

Fair Use: No Excuse for Wholesale Copyright Infringement in the USA

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no claim of copyright for text quoted from works of the U.S. Government

Keywords

copyright, fair use, Internet, law, photocopy, photocopying, professor, teacher

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Introduction

Since the widespread use of photocopy machines in the 1970s, and particularly since the widespread availability of the Internet beginning in the mid-1990s, teachers and professors in the USA have commonly distributed copies of chapters in books, entire articles in scholarly journals, and entire webpages to their pupils or students, *without* obtaining permission from the owner of the copyright in these works. Such copying is generally copyright infringement, for which the teacher or professor is personally liable. This essay explains the legal concept of fair use in the context of teaching and scholarly research in the USA, and cites statutes, cases, and law review articles.

In education law, there is often an important distinction between a teacher and professor, or between a pupil or student. Such distinctions are *not* important in copyright law, so the words *teacher* and *professor* can be used interchangeably in statutes and court cases.

This essay only covers the law in the USA. This essay presents information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> . Because I am an advocate for legal rights of authors and copyright owners, potential copyright infringers are advised to obtain legal advice from an attorney who is knowledgeable¹ about copyright law.

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

preliminary draft

I began work on this essay in March 2006. Despite working on this essay for more than 175 hours — *not* including my time to read cases and law review articles — I never completed either (1) reading all of the major law review articles on fair use or (2) critically reviewing all of the cases involving copyright infringement by a professor or teacher. Nonetheless, I hope the current draft, with numerous citations to authority, is a useful resource. I would welcome a grant or contract from a corporation or nonprofit organization to pay for my time and expenses to finish this essay.

¹ Lawyers seem to have an opinion about everything. In this context, I suggest that “knowledgeable” means having read at least: (a) one textbook on copyright law; (b) the U.S. Copyright Act of 1976 as amended; *and* (c) the three U.S. Supreme Court cases on fair use since 1980 (i.e., cases involving Sony Betamax video recorders, President Ford’s memoirs, and *Campbell*).

preliminary draft

wholesale copying defined

Some people make *one* copy of a copyrighted work for their own use. They may think that making *only one* copy is a minimal harm to the copyright owner, but if tens of thousands of people are each making one copy of one copyrighted work, the cumulative harm to the copyright owner is substantial. The copyright owner generally has no knowledge of each instance of copyright infringement of this kind, and it is generally not economical to sue an infringer for making only one copy. Therefore, there are few copyright cases involving a single copy.

In contrast to the situation in the previous paragraph, there is wholesale copyright infringement, which can occur in two different ways.

1. One way is distributing *many* (e.g., dozens, hundreds, even thousands) of copies of one copyrighted work, typically to students.² The instructor can make photocopies to distribute to the students (e.g., either a so-called “course pack” that substitutes for a textbook, or a daily handout to students) or the instructor can post an infringing copy at a website and invite students to download or print the infringing copy.³
2. Another way is to make one copy of each of thousands of different copyrighted works each year, typically in the context of interlibrary loan⁴ or industrial research.⁵

In such wholesale copyright infringement, the public distribution makes it easier for the copyright owner to know about the infringement. Because of the relatively large loss of royalty payments, it can be economical for the copyright owner to sue the infringer.

Wholesale copying usually refers to copying an entire chapter in a book, copying an entire article in a periodical, or copying an entire document or webpage. Copying the *entire* work is never fair use, as explained below, beginning at page 24. Wholesale copying also usually refers to verbatim copying, in which the copier added no original expression (i.e., no “transformative” use, in the words of Judge Leval).

Therefore, wholesale copying is (1) large scale, involving *many* copies, (2) copying of *entire* works, and (3) is verbatim copying.

² I include in the general term *students* participants in continuing education for professionals.

³ A related wholesale copyright infringement occurs in the distribution of copyrighted music files on the Internet, a topic briefly discussed in this essay, beginning at page 54.

⁴ See *Williams & Wilkins Co. v. U.S.*, which is discussed below, beginning at page 48.

⁵ See *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995).

The phrases “wholesale copying” and “wholesale infringement” have a long history of use in copyright cases.⁶ These phrases continue to be used in recent copyright cases in the U.S. Courts of Appeal.⁷

Extent of Copyright Protection

The owner of a copyright (i.e., the author, or someone assigned by the author, such as a publisher) has the following legal rights, according to U.S. Statute:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (enacted 1976, ¶6 added 1995, current Nov 2008).

For the purposes of this essay, the most important of the exclusive rights belonging to the owner of a copyright is the first right, the exclusive right to make copies or to authorize the making of copies (i.e., giving written permission to copy).

⁶ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 583, n.5 (1985) (Brennan, J., dissenting) (“The step beyond the narrow and clear prohibition of wholesale copying is, however, a venture onto somewhat uncertain terrain.”); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937) (“Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use.”); *Williams & Wilkins Co. v. U. S.*, 487 F.2d 1345, 1366 (Ct.Cl. 1973) (“It is undisputed that the photocopies in issue here were exact duplicates of the original articles; they were intended to be substitutes for and they served the same purpose as the original articles. This is the very essence of wholesale copying and, without more, defeats the defense of fair use.” Then Judge Cowen quoted *Leon.*) (Cowen, C.J., dissenting), *majority opinion aff'd by an equally divided court*, 420 U.S. 376 (1975); *R. L. Polk & Co. v. Musser*, 105 F.Supp. 351, 352 (D.Pa. 1952) (“There certainly was nothing remotely resembling wholesale appropriation of the plaintiff's work”).

⁷ See, e.g., *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 73 (2d Cir. 1994) (“wholesale copying”); *On Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001) (“... fragmentary copying is more likely to have a transformative purpose than wholesale copying.”); *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 532 (6th Cir. 2004) (“wholesale nature of the copying”); *Peter Letterese And Associates, Inc. v. World Institute Of Scientology Enterprises*, 533 F.3d 1287, 1307 (11th Cir. 2008) (“wholesale copying”).

When someone purchases a publication (e.g., a book or magazine), that person owns the paper on which the text is published, but does *not* own the text or expression contained therein. 17 U.S.C. § 202. Someone who has purchased an expensive book, or subscribed to an expensive magazine or scholarly journal, may *believe* they have the right to make copies of the book or magazine that they own, but the law is clear that, in general, such copies would infringe a copyright.

The U.S. Constitution explicitly authorizes Congress to grant copyrights:

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; U.S. Constitution, Article I, § 8, clause 8.

The concluding paragraph of a U.S. Supreme Court case in 1954 expressed the purpose of copyright law:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Mazer v. Stein, 347 U.S. 201, 219 (1954).

quoted with approval in:

- *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977);
- *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., joined by Marshall, Powell, and Rehnquist, dissenting);
- *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985);
- *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 495, n. 3 (2001);
- *Eldred v. Ashcroft*, 537 U.S. 186, 212, n. 18 (2004).

Thus, copyright is long-standing, mainstream American law.

Copyright law is part of property law: copyrights are personal property.⁸ The owner of property has nearly absolute, total control of his/her property. People who want, or need, someone else’s property generally have *no* entitlement to that property.⁹ In the context of copyrights, the U.S. Supreme Court has declared:

The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. Compare *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 422, 424, 28 S.Ct. 748, 52 L. Ed. 1122 [(1908) (“... an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute.”)]. The sole interest of the United States

⁸ See, e.g., *Maurel v. Smith*, 271 F. 211, 214 (2d Cir. 1921); *Davis v. Blige*, 505 F.3d 90, 98 (2dCir. 2007).

⁹ As an extreme example, an indigent person who is hungry has no entitlement to free food from a grocery store or restaurant. An indigent person may receive welfare payments for the *purchase* of food and other necessities.

and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is “at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects.” *Kendall v. Winsor*, [62 U.S. 322, 328 (1858)]

Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). The sentence about “the right to exclude others”, and also the sentence from *Kendall*, were quoted with approval by the U.S. Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) and were cited with approval by the U.S. Supreme Court in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

Fair Use

In 1986, the U.S. Court of Appeals in New York City recognized that fair use was the “most troublesome” concept in copyright law.

Nearly half a century ago, a distinguished panel of this Court including Learned Hand called the question of fair use “the most troublesome in the whole law of copyright,” *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam). That description remains accurate today. Since Judge Hand’s time, the common law doctrine has been inscribed into the Copyright Act, but the fair use inquiry continues to require a difficult case-by-case balancing of complex factors.

Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1254-55 (2d Cir 1986).

Fair use is common law, made by judges, to help decide cases involving an author who quoted an earlier copyrighted work. One of the earliest statements of fair use appeared in a U.S. Circuit Court opinion written by Justice Story, who was then also a justice of the U.S. Supreme Court.

In short, we must often, in deciding questions of this sort, look to 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 sale, or diminish the profits, or supersede the objects, of the original work.

Folsom v. Marsh, 9 F.Cas. 342, 348 (C.C.D. Mass. 1841).

Justice Story recognized three of the four factors in 17 U.S.C. § 107. Story’s “nature and objects ... supersede the objects” became the first factor. The second factor on “nature” of the work was added later, as judges realized that copyright did not protect ideas. Story’s “quantity and value” became the third factor. And Story’s “degree in which the use may prejudice the sale, or diminish the profits” became the fourth factor on potential market effect.

The Copyright Act of 1976 contained a new section titled “fair use” that specified some conditions under which copying of a limited amount of copyrighted material was *not* an infringement of copyright. The statute says:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, 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 a fair use the factors to be considered shall include —

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

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

17 U.S.C. § 107 (current Mar 2006).

Note that fair use is *not* a legal right,¹⁰ but only an affirmative defense to copyright infringement.¹¹

In a law review article published in 1990, a judge in the U.S. District Court who had decided two copyright cases wrote about the uncertainties in the fair use statute:

What is most curious about this doctrine is that neither the decisions that have applied it for nearly 300 years, nor its eventual statutory formulation, undertook to define or explain its contours or objectives. In *Folsom v. Marsh*, [9 F.Cas. 342, 348 (C.C.D. Mass. 1841)], Justice Story articulated an often cited summary of how to approach a question of fair use The 1976 Copyright Act largely adopted his summary. [footnote quoting § 107 deleted] These formulations, however, furnish little guidance on how to recognize fair use. The statute, for example, directs us to examine the “purpose and character” of the secondary use as well as “the nature of the copyrighted work.” Beyond stating a preference for the critical, educational, and nonprofit over the commercial, the statute tells little about what to look for in the “purpose and character” of the secondary use. It gives no clues at all regarding the significance of “the nature of” the copyrights work.

Curiously, judges generally have neither complained of the absence of guidance, nor made substantial efforts to fill the void. Utter confident conclusions as to whether the particular taking was or was not a fair use, courts have treated the definition of the doctrine as assumed common ground.

The assumption of common ground is mistaken. Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals [FN9] and divided courts [FN10] are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns. Justification is sought in notions of fairness, often more responsive to the concerns of private property than to the objectives of copyright.

¹⁰ William F. Patry, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW*, page 361, n. 1, Bureau of National Affairs Books, first edition (1985); second edition, page 413, n. 1 (1995); David R. Johnstone, “Debunking Fair Use Rights and Copyduty Under U.S. Copyright Law,” 52 *JOURNAL OF THE COPYRIGHT SOCIETY OF THE USA* 345 (Spring 2005).

¹¹ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985) (citing H.R.Rep. No. 83, 90th Cong., 1st Sess., p. 37 (1967) and Patry, *FAIR USE*, p. 477, n. 4. (1985); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (citing H.R. Report 102-836, at page 3, n. 3 (1992), reprinted in 1992 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS at 2554.).

[FN9] Five of the recent leading cases were reversed at every stage of review. [citing cases, including *Universal City Studios v. Sony*, 464 U.S. 417 (1984) and *Harper & Row v. Nation*, 471 U.S. 539 (1985).]

[FN10] In its first two encounters with fair use, the Supreme Court split 4-4 and thus failed to resolve anything. See *Williams & Wilkins v. United States*, 420 U.S. 376 (1975); *Columbia Broadcasting Sys. v. Loew's, Inc.*, 356 U.S. 43 (1958). The Court decided *Sony* by a 5-4 majority ... and *Nation* by a 6-3 majority

Pierre N. Leval, "Toward a Fair Use Standard," 103 HARVARD LAW REVIEW 1105, 1105-07 (1990).

Four justices of the U.S. Supreme Court have remarked: "But neither the statute nor its legislative history suggests any intent to create a general exemption for a single copy made for personal or private use." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 465 (1984) (Blackmun, J. joined by Marshall, Powell, and Rehnquist, dissenting). This remark reminds us that *neither* the courts *nor* Congress have definitively addressed the photocopying of books, periodicals, and other copyrighted material, despite the more than forty years since the widespread use of photocopying machines began in libraries and offices.

1..first factor

(a) commercial vs. nonprofit

This statute seems to say that copiers who work for a for-profit company have a higher standard for justifying fair use of copyrighted material than copiers who are employed by a nonprofit corporation (e.g., a private college). However, on closer scrutiny I think the issue is far from clear. If one compares a research scientist at Texaco, a for-profit oil company, with a research scientist at Harvard University, one sees many similarities: both are paid a salary for their work, both work for a large corporation, and both of them may be engaged in writing a scholarly work that will be published in the open literature. A professor at a university can¹² earn royalties from sales of a book that he/she wrote, which makes writing a book an income-producing activity. And a professor at a university may use his/her "fair use" photocopies in connection with private, for-profit consulting to augment his/her meager salary as a professor.

In 1984, the U.S. Supreme Court first explained the distinction in fair use between nonprofit and for-profit uses:

... although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

¹² I say "can" because some publishers affiliated with a university do not pay royalties to an author, while commercial publishers (e.g., McGraw-Hill or Wiley) do pay royalties.

Note that a presumption is rebuttable and is *not* a conclusion.

But the U.S. Court of Appeals in New York City later commented that this quotation from *Sony* could not be taken literally, and that commercial use was not an absolute bar to finding of fair use:

It is undisputed that [defendant-author] was paid for his efforts and that his publishers were not motivated by purely charitable intentions. But the inquiry does not end there. We do not read Section 107(1) as requiring us to make a clear-cut choice between two polar characterizations, “commercial” and “non-profit.” Were that the case, fair use would be virtually obliterated, for “[a]ll publications presumably are operated for profit...” *Koussevitzky v. Allen, Towne & Heath*, 188 Misc. 479, 483, 68 N.Y.S.2d 779, 783, *aff’d*, 272 App.Div. 759, 69 N.Y.S.2d 432 (1st Dept. 1947), quoted in *Rosemont Enterprises*, 366 F.2d at 307 [(2dCir. 1966)]. The commercial nature of a use is a matter of degree, not an absolute, and we find that the educational elements of [defendant's book] far outweigh the commercial aspects of the book.

Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1262 (2dCir. 1986).

In 1986, Judge Leval in the U.S. District Court for New York City observed:

Commercial v. Educational. “[F]air use ... for such purposes as criticism, comment, news reporting ... scholarship or research is not an infringement.... [T]he factors to be considered shall include ... whether such use is of a commercial nature or is for nonprofit educational purposes....” 17 U.S.C. § 107 (1982). In so saying, the statute somewhat unrealistically paints the world into two corners — the venal commercial and the altruistic instructive. In fact, publishers of educational textbooks are as profit-motivated as publishers of scandal-mongering tabloid newspapers. And a serious scholar should not be despised and denied the law's protection because he hopes to earn a living through his scholarship. The protection of the statute should not turn on sackcloth and missionary zeal. It rather directs the court to make an appraisal of social usefulness and of commercial fair play.

Salinger v. Random House, Inc., 650 F.Supp. 413, 425 (S.D.N.Y. 1986),

rev'd on other grounds, 811 F.2d 90 (2d Cir. 1987), *cert. den.*, 484 U.S. 890 (1987).

Four years later, in a scholarly article, Judge Leval said:

One should not exaggerate the importance of this distinction [between “commercial” and “nonprofit educational”]. It is not suggested in any responsible opinion or commentary that by reason of this clause all educational uses are permitted while profitmaking uses are not.

Pierre N. Leval, “Toward a Fair Use Standard,” 103 HARVARD LAW REVIEW 1105, 1116, n. 53 (1990).

In 1994, the U.S. Supreme Court repudiated its earlier presumption in *Sony*:

The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term “including” to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into “purpose and character.” As we explained in *Harper & Row*, Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence. 471 U.S., at 561, 105 S.Ct. at 2230; House Report, p. 66, U.S.CODE CONG. & ADMIN.NEWS 1976, pp. 5659, 5679. Accordingly, 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. If, indeed, 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." *Harper & Row, supra*, at 592, 105 S.Ct., at 2246 (Brennan, J., dissenting). Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that "[n]o man but a blockhead ever wrote, except for money." 3 BOSWELL'S LIFE OF JOHNSON 19 (G. Hill ed. 1934).

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

It is particularly important that the U.S. Supreme Court has explicitly recognized that a nonprofit purpose does *not* automatically mean that copying is fair use.

A U.S. Circuit Court of Appeals noted that money is not always the measure of profit from a copyrighted work:

We agree with the Second Circuit that in weighing whether the purpose was for "profit," "[m]onetary gain is not the sole criterion ... [p]articularly in [a] ... setting [where] profit is ill-measured in dollars." *Weissmann [v. Freeman]*, 868 F.2d [1313] at 1324 [and 1326 (2dCir. 1989)] (holding that a professor's verbatim copying of an academic work was not fair use, in part because "the profit/nonprofit distinction is context specific, not dollar dominated" and a professor can "profit" by gaining recognition among his peers and authorship credit).

Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1117-18 (9th Cir. 2000), *cert. den.*, 532 U.S. 958 (2001).

Elsewhere in the legislative history of the Copyright Act of 1976, the U.S. House of Representatives has recognized that nonprofit organizations should pay royalties for their use of copyrighted material.

The line between commercial and "nonprofit" organizations is increasingly difficult to draw. Many "non-profit" organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth nothing that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write.

U.S. House of Representatives Report Nr. 94-1476 at pages 62-63. This Agreement is reprinted in the notes for 17 U.S.C.A. § 106 and also reprinted in the 1976 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS at page 5676.

My view of the commercial vs. nonprofit distinction in § 107 was altered as a result of reading the following sentence from a U.S. Supreme Court case and Prof. Dratler's comment on that sentence.

The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price. See *Roy Export Co. Establishment v. Columbia Broadcasting System, Inc.*, 503 F.Supp. [1137], at 1144 [S.D.N.Y. 1980];

3 Nimmer [, COPYRIGHT,] § 13.05[A][1], at 13-71, n.25.3 [(1984)].”.

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 562 (1985).

Prof. Dratler says that *any* copying without paying a royalty will result in the copier not “paying the customary price”.¹³ Therefore, if we *always* object to people copying without paying royalties, then the concept of fair use becomes impossible to justify. This sentence from *Harper & Row* must be wrong. The phrase about “the user stands to profit” can mean two different things: (1) the user could attempt to be paid for his exploitation of the original author's labor, skill, and expense in producing copyrighted material,¹⁴ or (2) everyone who copies “without paying the customary price” will profit, in the sense that they are richer for having avoided payment of the customary royalties to the copyright owner. Furthermore, this sentence from *Harper & Row* ignores the specific words in the statute about whether the exploitation of copyrighted works is done for a “commercial nature” or for “nonprofit educational purposes”. This kind of ambiguity indicates that neither the U.S. Congress nor the U.S. Supreme Court has a clear understanding of the for-profit vs. nonprofit distinction in § 107.

In the context of Napster, a service that allowed people to download copyrighted music from the Internet without paying royalties to the copyright owner, courts tersely commented:

Moreover, the fact that Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use.

A&M Records, Inc. v. Napster, Inc., 114 F.Supp.2d 896, 912 (N.D.Cal. 2000).

