id. at 35.

n420 See John Shelton Lawrence, Donald Duck v. Chilean Socialism: A Fair Use Exchange, in Fair Use and Free Inquiry: Copyright Law and the New Media 45 (John Shelton Lawrence & Bernard Timbert eds., 1980).

n421 Stowe, supra note 418, at 36.


n425 See id.

n426 See Franklin, supra note 399 ("To combat slackened demand for new textbooks, many publishers update them every three or four years, rendering older versions
obsolete."); see also Bunuel, supra note 398.

n427 A.A.P. Launches Textbook Campaign Aimed at College Professors, Educ. Marketer, Mar. 4, 1996; see also Former Textbook Salesman Writes Advice Book, Says Industry "Exploits" Captive College Students, supra note 398 ("The A.A.P. is planning to spend over $100,000 in a campaign to encourage professors--the "key influencers' in student attitudes--to make textbooks an integral part of instruction . . . .").


n429 See Lisa Benavides, Ruling Means Extra Credit for Copyright Shops, Boston Bus. J., Nov. 29, 1996, at 10 ("The booming custom publishing business is expected to benefit even more from a recent Michigan court decision that makes it harder for copy shops to get a piece of the college "course pack' business."); see also Instant Instruction: Custom Texts Showing Up on Campuses, Plain Dealer (Cleveland), Oct. 19, 1993, at F14 (discussing how print on demand publishing is making inroads into college textbook market); Jon Marcus, Computer-Customized Textbooks a Hit, Capital Times (Madison, WI), Sept. 15, 1993, at B6 ("Industry officials say the print-on-demand market will grow from around $10 million this year to $500 million by the end of the decade."); Textbook Publishers Say All College Products Will One Day Be Customized, Educ. Marketer, Nov. 18, 1996 ("In the near future all products will be customized to some extent.").

n430 See, e.g., Debbie Graves, Tailor-Made Textbooks Trim Student Expenses, Austin American-Statesman, Sept. 12, 1994, at B1; Marcus, supra note 429 (stating that coursepack prices are often 20% less than those of textbooks).

n431 See Benavides, supra note 429 (discussing how custom publishing companies often charge three times as much as copy shops and pass the cost on to students).


n433 Sample on file with author and University of Pittsburgh Law Review. The on-line sites of NBC News, CBS News, and ABC News also contain similarly overbroad copyright statements.

Sample on file with author and University of Pittsburgh Law Review.


See Spalding, supra note 20, at 473.

See Loren, supra note 30, at 24.


Morris, supra note 439, at 129; see also Bell, supra note 33, at 587 ("Academics, artists, commentators, and others desirous of reusing copyrighted works without authorization must borrow at their peril, consult experts on fair use, or, sadly, forego such reuse altogether."); William Stott, Other People's Images: A Case History, in Fair Use and Free Inquiry: Copyright Law and the New Media 62, 62-67 (John Shelton Lawrence & Bernard Timberg eds., 1980) (describing the difficulties of publishing photographs, drawings and advertisements of the 1930s to accompany a doctoral dissertation).

See Stowe, supra note 418, at 32-33.

See id. at 34.


See Dratler, supra note 16, at 245-48. See generally Boyle, supra note 27.


See Gasaway, supra note 3, at 158.

See id. at 159.


n450 Litman, supra note 20, at 45-46.

n451 See Loren, supra note 30, at 35 n.144.

n452 Morris, supra note 439, at 147.

n453 See survey results on file with author; see also Brandonbrener, supra note 47, at 674 n.21. See generally A Copyright Sampler (Wanda K. Johnson & Oerrie B. Roark eds., 1996) (presenting a collection of "sample" policies pertaining to use of copyrighted materials at community and junior colleges).

n454 See Loren, supra note 30, at 35 n.144.

n455 See id. See generally Lemley, supra note 22, at 1083-84 & n.432 ("Intellectual property owners have far more political power and organizing ability than users."); Jessica Litman, Copyright Legislation and Technological Change, 68 Or. L. Rev. 275 (1989). But see Stowe, supra note 418, at 39-40 (reporting that Duke University Press took a bold step in defense of fair use by publishing an issue of a journal on country music without obtaining permission to quote song lyrics).


n458 Id. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

n459 See id. at 1131-32; see also Chavez v. Arte Publica Press, 139 F.3d 504, 507-12 (5th Cir. 1998). But see Genentech, Inc. v. Regents of the Univ. of Cal., 143 F.3d 1446, 1449-51 (Fed. Cir. 1998).

n460 U.S. Const. art. I, § 8, cl. 8.

n461 See, e.g., Goldstein v. California, 412 U.S. 546, 555 (1973) (stating that art. I, § 8, cl. 8 gives Congress the power to grant copyrights, describes the objectives of the power, and delimits the means to achieve them); Sears, Roebuck & Co. v. Stiffel Company, 376 U.S. 225, 228-29 (1964); Mazer v. Stein, 347 U.S. 201, 214-15 (1954) (stating that copyright did not exist at common law).

