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THE IMPACT OF "FAIR USE" IN THE HIGHER EDUCATION COMMUNITY: A NECESSARY EXCEPTION?

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I. INTRODUCTION

Despite legislative efforts to define it, the concept of Fair Use¹ has been the subject of aggressive debate among publishers, authors, librarians, and users of copyrighted information ("academics") at academic institutions.² With the advent of the Internet and the prospect of multimedia projects,³ the debate has intensified and expanded into the international community.⁴

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¹ Fair Use has been defined as "the privilege in others than the owner to use the copyrighted material in a reasonable manner without . . . consent, notwithstanding the monopoly granted to the owner." HARRY G. HENN, *COPYRIGHT LAW: A PRACTITIONER'S GUIDE* 179 (2d ed. 1988) (quoting *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966)).

² See Benjamin Ely Marks, Note, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade Reconsidered*, 72 N.Y.U. L. REV. 1376, 1376, 1389 (1997) (noting that decisions in several cases limiting the applicability of fair use generated criticism and activity among these groups).

³ "Multimedia projects" refer to projects involving the use of multiple sources of copyrighted material including, but not limited to, film, video, magazines, and newspapers. See MELVILLE B. NIMMER & DAVID NIMMER, 5 NIMMER ON COPYRIGHT § 21, at 61-62 (1998) (noting that a multimedia work "combines authorship in two or more media").

⁴ The World Intellectual Property Organization (WIPO) held its Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva, Switzerland, in December 1996. See *Diplomatic Conference on Certain Copyright and Neighboring Rights Questions* (visited Nov. 20, 1998) <http://www.wipo.org/eng/diplconf/4dc_star.htm>. The primary

This Article focuses primarily on the challenges that face academic administrators and college and university attorneys seeking to advise their academic clients of the parameters of the Fair Use Doctrine—encouraging both sharing and dissemination of scholarly information, and compliance with the law, while limiting institutional liability. This Article will include a focus upon the common misconceptions and misinterpretations of the Fair Use Doctrine by members of the academic community, along with the reasons for them.

It is not surprising that users of the copyrighted material of others have different concerns than the owners of copyrighted material.⁵ Particularly in academic settings, where access to tools and resources to enhance the teaching and learning process is of paramount importance, easy and immediate access to such materials is considered essential.⁶ In order to facilitate the use of the most current material, customize the classroom and minimize the economic consequences of both, faculty and teaching assistants often want to use at least a portion of copyrighted materials—books, magazines, and journal articles—in the classroom without requiring their students to purchase the entire material.⁷ Professors may also choose

agenda for the Conference was consideration of three proposed treaties. *See id.* The first treaty was an update of the Berne convention, providing international protection for literary and artistic works. *See id.* Second, a global accord designed to protect rights of recording artists and producers. *See Draft Treaty for the Protection of the Rights of Performers and Producers of Phonograms* (visited Nov. 20, 1998) <http://www.wipo.org/eng/diplconf/5dc_star.htm>. The third and last proposed treaty was intended to extend copyright protection to databases on the Internet. *See Draft Treaty on Intellectual Property in Respect of Databases* (visited Nov. 20, 1998) <http://www.wipo.org/eng/diplconf/6dc_star.htm>. The latter treaty was tabled after a number of countries indicated they were not ready to address these issues. *See id.* Of particular concern to libraries and other users of copyrighted material was a portion of this third treaty that sought to make “browsing” without permission infringement. *See id.* The other two treaties were adopted by 15 countries and the European communities on December 20, 1996. *See World Intellectual Property Organization: Copyright Treaty*, Dec. 20, 1996, 36 I.L.M. 65; *World Intellectual Property Organization: Performances and Phonograms Treaty*, Dec. 20, 1996, 36 I.L.M. 76. The United States signed the treaties on April 12, 1997. *See World Intellectual Property Organization: Copyright Treaty and the World Intellectual Property Organization: Performances and Phonograms Treaty*, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), 36 I.L.M. 65, 76; *see also* Julie S. Sheinblatt, *The WIPO Copyright Treaty*, 13 BERKELEY TECH. L.J. 535, 535 (1998) (explaining that the adopted treaties were in response to the “digital age”).

⁵ *See* Mary R. Barry, Note, *Multiple Photocopying by Educators and the Fair Use Doctrine: The Court's Role in Reducing Transaction Costs*, 1994 U. ILL. L. REV. 387, 394 (describing an example of the differing concerns between the users and owners of copyrighted material).

⁶ *See id.* at 387 (stating that supplemental photocopied reading materials are used to enhance the information offered to students).

⁷ *See id.* (explaining that photocopied materials are “important [educational] tool[s]” for classroom use).

to place the material on the library's printed or electronic reserve and/or make materials available via the Internet.⁸ Similarly, academic authors of copyrighted material may wish to have the same ease of access and/or the ability to share their materials with others, as do their colleagues who wish to utilize their copyrighted materials. Because academic authors often assign the copyright to their materials to academic publishers, even an author may have limited access to his or her own materials.⁹ This Article will illuminate these issues in the context of copyright protections and the Fair Use Doctrine.

II. THE FAIR USE DOCTRINE

As a general rule, use, reproduction, display, dissemination, and development of the derivative works of copyrighted material all require the permission of copyright owners.¹⁰ The Fair Use Doctrine functions as an exception to this general rule.¹¹ Since the addition of the Fair Use Doctrine to the Copyright Act of 1976,¹² the academic community has often relied upon it to facilitate otherwise protected access to copyrighted materials.¹³ Under this doctrine, certain uses of copyrighted material are permitted, without permission from the owner of the copyrighted materials.¹⁴

Despite inclusion of the Fair Use Doctrine into the 1976 Copyright Act, concerns remained both for the community of copyright owners and users of copyrighted materials over uncertainty in the interpretations of this portion of the new Act, as well as what might

⁸ Web pages have become very popular for just such purposes. *But see* Kenneth R. Weiss, *A Wary Academia on Edge of Cyberspace*, L.A. TIMES, Mar. 31, 1998, at A1 (noting that not all educators "embrace the Internet").

⁹ *See* Michael D. Scott, *Frontier Issues: Pitfalls in Developing and Marketing Multimedia Products*, 13 CARDOZO ARTS & ENT. L.J. 413, 424 (1994) ("Many publishers also control the copyrights through contractual relationships with their authors.").

¹⁰ *See* 17 U.S.C. § 106 (1994 & Supp. I 1996) (granting an exclusive right to the owner of a copyright to use and authorize the use of that copyright).

¹¹ *See* 17 U.S.C. § 107 (1994) (providing an exception to the exclusive rights of a copyright owner when the use of the work is considered a fair use, and listing the factors used to make that determination).

¹² Section 107 was added to the Copyright Law on October 19, 1976. *See* Copyright Act of Oct. 19, 1976, Pub. L. No. 94-553, tit. I, 90 Stat. 2541, 2546; Steven D. Smit, "Make a Copy for the File . . .": *Copyright Infringement by Attorneys*, 46 BAYLOR L. REV. 1, 8 (1994) (noting that "the fair-use defense was expressly incorporated . . . into the Copyright Act of 1976").

¹³ *See* Marks, *supra* note 2, at 1377 (explaining that public interest sometimes outweighs an author's interest in copyright protection).

¹⁴ *See* 17 U.S.C. § 107 (describing the uses and purposes for use that do not require permission from the owner of the copyrighted materials).

constitute an abuse of the fair use privilege.¹⁵ After enactment of the fair use legislation, and as an initial response to those concerns, publishers and academicians met to discuss the use of copyrighted materials in the non-profit academic setting. The result was the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions, with Respect to Books and Periodicals ("Classroom Guidelines").¹⁶ These Classroom Guidelines addressed the Fair Use Doctrine's applicability to the academic community much more specifically than the previously enacted legislation, and sought to provide guidance to users within the non-profit educational environment on what constitutes proper use of copyrighted materials for research and teaching purposes. After an agreement on the Classroom Guidelines was reached, Congress put its imprimatur on the Classroom Guidelines by incorporating them into the House Report on the 1976 Copyright Act, although they were not a part of the new statute.¹⁷

More than twenty years later, complaints still remain from a number of academic user circles (faculty, staff, students, and librarians) that the Classroom Guidelines do not work in the way most necessary: facilitating access to and use of copyrighted materials for research, teaching, and learning purposes.¹⁸ Some of the most frequent complaints from academic users of copyrighted material about the Classroom Guidelines involve the seemingly arbitrary limit on the number of words and/or percentage of a work which is allowed to be reproduced and used.¹⁹ In fact, as early as February 1976, before congressional adoption of the Classroom Guidelines and in an unsuccessful effort to delay the congressional adoption of the Classroom Guidelines, The American Association of University

¹⁵ See Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105-07 (1990) (noting the confusion surrounding the Fair Use Doctrine).