The U.S. of Court of Appeals reversed the trial court, but did agree with the above finding of fact:

The district court determined that Napster users engage in commercial use of the copyrighted materials largely because ... “Napster users get for free something they would ordinarily have to buy.” *Napster*, 114 F.Supp.2d at 912. The district court's findings are not clearly erroneous.

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9thCir. 2001).

Such concerns reach the core values of equitable doctrines like fair use.

¹³ Jay Dratler, “Distilling the Witches’ Brew of Fair Use in Copyright Law,” 43 UNIVERSITY OF MIAMI LAW REVIEW 233, 281 (1988).

¹⁴ But the user could defend himself by saying he was paid to create new material, and he seeks no payment for his use of quotations from prior works by others.

I have a number of specific criticisms of the commercial vs. nonprofit criterion in § 107. First, by placing a test about “commercial nature” vs. “nonprofit **educational**¹⁵ purposes” first, and by placing the most important factor in the number four position, the statute may give the misleading impression that an educational purpose is always fair use. This misleading impression has *not* been followed by federal courts, as explained below, beginning at page 43.

Second, the category of a for-profit corporation should also include any copying by a professional person — physician, attorney, accountant, engineer, scientist, businessman, etc. — for use in his/her profession. There is no difference between a corporation making a substantial profit and a physician or attorney in private practice making a nice income. Indeed, many physicians and attorneys incorporate, to protect their personal assets from attack in malpractice litigation.

Third, it is superficially tempting to make copying by a pupil or student — or an instructor’s copying for distribution to pupils or students at no extra cost to the pupils/students — a preferred activity under the fair use statute. However, making educational uses favored under fair use could destroy the market for educational materials. Allowing such copying under fair use could seriously harm authors who create material for pupils or students, and seriously harm publishers who produce such material with the expectation of making a profit either from sales of copies or from royalty payments. Furthermore, the harm to the copyright owner and the benefit to pupils or students (i.e., benefit to society from education) is the same, regardless whether the copying is done by a for-profit copy shop (e.g., Kinko’s or Michigan Document Services) or by a public school or nonprofit college.

Fourth, the phrase “nonprofit educational purposes” in the first factor disagrees with the broader characterization of nonprofit activities in the preamble of § 107 that also includes “scholarship, or research”. If we favor educational uses, then scholarly research by professors, independent scholars, and employees of nonprofit corporations needs to be at least as favored as education. The Copyright Act of 1976 contains a similar theme of favoring nonprofit uses in other sections. For example, § 108 permits libraries to make *one* copy “without any purpose of direct or indirect commercial advantage” when the user has a purpose of “private study, scholarship, or research”. And § 110 permits educational institutions, churches, and other nonprofit organizations to publicly perform nondramatic literary or musical works.

Fifth, despite the intent of Congress to only codify the existing judicial common-law concept of fair use, the inclusion of the “commercial nature” vs. “nonprofit educational purposes” in 17 U.S.C. § 107 was made without any basis in reported judicial opinions. In this respect, the Copyright Act of 1976 is *inconsistent* with its own legislative history.

¹⁵ My emphasis.

I think the law of fair use would be much clearer if there were no consideration of whether the copying was done by an employee of a for-profit corporation, an employee of a nonprofit corporation, or an employee of a school or college operated by government. However, we need to understand the law as it actually is, including ambiguities and mistakes in drafting the statute.

(b) purpose — transformative?

In 1994, the U.S. Supreme Court considered fair use in the context of a rap group that wrote a parody of a popular song, without permission of the original song's copyright owner.

The first factor in a fair use enquiry is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." § 107(1). This factor draws on Justice Story's formulation, "the nature and objects of the selections made." *Folsom v. Marsh*, [9 F.Cas. 342 (No. 4,901) (C.C.D. Mass. 1841)] at 348. The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like, see § 107. The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation, *Folsom v. Marsh, supra*, at 348; accord, *Harper & Row, supra*, 471 U.S., at 562, 105 S.Ct., at 2231 ("supplanting" the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Leval ["Toward a Fair Use Standard," 103 Harv.L.Rev. 1105 (1990) at] 1111. Although such transformative use is not absolutely necessary for a finding of fair use, *Sony, supra*, 464 U.S., at 455, n. 40, 104 S.Ct., at 795, n. 40, [FN11] the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, see, e.g., *Sony, supra*, at 478-480, 104 S.Ct., at 807-808 (BLACKMUN, J., dissenting), and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

FN11. The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-579 (1994). Note that footnote 11 in *Campbell* is obiter dictum.

In considering the "purpose" of an allegedly infringing work under the first factor in § 107, there are two relevant inquiries:

- (1) Does the allegedly infringing work serve the same purpose as the original work?
- (2) Did the alleged infringer add something new (i.e., what Judge Leval and the Supreme Court in *Campbell*, 510 U.S. at 579 called a "transformative" use¹⁶)?

¹⁶ Earlier judicial opinions use the word "productive", instead of "transformative". *American Geophysical Union v. Texaco Inc.*, 802 F.Supp. 1, 12 (S.D.N.Y. 1992), *aff'd*, 60 F.3d. 913, 920 (2dCir. 1994).

Incidentally, these two questions are related to the fourth factor in § 107, the effect on the market, because if the purpose of the original and copy are the same, and if the copier adds nothing new, then it is likely that the copy will usurp the original in the marketplace. *Campbell*, 510 U.S. at 591. There is a long series of appellate decisions that explain these considerations.

- *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985) (“The Nation’s use had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder’s commercially valuable right of first publication.” The Court held that the Nation’s copying was *not* fair use.);
- *Folsom v. Marsh*, 9 F.Cas. 342, 344-345 (C.C.D. Mass. 1841) (Story, J.) (“Thus, for example, no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy. It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such [a fair] abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.”);
- *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983) (“This court has often articulated the principle that a finding that the alleged infringers copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used is strong indicia of no fair use. *Jartech, Inc. v. Clancy*, 666 F.2d 403 (1982); *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963 at 969. See also *Iowa State University v. American Broadcasting Cos.*, 621 F.2d 57 (the scope of fair use is constricted when the original and the copy serve the same function).”);
- *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (Defendant’s “use is for the same intrinsic purpose as Dr. Weissmann’s, that is, as an adjunct to lectures delivered in professional symposia, such use seriously weakens a claimed fair use.” citing *Marcus v. Rowley*, 695 F.2d at 1175, and *Iowa State Research Foundation, Inc. v. American Broadcasting Cos., Inc.*, 621 F.2d 57, 61 (2d Cir. 1980));
- *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 923 (2d Cir. 1994) (“The “transformative use” concept is pertinent to a court’s investigation under the first factor because it assesses the value generated by the secondary use and the means by which such value is generated. To the extent that the secondary use involves merely an untransformed duplication, the value generated by the secondary use is little or nothing more than the value that inheres in the original. Rather than making some contribution of new intellectual value and thereby fostering the advancement of the arts and sciences, an untransformed copy is likely to be used simply for the same intrinsic purpose as the original, thereby providing limited justification for a finding of fair use. See *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir.) (explaining that a use merely for the same “intrinsic purpose” as original “moves the balance of the calibration on the first factor against” secondary user and “seriously weakens a claimed fair use”), *cert. denied*, 493 U.S. 883, 110 S.Ct. 219, 107 L.Ed.2d 172 (1989). [footnote to *Marcus v. Rowley*, 695 F.2d at 1175] It is therefore not surprising that the “preferred” uses illustrated in the preamble to section 107, such as criticism and

comment, generally involve some transformative use of the original work. See 3 *Nimmer on Copyright* § 13.05[A][1][b], at 13-160.”), *cert. dismissed*, 516 U.S. 1005 (1995);

- *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108-110 (2d Cir. 1998) (At 108: “As then-District Judge Leval noted in his frequently-cited article on fair use, a use of copyrighted material that ‘merely repackages or republishes the original’ is unlikely to be deemed a fair use. Leval, *Toward a Fair Use Standard*, 103 Harv. L.Rev. 1105, 1111 (1990).” At 109, the court concluded that the first factor favored Infinity: “... we think the different, and possibly beneficial, purposes of Kirkwood's customers are outweighed by the total absence of transformativeness in Kirkwood's acts of retransmission.” At 110, the court said the fourth factor “is concerned with secondary uses that, by offering a substitute for the original, usurp a market that properly belongs to the copyright-holder.”);
- *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (“The more critical inquiry under the first factor and in fair use analysis generally is whether the allegedly infringing work “merely supersedes” the original work “or instead adds something new, with a further purpose or different character, altering the first with new ... meaning [] or message,” in other words “whether and to what extent the new work is ‘transformative.’” *Campbell* at 579, 114 S.Ct. 1164 (quoting Leval at 1111). If “the secondary use adds value to the original — if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” Leval at 1111.”);
- *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1117-1118 (9th Cir. 2000) (“PCG's copying of WCG's *MOA*¹⁷ in its entirety bespeaks no “intellectual labor and judgment.” It merely “supersedes the object” of the original *MOA*, to serve religious practice and education. Although “transformative use is not absolutely necessary for a finding of fair use,” *Campbell*, 510 U.S. at 579, 114 S.Ct. 1164, where the “use is for the same intrinsic purpose as [the copyright holder's] ... such use seriously weakens a claimed fair use.” *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989).” Concluding: “It is beyond dispute that PCG “profited” from copying *MOA* — it gained an “advantage” or “benefit” from its distribution and use of *MOA* without having to account to the copyright holder. The first factor weighs against fair use.”), *cert. den.*, 532 U.S. 958 (2001);
- *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (in dictum: “Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium.¹⁸ [citations to three cases omitted] Those cases are inapposite, however, because the resulting use of the copyrighted work in those cases was the same as the original use.”);
- *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191, 198 (3rd Cir. (2003) (“... where the copier uses none of his own creative activity to transform the original work, holding the fair use doctrine inapplicable will not likely interfere with copyright's goal of encouraging creativity.”), *cert. den.*, 540 U.S. 1178 (2004);

¹⁷ *MOA* is an abbreviation for “a 380-page book entitled *Mystery of the Ages*.” 227 F.3d at 1112.

¹⁸ See also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

- *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 485 (2dCir. 2004) (Jacobs, J., concurring) (“Two closely-related inquiries are crucial: Does the secondary work quote or copy the first with the same literary intention as the original or with a new, transformative purpose? Does the secondary work usurp some of the market for the first by serving as an alternate means of acquiring the quoted material? the more the secondary work quotes the original to communicate an identical message or purpose, the more likely it is that potential purchasers will see the secondary work as an alternate means of acquiring the first — in which case, the secondary work will likely usurp the original's rightful market.”), *cert. den.*, 543 U.S. 1000 (2004).

(c) character and good-faith

In considering the “character” of an allegedly infringing work under the first factor in § 107, some courts have also whether the alleged infringer demonstrated good faith. I mention this good-faith criterion, because I expect that an attorney for some plagiarist will make a reprehensibly bogus argument that plagiarism is fair use. Actually, plagiarism is a form of fraud, because the plagiarist falsely asserts someone else’s work as the plagiarist’s original work.¹⁹ In my view, plagiarism is the ultimate bad-faith act by a copier.

The following list of appellate decisions mention “good-faith” or “clean hands” by a copier as part of the elements of fair use.

- *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562-563 (1985) (“Also relevant to the ‘character’ of the use is ‘the propriety of the defendant's conduct.’ 3 Nimmer [COPYRIGHT,] § 13.05[A], at 13-72. ‘Fair use presupposes good faith and fair dealing.’ *Time Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 146 (SDNY 1968), quoting Schulman, *Fair Use and the Revision of the Copyright Act*, 53 Iowa L.Rev. 832 (1968). The trial court found that The Nation knowingly exploited a purloined manuscript.”);
- *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922, 925-926 (2dCir. 1903) (“The defendant asserts that in no circumstance can the preliminary injunction be upheld, for the reason that the complainant has been guilty of a much more flagrant piracy than that charged against the defendant, and that, therefore, the complainant has no place in a court where clean hands and ‘a conscience void of offense’ are required. But if it were piracy in one it was piracy in the other and a literary pirate is not entitled to consideration in a court of equity.”);
- *Marcus v. Rowley*, 695 F.2d 1171, 1175-76 (9th Cir. 1983) (“Because fair use presupposes that the defendant has acted fairly and in good faith, the propriety of the defendant's conduct should also be weighed in analyzing the purpose and character of the use. [footnote omitted] See 3 Nimmer, *supra*, § 13.05[A][1] at 13-61. Here, there was no attempt by defendant to secure plaintiff's permission to copy the contents of her booklet or to credit plaintiff for the use of her material even though Rowley's copying was for the most part verbatim. [footnote omitted] Rowley's conduct in this respect weighs against a finding of fair use.”);

¹⁹ Ronald B. Standler, *Plagiarism in Colleges in USA*, <http://www.rbs2.com/plag.htm> (Feb 2000).

- *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (“... before undertaking a discussion of fair use, we consider the equitable considerations that exist in the case at bar. In this case, it cannot be ignored that Dr. Freeman not only neglected to credit appellant for her authorship of P-1, but actually attempted to pass off the work as his own, substituting his name as author in place of hers. Adding insult to this injury, he then distributed copies of her work, but modified the title slightly to one of his own devising. Even if, as Dr. Freeman claims, P-1 was a stock piece to be used by both parties to accompany their lectures, such use hardly justifies entirely appropriating another's work without crediting the author. Dr. Freeman's conduct severely undermines his right to claim the equitable defense of fair use. No case was cited — and we found none — that sustained such defense under circumstances where copying involved total deletion of the original author's name and substitution of the copier's. See *Rowley*, 695 F.2d at 1176 (failure to credit original author weighs against a finding of fair use).”);
- *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989) (“ Finally, this [first] factor weighs heavily against Freeman because she did not acknowledge in her work that she had consulted *Our City* in writing *Illusions*, although such an acknowledgment does not in itself excuse infringement. See *Marcus [v. Rowley]*, 695 F.2d at 1176, n. 8;”);
- *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992) (“ The first factor, purpose and character of the use, asks whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981). Knowing exploitation of a copyrighted work for personal gain militates against a finding of fair use. And — because it is an equitable doctrine — wrongful denial of exploitative conduct towards the work of another may bar an otherwise legitimate fair use claim. See 3 Nimmer, § 13.05[A] [1].” In this case defendant removed a copyright notice from plaintiff's work: “This action suggests bad faith in defendant's use of plaintiff's work, and militates against a finding of fair use.”), *cert. den.*, 506 U.S. 934 (1992);
- *Atari Games Corp. v. Nintendo of America Inc.*, 975 F.2d 832, 843 (Fed.Cir. 1992) (“To invoke the fair use exception, an individual must possess an authorized copy of a literary work. See *Harper & Row*, 471 U.S. at 562-63, 105 S.Ct. at 2232 (Knowing exploitation of purloined manuscript not compatible with "good faith" and "fair dealings" underpinnings of fair use doctrine.). Because Atari was not in authorized possession of the Copyright Office copy of 10NES, any copying or derivative copying of 10NES source code from the Copyright Office does not qualify as a fair use.”);
- *Nunez v. Caribbean Intern. News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (“Appellee's good faith also weighs in its favor on this prong of the fair use test. See *Harper & Row*, 471 U.S. at 562-63, 105 S.Ct. 2218; *Haberman*, 626 F.Supp. at 211. First, El Vocero attributed the photographs to Nunez. Although acknowledgment does not excuse infringement, the failure to acknowledge counts against the infringer. See *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989). Second, El Vocero obtained each of the photographs lawfully. An unlawful acquisition of the copyrighted work generally weighs against a finding of fair use; no such theft occurred here. See *Haberman*, 626 F.Supp. at 211.”).

Older cases, as well as cases in federal trial courts, are cited in Patry's book.²⁰

The expansion of the four factors to include "good faith" is permissible, as § 107 says that judges "shall include" the four factors, but leaves open the possibility of also including other factors. Moreover, fair use is an affirmative defense. If fair use is an equitable doctrine, then the equitable maxim "He who comes into a court of equity must come with clean hands." applies. Thus a plagiarist, whose hands are filthy, should not succeed with a defense of fair use.

fair use is equitable?

This is a good place to acknowledge a controversy whether fair use is an equitable doctrine. The phrase "fair use" implies that the use is "fair", which seems to invoke equity. However, copyright law in the USA is statutory and the doctrine of fair use originated in common law, which suggests that fair use is *not* an equitable doctrine and the word "fair" is a misnomer. A terse list of authorities supporting fair use as equitable includes:

- The legislative history of 17 U.S.C. § 107, which says "the doctrine is an equitable rule of reason".²¹
- The U.S. Supreme Court has accepted the congressional declaration that fair use "is an equitable rule of reason".²²
- Melville Nimmer in his famous treatise, *COPYRIGHT*, § 13.05[A][1][d] discusses these cases about "good faith" without criticizing the inclusion of an equitable doctrine.

On the other hand, the following terse list of authorities says that fair use is *not* part of equities:

- W. Patry, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* at pages 4-5 (1985);
- Pierre N. Leval, "Toward a Fair Use Standard," 103 *Harvard Law Review* 1105, 1127 (1990).
- Jay Dratler, "Distilling the Witches' Brew of Fair Use in Copyright Law," 43 *UNIVERSITY OF MIAMI LAW REVIEW* 233, 334, n. 515 (November 1988) (citing Patry).

In my view, fair use was *not* created as an equitable doctrine. However, after 1976, fair use seems to have evolved into an equitable doctrine.

²⁰ William F. Patry, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW*, at pages 121-122, Bureau of National Affairs Books, first edition (1985); second edition, at pages 130-132 (1995).

²¹ U.S. House of Representatives Report Nr. 94-1476 at page 65 (Sep 1976), reprinted in 1976 *U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS* at page 5679.

²² *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985); *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

There is one reported court case²³ in which a for-profit company had its library purchase *one* copy of scientific journals, and then the library made many photocopies of each journal, so that every scientist employed by the company could have a copy of the journal. One does not need to be a lawyer to see that such copying is *unfair* — the company in effect paid for one copy but acquired the advantages of having many copies, in effect unjustly enriching the company and deprived the publisher of revenue or royalties. The equitable doctrine of unjust enrichment seems to be a simpler route to the conclusion that the copying was unfair, compared with the complicated consideration of four factors in § 107.

2. second factor

The U.S. Supreme Court has written several important holdings involving the second factor of the fair use test. In 1990, the U.S. Supreme Court summarized the law on this second factor:

Applying the second factor, the Court of Appeals pointed out that “[a] use is less likely to be deemed fair when the copyrighted work is a creative product.” 863 F.2d, at 1481 (citing *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (CA9 1984)). In general, fair use is more likely to be found in factual works than in fictional works. See 3 Nimmer § 13.05[A], pp. 13-77 to 13-78 (“[A]pplication of the fair use defense [is] greater ... in the case of factual works than in the case of works of fiction or fantasy”); cf. *Harper & Row*, 471 U.S. [539] at 563, 105 S.Ct., at 2232 [(1985)] (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”).

Stewart v. Abend, 495 U.S. 207, 237 (1990).

In 1994, the U.S. Supreme Court considered fair use in the context of a rap group that wrote a parody of a popular song, without permission of the original song’s copyright owner.

The second statutory factor, “the nature of the copyrighted work,” § 107(2), draws on Justice Story’s expression, the “value of the materials used.” *Folsom v. Marsh*, 9 F.Cas., at 348. This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. See, e.g., *Stewart v. Abend*, 495 U.S., at 237-238, 110 S.Ct., at 1768-1769 (contrasting fictional short story with factual works); *Harper & Row*, 471 U.S., at 563-564, 105 S.Ct., at 2231-2233 (contrasting soon-to-be-published memoir with published speech); *Sony*, 464 U.S., at 455, n. 40, 104 S.Ct., at 792, n. 40 (contrasting motion pictures with news broadcasts); *Feist*, 499 U.S., at 348-351, 111 S.Ct., at 1289-1291 (contrasting creative works with bare factual compilations); 3 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 13.05[A][2] (1993) (hereinafter Nimmer); Leval [“Toward a Fair Use Standard,” 103 HARV.L.REV. 1105 (1990) at] 1116.