n462 Seminole Tribe, 116 S. Ct. at 1134 (Stevens, J., dissenting).

n463 Seminole Tribe, 116 S. Ct. at 1131 n.16 (internal citations and cross-references omitted).

n464 Id. at 1132 n.16 (citing Chavez v. Arte Publica Press, 59 F.3d 539 (5th Cir. 1995) ("we are aware of no case that specifically holds that laws passed pursuant to the Copyright Clause can abrogate state immunity"), cert. granted and judgment vacated by University of Houston v. Chavez, 517 U.S. 1184 (1996)).
n465 See id. at 1128 (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).


n467 See Chavez v. Arte Publico Press, 139 F.3d 504, 512 (5th Cir. 1998). Chavez also brought a Lanham Act claim based on the University of Houston's actions in naming her, without her permission, as the selector of plays in another book it published. See id. at 506. This claim was also dismissed on Eleventh Amendment grounds. See id. at 511.

n468 See id. at 508-11.

n469 Id. at 509.

n470 See id. at 511-12.

n471 See Genentech, Inc. v. Regents of Univ. of Cal., 143 F.3d 1446, 1454 (1998).


n473 Id. at 1352.


n478 See Seltzer, supra note 476, at 23.

n479 See Morris, supra note 439, at 149.

n480 Id.

n481 See, e.g., Rensselaer Polytechnic Institute Libraries, supra note 394 ("A few
individuals have reported that royalty costs tend to be lower if you contact copyright holders directly instead of using the Copyright Clearance Center, but this procedure takes longer.

\[\text{n482 See generally, e.g., Mary R. Barry, Multiple Photocopying by Educators and the Fair Use Doctrine: The Court's Role in Reducing Transaction Costs, 1994 U. Ill. L. Rev. 387, 408-13 (discussing the Guidelines and how courts must analyze the way in which the factors affect economic barriers).}\]

\[\text{n483 See Patry, supra note 22, at 908-09 (noting that legislative proposals are "heavily weighted" in favor of publishers); Samuelson, supra note 423 at 136; Dennis McCarthy, "No Cense"-Copyright-Reform Campaign (last modified Apr. 9, 1998) \[<\text{http://www.mindspring.com/mccarthys/no-cense/basics.htm}>\] (arguing that the Copyright Term Extension Act of 1997, which was subsequently enacted as the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105298, § 102, 112 Stat. 2827, 2827-28 (1998), and which extends copyrights from 75 to 95 years for most older works, and from "life of the author" plus 50 years to "life of the author" plus 70 years for works created since 1990, is blatant "corporate welfare").\]

\[\text{n484 See, e.g., Samuelson, supra note 423, at 136.}\]

\[\text{n485 See id. at 135.}\]

\[\text{n486 Hearing of the Courts and Intellectual Property Subcommittee of the House Judiciary Committee on Copyright Legislation, Federal News Service, Sept. 16, 1997; see also Boyle, supra note 27, at 53, 95 (stating that the White Paper achieves an increase in copyright protection by giving fair use an extremely narrow definition; "Under the White Paper's vision of current law, the potential for present or future licensing produces a presumption against fair use"); Mahon, supra note 13, at 259 ("The White Paper [endorsed by Lehman] addresses the needs of commercial providers of copyrighted information while providing little support for the preservation of fair use and other public benefits.").}\]

\[\text{n487 Concerned Profs.' Amicus Brief to the Sixth Circuit, supra note 24, at 191; see also Brandfonbrener, supra note 47, at 679 nn.37 & 38, 680-85.}\]


\[\text{n489 See Loren, supra note 30, at 38-48 (identifying the "problems resulting from allowing "lost' permission fees to constitute market harm": (1) there is an "inherent circularity" in such reasoning; (2) "bullies dictate the law"; (3) "fair use becomes an inquiry into the point of non-use"; (4) "the fourth factor always favors the copyright owner, making permission systems a tool to eliminate fair use"; (5) "fair use becomes "fared use"; and (6) such reasoning "ignores the public interest nature of copyright").}\]
Nor should a defendant's willingness to pay a customary fee weigh against a finding of fair use. "By definition, if the defendant's use is fair, no fee, customary or not, is due. A finding of fair use represents a determination that the use should require neither consent nor fee." Patry & Perlmutter, supra note 42, at 684.


Cf. Loren, supra note 30, at 43.

The evolution of the coursepack permission systems highlights the importance of the first test cases. Whoever wins those first cases effectively draws the line for fair use. The fear of litigation by most copyright defendants, and their willingness to settle when sued by economically powerful copyright owners, affects not only their rights but the rights of others seeking to make similar kinds of uses of copyrighted works.

Id.

See the Model Clause on the title page of this article.

See, e.g., Lank, supra note 406; Lux, supra note 406, at 27 (nobel laureate "happy to trade textbook royalties for the potentially wider audience of the Web"); Mann, supra note 21, at 66 (writing that Richard Stallman, an M.I.T. professor and recipient of a MacArthur "genius" award, could have cashed in on several essential computer programming tools he created but instead gave his work away and set up the Free Software Foundation.)