¹⁶ SHELDON ELLIOT STEINBACH ET AL., AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS, H.R. REP. NO. 94-1476, at 68-70 (1976), reprinted in 1976 U.S.C.A.A.N. 5659, 5681-83 (noting that this report is commonly referred to as the Classroom Guidelines).

¹⁷ See H.R. REP. NO. 94-1476, at 68 (stating that the Classroom Guidelines provide the "minimum . . . standards of educational fair use under Section 107 of [the Copyright Act of 1976]").

¹⁸ Kenneth D. Crews, *Fair Use and Higher Education: Are Guidelines the Answer?*, ACADEME, Nov./Dec. 1997, at 38, 38-40 (criticizing the usefulness of the guidelines, and discussing their failure to provide any helpful insight to the meaning of fair use in an educational environment).

¹⁹ See H.R. REP. NO. 94-1476, at 68 (defining "brevity," a requirement for compliance with the Classroom Guidelines, as a "complete poem if less than 250 words and if printed on not more than two pages or . . . an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words").

Professors (AAUP) suggested that the Classroom Guidelines "seriously interfere[d] with the basic mission [of] and effective operation of higher education . . . [and] ultimately resort to . . . language of prohibition" rather than an accurate interpretation of the language and intent of the fair use statute.²⁰ The AAUP further suggested that the Classroom Guidelines unnecessarily restricted uses of copyrighted material, "threaten[ing] the responsible discharge of the functions of teaching and research."²¹

The problem is even greater in the electronic forum. President Clinton established the Information Infrastructure Task Force (IITF) in 1993, to increase public access to electronic information on the Information Infrastructure.²² A subcommittee of this task force, the Working Group on Intellectual Property, was formed to address the applicability of the Copyright Laws to Internet materials.²³ This Group held a Conference on Fair Use (CONFU) from 1994 to 1996,²⁴ partially in an attempt to develop fair use guidelines applicable to material appearing on the Internet.²⁵ After more than two years, however, a consensus could not be reached on the appropriate guidelines for fair use in the electronic arena.²⁶ The impasse

²⁰ John C. Stedman, *The New Copyright Law: Photocopying for Educational Use*, AM. ASS'N OF UNIV. PROFESSORS BULL., Feb. 1977, at 5, app. C at 15 (reprinting in full the Letter from The American Association of University Professors (AAUP), to Robert W. Kastenmeier, Congressman (May 25, 1976)).

²¹ *Id.*

²² See DanThu Thi Phan, Note, *Will Fair Use Function on the Internet?*, 98 COLUM. L. REV. 169, 171 (1998) (noting that President Clinton formed the IITF in recognition of "the emerging significance and influence of new media and Internet technologies").

²³ See *id.* at 171-72 ("The Working Group's Mission [was] to discuss the applicability of existing copyright law to the [National Information Infrastructure] and to make recommendations about what is needed to lay the groundwork for the rapid and efficient development of the Internet.").

²⁴ The CONFU was held to "examine[] whether the current intellectual property regime was appropriate for maintaining a proper balance between the public interest in free information . . . and the economic interests of authors and creators." *Id.* at 172; see *infra* notes 124-29 and accompanying text (discussing the Conference on Fair Use).

²⁵ Use of copyrighted material on the Internet was only one area of use under consideration by CONFU. See Phan, *supra* note 22, at 172. The CONFU participants were divided into six working groups: Digital Images, Distance Learning, Educational Multimedia, Electronic Reserves Systems, Interlibrary Loan Document Delivery, and Software Use in Libraries. See *id.* at 172 n.17.

²⁶ BRUCE A. LEHMAN, U.S. PATENT AND TRADEMARK OFFICE, THE CONFERENCE ON FAIR USE: REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE FIRST PHASE OF THE CONFERENCE ON FAIR USE (1997) [hereinafter CONCLUSION REPORT]. Three sets of guidelines—digital images, distance learning, and educational multimedia—had been offered for "public debate, discussion, endorsement, and implementation" prior to the May 1998 meeting. *Id.* at 10-15. However, as with the other areas originally under consideration, these guidelines are being offered without a consensus endorsement of the CONFU participants.

was insurmountable and the group went on hiatus, promising that if it could not develop guidelines, then it would at least try to develop fundamental principles by which to approach the use of copyrighted materials. The date set for the group to resume discussion was May 18, 1998.²⁷

On that date, the Conference on Fair Use (CONFU) held what would be its final meeting. The meeting included an update on the three proposed guidelines emanating from the previous CONFU meeting, as described in the 1997 CONFU Interim Report, in addition to demonstrations of several copyright educational projects and licensing projects for educational uses.²⁸ Of the three areas in which proposed guidelines had been devised—distance education, educational multimedia, and visual images—apparently only the multimedia guidelines were being used.²⁹ With respect to the remaining two, the visual images guidelines were reportedly unworkable, and no consensus could be reached on the distance learning guidelines.³⁰ A final report is forthcoming which is expected to include a briefing on this last meeting; however, it does not appear that any new or significant progress was made.

III. DISCUSSION

Despite these circumstances and setbacks, educational institutions are still major users of copyrighted information and materials.³¹ Faculty, staff, and students still desire a timely, easy, and effective means by which to use such materials.³² The Classroom Guidelines³³ are no longer considered satisfactory to users in this regard, and in any event, may not apply to the electronic context.³⁴

See id. at 20. As the referenced report notes in fact, "indeed some CONFU participants strongly oppose them, while others strongly support them." *Id.* at 20-21.

²⁷ *Id.* at 9.

²⁸ *See* Page Putnam Miller, *Final Meeting of the Conference on Fair Use*, NCC WASH. UPDATE (National Coordinating Committee for the Promotion of History, Wash., D.C.), May 20, 1998, at 3 (noting that this concluded three years of meetings).

²⁹ *See id.* (noting that although they were being used, they were not approved by CONFU).

³⁰ *See id.* (noting that negotiations over the two issues had "bogged down").

³¹ *See* Barry, *supra* note 5, at 387 ("Most students at some point in their academic careers purchase supplemental photocopied reading materials in addition to the required textbooks for their classes.").

³² *See id.* at 394 (stating that educators want "maximum availability of teaching materials and teaching resources," which would include photocopied copyrighted materials).

³³ *See supra* notes 16-17 and accompanying text (discussing the Classroom Guidelines).

³⁴ *See* Lois F. Wasoff, *Fair Use Guidelines for Educational Multimedia*, in DRAFTING, NEGOTIATING AND ENFORCING TRADEMARK, COPYRIGHT AND SOFTWARE LICENSING

However, reference to the Fair Use Doctrine of the copyright law is certainly still appropriate in determining whether the relevant criteria for such use without permission are met.³⁵ Fair use is not the "catch all" panacea permitting any and all uses of copyrighted material, whether in printed, electronic, or other form, by academicians solely because the use is for "educational purposes."³⁶

This has been a widely held misinterpretation of the Fair Use Doctrine and is the most frequently offered defense (by academics defending themselves to weary academic administrators and attorneys) against suggestions that a particular use might be a copyright infringement.³⁷ The reasons for this misinterpretation of the Fair Use Doctrine are many, and are to some extent understandable. For instance, the Fair Use Doctrine, like much of the copyright law, is unclear and subject to multiple interpretations.³⁸ Thus, in an effort to facilitate a better understanding of this difficult subject, and avoid improper uses of copyrighted materials, an increase of adequate training and education is necessary.