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

²³ *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994), cert. dismissed, 516 U.S. 1005 (1995).

(a) nonfiction works

Beginning in the 1910s, judges in the USA decided that copyright does *not* protect facts in a work.²⁴ The U.S. Supreme Court accepted this rule in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (U.S. 1985) (“In addition, no author may copyright facts or ideas. [17 U.S.C.] § 102.”) and again in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 350-351 (1991) (“Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves.”).

As a consequence of that rule, copyright protection is stronger for fictional works and poetry than for nonfictional works. This means that it is easier to justify fair use of nonfiction, where copyright protection is weaker, and more difficult to justify fair use of fiction or poetry, where copyright protection is stronger.

The U.S. Court of Appeals in New York City has been particularly hostile to copyright for nonfiction. See, e.g.,:

- *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2dCir. 1980), *cert. den.*, 449 U.S. 841 (1980).
- *Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2dCir. 1984) (“... we have been particularly restrictive in the protection of non-fiction works...”).
- *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 808 F.2d 204, 207 (2dCir. 1986) (“At the outset in *Eckes*, we noted our well-established reluctance to grant copyright protection to works of non-fiction — chiefly on the ground that facts may not be copyrighted.”), *cert. denied*, 484 U.S. 820 (1987).

However, note that even these cases that deny copyright protection to facts would still find infringement in cases involving wholesale (i.e., copying large amounts of text) verbatim copying:

- *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2dCir. 1966) (“The fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard.”), *cert. den.*, 385 U.S. 1009 (1967).
- *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2dCir. 1980) (“A verbatim reproduction of another work, of course, even in the realm of nonfiction, is actionable as copyright infringement.”), *cert. den.*, 449 U.S. 841 (U.S. 1980).

²⁴ In a separate essay, Copyright Protection for Nonfiction or Compilations of Facts in the USA, <http://www.rbs2.com/cfact.pdf> (Feb 2009), I trace the history of this rule and explain why the rule is a mistake.

- *Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2dCir. 1984) (“... we have been particularly restrictive in the protection of non-fiction works indicating, for example, that the fruits of another's labor in lieu of independent research obtained through the sweat of a researcher's brow, does not merit copyright protection absent, perhaps, wholesale appropriation.”).
- *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 808 F.2d 204, 207 (2dCir. 1986) (quoting *Eckes*), *cert. denied*, 484 U.S. 820 (1987).

The amount of material copied is considered explicitly in the third factor in the fair use test. The point to be made here is that one can *not* legally copy large amounts of a nonfiction work.

The treatise, NIMMER ON COPYRIGHT, says:

[T]he more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff's work, the broader should be the scope of the fair use defense.

Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT, § 13.05[A][2][a] (2007).

Quoted in *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 531 (9thCir. 2008).

The second factor is probably the easiest of the four factors to apply in copyright infringement cases.

(b) unpublished works

Traditionally, unpublished works have stronger copyright protection than published works, because the copyright owner has the right of first publication. See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564 (1985); *Salinger v. Random House*, 811 F.2d 90 (2dCir. 1987), *cert. den.*, 484 U.S. 890 (1987). In 1992, Congress added one sentence to the end of 17 U.S.C. § 107 that says “the fact that a work is unpublished shall not itself bar a finding of fair use”,²⁵ which introduced a discontinuity and confusion into well-established copyright law.

3. third factor

In 1994, the U.S. Supreme Court considered fair use in the context of a rap group that wrote a parody of a popular song, without permission of the original song's copyright owner.

The third factor asks whether “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” § 107(3) (or, in Justice Story's words, “the quantity and value of the materials used,” *Folsom v. Marsh, supra*, at 348) are reasonable in relation to the purpose of the copying. Here, attention turns to the persuasiveness of a parodist's justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use. See *Sony, supra*, 464 U.S., at 449-450, 104 S.Ct., at 792-793 (reproduction of entire work “does not have its ordinary effect of

²⁵ 106 STATUTES-AT-LARGE 3145 (24 Oct 1992). For legislative history, see 1992 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 2553.

militating against a finding of fair use" as to home videotaping of television programs); *Harper & Row, supra*, 471 U.S., at 564, 105 S.Ct., at 2232 ("[E]ven substantial quotations might qualify as fair use in a review of a published work or a news account of a speech" but not in a scoop of a soon-to-be-published memoir). The facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives. See Leval ["Toward a Fair Use Standard," 103 Harv.L.Rev. 1105 (1990) at] 1123.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586-87 (1994).

Making *brief* quotations or photocopying a few pages from a book is a *de minimis* use that is inherently fair use. Copyright infringement requires copying an amount of text that is "more than *de minimis*." *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003), quoting *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 137-138 (2d Cir. 1998), which cites *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997). See also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451, n. 34 (1984) ("In certain situations, the copyright owner suffers no substantial harm from the use of the work.... Here again, is the partial marriage between the doctrine of fair use and the legal maxim *de minimis non curat lex*." Quoting Latman, FAIR USE OF COPYRIGHTED WORKS (1958)).

On the other hand, when *The Nation* magazine quoted a mere 350 words from President Ford's biography — which seems like a *de minimis* use, given that less than 0.2% of Ford's book was quoted — the U.S. Supreme Court held that short quotation was *not* fair use, because it destroyed some of the market for the biography (i.e., the fourth factor in 17 U.S.C. § 107, discussed below). *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). See the detailed discussion, beginning at page 30, below.

The third factor in the fair use test has both a quantitative and qualitative component. The quantitative component protects copyright owners from "wholesale copying" — copying of large amounts of expression, and especially from copying an entire work. The qualitative component protects copyright owners from copying the best or most essential portions of a work.

See, e.g.,

- *Marcus v. Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983) ("This case presents a clear example of both substantial quantitative and qualitative copying.");
- *Salinger v. Random House, Inc.*, 811 F.2d 90, 98-99 (2d Cir. 1987) ("The taking is significant not only from a quantitative standpoint but from a qualitative one as well. The copied passages, if not the " 'heart of the book,' " *Harper & Row, supra*, 471 U.S. at 565, 105 S.Ct. at 2233 (quoting the District Court's opinion, 557 F.Supp. 1067, 1072 (1983)), are at least an important ingredient of the book as it now stands. To a large extent, they make the book worth reading. The letters are quoted or paraphrased on approximately 40 percent of the book's 192 pages.");

- *United Telephone Co. of Missouri v. Johnson Pub. Co., Inc.*, 855 F.2d 604, 610 (8th Cir. 1988) (“Fair use analysis requires a qualitative as well as a quantitative view of the amount and substantiality of the material taken. See *West Publishing Co. v. Mead Data Cent., Inc.*, 616 F.Supp. 1571, 1580-81 (D.Minn. 1985), *aff’d*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070, 107 S.Ct. 962, 93 L.Ed.2d 1010 (1987).”);
- *New Era Publications Intern., ApS v. Carol Pub. Group*, 904 F.2d 152, 158 (2d Cir. 1990) (“This [third] factor has both a quantitative and a qualitative component, so that courts have found that use was not fair where the quoted material formed a substantial percentage of the copyrighted work, see, e.g., *Salinger*, 811 F.2d at 98 (factor three favors copyright holder where one-third of 17 letters and 10% of 42 letters used) or where the quoted material was “‘essentially the heart of’ ” the copyrighted work. *Harper & Row*, 471 U.S. at 565, 105 S.Ct. at 2233 (quoting the district court opinion in that case, 557 F.Supp. 1067, 1072 (D.C.N.Y. 1983)).”);
- *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 480 (2d Cir. 2004) (“Consideration of the third factor, ‘the amount and substantiality of the portion used in relation to the copyrighted work as a whole,’ 17 U.S.C. § 107(3), ‘has both a quantitative and a qualitative component,’ *New Era Pubs. Int’l, ApS v. Carol Publ’g Group*, 904 F.2d 152, 158 (2d Cir. 1990).”).

(a) quantitative: copying of entire work *not* fair use

The following opinions of the U.S. Courts of Appeals held that verbatim copying of an entire work is generally *not* fair use. Some of these opinions announce an absolute rule that copying entire works is *never* fair use.

- *Story v. Holcombe*, 23 F.Cas. 171, 173 (C.C.Ohio 1847) (“... but no one is allowed, under the pretense of quoting, to publish either the whole or the principal part of another man’s composition;”);
- *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937) (“Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use.”) [overruled on other grounds in *Feist*, 499 U.S. 340 (1991)];
- *Associated Music Publishers v. Debs Memorial Radio Fund*, 141 F.2d 852 (2d Cir. 1944) (Radio broadcast of 1/4 of copyrighted musical composition was *not* fair use.)
- *Benny v. Loew’s Inc.*, 239 F.2d 532, 536 (9th Cir. 1956) (“But up to the time of the present controversy, no federal court, in any adjudication, has supposed that there was a doctrine of fair use applicable to copying the substance of a dramatic work, and presenting it, with few variations, as a burlesque. The fact that a serious dramatic work is copied practically verbatim, and then presented with ... [a few changes], does not avoid infringement of the

copyright.”),²⁶ *aff'd without opinion by an equally divided court sub nom. Columbia Broadcasting System v. Loew's*, 356 U.S. 43 (1958);

- *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262, 272 (D.C.Cir. 1960) (“Insofar as that prayer asks for a declaration that the doctrine of fair use will justify publication as a book of verbatim copies of some of these speeches, the matter is put with sufficient definiteness to permit an answer. The publication of a work consisting in substantial part of quotations from another copyrighted work is not permitted under the theory of fair use.” [two citations omitted]); *vacated*, 369 U.S. 111 (1962) (record was insufficient to permit proper adjudication);
- *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962) (“Whatever may be the breadth of the doctrine of ‘fair use,’ it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a ‘fair use’ merely because the infringer had no intent to infringe.”);
- *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966) (“The fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard. See *Holdredge v. Knight Publishing Corp.*, 214 F.Supp. 921, 924 (S.D.Cal. 1963); see *Benny v. Loew's Inc.*, 239 F.2d supra, at 536. See also *MacDonald v. DuMaurier*, 144 F.2d 696, 701 (2d Cir. 1944).”), *cert. den.*, 385 U.S. 1009 (1967). *Rosemont* is cited with approval in *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977); *Weissmann v. Freeman*, 868 F.2d 1313, 1325 (2d Cir. 1989).
- *Wainwright Securities, Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 96-97 (2d Cir. 1977) (“... the Transcript appropriated almost verbatim the most creative and original aspects of the reports, the financial analyses and predictions, which represent a substantial investment of time, money and labor. By contrast, the appellants' use of the Wainwright reports was blatantly self-serving, with the obvious intent, if not the effect, of fulfilling the demand for the original work. [citation omitted] This was not legitimate coverage of a news event; instead it was, and there is no other way to describe it, chiseling for personal profit.”), *cert. den.*, 434 U.S. 1014 (1978);
- *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (“By copying the images in their entirety, defendants took more than was necessary While other factors in the fair use calculus may not be sufficient by themselves to preclude the fair use defense, this and other courts have accepted the traditional American rule that excessive copying

²⁶ A 1978 U.S. Court of Appeals case commented on *Benny*:

The language in *Benny* concerning the substantiality of copying can be given a reading much more in keeping with the context of that case and the established principles at the time of that case if the opinion is understood as setting a threshold that eliminates from the fair use defense copying that is virtually complete or almost verbatim. Accord 2 NIMMER ON COPYRIGHT § 145. It was an established principle at the time of *Benny* that such verbatim copying precluded resort to the fair use defense. See, E. g., *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937). [footnote omitted]

Thus *Benny* should stand only as a threshold test that eliminates near-verbatim copying. *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 756-757 (9th Cir. 1978). *Air Pirates* is quoted with approval in *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986) (“... ‘copying that is virtually complete or almost verbatim’ will not be protected.”).

precludes fair use. [citations to three cases omitted]”), *cert. den. sub nom. O’Neill v. Walt Disney Productions*, 439 U.S. 1132, (1979).

Copyright Act of 1976

The Copyright Act of 1976 follows the above cited cases when it says:

(3) the amount and substantiality of the *portion* used in relation to the copyrighted work as a whole; [Italics added by Standler.]

17 U.S.C § 107 (enacted 1976, amended 1990 and 1992, current Nov 2008).

Alan Latman commented on the significance of the word *portion*:

The use of the word “portion” supports the suggestion that “wholesale copying,” i.e., taking an entire work on an unduly large amount of material, can never be fair use.

Alan Latman, *THE COPYRIGHT LAW*, at p. 213 (5th ed. 1979).

Judges seem to have overlooked the significance of the word *portion* in the third factor of § 107, despite Latman’s remark in a famous copyright law textbook. My quick searches of Westlaw in Nov 2008 shows that judges simply quote the statute without remarking on the significance of the word *portion*.

more cases

After the Copyright Act of 1976 was in effect, the following opinions in the U.S. Courts of Appeals mentioned the third factor in the fair use test.

- *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983) (“With respect to this factor, this court has long maintained the view that wholesale copying of copyrighted material precludes application of the fair use doctrine. [citations to three cases omitted]”) (at 1177: “In this case, almost 50% of defendant’s [book] was a verbatim copy of plaintiff’s booklet and that 50% contained virtually all of the substance of defendant’s book. Even if it were true that plaintiff’s book contained only facts, this argument fails because defendant engaged in virtually verbatim copying. Defendant’s [book] could have been a photocopy of plaintiff’s booklet but for the fact that defendant retyped plaintiff’s material. This case presents a clear example of both substantial quantitative and qualitative copying.”);
- *Financial Information, Inc. v. Moody’s Investors Service, Inc.*, 751 F.2d 501, 509 (2d Cir. 1984) (Approximately half of Moody’s publication was copied from FII. Held not fair use. “Far more significant to the present case is the evidence of substantial, if not wholesale copying by Moody’s from FII,”);
- *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1409 (9th Cir. 1986) (“However, Supermarket copied the entire work verbatim. The fact that Supermarket at times distributed only the portions relevant to a particular customer’s interest does not mitigate the infringement. The district court correctly found that the challenged use was not fair use.”);

- *Hustler Magazine Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (considering parody of one-page advertisement and holding: “... we view the Defendants as having copied an entire work. Consequently, although wholesale copying does not preclude fair use *per se*, the amount of copying that the Defendants did in this case still militates against a finding of fair use.”);
- *Abend v. MCA, Inc.*, 863 F.2d 1465, 1481 (9th Cir. 1988) (quoted below, at page 30);
- *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926 (2d Cir. 1994) (“... we conclude, as did the District Court, that Texaco has copied entire works. Though this conclusion does not preclude a finding of fair use, it militates against such a finding, *see Sony*, 464 U.S. at 449-50, 104 S.Ct. at 792-93, and weights the third factor in favor of the publishers. In this case, the fact that Texaco photocopied the eight *Catalysis* articles in their entirety weakens its assertion that the overriding purpose and character of its use was to enable the immediate use of the article in the laboratory and strengthens our view that the predominant purpose and character of the use was to establish a personal library of pertinent articles for Chickering.”), *cert. dismissed*, 516 U.S. 1005 (1995);
- *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998) (“The third factor, amount and substantiality of the portion used, recognizes that the more of a copyrighted work that is taken, the less likely the use is to be fair, and that even a less substantial taking may be unfair if it captures the essence of the copyrighted work. Though not an absolute rule, ‘generally, it may not constitute a fair use if the entire work is reproduced.’ NIMMER ON COPYRIGHT, § 13.05[A] [3] at 13-178 (1997).”);
- *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000) (Defendant “... copied the entire *MOA*²⁷ verbatim, deleting only the ‘Suggested Readings’ and the reference to ‘Worldwide Church of God’ from the copyright page. While ‘wholesale copying does not preclude fair use *per se*,’ copying an entire work ‘militates against a finding of fair use.’ [*Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986)] Moreover, ‘the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else’s copyrighted expression.’ *Harper & Row*, 471 U.S. at 565, 105 S.Ct. 2218.”), *cert. den.*, 532 U.S. 958 (2001). **Quoted with approval in:** *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003); *Wall Data Inc. v. Los Angeles County Sheriff’s Dept.*, 447 F.3d 769, 780 (9th Cir. 2006); *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 531 (9th Cir. 2008);
- *On Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001) (“The third factor ... recognizes that fragmentary copying is more likely to have a transformative purpose than wholesale copying.”);
- *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) (“Gonzalez ... downloaded (and kept) whole copyrighted songs (for which, as with poetry, copying of more than a couplet or two is deemed excessive)”);

²⁷ *MOA* is an abbreviation for “a 380-page book entitled *Mystery of the Ages*.” 227 F.3d at 1112.

- *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 583 (6th Cir. 2007) (“As the *Princeton University Press* court recognized, “the larger the volume ... of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that a taking will qualify as a fair use.” *Princeton Univ. Press*, 99 F.3d at 1389 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L.REV. 1105, 1122 (1990)). Because Panorama copied the relevant compositions in their entirety, this factor, too, cuts against Panorama's fair-use defense.”);
- *Peter Letterese And Associates, Inc. v. World Institute Of Peter Letterese And Associates, Inc. v. World Institute Of Scientology Enterprises*, 533 F.3d 1287, 1314 (11th Cir. 2008) (“A book reviewer who copies snippets of a book is likely to increase the demand for the book, but ‘were a book reviewer to quote the entire book in his review, or so much of the book as to make the review a substitute for the book itself, he would be cutting into the publisher's market, and the defense of fair use would fail.’ *Ty, Inc. v. Publications Int'l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002).”).

commentators' views

Nimmer, in his widely respected treatise on U.S. copyright law, summarizes the law:

In general, it does not constitute a fair use if the entire work is reproduced. Nonetheless, exceptions exist [footnotes omitted]

Melville Nimmer and David Nimmer, *NIMMER ON COPYRIGHT*, § 13.05[A][3] at page 13-192 (August 2005).

A number of courts have held that the defense of fair use is never available to immunize copying that results in similarity that is not only substantial, but is indeed virtually complete or almost verbatim. [footnote omitted]

Melville Nimmer and David Nimmer, *NIMMER ON COPYRIGHT*, § 13.05[D][1] at page 13-230.9 (August 2005). This is a good general guideline, despite the fact that there are a few known exceptions²⁸ to this rule that verbatim copying of an entire work is *not* fair use. Patry expresses the rule in the following words:

Prior to the Court of Claims; decision in *Williams & Wilkins Co. v. United States*, the courts had uniformly denied fair use to the copying of entire works or substantial portions thereof. [footnote to 14 cases omitted] This has continued to be generally [footnote to 22 cases omitted] true after *Williams & Wilkins* and passage of the 1976 Act, with the notable exception of the time-shifting allowed in *Sony Corp. v. Universal City Studios, Inc.*

William F. Patry, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW*, pages 449-450, Bureau of National Affairs Books, first edition (1985). Quoted with approval in *American Geophysical Union v. Texaco Inc.*, 802 F.Supp. 1, 17 (S.D.N.Y. 1992).

²⁸ The Agreement cited in the legislative history to 17 U.S.C. § 107 (see below, beginning at page 37) says that teachers may sometimes make copies of entire works, up to 250 words in length. Eskew (1985, p. 1030) cites three cases and a dissenting opinion in which “a verbatim reproduction of [an entire work] *can* be a fair use.” (But these cases may have been wrongly decided.) Furthermore, libraries are allowed to make three complete copies of a published work that is physically disintegrating. 17 U.S.C. § 108(c). Also, making a videotape at home of an entire television broadcast program is fair use. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449-450 (1984).

old rule might still be correct

The old rule — i.e., prior to *Williams & Wilkins v. U.S.*, 487 F.2d 1345 (Ct.Cl. 1973) and *Sony*, 464 U.S. 417 (1984) — was that verbatim copying of an entire work was *never* fair use. This old rule was an absolute prohibition against fair use.

The cases under the Copyright Act of 1976 tend to see the amount of copying as just one factor to be considered amongst four factors, hence copying an entire work *might* be fair use if the other three factors favored such a finding. It is important to understand that fair use is an equitable rule, and consistency from judge to judge is not likely. Some judges who retreated from the old rule cite, as the reason for their retreat, the U.S. Supreme Court's decision in the Sony Betamax case:

- *Hustler Magazine Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (“The Supreme Court's opinion in *Sony Corp.*, 464 U.S. 417, 104 S.Ct. 774, however, casts doubt on our previous pronouncements concerning wholesale copying as an absolute preclusion to fair use.”);
- *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1526 (9th Cir. 1992) (“The fact that an entire work was copied does not, however, preclude a finding a fair use. *Sony Corp.*, 464 U.S. at 449-50, 104 S.Ct. at 792; *Hustler*, 796 F.2d at 1155 (“*Sony Corp.* teaches us that the copying of an entire work does not preclude fair use per se.”).”);
- *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (“We note, however, that under certain circumstances, a court will conclude that a use is fair even when the protected work is copied in its entirety. See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984) (acknowledging that fair use of time-shifting necessarily involved making a full copy of a protected work).”);
- *Ty, Inc. v. Publications Intern. Ltd.*, 292 F.3d 512, 521 (7th Cir. 2002) (“But the cases are clear that a complete copy is not per se an unfair use, see, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 447-50, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984);”).

Therefore, if *Sony* were wrongly decided, then the absolute rule is again valid.

I argue at <http://www.rbs2.com/ww2.pdf> that *Williams & Wilkins* was wrongly decided. I am not certain that *Sony* changed the rule, for two reasons. First, a key fact in *Sony* was the time-shifting ability of the new home videorecorder — a fact not present in photocopying entire chapters in books, entire articles, or entire webpages. Second, *Sony* explicitly acknowledged the “ordinary” rule (i.e., the old rule):

Moreover, when one considers the nature of a televised copyrighted audiovisual work, ... and that timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced, ..., does not have its ordinary effect of militating against a finding of fair use. [citations to § 107 and one footnote omitted]

Sony, 464 U.S. 417, 449-450 (1984).

Four years after the U.S. Supreme Court decision in *Sony*, the Ninth Circuit reiterated its view that copying of an entire work (i.e., “wholesale copying”) was *never* fair use:

We have held that “[o]ne cannot copy the substance of another’s work without infringing his copyright.” *Benny v. Loew’s Inc.*, 239 F.2d 532, 537 (9th Cir. 1956) (television burlesque of copyrighted motion picture is not a fair use), *aff’d by an equally divided court sub nom. Columbia Broadcasting System v. Loew’s*, 356 U.S. 43, 78 S.Ct. 667, 2 L.Ed.2d 583 (1958). Recently, we noted that the Supreme Court’s decision in *Sony* “casts doubt on [this court’s] previous pronouncements concerning wholesale copying as an absolute preclusion to fair use.” *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (Pregerson, J.). In *Sony*, however, the Supreme Court merely held that “time-shifting” — making a video-tape copy of a television broadcast for viewing at a later time — was a fair use. *Sony* does not stand for the proposition that wholesale copying for a purely commercial purpose may ever be a fair use. Indeed, in *Harper & Row* the Supreme Court held that the unauthorized quotation of an insubstantial portion of an unpublished manuscript was not a fair use when the quotation “took what was essentially the heart of the book.” 105 S.Ct. at 2233 (citation omitted).

Abend v. MCA, Inc., 863 F.2d 1465, 1481 (9th Cir. 1988).

For these reasons, the so-called “old” rule may still be valid.²⁹

(b) qualitative: copying short excerpt not always fair use

The quantitative component, expressed above, suggests that copying of an entire copyrighted work is *not* fair use. The qualitative component, discussed below, says that even a short quotation may *not* be fair use, if the quotation(s) is/are the most valuable part of the new work. The leading case on the qualitative component of the third factor in the fair use test involves President Ford’s memoirs, specifically about Ford’s pardon of Nixon.

In 1977, former President Ford contracted with [Harper & Row] to publish his as yet unwritten memoirs. The agreement gave [Harper & Row] the exclusive first serial right to license prepublication excerpts. Two years later, as the memoirs were nearing completion, [Harper & Row], as the copyright holders, negotiated a prepublication licensing agreement with Time Magazine under which Time agreed to pay \$25,000 (\$12,500 in advance and the balance at publication) in exchange for the right to excerpt 7,500 words from Mr. Ford’s account of his pardon of former President Nixon. [Two to three weeks]³⁰ before the Time article’s scheduled release, an unauthorized source provided The Nation Magazine with the unpublished Ford manuscript. Working directly from this manuscript, an editor of The Nation produced a 2,250-word article, at least 300 to 400 words of which consisted of verbatim quotes of copyrighted expression taken from the manuscript. It was timed to “scoop” the Time article. As a result of the publication of The Nation’s article, Time canceled its article and refused to pay the remaining \$12,500 to [Harper & Row].

²⁹ William F. Patry, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW*, page 451, Bureau of National Affairs Books, first edition (1985).

³⁰ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. at 543.

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 539 (1985) (Syllabus by Reporter of Decisions). The opinion of the U.S. Court of Appeals added one more detail: “The [book] manuscript, in comparison, was nearly 200,000 words and covered 655 typed pages.”³¹ Therefore, The Nation quoted approximately 350 words from a 200,000 word book — which was only 0.18% of Ford’s book, surely a *de minimis* amount in quantitative terms.

Harper & Row sued Nation. The District Court correctly found for Harper & Row, because Nation had copied “the heart”³² of “a soon-to-be-published” work. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 557 F.Supp. 1067, 1072 (S.D.N.Y. 1983). The U.S. Court of Appeals reversed, but the U.S. Supreme Court reversed the Court of Appeals, thereby affirming the District Court. The Supreme Court said the following about the third factor in the fair use test:

Amount and Substantiality of the Portion Used. Next, the Act directs us to examine the amount and substantiality of the portion used in relation to the copyrighted work as a whole. In absolute terms, the words actually quoted were an insubstantial portion of “A Time to Heal.” The District Court, however, found that “[T]he Nation took what was essentially the heart of the book.” 557 F.Supp., at 1072. We believe the Court of Appeals erred in overruling the District Judge’s evaluation of the qualitative nature of the taking. A Time editor described the chapters on the pardon as “the most interesting and moving parts of the entire manuscript.” Reply Brief for Petitioners 16, n. 8. The portions actually quoted were selected by Mr. Navasky as among the most powerful passages in those chapters. He testified that he used verbatim excerpts because simply reciting the information could not adequately convey the “absolute certainty with which [Ford] expressed himself,” App. 303 In short, he quoted these passages precisely because they qualitatively embodied Ford’s distinctive expression.

As the statutory language indicates, a taking may not be excused merely because it is insubstantial with respect to the infringing work. As Judge Learned Hand cogently remarked, “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (CA2), *cert. denied*, 298 U.S. 669, 56 S.Ct. 835, 80 L.Ed. 1392 (1936). Conversely, the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else’s copyrighted expression.

Stripped to the verbatim quotes,[footnote omitted] the direct takings from the unpublished manuscript constitute at least 13% of the infringing article. See *Meeropol v. Nizer*, 560 F.2d 1061, 1071 (CA2 1977) (copyrighted letters constituted less than 1% of infringing work but were prominently featured). The Nation article is structured around the quoted excerpts which serve as its dramatic focal points. In view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the “magazine took a meager, indeed an infinitesimal amount of Ford’s original language.” 723 F.2d at 209.

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 564-566 (1985).

³¹ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 198 (2dCir. 1983).

³² Bluntly stated, the quoted words from Ford were probably the only reason most people would want to read Ford’s book.

Nine years later, the U.S. Supreme Court reiterated its earlier holding in *Harper & Row*:

The Court of Appeals [*Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437 (6th Cir. 1992)] is of course correct that this [third] factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too. In *Harper & Row*, for example, the Nation had taken only some 300 words out of President Ford's memoirs, but we signaled the significance of the quotations in finding them to amount to "the heart of the book," the part most likely to be newsworthy and important in licensing serialization. 471 U.S., at 564-566, 568, 105 S.Ct., at 2232-2234, 2234 (internal quotation marks omitted). We also agree with the Court of Appeals that whether "a substantial portion of the infringing work was copied verbatim" from the copyrighted work is a relevant question, see *id.*, at 565, 105 S.Ct., at 2232, for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587-588 (1994).

In this way, the amount of material copied (i.e., the third factor in the fair use test) is also relevant to the first factor in the fair use test (purpose, transformative?), and the fourth factor (effect on the potential market). This makes sense, if fair use is an equitable doctrine, so *all* relevant considerations in fair use will address the fairness of copying without permission from the copyright owner.

Besides the *Harper & Row* case, there are several other classic cases on the qualitative portion of the third factor in the fair use test.

- *H. C. Wainwright & Co. v. Wall St. Transcript Corp.*, 418 F.Supp. 620, 625 (D.C.N.Y. 1976) ("Judged by these criteria the Transcript's abstracts do not constitute a fair use of Wainwright's reports. The takings have been substantial in quality, and absolutely, if not relatively substantial in quantity. Compelled by their very raison d'etre to present the essence of the Wainwright reports the Transcript abstracts suck the marrow from the bone of Wainwright's work without even the assertion of any independent research by the Transcript."), *aff'd*, 558 F.2d 91 (2d Cir. 1977), *cert. den.*, 434 U.S. 1014 (1978);
- *Marcus v. Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983) ("In this case, almost 50% of defendant's [book] was a verbatim copy of plaintiff's booklet and that 50% contained virtually all of the substance of defendant's book. This case presents a clear example of both substantial quantitative and qualitative copying.")
- *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) (Denying fair use defense to biographer of Salinger who wished to quote from Salinger's unpublished letters under second, third, and fourth factors: "To a large extent, [the quotations] make the book worth reading. The letters are quoted or paraphrased on approximately 40 percent of the book's 192 pages. The biography copies virtually all of the most interesting passages of the letters, including several highly expressive insights about writing and literary criticism."), *cert. denied*, 484 U.S. 890 (1987).

4. fourth factor

The fourth factor in 17 U.S.C. § 107, “the effect of the use upon the potential market for or value of the copyrighted work”, has been called by the U.S. Supreme Court, “undoubtedly the single most important element of fair use.” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).

In 1994, the U.S. Supreme Court considered fair use in the context of a rap group that wrote a parody of a popular song, without permission of the original song’s copyright owner.

The fourth fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market" for the original. Nimmer § 13.05[A] [4], p. 13-102.61 (footnote omitted); accord, *Harper & Row*, 471 U.S., at 569, 105 S.Ct., at 2235; Senate Report, p. 65; *Folsom v. Marsh*, 9 F.Cas., at 349. The enquiry "must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*, *supra*, 471 U.S. at 568, 105 S.Ct., at 2234. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

5. Congress *did* alter fair use in 1976

According to the legislative history prepared by the U.S. Congress, 17 U.S.C. § 107 of the Copyright Act of 1976 was intended to codify common law decisions by judges, neither enlarging nor contracting the judicial doctrine of fair use:

Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

U.S. House of Representatives Report Nr. 94-1476 at page 66, reprinted in the 1976 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS at page 5679. See also the recognition by the U.S. Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

Despite the intent of Congress only to codify the existing judicial common-law concept of fair use, the inclusion of “teaching (including multiple copies for classroom use)” in the preamble of 17 U.S.C. § 107 was made without any basis in reported judicial opinions. In fact, the cases involving copies made by a teacher have been uniformly decided by courts as *not* fair use.³³ In this respect, the Copyright Act of 1976 is *inconsistent* with its own legislative history.

The copyright law scholar, William Patry, remarked:

Yet in over 200 fair use cases surveyed, only two cases decided before the 1976 Act was passed, *Williams & Wilkins*, (disapproved of by Congress in 1976) and *American Institute of Architects v. Fenichel* (which rested on the consent of the copyright owner), authorized fair

³³ See cases cited below, beginning at page 43.

use for any appropriation other than that by a second author of portions of the copyrighted work. Accordingly, we must recognize that Congress *did* alter fair use in 1976. That alteration is, naturally, the inclusion of “passive” reproduction as a possible fair use. William F. Patry, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW*, Bureau of National Affairs Books, page *ix* (first edition 1985).

should fair use apply to photocopies?

Traditionally, fair use only applied to an *author* who made a brief quotation (i.e., a type of copy) while preparing a *new* work.

Seltzer blames the 1961 Report by the Register of Copyrights for first applying fair use to photocopying in libraries.³⁴

Williams & Wilkins, 172 U.S.P.Q. 670, *rev'd*, 487 F.2d 1345 (Ct.Cl. 1973) was the first case to apply the doctrine of fair use to using a photocopy machine to make an exact reproduction of entire articles, without permission from the copyright owner. I think the use of photocopy machines by libraries is akin to using a printing press to make exact copies of copyrighted originals.

Eighteen years after *William & Wilkins*, Judge Leval identified the transformative nature of an author quoting old text in the process of creating a new work.³⁵ In 1994, the U.S. Supreme Court accepted Judge Leval’s concept of transformative. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). There is nothing transformative in the process of making a photocopy, so this new concept of transformative makes it easier for judges to find that photocopying entire articles is not only copyright infringement, but also *unprotected* by fair use.

Originally — from Justice Story’s creation of fair use in the year 1841 until *Williams & Wilkins* in 1973 — fair use was only available to authors. The concept of transformative use continues the original law, in that fair use continues to be available to authors who make a transformative use of quoted material, but fair use should *not* apply to wholesale copiers.

³⁴ Leon E. Seltzer, “Exemptions and Fair Use in Copyright,” 24 *BULLETIN OF THE COPYRIGHT SOCIETY OF THE USA* 215, 239-240 (April 1977), reprinted in Seltzer, *EXEMPTIONS AND FAIR USE IN COPYRIGHT*, at p. 27, Harvard University Press (1978).

³⁵ Pierre N. Leval, “Toward a Fair Use Standard,” 103 *HARVARD LAW REVIEW* 1105 (March 1990).

In 1994, the U.S. Court of Appeals for the Second Circuit wrote to distinguish fair use of quotations by authors from photocopying:

Indeed, if the issue were open, we would seriously question whether the fair use analysis that has developed with respect to works of authorship alleged to use portions of copyrighted material is precisely applicable to copies produced by mechanical means. The traditional fair use analysis, now codified in section 107, developed in an effort to adjust the competing interests of authors — the author of the original copyrighted work and the author of the secondary work that “copies” a portion of the original work in the course of producing what is claimed to be a new work. Mechanical “copying” of an entire document, made readily feasible and economical by the advent of xerography, see *SCM Corp. v. Xerox Corp.*, 463 F.Supp. 983, 991-94 (D.Conn. 1978), *aff’d*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016, 102 S.Ct. 1708, 72 L.Ed.2d 132 (1982), is obviously an activity entirely different from creating a work of authorship. Whatever social utility copying of this sort achieves, it is not concerned with creative authorship.

American Geophysical Union v. Texaco Inc., 60 F.3d 913, 917 (2d Cir. 1994), *certiorari dismissed*, 516 U.S. 1005 (1995).

Application of four factors to photocopying

When one applies the four factors to copying of an entire chapter of a book, copying of an entire article in a scholarly journal, or copying of an entire webpage — without permission of the copyright owner — one concludes that such copying is *not* fair use, as explained in the following paragraphs.

The **first factor** in § 107 strongly favors copyright owners, because the copy is intended to serve as a substitute for the original and because the copy is identical with the original (i.e., the copier adds nothing significant; the copy is *not* transformative).

The **second factor** in § 107 considers the strength of the copyright protection, which is stronger for fictional works or poetry than for nonfictional works.

The **third factor** in § 107 strongly favors the copyright owner, because the *entire* work was photocopied.

The **fourth factor** in § 107 strongly favors the copyright owner in the case of pedagogical works (e.g., textbooks, handouts for students, outlines for students, etc.), for which classroom use is the principal market. Furthermore, many items that professors want to copy and distribute to their students are scholarly articles that have little or no market value outside of colleges and universities. Failure to pay royalties for such copying of scholarly articles will have a heavier impact on those authors/publishers than failure to pay royalties to, for example, a newspaper, which has significant revenue from advertising and subscriptions. Furthermore, photocopying without permission of the copyright owner surreptitiously exploits the copyrighted work, by denying the copyright owner an opportunity to collect royalties on his/her work.

In the special case of making multiple copies of copyrighted works in for-profit settings, Patry believes that the fourth factor will nearly always bar fair use: “multiple copying of copyrighted works should virtually always be held to be outside of fair use, as such appropriation will undoubtedly have an adverse economic effect on the market for the work.”³⁶

This straightforward analysis suggests that wholesale copying is *not* fair use. This conclusion may surprise many professors, teachers, and even attorneys, but it is a clear consequence of fair use doctrine that was created to provide fair use for *authors* who quoted text. Below, in the discussion of the *Williams & Wilkins* case beginning at page 48, I argue that the defendant there perverted the fair use doctrine to apply to photocopiers.

classroom use

People who have a superficial understanding of copyright law often toss out the phrase “fair use” as if it were some kind of mantra or dogma that justifies teachers or professors making multiple copies of a copyrighted work, without paying royalties to the owner of the copyright. This erroneous interpretation of fair use may come from the phrase in the beginning of § 107 that says “including multiple copies for classroom use”, but this phrase *must* be read in connection with *all four* factors listed later in § 107.

The boundary of fair use appears only in various judicial opinions that interpret copyright law. As discussed below, beginning at page 43, there have been two reported cases involving educational copying by for-profit copy shops (i.e., *Kinko’s* and *Michigan Document Services*), two cases involving copying in schools operated by the government (i.e., *Wihitol v. Crow* and *Encyclopedia Britannica Educational Corp. v. Crooks*), but no reported cases involving educational copying in nonprofit institutions. Hence, there is no certain answer to the commercial vs. nonprofit distinction in copying for educational or research purposes. Nonetheless, *all four* of these cases found *no* fair use, which hints that making multiple copies of entire chapters of copyrighted books or entire articles in scholarly journals is *inexcusable* copyright infringement.

Because of the dearth of reported cases on fair use in educational institutions, the exact limits of fair use are not precisely known, which is why I suggest that teachers and professors either ask permission of the copyright owner before photocopying or adopt the following restrictive view of fair use, instead of risking infringement of copyrights.

³⁶ William F. Patry, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW*, page 452, Bureau of National Affairs Books, first edition (1985).

the Agreement's view of fair use

During the preparation of the Copyright Act of 1976, an ad hoc committee of educational institutions, authors, and publishers prepared an AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS WITH RESPECT TO BOOKS AND PERIODICALS.³⁷ I have posted a HTML version of the entire Agreement at <http://www.rbs2.com/copyr2.htm>, to keep this Agreement separate from my writing. Because of the importance of this Agreement in fair use cases involving teachers or professors, I refer to it in this essay with an upper-case A.

The first paragraph of this Agreement concedes that the purpose of the Agreement is to “state the minimum ... standards of educational fair use”. The second paragraph of the Agreement concludes:

There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use. In other words, this Agreement took a narrow, restrictive view of fair use. It is *possible* that a judge in a copyright infringement litigation *might* decide that conduct outside the guidelines in the Agreement is also fair use. The U.S. House of Representatives Judiciary Committee, which wrote the Copyright Act of 1976, stated:

The Committee believes the guidelines are a reasonable interpretation of the minimum standards of fair use. Teachers will know that copying within the guidelines is fair use. Thus, the guidelines serve the purpose of fulfilling the need for greater certainty and protection of teachers.