The objectives of this Article are threefold: (1) to explain the law relating to fair use, distinguishing it from the misapplications of the law that sometimes occur in academia;³⁹ (2) to speculate on the consequences of continued abuses of the Fair Use Doctrine—even by academicians;⁴⁰ and (3) to make suggestions to the academic community for education, training, and monitoring of the uses of copyrighted material.⁴¹ When implemented, the suggestions are intended to reduce the risk of copyright infringement and

AGREEMENTS: A SATELLITE PROGRAM 1998, at 111, 114 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. 517, 1998) (noting that the Classroom Guidelines are not intended to cover every educational context, including certain electronic uses).

³⁵ See 17 U.S.C. § 107 (1994) (listing the relevant criteria for determining "fair use"); *infra* notes 46-128 and accompanying text (discussing the four-prong test for determining fair use and discussing case law in which courts have applied the test).

³⁶ See Barry, *supra* note 5, at 394 (explaining that educators want a "blanket exemption for multiple copying for educational purposes").

³⁷ See 17 U.S.C. § 504 (c)(2) (1994) (providing a defense to infringement to an educational user who "believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107").

³⁸ See MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13, at 153 (1998) (stating that "fair use" is not defined by the Fair Use Doctrine due in part to the lack of "a rule that may automatically be applied in deciding whether any particular use is 'fair'").

³⁹ See *infra* notes 46-128 and accompanying text (discussing the law relating to fair use).

⁴⁰ See *infra* notes 135-54 and accompanying text (discussing the consequences of abuses of the Fair Use Doctrine). To date, the academic/educational community has not been challenged in court by either the copyright owner or publishing community regarding some of the questionable uses of copyrighted material without permission.

⁴¹ See *infra* notes 155-62 and accompanying text (discussing suggestions for change).

institutional liability, while providing a means by which to most efficiently assess whether the use in question is a fair use or requires permission.

IV. THE LAW

The authors of intellectual property have a property right in their creations that is protected within the copyright law.⁴² This property interest is subject to abuse by those who attempt to use the ideas of others for commercial gain without permission of the copyright owner. Under these circumstances, copyright owners may file a civil action for copyright infringement seeking equitable relief and/or damages.⁴³ Those charged often offer the Fair Use Doctrine as a defense or justification for the alleged infringement.⁴⁴ In order to determine whether an alleged infringement of copyrighted work constitutes a fair use rather than an unlawful one, the courts have applied a four-factor test as mandated by statute.⁴⁵

A. *The Four-Prong Test*

1. The Purpose and Character of the Use

The purpose and character of the use is the first of four factors analyzed to determine whether or not the secondary use in question is justified.⁴⁶ Since the earliest application of the Fair Use Doctrine,⁴⁷ American courts have held that use of copyrighted work which is transformative is the kind of activity that the Fair Use Doctrine is designed to permit.⁴⁸ Therefore, the Fair Use Doctrine will be justified where the purpose and character of the use is to

⁴² See Copyright Act of 1976, 17 U.S.C. §§ 101-107 (1994 & Supp. 1996) (providing for copyright protection).

⁴³ See 17 U.S.C. § 501(b) (1994) ("The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.").

⁴⁴ See 17 U.S.C. § 107 (providing for a fair use defense).

⁴⁵ See *id.* (listing the four criteria); *infra* notes 46-128 (discussing the four-prong test and cases in which courts have applied this test).

⁴⁶ See 17 U.S.C. § 107 (stating the first factor).

⁴⁷ See *Gyles v. Wilcox*, 26 Eng. Rep. 489, 490 (Ch. 1740) (stating that copyright laws "must not be carried so far as to restrain persons from making a real and fair abridgement").

⁴⁸ See *Leval*, *supra* note 15, at 1111 ("A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the [fair use] test.").

create or produce that which is different from the original work.⁴⁹ However, it is important to emphasize that if the use is of a commercial nature rather than for a nonprofit educational purpose, the use may be inappropriate for fair use justification.⁵⁰

2. The Nature of the Copyrighted Work

The second factor that guides the application of the Fair Use Doctrine weighs the nature of the copyrighted work in relation to its established purpose. Copyrighted material intended for publication is more likely to be considered susceptible to fair use than a document created for a private purpose. For example, the Fair Use Doctrine might be successfully applied to use of a published academic research article. However, the doctrine would probably not be successfully applied to allow use of a work that is unpublished, mainly because the author's right to control the initial appearance of her expressions would take priority over release of the work before publication.⁵¹

Furthermore, the courts have granted a wider latitude in the use of factual material developed by another, as opposed to nonfactual material.⁵² For instance, a finding of fair use would not be justified if a defendant copied excerpts from creative material such as a book of poetry or a novel.⁵³ To the contrary, a finding of fair use would not be improper if the copies were telephone book listings, citations

⁴⁹ An example of this is a multimedia work incorporating a portion of the copyrighted works of a number of individuals in order to create a wholly new work for use in classroom teaching. *See id.* There are, in fact, an infinite number of ways in which original works may be manipulated to be substantially different from, yet based upon original, copyrighted works, i.e., as derivative works. *See id.*

⁵⁰ *See* Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1400 (6th Cir. 1996) ("The fact that a publication [is] commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." (citation omitted)); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1532 (S.D.N.Y. 1991) (stating that "consideration of the commercial use is an important one").

⁵¹ *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985) ("The fact that a work is unpublished is a critical element of its 'nature.'" (citation omitted)); Wright v. Warner Books, Inc., 953 F.2d 731, 737 (2d Cir. 1991) (noting the importance of an author's right to "control the first public appearance of his expression"); *see also* Leval, *supra* note 15, at 1118 (stating that an author who prefers not to publish a work, or prefers to make "aesthetic choices" regarding its first publication, will generally have the legal right to do so).

⁵² *See* *Kinko's Graphics Corp.*, 758 F. Supp. at 1532-33 (emphasizing that factual works are given less protection).

⁵³ *See id.* at 1533 ("Fictional works . . . are often based closely on the author's subjective impressions and, therefore, require more protection.").

from the yellow pages, or some other factual source, i.e., historical dates without accompanying creative information.⁵⁴

3. The Amount and Substantiality of the Material Used

The third factor considers the amount and substantiality of the copyrighted material used in relation to the entire copyrighted work. While the courts have found relatively small quantitative uses to be within the Fair Use Doctrine,⁵⁵ use of either a significant portion of a copyrighted work, whether that be the number of pages or the "heart of the book,"⁵⁶ is less likely to qualify as fair use.⁵⁷ Thus, efforts to copy entire works for use in the classroom are generally prohibited.⁵⁸ This includes out-of-print material.⁵⁹

This factor demands that the amount and substantiality of use be assessed simultaneously.⁶⁰ Just as the percentage of the original copyrighted work used is important,⁶¹ consideration of whether the portion of the material used—large or small—constitutes a central or critical part of the copyright owner's work is required by substantiality analysis.⁶² Consideration of this factor in this light

⁵⁴ See *Michigan Document Servs., Inc.*, 99 F.3d at 1405 ("Factual compilations, such as telephone book listings . . . with only a small element of creativity and originality may be used more freely than creative works."); *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987) (explaining that there is no risk in copying factual content).

⁵⁵ See *New Era Publications, Int'l v. Carol Publ'g Group*, 904 F.2d 152, 158 (2d Cir. 1990) (holding that use of a small percentage of a published work is fair use).

⁵⁶ *Harper & Row, Publishers, Inc.*, 471 U.S. at 564-65; see Elaine B. Krasik, Note, *Taking of Verbatim Quotations in Maxtone-Graham v. Burtchaell: An Unfair Use*, 49 U. PITT. L. REV. 617, 645 (1988) (defining the "heart of the book" as "among the most powerful passages in' the book" (citation omitted)).

⁵⁷ See *Michigan Document Servs., Inc.*, 99 F.3d at 1389 (stating that the greater the volume or importance of what is taken, the less likely the taking will qualify as fair use).

⁵⁸ See *Kinko's Graphics Corp.*, 758 F. Supp. at 1534 (finding infringement occurred where "[i]n almost every case, defendant copied at least an entire chapter of a plaintiff's book" for classroom use).

⁵⁹ See *id.* at 1533 (noting that out-of-print material may be particularly problematic since fees for copying and use of such material may be the only source of income for such material); *infra* notes 102-03 and accompanying text (discussing the importance of the fact that the copied materials in the *Kinko's* case were out of print). But see *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1264 n.8 (2d Cir. 1986) ("If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case." (citation omitted)).

⁶⁰ See *Kinko's Graphics Corp.*, 758 F. Supp. at 1533 (noting that there is an implicit assumption that amount and substance of use must be assessed simultaneously).

⁶¹ See *Michigan Document Servs., Inc.*, 99 F.3d at 1389 (making the point that "the larger the volume . . . the greater the affront to the interests of the copyright owner"); *Kinko's Graphics Corp.*, 758 F. Supp. at 1533 (indicating that the percentage of the original work used is considered).

⁶² See *Kinko's Graphics Corp.*, 758 F. Supp. at 1533 (declaring that, in addition to the quantitative, courts must also evaluate the qualitative aspects of the material copied).

helps guard against a harsh application of the Fair Use Doctrine, which would deny its implementation simply because a large portion of the copyrighted work was used irrespective of its overall importance to the work.⁶³ Hence, if the "essence" of the copyright holder's work is not used and there is no adverse market impact, use of a rather extensive portion of copyrighted material may still qualify as a fair use.⁶⁴

4. The Effect of the Use on the Work's Market Value

The fourth factor, the effect of the use on the work's market value, has been characterized in certain U.S. Supreme Court cases as the most important element in fair use analysis.⁶⁵ The Court has generally held that "[f]air use . . . is limited to copying by others which does not materially impair the marketability of the work which is copied."⁶⁶ This does not mean that the absence of an adverse impact on the marketability of the work in every instance justifies the use as a fair use, or conversely that whenever there is any market impact the use cannot be fair use.⁶⁷ The other three factors remain important and are not made irrelevant by the fourth factor. However, the Supreme Court has suggested that the fourth factor is the most important, requiring only a showing of widespread use that would negatively affect the potential market of the copyrighted material to bar a fair use defense.⁶⁸

⁶³ See HARRY G. HENN, *COPYRIGHT LAW: A PRACTITIONER'S GUIDE* 186 (2d ed. 1988) ("Qualitative is more important than quantitative.")

⁶⁴ See Leval, *supra* note 15, at 1123 (providing an example of a work which quotes all of a copyrighted work without affecting the market potential of the piece). *But see* Krasik, *supra* note 55, at 617 n.3 (summarizing a case in which the court rejected a claim for fair use because the "essence" had been used and the market value was adversely impacted).

⁶⁵ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (stating that the effect on the work's market value "is undoubtedly the single most important element of fair use"). *But see* *Kinko's Graphics Corp.*, 758 F. Supp. at 1533 (stating that the four factors must be equally balanced).

⁶⁶ *Harper & Row, Publishers, Inc.*, 471 U.S. at 566-67 (quoting 1 NIMMER ON COPYRIGHT, *supra* note 3, § 1-10[D], at 87); see *Michigan Document Servs., Inc.*, 99 F.3d at 1385 (noting the four factors that the legislature promulgated in order to determine fair use).

⁶⁷ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (noting that "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").

⁶⁸ See *Harper & Row, Publishers, Inc.*, 471 U.S. at 568 (noting that "to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work'" (citation omitted)); see also Leval, *supra* note 15, at 1124-25 (asserting that the doctrine of fair use should be negated when impairment to the copyright holder's potential market is substantial).

B. *The Law and the Four-Prong Test*

In *Iowa State University Research Foundation, Inc. v. American Broadcasting Co.*, the Second Circuit addressed the issue of copyright infringement.⁶⁹ The defendant in that case, the American Broadcasting Companies (ABC), attempted to assert the Fair Use Doctrine as a defense for their unauthorized use of a film, produced by an Iowa State University (ISU) student, entitled "Champion."⁷⁰ The film featured then world-class wrestler Dan Gable, a gold medal favorite in the 1972 Olympic Games, and provided a brief biography of Gable.⁷¹ Attempts to sell the film to ABC and others failed.⁷² Subsequently, an ABC producer obtained a copy of the film; however, no compensation was ever tendered by ABC to the student or to ISU.⁷³ Portions of the film thereafter appeared during ABC's broadcast of the 1972 Summer Olympics.⁷⁴

Unable to reach a settlement regarding compensation for ABC's use of the clips from the film, ISU filed suit against ABC.⁷⁵ Although ABC admitted copying and using portions of the film, it argued that its use was a fair use since it only disseminated the life history of a public figure participating in an event of global concern.⁷⁶ The district court rejected this defense, stating that the "defendants appropriated something of value for which, from the nature and extent of their business, they were well prepared to pay."⁷⁷ In other words, the nature and character of ABC's use was not solely motivated by beneficence, but at least in part, by commercial exploitation.⁷⁸

⁶⁹ 621 F.2d 57 (2d Cir. 1980).

⁷⁰ *See id.* at 60 (stating that ABC raised the defense of fair use).

⁷¹ *See id.* at 58 (noting that Gable was a "fellow student . . . who was destined to win a gold medal").

⁷² *See id.* at 59 (noting the students failed attempt to sell the film to ABC, NBC, and the Hughes Sports Network).

⁷³ ISU had a registered copyright to the film and retained all rights to it, except that it had granted to the student the right to license its first television broadcast. *See id.*

⁷⁴ *See id.* (explaining that the student did not believe he had entered into a contract to sell the film and was "shocked" to see portions of it on the Olympic telecast).

⁷⁵ *See id.* (explaining that initially ABC denied using "Champion," but after suit was brought, they admitted to limited use of the film).

⁷⁶ *See id.* at 60 (noting that ABC attempted to use "public benefit" as justification for its use of the film).

⁷⁷ *Iowa State Univ. Research Found., Inc. v. American Broad. Co.*, 463 F. Supp. 902, 905 (S.D.N.Y. 1978).

⁷⁸ *See id.* (declaring that it is relevant that the film was used at least partially for commercial purposes).

Rejecting the application of rigid rules, the Second Circuit instead emphasized the importance of an ad hoc examination of the facts presented in each case that seeks to apply the Fair Use Doctrine. To guide such an examination, the court turned to the four-prong fair use test.⁷⁹

In so doing, the court rejected ABC's argument that it was engaged in sharing important information about a renowned public figure.⁸⁰ The court opined that ABC's infringement stemmed from its use of actual film footage of "Champion." This does not mean that ABC would have been liable for copyright infringement had it only used facts expressed in the film made by ISU.⁸¹ "The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts."⁸² Nonetheless, ABC could not successfully assert the Doctrine of Fair Use by arguing that the American public may have had a sincere interest in a telecast about one of its athletes competing in the Olympic games. According to the court:

The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance. Indeed, we do not suppose that appellants would embrace their own defense theory if another litigant sought to apply it to the ABC evening news.⁸³

ABC's argument that the Fair Use Doctrine was a valid defense was fourfold: first, ABC asserted that the public benefit in sharing historical and biographical information should move the court to find that ABC's use was appropriate; second, they argued that the "nature of the copyrighted work" was essentially different from that of the network's olympic broadcasts";⁸⁴ third, they asserted that a portion of material used from the copyrighted work was insignificant; finally, ABC contended that the copyright holder's potential

⁷⁹ See *American Broad. Co.*, 621 F.2d at 60 (explaining that although there are no fixed set of rules in fair use analysis, consideration is given to these factors: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of material used in relation to the copyrighted work as a whole; and (4) the effect of the use on the copyright holder's potential market for the work").

⁸⁰ See *id.* at 61 (stating that "[t]his argument proves too much").

⁸¹ See *id.* (declaring that ABC possessed the right to use factual information revealed in "Champion," but that there was no need to use the actual footage).

⁸² *Id.*

⁸³ *Id.* (footnote omitted).