House of Representatives Report Nr. 94-1476, at page 72 (1976). Reprinted in the 1976 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS at page 5686. With these words, there appears to be strong legislative history that § 107 of the Copyright Act of 1976 should be interpreted as considering copying within the guidelines in this Agreement as conforming to fair use. However, as explained in the paragraphs below, I have come to the conclusion that this Agreement is worthless, because this Agreement does *not* accurately reflect fair use law, and because this Agreement is *not law* that a judge will follow. It's another example of Congress *saying* that they did not change fair-use law, but then endorsing this Agreement that wildly departs from fair-use law.

³⁷ The complete text of the Agreement is printed in the legislative notes for the Copyright Act of 1976, House of Representatives Report Nr. 94-1476 at pages 68-70. This Agreement is reprinted in the notes for 17 U.S.C.A. § 107 (e.g., pages 243-245 of the edition of USCA published by West in the year 2005) and also reprinted in the 1976 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS at pages 5681-83.

judicial citations to this Agreement

Law that is binding on courts includes statutes, precedential judicial opinions, and government regulations. This Agreement was privately negotiated, included in the legislative history by the U.S. House of Representatives, but is *not* law that is binding on courts. Nonetheless, several judicial opinions have considered this Agreement. For example:

- *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983) (“The guidelines were designed to give teachers direction as to the extent of permissible copying and to eliminate some of the doubt which had previously existed in this area of the copyright laws. The guidelines were intended to represent minimum standards of fair use. 3 NIMMER, *supra*, § 13.05[E][3] at 13-75. Thus, while they are not controlling on the court, they are instructive on the issue of fair use in the context of this case.”).

Despite the fact that the Agreement specifically states that it is limited to copying by nonprofit educational institutions, federal judges have cited the Agreement in cases involving copyright infringement by a for-profit oil company (Texaco) and for-profit photocopy shops (Kinko’s and Michigan Document Services):

- *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991) (At 1536: “This court finds and concludes that even if Kinko's copying warranted review under the Classroom Guidelines, it is excessive and in violation of the Guidelines requirements. This court finds that the copying in suit clearly deviates from the letter and spirit of the Guidelines.” At 1537: “We ... refuse to hold that all unconsented anthologies are prohibited without a fair use analysis. However, the fact that these excerpts were placed in anthologies weighs significantly against defendant.”);
- *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 918, n.5 (2d Cir. 1994) (“These guidelines were included in the legislative history of the 1976 revision of the Copyright Act, see H.R.Rep. No. 1476, 94th Cong., 2d Sess. 68-71 (1976), U.S.Code Cong. & Admin.News 1976, p. 5659, and were endorsed by the House Judiciary Committee as ‘a reasonable interpretation of the minimum standards of fair use.’ *Id.* at 72, U.S.Code Cong. & Admin.News 1976, at 5686. Though these guidelines are not considered necessarily binding on courts, see *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983), they exist as a persuasive authority marking out certain minimum standards for educational fair uses, see *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522-36 (S.D.N.Y. 1991). See generally 3 NIMMER ON COPYRIGHT § 13.05[E][3][a], at 13-226.1 to 13-226.2 (discussing nature and impact of guidelines); Patry, THE FAIR USE PRIVILEGE, at 307-09, 404-07 (same) [1st ed. 1985].”);
- *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381, 1390-91 (6th Cir. 1996) (“In its systematic and premeditated character, its magnitude, its anthological content, and its commercial motivation, the copying done by [defendant] goes well beyond anything envisioned by the Congress that chose to incorporate the guidelines in the legislative history. Although the guidelines do not purport to be a complete and definitive statement of fair use law for educational copying, and although they do not have the force of law, they do provide

us general guidance. The fact that the [defendant's] copying is light years away from the safe harbor of the guidelines weighs against a finding of fair use.”).

Note that both *Marcus v. Rowley* and *AGU v. Texaco* recognize that the Agreement is “not controlling on the court” and — at best — is only persuasive authority. Furthermore, including the Agreement in the legislative history does *not* elevate this Agreement to the status of a legal standard.³⁸ I believe a dissenting judge on a U.S. Court of Appeals was correct when he said:

The majority opinion stresses the fact that Congress “initiated and supervised negotiations among interested groups — groups that included authors, publishers, and educators — over specific legislative language [and that m]ost of the language that emerged was enacted into law or was made a part of the committee reports.” Maj. op. at 1390. However, what were not “enacted into law,” but only made a part of the conference committee reports, are the Classroom Guidelines upon which the majority so heavily relies to decide how the language enacted into law applies. Indisputably, the Classroom Guidelines assure educators that nonprofit copying for educational purposes of “not more than 1,000 words” is fair use when “[t]he inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.” H.R. REP. NO. 1476 at 68-71. The Classroom Guidelines “prohibit [] ... [c]opying ... used to create ... anthologies, compilations or collective works.” H.R. REP. NO. 1476 at 69. But, as the majority opinion acknowledges, that language did not survive congressional debate and was not enacted into law.

Despite the well-settled rule that legislative history is irrelevant and inappropriate to consider except to clarify an ambiguity in the text of a statute, the majority relies upon the legislative history without identifying any ambiguity in the statute, but only because “[t]he statutory factors are not models of clarity, ... the fair use issue has long been a particularly troublesome one ..., [and other] courts have often turned to the legislative history when considering fair use questions.” Maj. op. at 1390. I wish to emphasize in the strongest terms that it is entirely inappropriate to rely on the Copyright Act’s legislative history at all.

As Justice Scalia has observed, “The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.” *Conroy v. Aniskoff, Jr.*, 507 U.S. 511, 519, 113 S.Ct. 1562, 1567, 123 L.Ed.2d 229 (1993) (Scalia, J., concurring). The Classroom Guidelines do not become more authoritative by their adoption into a Committee Report. “[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law.” *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, ----, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994). We may not permit the statutory text enacted by both Houses of Congress and signed by the President “to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.” *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99, 111 S.Ct. 1138, 1147, 113 L.Ed.2d 68 (1991). That the Classroom Guidelines are not law should be reason enough for this court to refrain from using them to find infringement, but this is not the only reason to reject out of hand arguments based on legislative history. Committee Reports are unreliable “as a genuine indicator of congressional intent” and “as a safe predictor of judicial construction.” *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 617, 111 S.Ct. 2476, 2488, 115 L.Ed.2d 532 (1991) (Scalia, J., concurring). Committee Reports do not accurately indicate congressional intent because they do not “necessarily say anything about what Congress as a whole thought,” *even if* all the members of the Committee

³⁸ Kenneth D. Crews, “The Law of Fair Use and the Illusion of Fair-Use Guidelines,” 62 OHIO STATE LAW JOURNAL at 647, 649, 663, and especially 672-673 (2001).

"actually adverted to the interpretive point at issue ... [and] were in unanimous agreement on the point." *Id.* at 620, 111 S.Ct. at 2489. The members of Congress who voted for the statutory language of section 107 could have had any variety of understandings about the application of the fair use factors; all we know for certain is that the full House, the full Senate, and the President, pursuant to the procedures prescribed by the Constitution, enacted into law the text of section 107, and did not enact the standards of the Classroom Guidelines. *Id.* at 621, 111 S.Ct. at 2490. Committee Reports do not reliably further consistent judicial construction. I subscribe 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." *Conroy*, 507 U.S. at 519, 113 S.Ct. at 1567 (Scalia, J., concurring). "We use [Committee Reports] when it is convenient, and ignore them when it is not." *Mortier*, 501 U.S. at 617, 111 S.Ct. at 2488.

The statutory language of section 107, like most statutory language, may not be a "model of clarity," and the fair use issue, like many issues of law we face, may be a difficult or "troublesome" one, but neither of these inconveniences is a substitute for the requisite ambiguity that, alone, justifies recourse to legislative history.

Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381, 1410-1411 (6th Cir. 1996) (Ryan, J., dissenting). Judge Ryan finds that the copying by Michigan Document Services should be fair use. While I disagree with his minority conclusion about fair use, I do agree with Judge Ryan that the Court should *not* have considered the Agreement on Classroom Guidelines for two reasons. First, the Agreement is *not* law, and is not even proper legislative history, because the Agreement was *not* written by Congress. Second, the Agreement only applies to copying by nonprofit educational institutions, while Michigan Document Services was a for-profit organization.

The Agreement appears to resemble a covenant not to sue for copyright infringement, except that the Parties who negotiated this Agreement are *not* the Parties who will be involved in copyright litigation. Furthermore, as explained below, this Agreement is *not* consistent with fair-use law at the time the Agreement was written.

Agreement *not* consistent with law

Prof. Crews, in a long article on various fair use guidelines, provides a critical view of this Agreement. Prof. Crews says that Congress was unwilling to resolve the vagueness of fair use law, instead Congress urged publishers and educators to negotiate guidelines, and then Congress accepted those guidelines without any substantive scrutiny.³⁹

The fair use statute, 17 U.S.C. § 107, lists four factors to consider in determining fair use: (1) purpose and character, (2) nature, (3) amount and substantiality, and (4) effect on potential market. The Agreement lists three factors: brevity, spontaneity, and cumulative effect. The Agreement's brevity corresponds to the "amount" listed in the law. The other two factors in the Agreement are without support in the law, while three factors that are in the statute are ignored by

³⁹ Kenneth D. Crews, "The Law of Fair Use and the Illusion of Fair-Use Guidelines," 62 OHIO STATE LAW JOURNAL 599, 609, 636, 672-673 (2001).

the Agreement. Further, the Agreement contains an absolute prohibition against creating or replacing anthologies, which is without support in the case law in existence at that time.⁴⁰ The Agreement also contains an absolute prohibition against repeated copying of the same item in subsequent terms, which is also without support in the case law. Prof. Crews concludes that the Agreement “blatantly diverge[s] from ... the statute”, and “may be a subversive force on the law”.⁴¹

Notice that the spontaneity requirement in this Agreement makes no distinction between (1) an article that is published during a semester (e.g., today’s newspaper) and (2) an article that was published years ago but was just discovered by a teacher. In the first situation, there may not be time to obtain copyright permission. But in the second situation, the Agreement seems to reward the teacher’s procrastination or lack of planning.

Back in the year 1976, permissions had to be requested and granted by writing and mailing a letter, which was slow. Negotiation and payment of a royalty required additional letters to be written and mailed. These delays by mail may have been the origin of the spontaneity requirement in the Agreement. But today one can request permissions by e-mail and often receive an answer in the same day, which makes obsolete the spontaneity requirement in the Agreement. Furthermore, for many items, one can make copies and pay the designated royalty to the Copyright Clearance Center,⁴² which accepts credit cards, without asking permission and without negotiating the amount of a royalty. So the historical reasons for a spontaneity requirement in the Agreement may now be obsolete.

Prof. Crews interprets the few cases in this area of law as applying the law in 17 U.S.C. § 107 (i.e., the four factors in the statute) and reaching a conclusion. Crews found that, only after a judge had formed a conclusion, did the judge consider the Agreement as providing additional support for his/her conclusion.⁴³ Interestingly, judges have mentioned the Agreement in cases involving educational copying by for-profit copy shops (e.g., *Kinko’s* and *Michigan Document Services*) where this Agreement does not apply.

⁴⁰ I believe that any instructor who creates an anthology should obtain written permission from the copyright owner of each item in the anthology, see below at page 43. Permission is an absolute bar to a claim of copyright infringement. The point to be made here is, at the time of the Agreement, no reported court case had considered such anthologies. Subsequently, several court cases did hold that creation of anthologies, which were photocopied by for-profit copy shops, was copyright infringement.

⁴¹ Kenneth D. Crews, “The Law of Fair Use and the Illusion of Fair-Use Guidelines,” 62 OHIO STATE LAW JOURNAL at 618, 665 (2001).

⁴² <http://www.copyright.com/>

⁴³ Kenneth D. Crews, “The Law of Fair Use and the Illusion of Fair-Use Guidelines,” 62 OHIO STATE LAW JOURNAL at 642-643, 649, 650-652, 655, and especially 662-663 (2001).

I first encountered this Agreement in 1997, when I was reading the legislative history of 17 U.S.C. § 107. I initially liked this Agreement, because it contained precise boundaries that were much easier to understand than the vague fair use law. However, after reading Prof. Crew's article in March 2006, I agree with Prof. Crews that this Agreement may seduce readers into believing that they understand the limits of fair use, when the Agreement does *not* accurately reflect the law of fair use.

Those readers who still believe that this Agreement is valid or useful should note that this Agreement does *not* authorize much of the routine photocopying by professors for their students, and the Agreement prohibits the creation of course packs that substitute for a published book. Under Part II, the criteria of *brevity* permits copying of an entire article only if that article contains less than 2500 words.⁴⁴ Under Part III, the Agreement prohibits creation of any compilation or anthology that will be substitute for, or replace, a published book. Further, the same copied item(s) can *not* be distributed again in subsequent semesters. In my opinion, this Agreement seems most useful to teachers who want to distribute articles from recent newspapers or news magazines, to show the relevance of a lesson to current events.

In conclusion, this Agreement is worthless and should be ignored because:

1. this Agreement is *not* law, and is not even proper legislative history, because the Agreement was *not* written by Congress.
2. this Agreement is *not* an accurate statement of fair use law: two of the three factors in the Agreement are without support in the law, while three factors that are in the fair use statute are ignored by the Agreement.
3. this Agreement appears to resemble a covenant not to sue for copyright infringement, but the Agreement is *not* binding on copyright owners.

Law expresses the boundaries of acceptable conduct by people in our society. Conduct on one side of the boundary is unlawful (subjecting the perpetrator to criminal penalties) or wrongful (subjecting the defendant to civil litigation and paying damages to the plaintiff). Someone who wants to be a "good person" should arrange their conduct to be *far* from the illegal/wrongful boundary. I believe teachers or professors should set an example of good conduct for their students, which means — in the context of this essay — scrupulously observing copyrights. Accordingly, I urge teachers and professors to adopt a narrow and restrictive view of fair use, instead of risking infringement of copyrights, and to set a good example for their pupils or students of showing respect for the property of others (e.g., authors and publishers).

⁴⁴ Note that 2500 words is approximately five pages of this essay.

course packs

Since the late 1970s, when high-speed photocopy machines became a substitute for a printing press, many college professors have collected hundreds of pages of chapters from books, articles in scholarly journals, webpages, and other copyrighted material for use as their custom textbook. The professors give this stack of paper to a local photocopy shop to be used as a master copy in creation of a “course pack”, which substitutes for a published book. Both courts that considered the creation of a course pack held the course pack to be copyright infringement.⁴⁵

If a professor wants to use a course pack, then the professor should obtain written permission from the owner of the copyright of each item in the pack. This is a reasonable requirement. If the professor were compiling an anthology, the publisher of the anthology would surely require that the professor obtain written copyright permissions for every item in the anthology. Preparing a course pack is equivalent in copyright law to preparing an anthology to publish. It does not matter whether the copying is done with a high-speed photocopy machine or with a printing press. Some copyright owners may require payment of a royalty per copy of course pack that is sold, as a condition of granting permission to copy.

Case Law

I note that there are more law review articles on this topic than there are reported cases. Perhaps this is not surprising, as law professors are more likely to write an article than sue for copyright infringement, and this subject has been a hot topic in education law, as a result of the threat of litigation against professors by copyright owners since several publishers sued New York University and several for-profit copy shops in the early 1980s and since *Basic Books v. Kinko* was decided in 1991.

King (1914)

Macmillan Co. v. King, 223 F. 862 (D.Mass. 24 June 1914).

King tutored students in economics. As part of his tutoring, King had prepared approximately thirty pages of typewritten sheets, called an outline or memorandum, that either quoted or paraphrased material from a textbook published by Macmillan. Each week King loaned a student one page of the outline for study, and collected the page from the previous week. King also prepared some outlines to assist students in studying for examinations, those outlines King

⁴⁵ *Basic Books v. Kinko's*, 758 F.Supp. 1522 (S.D.N.Y. 1991); *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1383 (6thCir. 1996) (“We agree with the district court that the defendants’ commercial exploitation of the copyrighted materials did not constitute fair use, and we shall affirm that branch of the district court’s judgment.”).

collected immediately after the examination. The trial court opinion mentions that King made quotations or paraphrases from the copyrighted textbook:

It will be noticed that clause (a) contains one word, and clause (f) an entire sentence, in quotation marks. The words so quoted are taken direct from the book. Instances of such quotation are frequent throughout the sheets. They are generally short, consisting of one or two words only; the words selected being usually such as would be likely to catch the attention and remain in the memory. Instances of entire sentences quoted are not so common, though there are several of them. The language of the book is sometimes followed, without being distinguished by quotation marks, though not for more than a few words at a time, so far as I have noticed.

....

In it, as in them, there is frequent quotation of words, and occasional quotation of sentences from the book; the topics treated are topics treated in the book, the attempt is made to reproduce in abridged and paraphrased form (so far as such reproduction is possible within the very narrow limits adopted) the author's treatment of the topics selected, and the author's order and arrangement of topics within the portions of the book dealt with is followed, except for a certain amount of transposition or repetition.

It seems to me that the defendant's method of dealing with the book has resulted in an appropriation by him of the author's ideas and language more extensive than the copyright law permits. It is true that the whole book has not been thus dealt with; but the copyright protects every substantial component part of the book, as well as the whole. Though the reproduction of the author's ideas and language is incomplete and fragmentary, and frequently presents them in somewhat distorted form, important portions of them are left substantially recognizable. If they had not been so left, the defendant's evident purpose could not have been accomplished. It seems obvious that what he was trying to give, and what his pupils were trying to get, was an acquaintance with the contents of the book, which should resemble as much as possible that acquaintance which they would have obtained for themselves by following with sufficient diligence the University course of instruction for which the book was the appointed text-book.

Macmillan Co. v. King, 223 F. at 865-866.

While the students were expected to return the outlines to King, at least one student provided an outline to the publisher.⁴⁶

It is unclear from reading this decision if all of the students purchased a copy of the book to read. If all, or most, of King's students purchased the book, then King's outlines could have had the effect of *increasing* sales of the textbook, by steering students away from competing books. King claimed that "each of his pupils is recommended and expected to possess a copy of the book, and in general does so; that all of them possess copies, as far as he knows;" *Macmillan Co. v. King*, 223 F. at 863. However, the judge accepted the publisher's claim: "Nor do I see any reason to doubt that, as the author testifies, these 'outlines' might readily 'cause the student to think he

⁴⁶ How the outline found its way to the plaintiff-publisher is not stated in the opinion. My guess is that a student showed an outline to the author of the book, who was a professor of economics at Harvard, and the author mailed the outline to the publisher.

(could) meet the minimum requirements without using the book itself.' ”. 223 F. at 866. However, the judge found:

The evidence can hardly be said to show that the infringing outlines have injured the sale of the book. Nothing more appears than that they might do so, by enabling students to get along without the book who otherwise would have had to buy it. The plaintiff's loss, if any, prior to the filing of the bill, can hardly have been of substantial amount, because [there were fewer than 60 students who used these outlines, and most of those students probably purchased the textbook.]

Macmillan Co. v. King, 223 F. at 867.

The plaintiff-publisher only requested an injunction prohibiting King's future use of his outlines, so it was not necessary to compute the monetary damages from King's infringement. The trial judge granted the injunction. There apparently was no appeal by King.

This case is still cited for the proposition that educational use is *not* always fair use.⁴⁷ The trial judge specifically found:

If the above conclusions are right, I am unable to believe that the defendant's use of the outlines is any the less infringement of the copyright because he is a teacher, because he uses them in teaching the contents of the book, because he might lecture upon the contents of the book without infringing, or because his pupils might have taken their own notes of his lectures without infringing.

Macmillan Co. v. King, 223 F. at 867.

Under modern copyright law, it seems that King created a derivative work without the permission of the copyright owner, which was infringement of the copyright.

Wihtol v. Crow (1961-62)

1. *Wihtol v. Crow*, 199 F.Supp. 682 (S.D.Iowa 22 Nov 1961);
2. *rev'd*, 309 F.2d 777 (8th Cir. 27 Nov 1962).