⁸⁴ *Id.*

market had not been adversely affected.⁸⁵ The circuit court rejected all of these arguments and instead found that the copyright granted the holder the right to exploit the marketplace or withhold the copyrighted material from use in the marketplace.⁸⁶ Further, the court held that ABC's use of "Champion" violated the fundamental privileges that all copyright holders are granted by law.⁸⁷ Thus, the Fair Use Doctrine was deemed unavailable.⁸⁸

In *Basic Books, Inc. v. Kinko's Graphics Corp.*,⁸⁹ the most celebrated copyright case related to the academic setting prior to the recent *Michigan Document Services, Inc.* case,⁹⁰ the Fair Use Doctrine was the source of litigation between a publisher and a copy center. Kinko's provides copying services, primarily for college students and university professors.⁹¹ Basic Books, the plaintiff, is a publishing company that profits from the sale of textbooks and the assessment of permission fees.⁹² Basic Books filed an action for damages and injunctive relief on the grounds that Kinko's violated the plaintiff's copyright. Specifically, Basic Books alleged that Kinko's copied material from the plaintiff's textbooks without permission, assembled the copied materials as packets, and sold these packets to students,⁹³ thereby obviating the need for students to purchase textbooks from the plaintiff.⁹⁴

The court ruled in favor of the plaintiff, holding that Kinko's use constituted infringement.⁹⁵ Considering the four factors applicable to a determination of fair use, the court found that the character

⁸⁵ See *id.* at 62 (arguing that for the fourth factor, ABC's use actually increased the market value of the film as evidenced by the increase in demand for rentals of the film).

⁸⁶ See *id.* at 62 (stating the rights ISU had as owner of the copyright).

⁸⁷ See *id.* at 60-62 (implying that all copyright holders have fundamental rights that protect their work unless a Fair Use Doctrine exception applies).

⁸⁸ See *id.* at 62 (concluding that "the fair use defense is unavailable to ABC").

⁸⁹ 758 F. Supp. 1522 (S.D.N.Y. 1991).

⁹⁰ See *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (holding that infringement occurred where the copy shop prepared and sold copied portions of copyrighted work without paying royalties or permission fees); see also *infra* notes 116-24 and accompanying text (discussing the *Michigan Document Services* case).

⁹¹ See *Kinko's Graphics Corp.*, 758 F. Supp. at 1534 (noting that Kinko's has "200 stores nationwide" that are mostly located near college campuses).

⁹² See *id.* (noting that "plaintiff's derive a significant part of their income from textbook sales and permissions").

⁹³ See *id.* at 1526 (describing plaintiff's allegations that Kinko's infringed plaintiff's copyright by copying and distributing materials without permission and without paying required fees.)

⁹⁴ See *id.* at 1534 (noting that "it is . . . likely that purchase of the packets obviates [the] purchase of the full texts").

⁹⁵ See *id.* at 1547 (stating that "the excerpts copied by defendant Kinko's [were] not a fair use of plaintiff's copyrights").

and purpose of Kinko's use was commercial and not educational.⁹⁶ Kinko's argued that it acted as an agent of the educational institution, but the court concluded that the advertisement and incentives offered to professors to use Kinko's services "belie[d] this contention."⁹⁷ Kinko's went to great lengths to achieve profit-making objectives and offered professors a 10% discount for submitting orders early, marketed savings programs to students, and offered pick-up and delivery services.⁹⁸ In light of these efforts, the court stated that Kinko's insistence that it had "educational concerns and not profitmaking ones boggles the mind."⁹⁹

As for the nature of the work copied, the law gives less copyright protection to factual works because they are deemed to have greater public value than fictional works that are based upon an author's subjective impressions.¹⁰⁰ In this case, the books included were both in print and out-of-print, and focused largely on the range of social sciences writings.¹⁰¹ Thus, the materials infringed upon in this case, were factual in nature, thereby supporting the defendant's fair use defense.¹⁰²

The third factor of the four-prong test considers the amount and substantiality of the material used.¹⁰³ The court acknowledged that there is no bright line rule regarding how much of a copyrighted material can be used and still be considered fair use, but concluded that the portions used were critical because the professors wanted students to have these materials for their classes.¹⁰⁴ The court noted that the content of the copied works, when coupled with the amount of Kinko's usage, was so excessive it violated the third prong of the test.¹⁰⁵

⁹⁶ See *id.* at 1531 (noting that although the packets had an educational use to students, their use to Kinko's employees was commercial).

⁹⁷ *Id.* at 1532.

⁹⁸ See *id.* at 1531-32 (providing examples of the advertising used and incentives granted).

⁹⁹ *Id.* at 1532.

¹⁰⁰ Courts generally hold that "the scope of fair use is greater with respect to factual than non-factual works." *New Era Publications, Int'l v. Carol Publ'g Group*, 904 F.2d 152, 157 (2d Cir. 1990).

¹⁰¹ See *Kinko's Graphics Corp.*, 758 F. Supp. at 1534 (noting that the books copied were "out-of-print" which effected the potential market value).

¹⁰² See *id.* at 1530 (noting that "any common law interpretation proceeds on a case-by-case basis"); see also *Carol Publ'g Group*, 904 F.2d at 157 (noting that "there is no bright-line test for distinguishing between" factual and non-factual works).

¹⁰³ See *Kinko's Graphics Corp.*, 758 F. Supp. at 1533 (noting that the "courts must evaluate the qualitative aspects as well as the quantity of material copied").

¹⁰⁴ See *id.* (noting that the content of the copied sources was important "since that is the likely reason the college professors used them in their classes").

¹⁰⁵ See *id.* at 1533-34.

The final factor focuses on the effects of the use on the potential market for the copyrighted work.¹⁰⁶ Of critical importance in the *Basic Books* case was the fact that the material Kinko's copied from the plaintiff's textbook involved out-of-print books.¹⁰⁷ "[P]laintiffs in this case convincingly argue[d] that damage to out-of-print works may in fact be greater since permissions fees may be the only income for authors and copyright owners."¹⁰⁸ Kinko's is a nationwide commercial business strategically located near colleges and universities across the country.¹⁰⁹ By copying the plaintiff's books, Kinko's can assemble convenient packets of material as per a professor's instruction, taking excerpts from various books.¹¹⁰ Thus, students need not buy an entire book if only a chapter is necessary. "While it is possible that reading the packets whets the appetite of students for more information from the authors, it is more likely that purchase of the packets obviates purchase of the full texts."¹¹¹ Therefore, the court concluded, packets sold by Kinko's exacted a substantial hardship on Basic Books' ability to market any of its books which were impermissibly copied by Kinko's.¹¹²

In addition to the four-factor analysis, the court also took into consideration Kinko's status as a for-profit corporation combined with its intent to generate revenue, which were contrary to the fundamental legislative design of the copyright law.¹¹³ The court turned to the Classroom Guidelines¹¹⁴ in order to interpret the leg-

In this case, the passages copied ranged from 14 to 110 pages, representing 5.2% to 25.1% of the works. In one case Kinko's copied 110 pages of someone's work and sold it to 132 students. Even for an out-of-print book, this amount [was] grossly out of line with accepted fair use principles.

Id. (citations omitted).

¹⁰⁶ *See id.* at 1534 (stating that market effect "has been held to be 'undoubtedly the single most important element of fair use'" (citation omitted)).

¹⁰⁷ *See id.*

¹⁰⁸ *Id.* at 1533.

¹⁰⁹ *See id.* at 1534 (noting that Kinko's has hundreds of stores nationwide which cater to thousands of college students and many universities).

¹¹⁰ *See id.* at 1526-29 (describing the process by which Kinko's copies and markets course packets to professors).

¹¹¹ *Id.* at 1534.

¹¹² *See id.* (finding that Kinko's copying "unfavorably impact[ed] upon plaintiffs' sales of their books and collections of permissions fees").

¹¹³ *See id.* at 1535-36 (noting that Kinko's status as a for-profit corporation, and its profitmaking intent, were to be considered).

¹¹⁴ SHELDON ELLIOT STEINBACH ET AL., AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS, H.R. REP. NO. 94-1476, at 68-70 (1976), reprinted in 1976 U.S.C.A.A.N. 5659, 5681.

islative intent of the Copyright Act of 1976.¹¹⁵ The Classroom Guidelines suggest that Congress intended to give more support to the assertion of the fair use defense by a nonprofit educational institution as opposed to a for-profit corporation.¹¹⁶ Kinko's never submitted a request for permission to use Basic Books' material and the court believed that production and sale of the packets severely hampered the plaintiff's business opportunity.¹¹⁷ Classification of the defendant's conduct as fair use in this case would, according to the courts, amount to an expansion of that doctrine that was not equitable or reasonable.¹¹⁸

In facts comparable to those found in *Kinko's*, the United States Court of Appeals for the Sixth Circuit addressed a similar dispute between a publisher and a copying service business regarding fair use in *Princeton University Press v. Michigan Document Services, Inc.*¹¹⁹ Michigan Document Services (MDS) is a copy shop in Ann Arbor, Michigan which provides services to those in and near the University of Michigan. MDS's services include production of course packs that are copied excerpts from copyrighted works.¹²⁰ Publishers of some of those copyrighted works filed a lawsuit claiming infringement because of MDS's failure to seek permission and/or pay royalties or permission fees.¹²¹

In what was a short-lived victory for the copy shop, professors, and other classroom users of copyrighted information, a three-judge panel in the Sixth Circuit initially held that the action of MDS met the fair use test,¹²² by finding that reproduction by the copy center

¹¹⁵ See *Kinko's Graphics Corp.*, 758 F. Supp. at 1535 (noting that the Classroom Guidelines are a part of the legislative history of the Copyright Act of 1976).

¹¹⁶ See *id.* at 1536 (stating that "notwithstanding their promulgation, fair use standards may be more or less permissive—depending upon the circumstances and based upon equitable considerations" (footnote omitted)). But see *id.* at 1537 (noting that the court in *Kinko's* refused to pronounce a bright line rule which would hold that "all unconsented anthologies are prohibited without a fair use analysis").

¹¹⁷ See *id.* at 1526, 1534 (stating that Kinko's admitted to copying excerpts without permission).

¹¹⁸ See *id.* at 1529 (noting that the Fair Use Doctrine is an "equitable rule of reason").

¹¹⁹ 99 F.3d 1381 (6th Cir. 1996).

¹²⁰ See *id.* at 1383 (noting that Michigan Document Services, Inc. "reproduced substantial segments of copyrighted works of scholarship, bound the copies into 'coursepacks,' and sold [them] to students").

¹²¹ James Smith, the owner of Michigan Document Services, concluded that the *Kinko's* decision was incorrectly decided and published this opinion in "speeches, writings, and advertisements." *Id.* at 1384. Mr. Smith decided not to seek permission from copyright holders to reproduce their materials in the coursepacks, and Princeton University Press, MacMillan, Inc., and St. Martins Press, Inc. filed this lawsuit. See *id.*

¹²² See *Princeton Univ. Press v. Michigan Document Servs., Inc.*, No. 94-1778, 1996 WL 54741, at *12 (6th Cir. Feb. 12), *vacated*, 74 F.3d 1528 (6th Cir.), *reh'g granted*, 99 F.3d 1381

of materials designated by the professors was fair use.¹²³ Had this decision been upheld on appeal, it would likely have been interpreted to signal a major shift in fair use determinations by courts (even though this was a Sixth Circuit rather than a Supreme Court decision), and very possibly would have increased the amount of flexibility of those within academic institutions to use copyrighted materials in their courses.¹²⁴ Instead, the Sixth Circuit vacated this decision and granted a rehearing en banc.¹²⁵

On rehearing, the full court, applying the four-factor test, found that Michigan Document's use of the plaintiffs' work was outside the parameters of fair use.¹²⁶ The court stated:

In its systematic and premeditated character, its magnitude, its anthological content, and its commercial motivation, the copying done by MDS goes well beyond anything envisioned by the Congress that chose to incorporate the guidelines in the legislative history

Although the Congress that passed the Copyright Act in 1976 would pretty clearly have thought it unfair for a commercial copyshop to appropriate as much as 30 percent of a copyrighted work without paying the license fee demanded by the copyright holder, the changes in technology and teaching practices that have occurred over the last two decades might conceivably make Congress more sympathetic to the defendants' position today. If the law on this point is to be changed, however, we think the change should be made by Congress and not by the courts.¹²⁷

Thus, while suggesting that MDS has no legislative support for its conduct, the court left open the possibility that a different result

(6th Cir. 1996) (reversing the district court and granting summary judgment for MDS "on the basis of fair use").

¹²³ See *id.* at *6-*12 (analyzing the copying under the four prong test and concluding that "the statutory factors, plus author incentives, dictate a finding of fair use"); see also Victoria Slind-Flor, *Copyright Lawyers Razz Adverse 6th Circuit Ruling*, NAT'L L.J., Mar. 4, 1996, at A11 (reporting on the projected import of the decision that the coursepacks fall under the Fair Use Doctrine).

¹²⁴ See Slind-Flor, *supra* note 123, at A11 (quoting a copyright attorney as predicting that the decision could result in "academic freedom for those who sell these materials to students to infringe copyrights willy-nilly").

¹²⁵ See *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 74 F.3d 1528 (6th Cir. 1996) (vacating the previous opinion and judgment).

¹²⁶ See *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1383 (6th Cir. 1996) (stating that the "defendants' commercial exploitation of the copyrighted materials did not constitute fair use").

¹²⁷ *Id.* at 1390-91.

might be forthcoming should Congress revisit the copyright statute. Certainly, technology has had a dramatic impact on virtually every segment of American society, and to think that the application of American copyright law has been unaffected by the advances in technology since 1976 is naive.¹²⁸

Copyright protection has been and probably will continue to be challenged. Moreover, the Doctrine of Fair Use has become and may continue to be a defense against charges of copyright infringement. For higher education practitioners, the relevant inquiry regards the limits of fair use. If bright-line standards can be defined to aid decision-making as to the use of copyrighted materials, an opportunity exists to mount a successful defense to charges of infringement and possibly diminish the onset of such allegations at large.

V. CONFERENCE ON FAIR USE

In September 1994, in an effort to develop and articulate these "bright-line" standards, representatives of the academic community (including scholars, scholarly societies, libraries, museums, universities, colleges, and research institutions) began meeting with publishers (for-profit and university presses and other not-for-profit publishers) and other copyright owners (including artists, authors, photographers, and musicians) in an effort to develop fair use standards upon which all could agree.¹²⁹ The group, known as CONFU (The Conference on Fair Use), determined that fair use guidelines for use of copyrighted materials in the electronic arena were necessary in five major areas: Distance Learning, Multimedia, Electronic Reserves, Interlibrary Loans, and Image Collection.¹³⁰ The participants thus separated themselves into groups/committees based upon areas of interest.

¹²⁸ Fred H. Cate, *The Technological Transformation of Copyright Law*, 81 IOWA L. REV. 1395, 1460 (1996) (noting that "copyright law is a declining source of rights for protecting works, particularly in the digital environment").

¹²⁹ See BRUCE A. LEHMAN, U.S. PATENT AND TRADEMARK OFFICE, THE CONFERENCE ON FAIR USE: AN INTERIM REPORT TO THE COMMISSIONER 2 (1996) [hereinafter INTERIM REPORT] (noting that 40 groups were invited to participate in the first CONFU meeting, and more than 95 organizations were participating by November 1996); *CONFU Background* (visited Nov. 20, 1998) <<http://www.utsystem.edu/OGC/IntellectualProperty/confu2.htm>> (noting that "copyright stakeholders" were called upon to participate).

¹³⁰ See *CONFU Background*, *supra* note 129 (stating the five areas of educational use which were selected for consideration by smaller working groups).

Nearly three years and thousands of dollars and human hours later, the parties could not come to a consensus on guidelines in any of the areas.¹³¹ One explanation for the impasse was that academics and other educational users of copyrighted information felt the proposed guidelines were too restrictive (preferring the uncertainty of the law and the four-prong test to the proposed guidelines), while publishers seemed to believe they were being asked to relinquish more control over the use of their materials in the context of fair use than was desirable.¹³²

The CONFU process may provide necessary insight into both the strength of the publishers' lobby and its intransigence with respect to issues of fair use. Neither is unexpected nor inconsistent with the posture publishers have taken in the last several years with respect to use and reproduction of copyrighted works owned by publishers. The more significant question is whether the academic community should view these issues with greater concern. As a review of the law in the previous section indicates, publishers have focused previous objections to use and copying without permission on those outside the academic community.¹³³ While CONFU certainly signaled growing dissatisfaction within the academic community with the parameters of use as outlined in the Guidelines for Classroom Use, the inability to reach consensus during the recent CONFU process may also suggest that publishers are unwilling to significantly alter their position to accommodate the academic community. With the advent of the Internet and the decline in subscriptions to expensive print journals, the publishers' concern for protecting unauthorized use and copying of copyrighted works is growing since electronic use, dissemination, and copying are almost immediate on the Internet.¹³⁴ Will academic use and reproduction

¹³¹ See INTERIM REPORT, *supra* note 129, at 14-15 (outlining the goals and results of the conference on fair use and discussing the struggle of the participants in their quest to reach an agreement in the creation of fair use guidelines).