Wihtol wrote a song. He registered the copyright in 1934 and also registered the copyright of a later version in 1944, and published these versions. The U.S. Court of Appeals stated the facts of this case:

The defendant Nelson E. Crow was the head of the Vocal Department of the Junior College and High School of the Clarinda, Iowa, School District, during the school year 1958-59. He has a Degree of Master of Music Education. He was employed by the School District and was paid a salary for his services in supervising its choral music activities. He selected what was to be sung by the choral groups of the School and supplied the members of such groups with printed copies of the music to be sung. Crow, during this same period, was also the Choir Director of the First Methodist Church of Clarinda, and its organist. He received compensation from it for his services. His duties as Director included the selecting of choral music for the choir and the furnishing of printed copies of the music to its members.

⁴⁷ See, e.g., *Marcus v. Rowley*, 695 F.2d 1171, 1175, n. 5 (9th Cir. 1983).

In November of 1958, Crow, without the permission of the plaintiffs, copied the song 'My God and I,' incorporating it in a new arrangement made by him. He had found the copyrighted version of the song as published and sold by the plaintiffs — of which the School had acquired some 25 copies — unsuitable for choir use. About 48 copies of his new arrangement, adapted for such use, were produced by him upon one of the School's duplicating machines. The new arrangement of the song was performed once by the High School choir of 84 voices at one of the regular monthly School chapel services, and was performed at church services on one Sunday by the much smaller choir of the First Methodist Church. Crow had furnished the choirs with copies of his new arrangement. The copies contained the words 'arranged Nelson E. Crow,' and made no reference to Wihtol. *Wihtol v. Crow*, 309 F.2d 777, 778-779 (8th Cir. 1962).

Wihtol sued Crow personally, and also sued the school district in Iowa that employed Crow, and the church that employed Crow. The famous American legal expert on copyright law, Melville V. Nimmer, was co-counsel for plaintiff (Wihtol) during trial and the sole attorney for the plaintiff on appeal.

The trial court held that Crow had made fair use of Wihtol's copyrighted work, because Crow was only engaged in nonprofit "testing and experimentation with the school and church choir."⁴⁸ The trial court also ordered Wihtol to pay \$500 to each of the three defendants for their attorney's fees, because Wihtol had made a bogus threat of criminal prosecution in a letter sent to Crow.⁴⁹

The U.S. Court of Appeals rejected Crow's fair use defense, and found that Crow had infringed Wihtol's copyright:

Obviously the plaintiffs had the exclusive right to copy their copyrighted song, and obviously Nelson E. Crow had no right whatever to copy it. The fact that his copying was done without intent to infringe would be of no help to him, [FN1] as the trial court recognized, if the copying constituted an infringement.

FN1. *Johns & Johns Printing Co. v. Paull-Pioneer Music Corporation*, 8 Cir., 102 F.2d 282, 283; *Sheldon v. Metro-Goldwyn Pictures Corporation*, 2 Cir., 81 F.2d 49, 54, certiorari denied, 298 U.S. 669, 56 S.Ct. 835, 80 L.Ed. 1392; *Khan v. Leo Feist, Inc.*, D.C.S.D.N.Y., 70 F.Supp. 450, 459, affirmed C.C.A.2, 165 F.2d 188; *Advertisers Exchange, Inc. v. Hinkley*, W.D. Mo., 101 F.Supp. 801, 805, affirmed C.A. 8, 199 F.2d 313.

The trial court, however, was of the opinion that innocent intent had a bearing on the question of fair use, and ruled that Crow did nothing more than make a fair, noninfringing use of the copyrighted song in suit.

Whatever may be the breadth of the doctrine of 'fair use,' it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a 'fair use' merely because the infringer had no intent to infringe. In *Bradbury v. Columbia Broadcasting System, Inc.*, 9 Cir., 287 F.2d 478, the court, in considering the doctrine of 'fair use' of a copyrighted production, said (page 485):

⁴⁸ 199 F.Supp. at 685.

⁴⁹ 199 F.Supp. at 686.

To constitute an invasion of copyright it is not necessary that the whole of a work should be copied, nor even a large portion of it in form or substance, but that, if so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient to constitute an infringement. The test of infringement is whether the work is recognizable by an ordinary observer as having been taken from the copyrighted source. Slight differences and variations will not serve as a defense. The means of expressing an idea is subject to copyright protection and where one uses his own method or way of expressing his idea, as Bradbury has done, such adornment constitutes a protectible work. *Universal Pictures Co. v. Harold Lloyd Corporation*, 9 Cir., 162 F.2d 354, 361, 363.

Compare *Benny v. Loew's Incorporated*, 9 Cir., 239 F.2d 532, 536; and note what the Seventh Circuit Court of Appeals held to be an infringement of Wihtol's song, in *Wihtol v. Wells*, 231 F.2d 550. It must be kept in mind that the applicable law is purely statutory and that the Copyright Act has little elasticity or flexibility.

Wihtol v. Crow, 309 F.2d 777, 780-781 (8th Cir. 1962).

The final sentence in the above quotation, about the rigidity of the statute, essentially ignored the common-law doctrine of fair use. Nonetheless, this case stands for the proposition that a teacher's arrangement of a copyrighted work is an infringement of copyright, and *not* fair use.

As a technical matter, the U.S. Court of Appeal held that the federal courts had no jurisdiction to consider the litigation against the school district that employed Crow, because of the Eleventh Amendment to the U.S. Constitution. This issue remains controversial today, but will not be discussed here, because it is outside of the scope of this essay.

The U.S. Court of Appeals also reversed the award of \$500 in attorney's fees to Crow, stating that not only were the grounds for the award "not justified", but also the defendants were no longer the prevailing party, and thus were not entitled under the Copyright Act to an award of attorney's fees.

Finally, the U.S. Court of Appeals concluded:

The discretion to award damages for copyright infringement is that of the trial court, not of this Court. In lieu of actual damages, the damages allowed may be such 'as to the court shall appear to be just,' but must be within statutory limits (17 U.S.C. § 101). [footnote omitted] The discretion respecting allowance of attorney's fees to the prevailing party is also that of the trial court.

We hold: (1) that, under the evidence and the Copyright Act, Crow is an infringer of both of the copyrights in suit; (2) that the Church, as his employer, is jointly liable with him under the doctrine of respondeat superior; (3) that the School District is entitled to a dismissal, for want of jurisdiction, of the action as against it.

Damages, within the statutory limits, must be allowed by the trial court, which must also determine the question of whether any attorneys' fees shall be added to costs. While it seems highly improbable that, under the circumstances, there is the slightest danger of any of the defendants ever again copying or using the plaintiffs' song, the plaintiffs, no doubt, have the right to have their plea for an injunction considered and ruled upon by the trial court.

The judgment appealed from is reversed, and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

Wihtol v. Crow, 309 F.2d 777, 782-783 (8th Cir. 1962).

The *Wihtol* case was decided under the Copyright Act of 1909, as amended, which statute is now superseded by the Copyright Act of 1976, as amended. However, the *Wihtol* case is still relevant today for two reasons. First, as explained above, 17 U.S.C. § 107 in the Copyright Act of 1976 did *not* intend to change the common-law concept of fair use. Second, courts continue to cite the *Wihtol* case after the Copyright Act of 1976 became effective.⁵⁰

Under modern copyright law, it seems that Crow created a derivative work without the permission of the copyright owner, which was infringement of the copyright. The *Wihtol* case stands for the proposition that copying a copyrighted work for a nonprofit, noncommercial purpose can be copyright infringement.

Williams & Wilkins (1972-75)

1. *Williams & Wilkins Co. v. U.S.*, 172 U.S.P.Q. 670 (Ct.Cl. 16 Feb 1972);
2. *dismissed*, 487 F.2d 1345 (Ct.Cl. 27 Nov 1973);
3. *aff'd without opinion by an equally divided Court*, 420 U.S. 376 (25 Feb 1975).⁵¹

Williams & Wilkins is a publisher of medical journals who sued the National Institutes of Health (NIH) and the National Library of Medicine (NLM), agencies of the U.S. government, for making and distributing photocopies of articles in journals without paying royalties to the copyright owner. NIH distributed copies to employees of the National Institutes of Health. NLM distributed copies through interlibrary loans to users of libraries nationwide. This case is important to this essay because it was the first reported judicial decision to apply fair use to making photocopies of copyrighted material. This case does not involve teaching, however this case is also relevant to this essay, because of the importance of interlibrary loans to scholarly researchers in universities and other nonprofit organizations.

I posted at my website a copy of the entire trial court opinion with my comments at <http://www.rbs2.com/ww1.pdf>. I believe that the trial judge correctly stated the law, although the trial judge was later overruled.

I posted a copy of the entire appellate court opinion (and a discussion of the U.S. Supreme Court decision) in *Williams & Wilkins* at <http://www.rbs2.com/ww2.pdf>, together with my critical analysis, and citation to other cases, treatises, and law review articles.

⁵⁰ See, e.g., *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983); *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 1982 WL 19198 at *2, 214 U.S.P.Q. 409 (7th Cir. 1982); *Ford Motor Co. v. B & H Supply, Inc.*, 646 F.Supp. 975, 987-989 (D.Minn. 1986); *Animal Fair, Inc. v. AMFESCO Industries, Inc.*, 620 F.Supp. 175, 188 (D.Minn. 1985).

⁵¹ Affirmance by an equally divided U.S. Supreme Court is *not* precedent for future cases.

Encyclopedia Britannica Educational Corp. v. Crooks (1978-1983)

1. *Encyclopedia Britannica Educational Corp. v. Crooks*, 447 F.Supp. 243 (W.D.N.Y. 27 Feb 1978) (preliminary injunction issued);
2. *Encyclopedia Britannica Educational Corp. v. Crooks*, 542 F.Supp. 1156 (W.D.N.Y. 21 June 1982) (permanent injunction issued);
3. *Encyclopedia Britannica Educational Corp. v. Crooks*, 558 F.Supp. 1247 (W.D.N.Y. 10 Mar 1983) (awarding damages).

Marcus v. Rowley (1983)

Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 6 Jan 1983).

The *Marcus* case stands for the proposition that copying a copyrighted work for a nonprofit, noncommercial purpose can be copyright infringement.⁵²

Basic Books v. Gnomon (1980)

Basic Books, Inc. et al. v. The Gnomon Corp., 1980 WL 1157, 1978-81 Copyright Law Decisions ¶ 25,145 (D.Conn. 20 Mar 1980).

A group of seven publishers sued a for-profit copy shop that was making multiple photocopies of copyrighted works (i.e., chapters from books) for sale to students. The defendant settled the litigation by agreeing not to make multiple photocopies unless either (1) the copyright owner consented in writing or (2) a faculty member at a nonprofit educational institution certified that the copying was within the Agreement in the legislative history for § 107.

⁵² *Marcus v. Rowley*, 695 F.2d 1171, 1179 (9th Cir. 1983) (“Under these circumstances, neither the fact that the defendant used the plaintiff’s booklet for nonprofit educational purposes nor the fact that plaintiff suffered no pecuniary damage as a result of Rowley’s copying supports a finding of fair use.”).

Harper & Row v. Tyco (1981)

Harper & Row, Inc. v. Tyco Copy Service, Inc., 1981 WL 1427, 1978-81 Copyright Law Decisions ¶ 25,230 (D.Conn. 19 Jan 1981).

One book publisher sued a for-profit copy shop that had made multiple copies of material from a textbook published by plaintiff. The defendant settled the litigation by agreeing not to make multiple photocopies unless either (1) the copyright owner consented in writing or (2) a faculty member at a nonprofit educational institution certified that the copying was within the Agreement in the legislative history for § 107.

New York University (1983)

Addison-Wesley Pub. Co., Inc. v. New York University, 1983 WL 1134 (S.D.N.Y. 31 May 1983). Also reported at 1983 Copyright Law Decisions ¶ 25,544.

On 14 Dec 1982, a group of eight publishers filed litigation against New York University, Unique Copy Center, Inc., and nine professors. A few months later, the parties settled the litigation. In the settlement agreement, New York University agreed to adopt the Agreement (see above at page 37) as a *maximum* amount of copying of copyrighted material for students. Thus, the Agreement in the legislative history of 17 U.S.C. § 107, which was originally understood to suggest minimum conditions for copying for distribution to students that would probably be fair use, was perverted into a maximum that could not be exceeded without legal consequences.⁵³

The importance of this case involving New York University is shown by the publication in the Westlaw database of the settlement agreement, and by at least one law review article on this case.⁵⁴

⁵³ Kenneth D. Crews, "The Law of Fair Use and the Illusion of Fair-Use Guidelines," 62 OHIO STATE LAW JOURNAL at 639-641, 671 (2001).

⁵⁴ David Izakowitz, "Fair Use of the Guidelines For Classroom Copying? An Examination of the *Addison-Wesley* Settlement," 11 RUTGERS COMPUTER & TECHNOLOGY LAW JOURNAL 111 (1985).

Basic Books v. Kinko's (1991)

1. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 28 Mar 1991).
2. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 1991 WL 311892 (S.D.N.Y. 16 Oct 1991) (final judgment, awarding Plaintiffs US\$ 510,000 in statutory damages and \$ 1,365,000 in attorney's fees and costs.).

Although the decision in *Kinko's* was made on the basis of the statute, after making an initial conclusion, the judge then considered the Agreement (summarized above at page 37), despite the fact that the guidelines were for copying by nonprofit educational institutions and the defendant in this case was a for-profit business. The judge did reject the absolute prohibition in the Agreement against the creation of anthologies without permission of the copyright owners.⁵⁵ It is not clear whether the judge's rejection of the prohibition in the Agreement is obiter dictum or a holding.

Melville Nimmer, in his famous treatise on copyright law, said *Basic Books v. Kinko's* "stands for the proposition that making multiple copies is actionable."⁵⁶ However the facts of this case include a for-profit copy shop making the copies. It is *not* known if a judge would reach the same result if the copies had been made by a nonprofit educational institution, because apparently no reported case has addressed those facts.

Patry concludes that "the only surprise in *Kinko's* is that the case had to be decided by the court: the infringement was so blatant, so widespread, and so obviously not fair use that its defense smacks more of ego than reason."⁵⁷

⁵⁵ *Kinko's*, 758 F.Supp. at 1537 ("We ... refuse to hold that all unconsented anthologies are prohibited without a fair use analysis. However, the fact that these excerpts were placed in anthologies weighs significantly against defendant.").

⁵⁶ Melville Nimmer and David Nimmer, NIMMER ON COPYRIGHT, § 13.05[E][4][d], at page 13-257 (Dec 1997).

⁵⁷ William F. Patry, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW, page 224, Bureau of National Affairs Books, second edition (1995).

Michigan Document Services (1994-96)

1. *Princeton University Press v. Michigan Document Services, Inc.*, 855 F.Supp. 905 (E.D.Mich. 9 June 1994) (summary judgment for publishers);
2. *Princeton University Press v. Michigan Document Services Inc.*, 869 F.Supp. 521 (E.D.Mich. 5 Dec 1994) (awarding plaintiffs attorneys fees);
3. *rev'd*, 74 F.3d 1512 (6th Cir. 12 Feb 1996) [this opinion was vacated]
4. *aff'd in part by en banc court*, 99 F.3d 1381 (6th Cir. 8 Nov 1996);
5. *cert. den.*, 520 U.S. 1156 (31 Mar 1997).

Substance, Inc. (2002-2003)

1. *Chicago School Reform Board of Trustees v. Substance, Inc.*, 79 F.Supp.2d 919 (N.D.Ill. 4 Jan 2000);
2. *Chicago Board of Education v. Substance, Inc.*, 2002 WL 1880135 (N.D.Ill. 7 Aug 2002);
3. *aff'd in part*, 354 F.3d 624 (7th Cir. 31 Dec 2003),
4. *cert. den.*, 543 U.S. 816 (4 Oct 2004).

This case also implicates considerations in the legal right of government employees (e.g. teachers in public schools) to publicly discuss important public policy issues (e.g., validity of tests used on all pupils).

Gonzales (2005)

1. *BMG Music v. Gonzalez*, 2005 WL 106592 (N.D.Ill. 2005),
2. *aff'd*, 430 F.3d 888 (7th Cir. 2005),
3. *cert. den.*, 547 U.S. 1130 (2006).

The defendant, Gonzalez, downloaded “more than 1370 copyrighted songs” via the KaZaA file-sharing network. Plaintiff chose to prove copyright infringement of only thirty songs. Plaintiff elected the minimum statutory damages of \$ 750/song, which avoided a trial to determine the amount of damages. The trial court awarded plaintiff \$ 22,500 on plaintiff’s summary judgment motion, and U.S. Court of Appeals affirmed. In this case, Judge Easterbrook, one of the most commonly cited judges in the USA, wrote about fair use in the context of downloading copyrighted music files without the permission of copyright owners:

A “fair use” of copyrighted material is not infringement. Gonzalez insists that she was engaged in fair use under the terms of 17 U.S.C. § 107 — or at least that a material dispute entitles her to a trial. It is undisputed, however, that she downloaded more than 1,370 copyrighted songs during a few weeks and kept them on her computer until she was caught. Her position is that she was just sampling music to determine what she liked enough to buy at retail. Because this suit was resolved on summary judgment, we must assume that Gonzalez

is telling the truth when she says that she owned compact discs containing some of the songs before she downloaded them and that she purchased others later. She concedes, however, that she has never owned legitimate copies of 30 songs that she downloaded. (How many of the remainder she owned is disputed.)

Instead of erasing songs that she decided not to buy, she retained them. It is these 30 songs about which there is no dispute concerning ownership that formed the basis of the damages award. This is not a form of time-shifting, along the lines of *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984) (*Betamax*). A copy downloaded, played, and retained on one's hard drive for future use is a direct substitute for a purchased copy—and without the benefit of the license fee paid to the broadcaster. The premise of *Betamax* is that the broadcast was licensed for one transmission and thus one viewing. *Betamax* held that shifting the time of this single viewing is fair use. The files that Gonzalez obtained, by contrast, were posted in violation of copyright law; there was no license covering a single transmission or hearing — and, to repeat, Gonzalez kept the copies. Time-shifting by an authorized recipient this is not. See William M. Landes & Richard A. Posner, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 117-22 (2003).

Section 107 provides that when considering a defense of fair use the court must take into account “(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.” Gonzalez was not engaged in a nonprofit use; she downloaded (and kept) whole copyrighted songs (for which, as with poetry, copying of more than a couplet or two is deemed excessive); and she did this despite the fact that these works often are sold per song as well as per album. This leads her to concentrate on the fourth consideration: “the effect of the use upon the potential market for or value of the copyrighted work.”

As she tells the tale, downloading on a try-before-you-buy basis is good advertising for copyright proprietors, expanding the value of their inventory. The Supreme Court thought otherwise in *Grokster*, with considerable empirical support. As file sharing has increased over the last four years, the sales of recorded music have dropped by approximately 30%. Perhaps other economic factors contributed, but the events likely are related. Music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying originals. That is exactly what Gonzalez did for at least 30 songs. It is no surprise, therefore, that the only appellate decision on point has held that downloading copyrighted songs cannot be defended as fair use, whether or not the recipient plans to buy songs she likes well enough to spring for. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014-19 (9th Cir. 2001). See also *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349 (S.D.N.Y. 2000) (holding that downloads are not fair use even if the downloader already owns one purchased copy).

Although BMG Music sought damages for only the 30 songs that Gonzalez concedes she has never purchased, all 1,000+ of her downloads violated the statute. All created copies of an entire work. All undermined the means by which authors seek to profit. Gonzalez proceeds as if the authors' only interest were in selling compact discs containing collections of works. Not so; there is also a market in ways to introduce potential consumers to music.

...