¹³² See Phan, *supra* note 22, at 200 (stating that opponents of CONFU "contend that the Guidelines excessively restrict the scope of fair use").

¹³³ See *supra* notes 69-128 and accompanying text (discussing cases involving publishers' attacks on use and copying).

¹³⁴ See Kim Pawlak, *Schroeder: Don't Underrate Content* (visited Nov. 20, 1998) <http://wionanet.com/cyberindee/_ACADAUTH/ARTICLES/98/02feb/0219schroeder.html> (noting that Patricia Schroeder, the president of the American Association of Publishers (AAP), in a speech to the National Association of College Store's Context 98 Conference Luncheon on February 19, 1998, commented on the fact that "[t]echnology has made it so easy to copy someone's content"). "Those who create content aren't going to be creating it very long if they don't get paid for it." *Id.*

of copyrighted materials come under greater scrutiny by publishers; and if so, what could be the consequences?

VI. IMPLICATIONS AND CONSEQUENCES

A. *Concerns for Publishers and the Academic Community*

The publishers/owners lobby appears to be active,¹³⁵ particularly as the electronic/digital forum assumes greater importance to the academic community, and as publishers perceive the potential for losing revenue if greater safeguards for the copyrighted works they own are not developed.¹³⁶ The print media is becoming too expensive for the academic environment.¹³⁷ Throughout the academic community, librarians and other budget-focused administrators are finding it more difficult to purchase the journals (especially scientific journals), periodicals, and other resources requested by their academic communities, because they are just too expensive.¹³⁸

As the option of peer-reviewed electronic journals continues to gain support and viability, and with the greater accessibility of materials on the Internet, publishers have become more concerned about their continued ability to monitor and control access to their works.¹³⁹ This has resulted in a stronger publishers' lobby which has received congressional attention by clamoring for more protec-

¹³⁵ See *infra* notes 140-47 and accompanying text (discussing new legislation and lobbying efforts).

¹³⁶ Although there are a growing number of tools which can be utilized to protect copyrighted information found on the Internet (e.g., passwords, on-line subscriptions, files which limit which network addresses can access information on a particular web server, user authentication tools, password, and identification protection), publishers appear to be dissatisfied with such tools as a means to adequately protect their copyrighted information from unauthorized use and dissemination.

¹³⁷ See Kenneth N. Gilpin, *Concerns About an Aggressive Publishing Giant*, N.Y. TIMES, Dec. 29, 1997, at D2 (discussing the fiscal incapability of Purdue University "of absorbing anything close to th[e] rate rise" for on-line publications announced by one of the largest publishing companies).

¹³⁸ See *id.* (discussing the weak-bargaining position of subscribing entities in comparison to the all powerful publishing companies who take advantage of their position in the market by attempting to lock in subscribers to an annual increase of 9.5% for scientific and technical journals); *Reed Elsevier Pushing Aggressive Growth Plan*, N.Y. TIMES, Dec. 29, 1997, at D1 (reporting on the decision by Purdue University to cancel many Reed Elsevier publication subscriptions due to projected rate increases).

¹³⁹ See J. Beckwith Burr, *Competition Policy and Intellectual Property in the Information Age*, 41 VILL. L. REV. 193, 195 (1996) (discussing the decentralized nature of the Internet and its effect on a publisher's ability to control mass distribution).

tions for their work.¹⁴⁰ Further, publishers seem less willing to entertain the special considerations of academic institutions as evidenced by the fervor with which both academic and commercial publishers supported the referenced MDS litigation. Additionally, the legislation proposed and considered by the 1996-1997 Congress, was intended to impose affirmative duties of monitoring on all access providers, including academic institutions, and several other access restrictions.¹⁴¹

The two areas of greatest concern to academics are: first, whether greater lobbying efforts by publishers will result in new legislation further restricting the use of copyrighted material without and within the academic community; and second, whether publishers will legally venture into the previously uncharted ground of academia, suing institutions and/or individuals whom they believe violate their copyrights? Will a campus-owned copy center soon take the place of the Michigan Document Services as defendant?

B. *New Legislation / Lobbying Efforts*

The National Information Infrastructure (NII) Copyright Protection Act of 1995 represented the most significant effort of the publishers lobby to limit the uses and reproduction of copyrighted materials.¹⁴² Although the legislation ultimately never made its way to either the House or Senate for a vote, there were serious efforts

¹⁴⁰ In early 1996, both the House and the Senate were considering copyright legislation, namely the National Information Infrastructure (NII) Copyright Protection Act of 1995, that evolved from the *White Paper on Intellectual Property and the National Information Infrastructure* prepared by the Information Infrastructure Task Force, commissioned by the White House. See H.R. 2441, 104th Cong. (1995); S. 1284, 104th Cong. (1995). This proposed legislation represented an effort by publishers to expand their rights as owners of copyrighted material at the expense and without the benefit of input from the education community. While the bills never made it out of committee in either the House or the Senate, there is continued concern that such legislation may be introduced.

¹⁴¹ See *id.* (asserting that one of the stated purposes of the bill is to clarify the fact that access providers are not liable for third-party copyright infringements unless they have notice of the infringing material and have a reasonable opportunity to limit the third-party infringement). Some suggest that this, coupled with a renewed energy around the Fair Use Doctrine by academicians, is the reason the CONFU process was unsuccessful. See generally Michael J. Ybarra, *Net's Glitch: Copyright Law Schools: A Computer on Every Desktop?*, L.A. TIMES, May 29, 1997, at E1 (reporting that the academic world refused to relinquish the rights they had "long fought for" by letting publishers limit fair use).

¹⁴² See H.R. 2441, S. 1284 (noting the liability imposed on copyright infringers); *supra* note 140 and accompanying text (providing that violators will be liable for the actual damages of the complaining parties and any additional profits attributable to the violation or for statutory damages provided for in the Act).

to pass the legislation.¹⁴³ The persistent concern of the academy and other non-commercial users of copyrighted material is that future sessions of Congress may consider and pass significantly similar iterations of this legislation.¹⁴⁴ The form of the bill under consideration in 1997 contained the following provisos of concern to the academic community: it would be a copyright violation to simply browse the Internet without a license from copyright owners; computer system operators (e.g., on-line services and networks at schools and libraries) would be subject to liability for the copyright violations of their users; distance education efforts would be limited; the manufacture, importation, or distribution of devices and software (including computers and VCRs) needed by industry, schools, and libraries to make "fair use" of encrypted information would be illegal—overruling long-standing Supreme Court precedent.¹⁴⁵

Through lobbying efforts of their own, academic institutions and others assisted in curtailing the debate until greater voice was given to their concerns.¹⁴⁶ However, similar legislation will con-

¹⁴³ See Status of House Bills, [1995-1996 Transfer Binder] Cong. Index (CCH) ¶ 34,001, at 35,054, 21,029 (Nov. 22, 1996) (indicating that neither H.R. 2441 nor S. 1284 advanced past their respective Judiciary Committees); NII Copyright Protection Act of 1995: Hearings on H.R. 2441 Before The Subcommittee On Courts and Intellectual Property of The House Committee On The Judiciary, *microformed on* CIS No. 96-H521-18:1 (Congressional Info. Serv.) (detailing the statement of Edward P. Murphy, President and CEO, National Music Publishers' Association, Inc. testifying on behalf of the 600 members on the NMPA and their support of H.R. 2441, and emphasizing the many public policy reasons to pass the provision).

¹⁴⁴ The good news is that there is also legislation ready for consideration by the 1998 Congress which is supported by the American Library Association (ALA). See Digital Copyright Clarification and Technology Education Act of 1997, S. 1146, 105th Cong. (1997); Digital Era Copyright Enhancement Act, H.R. 3048, 105th Cong. (1997). The ALA believes that this proposed legislation has the best chance of preserving the rights of copyright owners and users of copyrighted material. See *Key Library Issues and Messages for Congress: Copyright/Intellectual Property* (visited Nov. 20, 1998) <<http://www.ala.org/washoff/key.html>>. There has been little movement towards passage of either of these bills. See Status of Senate Bills, Cong. Index (CCH) ¶ 20,001, at 21,019 (Mar. 13, 1998).