.... With all of these means available to consumers who want to choose where to spend their money, downloading full copies of copyrighted material without compensation to authors cannot be deemed “fair use.” Copyright law lets authors make their own decisions about how best to promote their works; copiers such as Gonzalez cannot ask courts (and juries) to second-guess the market and call wholesale copying “fair use” if they think that authors err in understanding their own economic interests or that Congress erred in granting authors the rights in the copyright statute. Nor can she defend by observing that other persons were greater offenders; Gonzalez's theme that she obtained “only 30” (or “only 1,300”) copyrighted songs is no more relevant than a thief's contention that he shoplifted “only 30” compact discs, planning to listen to them at home and pay later for any he liked.

BMG Music v. Gonzalez, 430 F.3d at 889-891.

The last quoted paragraph above shows the arrogance of copyright infringers, like Gonzales, who take someone else's copyrighted work and then make a specious justification about how their free use allegedly benefits the copyright owner. The law is clear: the copyright owner has the *exclusive* legal right to authorize *all* copies of the entire copyrighted work, and to establish licensing fees for copying the work.

Copying Music From the Internet

The U.S. Supreme Court noted that the history of copyright law responded to new technology.⁵⁸ The first copyright statute, in England, was enacted in response to the invention of the printing press, which allowed the creation and distribution of many copies. The invention of high-speed photocopying machines in the 1970s created a new way for people to copy books and journal articles, without paying royalties to the copyright owner and without being caught. While the law in the USA was still unsuccessfully grappling with the problem of how to compensate copyright owners for illicit copies made with photocopying machines, the Internet became popular in the mid-1990s. As with the photocopying machine, there has developed a culture in the USA that anything that one can find on the Internet is available for free downloading and printing, without paying royalties to the copyright owner. Similar to the anonymity of the user of a photocopy machine in a library or office, the anonymity of the Internet contributed to this environment for blatant and widespread copyright infringement, because the copyright owner would generally not know who was infringing their copyrights by making illicit copies.

Beginning in 1999, and continuing in the early 2000s, there have been several peer-to-peer file sharing services (e.g., Napster, Aimster, KaZaa, Grokster, StreamCast) that were designed to allow users to make free copies of copyrighted musical performances and copyrighted movies. The file sharing services provided free software to allow users to upload and download files from computers belonging to other users, and the services also provided an index of which computers had a copy of a given item. The services received money from advertisements that were displayed

⁵⁸ *Sony*, 464 U.S. 417, 430 (1984) (“From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment — the printing press — that gave rise to the original need for copyright protection.” [two footnotes omitted]).

by their software while users were downloading or uploading files. In the view of attorneys who understood copyright law, such file sharing services were blatantly allowing copyright infringement.⁵⁹ However, I am more bothered by the attitude of *users* toward these file-sharing services: people who would *not* steal an orange from a grocery store felt entitled to download free copies of copyrighted music and movies.⁶⁰ While the legal issues were resolved in court cases discussed below, there has been little discussion of the public culture in which many people feel entitled to make free copies of valuable copyrighted works. This cultural issue appears identical to the entitlement that many pupils, students, teachers, and professors feel toward making photocopies of copyrighted works. This culture is accurately described by: "I want it. I can make a free copy without being caught or punished. Therefore, I am *entitled* to a free copy for myself." When expressed in such stark terms, the brazen lack of morality and appalling lack of respect for property of others is exposed.

Napster

1. *A & M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896 (N.D.Cal. 10 Aug 2000) (Granted plaintiffs' motion for preliminary injunction),
2. *aff'd in part*, 239 F.3d 1004 (9th Cir. 12 Feb 2001),
3. *aff'd after remand*, 284 F.3d 1091 (9th Cir. 25 Mar 2002) (affirming preliminary injunction, including shutting down Napster until Napster removed plaintiffs' copyrighted works from its file-sharing system).

The trial court found:

For the reasons set forth below, the court finds that any potential non-infringing use of the Napster service is minimal or connected to the infringing activity, or both. The substantial or commercially significant use of the service was, and continues to be, the unauthorized downloading and uploading of popular music, most of which is copyrighted. However, given the vast scale of Napster use among anonymous individuals, the court finds that downloading and uploading MP3 music files with the assistance of Napster are not private uses. At the very least, a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester. Moreover, the fact that Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use.

Napster, 114 F.Supp.2d at 912. The trial court found that *all four* factors in § 107 were against the users of Napster.

⁵⁹ It is *possible* that a user might make available his/her own work for distribution, or that a user might post text that is in the public domain (i.e., not copyrighted). However, there can be no doubt that the most common use of file-sharing software was to acquire free copies of copyrighted material.

⁶⁰ I do not understand whether the nontheft of oranges is due to security cameras and the possibility of arrest for shoplifting, or whether people distinguish between theft of physical property and infringement of intellectual property (e.g., copyrights). Parents commonly teach their children not to steal, but it would be a rare parent who explained copyright infringement to his/her child.

The global scale of Napster usage and the fact that users avoid paying for songs that otherwise would not be free militates against a determination that sampling by Napster users constitutes personal or home use in the traditional sense.

Napster, 114 F.Supp.2d at 914.

These conclusions about no fair use were upheld on appeal. 239 F.3d at 1014-17. The U.S. Court of Appeal said:

Plaintiffs claim Napster users are engaged in the wholesale reproduction and distribution of copyrighted works, all constituting direct infringement. [footnote omitted] The district court agreed. We note that the district court's conclusion that plaintiffs have presented a prima facie case of direct infringement by Napster users is not presently appealed by Napster.

....

The record supports the district court's determination that "as much as eighty-seven percent of the files available on Napster may be copyrighted and more than seventy percent may be owned or administered by plaintiffs." *Napster*, 114 F.Supp.2d at 911.

The district court further determined that plaintiffs' exclusive rights under § 106 were violated: "here the evidence establishes that a majority of Napster users use the service to download and upload copyrighted music.... And by doing that, it constitutes--the uses constitute direct infringement of plaintiffs' musical compositions, recordings." *A & M Records, Inc. v. Napster, Inc.*, Nos. 99-5183, 00-0074, 2000 WL 1009483, at *1 (N.D.Cal. July 26, 2000) (transcript of proceedings). The district court also noted that "it is pretty much acknowledged ... by Napster that this is infringement." *Id.* We agree that plaintiffs have shown that Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction, § 106(1); and distribution, § 106(3). Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.

Napster, 239 F.3d at 1013-14.

The original Napster filed for bankruptcy in June 2002, just three years after it began. Obviously, there was no way that the original Napster could collect enough revenue from future users to pay many tens of millions of dollars for past copyright infringements, plus pay royalties for future copies. Napster was purchased from the bankruptcy court and was reincarnated as a website that distributed MP3 files to members who paid \$10/month or \$1/song. The new Napster paid royalties to the copyright owner.

Aimster

1. *In re Aimster Copyright Litigation*, 252 F.Supp.2d 634 (N.D.Ill. 4 Sep 2002) (issued preliminary injunction),
2. *aff'd*, 334 F.3d 643 (7th Cir. 30 June 2003),
3. 86 Fed.Appx. 984 (7th Cir.(Ill.) 29 Jan 2004) (Affirming trial judge's determination that defendant violated injunction, defendant fined \$5000, plus ordered defendant to pay more than \$100,000 in attorney fees to plaintiff).

Grokster

1. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 259 F.Supp.2d 1029 (C.D.Cal. 25 Apr 2003),
2. *aff'd*, 380 F.3d 1154 (9th Cir. (19 Aug 2004),
3. *vacated*, 125 S.Ct. 2764 (27 June 2005).

A large group of movie studios, music recording companies, music publishers, and songwriters sued three file-sharing networks: Grokster, StreamCast, and KaZaa. KaZaa stopped defending its actions early in the litigation. 259 F.Supp.2d at 1032, n.2.

The District Court held that users were infringing copyrights, 259 F.Supp.2d at 1034-35, and that holding was *not* disputed by defendants on appeal.⁶¹ Note that the copying by users was *not* fair use. 125 S.Ct. at 2785 (Ginsburg, J., concurring). Most of the legal wrangling was whether the defendant file-sharing services were liable for acts of infringement by their users.

Evidence accepted by the courts showed that “nearly 90% of the files available for download” in Grokster “were copyrighted works.” 125 S.Ct. at 2772. Moreover, one suspects that the copyrighted works were probably more popular with downloaders than public domain works.

But MGM's evidence gives reason to think that the vast majority of users' downloads are acts of infringement, and because well over 100 million copies of the software in question are known to have been downloaded, and billions of files are shared across the FastTrack and Gnutella networks each month, the probable scope of copyright infringement is staggering. *Grokster*, 125 S.Ct. at 2772.

Evidence showed that, defendants Grokster and StreamCast “clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.” 125 S.Ct. at 2772. Furthermore, while Napster was under legal attack for copyright infringement, defendant StreamCast actively recruited Napster's users. 125 S.Ct. at 2773, 2780. It appears that Grokster and StreamCast actively defied copyright law, and refused to learn from the Napster debacle. The U.S. Supreme Court also noted a public policy issue:

This very breadth of the software's use may well draw the public directly into the debate over copyright policy, Peters, Brace Memorial Lecture: Copyright Enters the Public Domain, 51 J. Copyright Soc. 701, 705-717 (2004) (address by Register of Copyrights), and the indications are that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection, Wu, When Code Isn't Law, 89 Va. L.Rev. 679, 724-726 (2003). *Grokster*, 125 S.Ct. at 2775.

⁶¹ “The Copyright Owners assert, without serious contest by the Software Distributors, that the vast majority of the files are exchanged illegally in violation of copyright law.” 380 F.3d at 1160.

A unanimous U.S. Supreme Court vacated the lower courts' grant of summary judgment for defendants, and held:

The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast's and Grokster's software. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement. See *In re Aimster Copyright Litigation*, 334 F.3d 643, 645-646 (C.A.7 2003).

Grokster, 125 S.Ct. at 2776.

The Supreme Court held

that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.

Grokster, 125 S.Ct. at 2780.

In the context of a criminal conspiracy to commit copyright infringement, a U.S. Court of Appeals said:

Even if [defendant] could show some noncommercial educational purpose, consideration of other factors weighs decisively against application of the fair use doctrine to Internet piracy. It is preposterous to think that Internet piracy is authorized by virtue of the fair use doctrine.

U.S. v. Slater, 348 F.3d 666, 669 (7th Cir. 2003).

music cases against individuals

- *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005) (Defendant downloaded thirty copyrighted songs,⁶² copyright owner sued for minimum statutory damages of \$750/song, district court awarded plaintiff \$ 22,500, and U.S. Court of Appeals affirmed.), *cert. den.*, 547 U.S. 1130 (2006). See page 52 of this essay.
- *Capitol Records v. Thomas-Rasset*, Civil File Nr. 06-1497 (D.Minn. 2009) (Defendant shared 24 copyrighted songs via KaZaA file-sharing.⁶³ Jury found willful violation of copyrights and assessed damages of \$ 80,000 per song, for a total of US\$ 1,920,000.).
- *Capitol Records v. Alaujan*, Civil File Nrs. 2003 CV 11661-NG and 2007 CV 11446-NG (D.Mass. 2009) (Joel Tenenbaum, the sole defendant at trial, ordered to pay US\$ 675,000 for willful copyright infringement.)

⁶² She actually downloaded "more than 1370 copyrighted songs", but plaintiff chose to prove only thirty songs. *Gonzalez*, 430 F.3d at 889-891.

⁶³ Plaintiffs allege that the defendant actually shared 1702 songs, but plaintiffs chose to prove copyright infringement of only 24 songs.

During the years 2003-2009, record companies sued thousands of individual people in the USA for making copyrighted music files available for free downloading through file sharing services on the Internet.⁶⁴ Nearly all of these defendants settled their cases by paying a few thousand dollars to plaintiffs. Settling was a wise decision, because a settlement:

1. avoided huge damage awards, which were justified by depriving plaintiffs of royalties for at least dozens —sometimes many hundreds— of music files, each of which could have been downloaded many thousands of times per year.
2. minimized defendant's attorney fees, and
3. avoided defendant being ordered to reimburse plaintiff's legal fees under 17 U.S.C. § 505.

However, settling the case avoided creation of a judicial opinion that might have explained legal issues in copyright infringement.

Two defendants — Jammie Thomas-Rasset in Minnesota and Joel Tenenbaum in Boston, Massachusetts — defiantly denied wrongdoing and refused to settle. On 18 June 2009, a jury in Minnesota ordered Thomas-Rasset to pay US\$ 1,920,000 in damages. On 31 July 2009, a jury in Boston ordered Tenenbaum to pay US\$ 675,000 in damages for wilful copyright infringement. Both defendants said they would appeal. My search of Westlaw on 17 Sep 2009 found no judicial decision for either of these verdicts at trial.

The attorney for Thomas-Rasset apparently inadvertently waived a fair use defense.⁶⁵ In the case of Tenenbaum, the trial judge granted plaintiffs' motion for summary judgment on the issue of fair use.⁶⁶

When the appellate opinion is issued (perhaps sometimes in the years 2010 or 2011), I will add the appellate judges' discussion of why fair use did *not* justify copyright infringement by these two defendants.

⁶⁴ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 963, 125 S.Ct. 2764, 2794 (2005) (Breyer, J., concurring).

⁶⁵ *Capitol Records Inc. v. Thomas-Rasset*, 2009 WL 1664468 at *9-*10 (D.Minn. 11 June 2009) (Defendant first asserted a fair-use defense two weeks before retrial began, and *after* discovery had closed. The judge held that defendant had waived this defense.).

⁶⁶ The trial judge's 27 July 2009 order is available at neither Westlaw nor the U.S. Government PACER website on 17 Sep 2009.

conclusion about copying music files

I am troubled at the public outrage over *Capitol Records* cases in 2009 and other copyright infringement litigation filed by the RIAA. People need to understand that when they purchase one copy of a copyrighted recording, they do *not* have the right to distribute copies of that recording. There is a simple explanation of legal property rights in copyright law. When you purchase a book, you own the paper, ink, and binding of the physical book, but the copyright owner (*not* the owner of one physical book) continues to own the expression in the text of the book. It might be fair use for the owner of the physical book to make one photocopy of one page, for his/her personal use. It is definitely *not* fair use for the owner of the physical book to make multiple photocopies of an entire chapter, to distribute as a substitute for purchasing the book. Similarly, when you purchase a sound recording, you own the vinyl disk, cassette tape, compact disk, or other medium used to distribute the recording, but the copyright owner (*not* the owner of the one sound recording) continues to own the music recorded in that medium. It is definitely *not* fair use for the owner of one sound recording to make multiple copies of the recording, to distribute as a substitute for purchasing the recording. And it is piracy to post a copy of a copyrighted recording on the Internet for free downloading by other people, in blatantly unfair competition with the owner of the copyrighted music.

In contrast with the above blatant infringements of copyrights, the proper way to distribute music files is the way adopted by Apple Computer, Inc. at its iTunes website that began in April 2003: charge users a small fee (e.g., \$1) for each file downloaded. It is simple, affordable, and fair to everyone.

remarks about other copying on the Internet

In posting a webpage on the Internet and allowing search engines to index that webpage, I believe a webmaster has offered an implied license for a user to read that webpage on the user's computer screen. However, it is not clear whether the user has a legal right to print a webpage, thus changing the ephemeral image on the screen to a permanent copy on paper. The owner of a copyright has the legal right to control the reproduction of the copyrighted work.⁶⁷

Some newspaper websites offer the user a link to click (i.e., "print-friendly version") to produce a copy without advertisements for printing, which seems to be an implied license to print. The terms of service at most websites say nothing about any right to print webpages, leaving the matter vague. Other websites may request a royalty payment or license fee for making a printed copy.

⁶⁷ 17 U.S.C. § 106.

I remark in passing about preparation of derivative works from the Internet, where original text in HTML is conveniently available for cut-and-paste. Suppose someone, let's call them D, downloads a webpage from P's website, makes a few changes, and then uploads the revised webpage at D's website. D has clearly violated P's legal right to make or authorize the preparation of derivative works, stated in 17 U.S.C. § 106(2). But, if D were to cut-and-paste short quotations⁶⁸ from P's website into a new document prepared by D, then these quotations would probably be fair use. This difference between no quotations and quotations is the difference between wrong and right.

Ignorance is No Excuse

In my experience as an attorney in copyright matters, when a person is notified that they have infringed a copyright, their first reaction is often to say they "did not know" it was wrong to copy material that is protected by copyright.

The cliché "ignorance of the law is no excuse" is a valid statement of law.⁶⁹ Civilized society would collapse if people were able to escape from criminal or civil law, merely by asserting ignorance of the law.

⁶⁸ In this hypothetical example, I assume that D *both* (1) formats each and every quotation with the indicia of a quotation (either enclosed in quotation marks or indented and single-spaced) *and* (2) includes a bibliographic citation to the original source. These two conditions avoid plagiarism, as explained in my essay at <http://www.rbs2.com/plag.htm> . If D fails either or both of these two conditions, then D has committed copyright infringement, as well as fraudulently asserting the text is D's own creation.

⁶⁹ *Barlow v. U.S.*, 32 U.S. 404, 411 (1833) (Story, J., opinion of the Court) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally; ..."); *U. S. v. International Minerals & Chemical Corp.*, 402 U.S. 558, 563 (1971) ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation."); *Cheek v. U.S.*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." [citing six cases and O.W. Holmes, *The Common Law* 47-48 (1881).]); *Ratzlaf v. U.S.*, 510 U.S. 135, 149 (1994) ("We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge. [Two citations omitted] In particular contexts, however, Congress may decree otherwise.").

In a copyright law context, see *Broadcast Music, Inc. v. Triple L Vending, Inc.*, 1987 WL 45244, 1987 Copr.L.Dec. P 26,174, 5 U.S.P.Q.2d 1346 (W.D.Tex. 1987) ("Defendants' argument of ignorance of the law is not based on common sense. The copyright laws are just like any other law and ignorance is no excuse." Finding of Fact Nr. 46).

The copyright statute explicitly says that placing a copyright notice in the proper place⁷⁰ defeats any claim of innocent infringement.⁷¹ A copyright notice is *not* an ornament, it is a legal notice similar to a “no trespassing” sign on a fence around private property.⁷²

Furthermore, many educational institutions have a written statement of copyright policy.⁷³ Violation of such a policy could mean that copyright infringement by teachers or professors would be their personal problem: the school or college would *not* pay for their attorney and the school or college would *not* pay damages in any settlement or judicial decision. Clearly, disregarding copyrights could be very expensive for a teacher or professor.

In the specific situation of photocopying in a library (e.g., interlibrary loans) the Copyright Act of 1976, 17 U.S.C. § 108(d), is quite specific that such photocopies are permissible *only* if they are made for the purpose of either “private study, scholarship, or research”. The statute requires a warning to interlibrary loan users,⁷⁴ which warning is specified at 37 CFR § 201.14. Note that this congressionally mandated warning is *not* helpful — it simply threatens the user with liability for copyright infringement if the user somehow makes copies “in excess of ‘fair use’ ”, whatever that may be. As seen in *Williams & Wilkins*, (above, at page 48) eight judges on the U.S. Court of Claims and eight justices of the U.S. Supreme Court disagreed in 1972-1974 whether photocopying of medical journals was fair use. If judges can not agree about fair use, what hope is there that teachers, professors, physicians, or scientists can understand the law that applies to photocopying? However — and this is important — the warning could defeat any claim by a photocopier that he/she did not know that such photocopying was wrong.

⁷⁰ The proper place is specified in 37 C.F.R. §201.20 to include —amongst other possibilities — the title page, the page immediately following the title page, the first page of the main body of the work, or the last page of the main body of the work.

⁷¹ “... no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as” 17 U.S.C. § 401(d).

⁷² *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 491 (2dCir. 1960) (“The notice requirement serves an important public purpose; the copyright proprietor is protected so long and only so long as he gives effective warning to trespassers that they are entering on forbidden ground.” [two citations omitted]) (Friendly, J., dissenting).

⁷³ Indeed, providing such a policy to “promote compliance with” copyright law is a condition for exempting a college or university from liability for copyright infringement by students or faculty. 17 U.S.C. § 512(e)(1)(C).

⁷⁴ The statute and federal regulation are quoted at <http://www.rbs2.com/ww2.pdf>.

Immunity for Teachers

The above essay explains why making multiple copies of a copyrighted work for distribution to pupils or students is copyright infringement, unless the teacher or professor first obtains permission from the copyright owner. Unfortunately for owners of copyrights, the Copyright Act of 1976 contains a purported immunity from liability for employees of nonprofit educational institutions, including teachers and professors. This immunity is hidden in the middle of a section about statutory damages for copyright infringement:

.... The court shall remit⁷⁵ statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords;

17 U.S.C. § 504(c)(2) (enacted 1976, still current Nov 2008).

The legislative history for this exemption from statutory damages for teachers says:

In addition to the general “innocent infringer” provision[,] clause (2) deals with the special situation of teachers, librarians, archivists, and public broadcasters, and the nonprofit institutions of which they are a part. Section 504(c)(2) [subsec. (c)(2) of this section] provides that, where such a person or institution infringed copyrighted material in the honest belief that what they were doing constituted fair use, the court is precluded from awarding any statutory damages. It is intended that, in cases involving this provision, the burden of proof with respect to the defendant's good faith should rest on the plaintiff.

House of Representatives Report Nr. 94-1476, at p. 163 (1976), reprinted in 1976 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 5659, 5779.

Note that the burden of proof of a defendant’s “good faith” is normally on the defendant, because he/she raised that defense and because only he/she knows his/her state of mind. It makes no sense to put this burden of proof on plaintiff.

As explained earlier in this essay, the doctrine of fair use in copyright law is complicated and judges sometimes make inconsistent decisions about fair use. Adding this statutory immunity in cases in which a teacher or professor “believed and had reasonable grounds for believing ... fair use” greatly increases the complexity of the litigation and uncertainty of the result. The statute is silent about how much *knowledge* of fair use law is necessary to support “reasonable grounds for believing”. One hopes that judges will require teachers to have some knowledge of copyright law as a condition for receiving immunity under this statute, so that ignorance of the law does not become an excuse. And how can anyone who is knowledgeable about copyright law have a reasonable belief that making multiple copies of entire articles or entire chapters of books is fair

⁷⁵ The word *remit* often means to send money, but that meaning makes no sense here. Here, the word *remit* means “to cancel or refrain from ... inflicting a debt of punishment.” THE NEW OXFORD DICTIONARY OF ENGLISH (1998).

use, when *all* of the court cases involving teachers (see cases cited beginning at page 43, above) have held such copying *not* to be fair use?

Does notice of copyright, which defeats a claim of innocent infringement, also defeat a claim of “reasonable ground for believing ... fair use”?⁷⁶ My quick search of the Westlaw ALLFEDS database in Nov 2008 found no reported case in which a judge had applied this immunity statute to a teacher or professor.

Patry’s TREATISE ON COPYRIGHT LAW explains the history of immunity for teachers in 17 U.S.C. § 504(c)(2) — this sentence was inserted on 3 Mar 1976 “to pacify educators who had lobbied unsuccessfully for an across-the-board exemption for nonprofit educational uses.”⁷⁷ The final version of the bill was enacted into law on 19 Oct 1976, so this one sentence conferring immunity was snuck into the bill about seven months before the final vote in Congress. Given the length and complexity of this bill, and given the fact that revisions of the copyright statute had been proposed and debated in Congress for years, this immunity was essentially a last-minute change.

my opinion

I have no objection to immunity for employees of a library, because libraries were exempt from copyright infringement for many types of copying, under 17 U.S.C. § 108. However, I believe this statutory immunity for teachers and professors in nonprofit educational institutions is unwise, because:

1. This immunity effectively prevents copyright owners from enforcing their copyrights against teachers, instructors, or professors in nonprofit educational institutions who copied copyrighted material without permission and without paying a license fee. Such immunity destroys the market value of articles and books that are intended for use in instructional programs.
2. This immunity is selective: teachers and professors are favored with immunity, while scientists, engineers, physicians, attorneys, and members of other learned professions continue to be liable for copyright infringement. I do not see any valid public policy argument for immunizing teachers and professors, but not immunizing members of other learned professions.

⁷⁶ 17 U.S.C. § 401(d) mentions an exception “as provided in the last sentence of § 504(c)(2).” However, the last sentence of § 504(c)(2) does not explicitly say anything about notice of copyright, so this reference may be to the second sentence in § 504(c)(2).

⁷⁷ William F. Patry, TREATISE, § 10:15, p. 10-49 (2008 edition).

3. Teachers and professors serve as role models for young people, to teach ethics and morality by example. Immunity from copyright infringement for teachers and professors allows them to violated copyrights and serve as a bad example to their pupils or students. The pupils or students having learned by example to violate copyrights, go download copyrighted music, and get whacked with copyright infringement litigation with potential large damages.
4. It seems pointless to have elaborate legal protections for copyright, and then give a few members of society immunity from infringing those property rights, without compensating copyright owners who are harmed. The immunity for teachers makes me sarcastic: the USA has the best law that special interest groups can purchase from Congress.

My view of fair use

Advocates for fair use in copying by instructors often emphasize the benefit to society from education, and the nonprofit nature of such copying.⁷⁸ There is no doubt that educational institutions, whether operated by state government or nonprofit corporations, are generally beneficial to the public. However, having a commendable purpose does *not* justify copying of privately owned copyrighted material without the permission of the copyright owner. *If* fair use were to permit a state-operate school or college to copy material without paying royalties to the copyright owner, then such use would constitute an additional tax levied only on copyright owners whose material was considered useful by a teacher or professor.⁷⁹ This is a bizarre way to reward authors for their effort and skill in the creation of new works.

Some professors have socialist views of personal property and those professors may believe that the law in the USA *should* permit widespread copying for educational use. However, one must distinguish between what the law actually *is* and what one wishes/believes the law should be. Any author or publisher may choose to put his/her/its work into the public domain, without protections of copyright law, simply by putting a public domain notice on the title page of the work. On the other hand, authors or publishers who put a copyright notice on the title page are informing the reader that the work is private property and that their copyrights must be respected.

It is tempting to say that making *one* photocopy of an article in a scholarly journal, or printing *one* copy of a webpage, without paying a few dollars in royalties to the copyright owner is fair use. The copyright owner suffers a *de minimis* loss from each free copy. However, in the case of a

⁷⁸ See, e.g., Ann Bartow, "Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely," 60 UNIVERSITY OF PITTSBURGH LAW REVIEW 149 (Fall 1998).

⁷⁹ Such use by a state-operated school or college might constitute a violation of the Fifth Amendment to the U.S. Constitution, which forbids the taking of private property for public use without just compensation.

popular webpage that has, for example, three hundred thousand hits in five years, the total loss to the copyright owner is substantial.

I see significant differences amongst the following different kinds of activities that *might* be considered fair use:

1. short quotations by authors
2. photocopying
 - a. *one* copy of an article made by a professor or nonprofit scholar, for purpose of creating subsequent works
 - b. *one* copy made by a teacher or professor for use in preparing a lecture
 - c. *many* copies made by a teacher or professor for distribution to pupils or students

The doctrine of fair use originated in the context of authors making quotations from work of earlier authors. Historically, there was little interest in regulating someone who sat in a library and laboriously made a handwritten copy of previous work. However, the introduction of duplicating machines in the 1950s and especially the introduction in the 1960s of high-speed photocopy machines (i.e., essentially a fast, cheap alternative to a printing press) created a new class of activities that some users have considered fair use.

In terms of equities, each *author* might be entitled to make a single copy of a previous scholarly article as part of preparing to write a new scholarly work.⁸⁰ Because an author, A, did not pay royalties to authors/publishers of previous works that were used by A, it follows that subsequent authors should not pay royalties to A. In this view, authors form a collegial community in which everyone contributes to the creation and propagation of knowledge, without paying royalties on single copies made for scholarship. Alternatively, one could argue that there is an implied license for authors to copy for advancement of science, medicine, law, or scholarship in other areas.⁸¹ Each author, A, benefits from his/her royalty-free copying of previous works, but also A will suffer from future royalty-free copying of A's works by other authors. This balance between benefit and suffering for each author seems equitable to me.

I believe that an instructor should get written permission before making dozens, hundreds, or even thousands of copies of a copyrighted article for distribution to pupils or students, because I argue that, without permission, such distribution is copyright infringement. In such a situation,

⁸⁰ Such preparation includes making one copy in order to accurately quote a previous work. Accurately quoting an author helps propagate the author's work and increases the recognition of that author.

⁸¹ See, e.g., *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1stCir. 1905); cited in *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 84 (1stCir. 1981).

an author/publisher suffers significant economic loss,⁸² without any benefit⁸³ in return. Most instructors produce either zero works, or few works, that someone else would want to copy, so there is no equitable balance. The situation with instructors is distinguished from the situation involving authors, which was discussed in the previous paragraph.

I am uncertain about the reason or justification that the Agreement says an instructor can make *one* copy for their use in preparing to teach a class, without paying royalties to the copyright owner. Certainly, having well informed instructors is a benefit to society, but that does not — in my opinion — justify trampling on private property rights of copyright owners. If instructors are entitled to disregard copyrights, why not also include physicians who copy articles in medical journals or books, because informed physicians are beneficial to society (i.e., less malpractice)? And why not also include stockbrokers who copy information on investments, because informed stockbrokers are beneficial to society (i.e., more dividend income to tax)? If an important societal objective justifies trampling on private property rights, then we should also legally require grocery stores to give free food to homeless or indigent people. I conclude that the Agreement was wrong when it declared that fair use allowed instructors to make one copy for their use in preparing to teach a class. Preparation for teaching a class is part of an instructor's professional obligations, for which they are paid a salary. Teachers can afford to pay for their continuing education, including paying royalties for use of copyrighted material, in the same way as other professionals, such as physicians or attorneys. The question of whether copying articles for continuing education of professionals is fair use should be decided by considering all professions together, and not by placing teachers in a specially preferred position. Finally, I would argue that a teacher, physician, attorney, or other professional is unjustly enriched when they earn an income for exploiting information for which they did not pay a royalty to the copyright owner. It is *not* equitable for authors to spend hundreds of hours of their unpaid time to write a copyrighted article that helps other professionals earn a living, when the readers pay no royalties to the copyright owner.

In my view, fair use should be mostly limited to *authors* who are either (1) making a brief quotation (together with a complete bibliographic citation) from a copyrighted work or (2) making one copy of a previous work for use in nonprofit, scholarly research. In neither situation is there a need either to get permission from the copyright owner or to pay royalties to the copyright owner.

⁸² Recall that the fourth factor in 17 U.S.C. § 107, “the effect of the use upon the potential market for or value of the copyrighted work”, has been called by the U.S. Supreme Court, “undoubtedly the single most important element of fair use.” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).

⁸³ Advocates of fair use exemption for making many copies of copyrighted works for use by pupils or students sometimes mention the propagation of an author's ideas and the increased fame of the author. I believe this is a contrived “benefit”. Academic communities take note of how often a particular work is cited by other scholars, so there is benefit to authors from being cited by subsequent *authors*. However, I can see no benefit to an author from being known to pupils or students, most of whom are under 25 years of age and who have little current influence on society.

Making *brief* quotations is a *de minimis* use.⁸⁴ As explained above, there is an equitable balance for authors who copy works of previous authors. Furthermore citing or quoting a work in a favorable setting adds to the reputation of the quoted author, by informing/reminding new readers of the previous work, and also by confirming or agreeing with the previous work, or by recognizing the previous author as an authority or initial discoverer of significant new knowledge.

cost of royalties

A frequently heard complaint by teachers and professors is that paying royalties can be *unaffordably* expensive. Sorenson⁸⁵ gives an example of a professor who wanted to copy 97 articles that had been published between 1972 and 1982 for assigned readings in an undergraduate seminar class. Of those 97 articles, permission for royalty-free copying was received for 49 articles (half the total number of articles). Publishers of 43 articles requested royalties between “\$0.02 per page per student to \$1.75 per page [per student], with the average cost per page [per student] being \$0.35.”⁸⁶ The total cost of royalties would have been \$108 per student, which compares to only \$25 for the expense of making the photocopies of 97 articles for one student.⁸⁷ Those royalties were considered too high by the professor, who made a course pack containing only the royalty-free articles.

Examples like the previous paragraph give the impression that some publishers are unreasonable. However, copyrights are personal property and, in a capitalist society, the law does not tell copyright owners how much they can charge for royalties. If a user believes that a requested royalty payment is too high, the user is free to find replacement material from another source to copy.

When I wrote the first draft of this essay in March 2006, the American Association for Advancement of Science, publisher of *Science* magazine, asked for a royalty of \$ 18/article, paid directly to the Copyright Clearance Center. The publisher of NIMMER ON COPYRIGHT asked for a royalty of \$ 1/page, paid directly to the Copyright Clearance Center. These royalties are expensive, and — no doubt — generally ignored by copiers who are confident that their copying will not be detected, and hence they will not be sued for copyright infringement. High royalties do *not* discourage making photocopies, they only discourage payment of royalties for copies that are made. On the other hand, small royalties are inefficient to collect, and therefore also commonly

⁸⁴ See above, at page 23.

⁸⁵ Gail Paulus Sorenson, “Impact of the Copyright Law on College Teaching,” 12 JOURNAL OF COLLEGE AND UNIVERSITY LAW 509, 515-517 (1986).

⁸⁶ *Ibid.* at 516.

⁸⁷ *Ibid.* at 517.

ignored, because the cost of writing a check and mailing the check to the copyright owner could be greater than the amount of the royalty.

By using computer technology to automatically collect royalties from *all* webbrowsers on the Internet and *all* photocopy machines in libraries — as explained in the next section — society can eliminate most of the problem of free riders, and establish a fairer system for *both* copyright owners *and* users. In exchange, copyright owners could agree to accept small royalties (e.g., US\$ 0.02/page) instead of burdensomely expensive royalties. I suggest that copyright owners would receive more money from my proposal of a small royalty from everyone, than from the current situation of a high royalty that only a few copiers actually pay.

how technology might have solved the problem

When the photocopy machine became a commercial success in the 1960s, those machines were mostly used in a commercial office environment, for copying of business material for which the copier presumedly owned the copyright. Thus, there was no copyright infringement.

Photocopy machines also quickly became popular in libraries during the 1960s, as illustrated by the *Williams & Wilkins* case discussed above. In libraries, most of the photocopies were presumedly of copyrighted materials for which the copier paid no royalties to the copyright owner.

In the case of manual photocopy machines in libraries, the royalty per page could be included in the price of making a photocopy. The user could scan a bar code appearing on the volume to tell the machine which publisher should receive the royalty. The user would have no incentive to scan the wrong bar code, because the user will pay the royalty regardless of to whom the royalty is paid. If no bar code is scanned for a photocopy, then the system could deposit the royalty into a general fund to be distributed proportionally to the amount of known royalties.

The developers of webbrowsers in the early 1990s were *not* concerned about copyright law. The design of HTML documents should have contained code in the document header about the amount of royalty per page and the place to pay the royalties (e.g., account number at the Copyright Clearance Center). Webbrowsers should have been designed to print such webpages and transmit payment information. Again, I suggest that a small royalty (e.g., US\$ 0.02/page) would be fair.⁸⁸ Instead of having a multitude of small financial transactions between users and copyright owners, it would be more efficient for the user's Internet Service Provider (ISP) to pay a monthly amount to the Copyright Clearance Center, together with the data for how much royalties should be credited to each account at the CCC. The ISP could bill the user for printing in the previous month.

⁸⁸ Of course an author or copyright owner could choose to request zero royalties for printing, effectively putting the document in the public domain.

Unfortunately, with the cultural sense of entitlement to make photocopies without paying royalties, and to print from a webbrowser without paying royalties, it may now be difficult for the U.S. Congress to enact compulsory licensing fees or requirements that library photocopy machines and webbrowsers automatically pay specified royalties.

In the legal profession, manual photocopying of pages of scholarly articles is already obsolete. Instead, one uses the Internet to access Hein Online database of law reviews in Adobe Portable Document Format (PDF) and print them on the user's laser printer. Alternately, one can print an HTML version of the law review article from the Westlaw or Lexis databases. It is a simple matter for the database provider to determine which articles are being photocopied and pay an appropriate royalty to the copyright owner.

After I wrote the above paragraphs, I found a treatise in the law library that makes a similar point:

As increasing numbers of copyrighted works become available instantaneously online — not only informational works and scientific papers, but also music, art and literature — transaction costs can be expected virtually to disappear as digital rights management systems set fees and collect and distribute revenues. Taping movies off the air or downloading them off the Internet, photocopying journal articles and even copying out cookbook recipes can be pay as you go in a digital environment in which search and negotiation will cost little more than the price of electricity and bills will be paid monthly or charged to the user's account. For the great bulk of uses previously excused because of transaction costs, fair use doctrine will simply become irrelevant, as consumers pay for what they previously used free, or it will be judicially deemed inappropriate, as in the [*Texaco vs.*] *American Geophysical [Union]* case.

Paul Goldstein, GOLDSTEIN ON COPYRIGHT, chapter 12, pages 7-8, third edition, (2005).

Conclusion

Copyright exists, in part, to provide a financial reward to authors who create original works that other people find useful. By making copies of copyrighted works, without permission of the copyright owner, users/readers fail to acknowledge the legal property rights of the copyright owner. While some authors (especially those who are paid a salary to create works) may permit royalty-free copying, other authors (many of whom are *unemployed*) hope to earn a significant part of their income from royalties or licensing fees for copying of their work.

Most pupils, students, teachers, and professors feel entitled to make photocopies of copyrighted works. This culture is accurately described by: "I want it. I can make a free copy without being caught or punished. Therefore, I am *entitled* to a free copy for myself." When expressed in such stark terms, the brazen lack of morality and appalling lack of respect for property of others is exposed.

People who have a superficial understanding of copyright law often toss out the phrase “fair use” as if it were some kind of mantra or dogma that justifies teachers or professors making multiple copies of a copyrighted work, without paying royalties to the owner of the copyright. Actually, fair use is one of the most difficult concepts in copyright law, and the boundaries of fair use have not been precisely specified, despite more than 160 years of history of fair use in U.S. law. Indeed, until the *Williams & Wilkins* case, fair use was *only* about the ability of *authors* to make short quotations from copyrighted works. In my opinion, the U.S. Court of Appeals in *Williams & Wilkins* perverted the doctrine of fair use to make it also apply to users or readers who wanted to make photocopies of entire works without permission of the copyright owners. Congress then made the mistake of including “for purposes such as ... teaching (including multiple copies for classroom use)...” in 17 U.S.C. § 107, despite the lack of support in case law and the explicit intention of Congress *not* to change fair use law.⁸⁹ Given these vague boundaries and legal controversies, instructors who make copies for their pupils or students would be well advised to ask written permission of the copyright owner *before* copying.

If society wants to make copies of scholarly articles without paying royalties, then society should consider having the federal government provide grants or contracts to scholarly authors⁹⁰ to produce material that will be published or posted on the Internet, in exchange for a contractual agreement that both the author and publisher/webmaster will not require royalties for making copies. In this proposal, the author is fully compensated by the federal government for producing the original work of scholarship, but *not* compensated by subsequent royalty payments.

⁸⁹ Note that teachers must satisfy the four factors in § 107, something that teachers have failed to accomplish in the reported cases, see the discussion beginning at page 43, above. I conclude that wholesale copying by teachers — or by anyone else — is *not* fair use.

⁹⁰ This suggestion was made — and rejected because it would allow the government to censor authors — by Steve Allan, et al., “New Technology and the Law of Copyright: Reprography and Computers,” 15 UNIVERSITY OF CALIFORNIA AT LOS ANGELES LAW REVIEW 939, 956 (April 1968).

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