¹⁴⁵ See National Information Infrastructure (NII) Copyright Protection Act of 1995, S.1284, 104th Cong. (1995); H.R. 2441, 104th Cong. (1995) (imposing liability on any person who knowingly distributes or imports for distribution copyright management information without the authority of the copyright owner).

¹⁴⁶ For instance, a conference of Big Ten officials met in Iowa City, Iowa, in May, 1996, and developed a statement which was distributed to each institution's Federal Relations Officer, for sharing with relevant legislators, which strongly urged legislators to delay voting on the measure until all voices—particularly those within the academic community—were heard. See FINAL REPORT: CONFERENCE ON COLLECTIVE STRATEGIES IN APPROACHING COPYRIGHT ISSUES AFFECTING CIC AND REGENT INSTITUTIONS (1996) [hereinafter COPYRIGHT ISSUES REPORT].

tinue to be considered in the present Congress.¹⁴⁷ Academic institutions must vigilantly monitor the status of such legislative efforts and insert themselves into the process when necessary. Otherwise, the obvious strength of the publishers/owners lobby will prevail and the interests of institutions of higher learning—particularly with respect to scholarly research and teaching efforts—will receive only marginal and inadequate consideration.

C. Litigation: Are Institutions at Risk?

To date, publishers have been unwilling to take legal action against academic institutions, individual faculty, staff or students and/or campus-owned copy centers—or even entertain the question of whether certain uses by faculty and students would be considered infringement.¹⁴⁸ In fact, with varied interpretations of the breadth and scope of fair use by and within the courts¹⁴⁹ and by le-

¹⁴⁷ In fact, new and possibly less favorable anti-piracy legislation was signed into law on December 16, 1997. See No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997). Moreover, House and Senate legislation designed to bring the United States into compliance with the 1996 WIPO treaties contains language which many academic libraries and institutions believe will further restrict fair use of copyrighted materials. See WIPO Copyright Treaties Implementation Act, H.R. 2281, 195th Cong. (1997); S. 2037, 105th Cong. (1997).

¹⁴⁸ See *Princeton Univ. Press v. Michigan Document Servs.*, No. 94-1778, 1996 WL 54741 (6th Cir. Feb. 12), *vacated*, 74 F.3d 1528 (6th Cir.), *reh'g granted*, 99 F.3d 1381 (6th Cir. 1996). On initial appeal to the Sixth Circuit, before a three judge panel, the court noted, "in the context of this case, we find the undisputed fact that MDS can produce 'multiple copies for classroom use,' at a profit, for less than it would cost the professors or students to produce them to be significant." *Id.* at *7. "The publishers declined at oral argument to argue that the professors and students may not copy these excerpts and assemble them privately for their own educational purposes." *Id.* (emphasis added); see *supra* note 119-28 and accompanying text (discussing the *Princeton University Press* case in detail).

¹⁴⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (holding that the commercial nature of the rap group 2 Live Crew's parody of the song *Oh, Pretty Woman* could be a fair use because the Court lacked evidence of the character and purpose of the use as well as the market harm, two of the four factors dictated by the 1976 Copyright Act in determining what constitutes fair use); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (ruling that the copyshop's preparation of coursepacks was not "fair use" because they profited from the sales of the works, they were substantial in nature, and they copied creative portions); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994) (finding that Texaco's unauthorized photocopying of copyrighted articles was not a "fair use" and thus violated the 1976 Copyright Act because the copying was commercial, substantial, and impacted market value of plaintiff's book); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) (finding that the multiple copies of coursebooks for student purchase was a violation of the 1976 Copyright Act and did not constitute a "fair use" of the work because Kinko's activity failed the first, third, and fourth factors of the fair use test).

gal analysts,¹⁵⁰ at least one university counsel has suggested that even where use is deemed infringement, "plaintiffs are unlikely to get damage awards against nonprofit educational institutions that follow reasonable rules about fair use."¹⁵¹ "Moreover, and especially in light of the initial Sixth Circuit ruling in *Princeton*, publishers and other owners of copyrighted information pursuing legal action also run the risk of having the court broaden the scope of fair use."¹⁵²

As the economic stakes rise for publishers, due to greater accessibility to copyrighted materials provided by the Internet, will publishers continue their current posture of avoiding any legal conflict with academic institutions in this area? Some institutions are wary of establishing formal policies that extend beyond very narrow and conservative interpretations of copyright laws.¹⁵³ More liberal policies could require indemnification of employees adhering to such policies and risk institutional liability for those same policies.¹⁵⁴

¹⁵⁰ See Kenneth D. Crews, *Copyright Law and Information Policy Planning: Public Rights of Use in the 1990's and Beyond*, 22 J. GOV'T INFO. 87, 90-96 (1995) (commenting on the everchanging nature of copyright law and the scope of fair use due to activity in both the courts and the Congress); Peter A. Jaszi, *Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. OF TRANSNAT'L L. 595 (1996) (advocating for the development of new, policy-grounded arguments and constitutionally based reasoning to battle expansionist legislative and judicial tendencies in copyright that loosen the reigns of public access to the "intellectual commons"); L. Ray Patterson, *Understanding Fair Use*, 55 LAW & CONTEMP. PROBS. 249, 260-63 (1992) (discussing the causes of confusion in the interpretation of the meaning of the term 'fair use' and concluding that it stems from the various views concerning where the source of copyright derives from); Kenneth D. Crews, *Not the "Last Word" on Photocopying and Coursepacks: The Sixth Circuit Rules Against Fair Use in the MDS Case* (visited Nov. 20, 1998) <<http://www.iupui.edu/it/copyinfo/mdscase.html>> (criticizing the Sixth Circuit's decision in the MDS case, predicting that "it is likely to leave dissatisfied most critics, copyright scholars, educators . . . and even publishers").

¹⁵¹ Georgia Harper, *Copyright Law: What Should We Be Doing About It?* (visited Nov. 20, 1998) <<http://www.utsystem.edu/OGC/IntellectualProperty/tasua.htm>>.

¹⁵² *Id.*

¹⁵³ See Vince Tortolano, *Fair Use*, 35 SANTA CLARA L. REV. 755, 760 (1994) (reviewing KENNETH D. CREWS, *COPYRIGHT, FAIR USE AND THE CHALLENGE FOR UNIVERSITIES* (1993)).

¹⁵⁴ On December 5, 1997, the Indiana University Board of Trustees adopted the "Policy on Fair Use of Copyrighted Works for Education and Research" which specifically indemnified employees who adhere to Indiana University's copyright policy with respect to Fair Use. *Indiana University Policy on Fair Use of Copyrighted Works for Education and Research* (visited Nov. 20, 1998) <<http://www.iupui.edu/it/copyinfo/fupolicy.html>>. The policy says in part:

[I]t therefore is the policy of Indiana University to facilitate the exercise in good faith of full Fair-Use rights by faculty, librarians, and staff, in furtherance of their teaching, research and service activities. To that end, the University shall . . . defend and indemnify faculty, librarians, and staff in accordance with provisions of the Officers Liability Insurance resolution

Id.

VII. SUGGESTIONS FOR CHANGE

There are a number of options available to colleges, universities, and other academic institutions to address institutional and employee concerns about the use and reproduction of copyrighted works.¹⁵⁵ Risks are inherent in some or all of these options; however, it is clear that taking no position on these matters serve neither the interests of scholarly research nor academic teaching efforts.

Of initial, critical importance to each institution is guidance. There can be no criticism of misuses and abuses of copyrighted materials by academics if there is no guidance as to what is legal and permissible, what is illegal and impermissible, and/or what is subject to disagreement and interpretation and thus, attendant risk. Guidance will be most useful within the academic environment in the areas of use and ownership of copyrighted materials.

A. Guidance

Academic institutions and their member organizations must develop clear policies to guide their employees in the use and reproduction of copyrighted materials.¹⁵⁶ Those policies must specifically focus on proper classroom, research, and other uses of copyrighted materials—either in print or electronic form—by academics in teaching, dissertations, theses, and other scholarly research, and with respect to use of on-campus copying centers.

Also of critical importance are training efforts. On-campus presentations and discussion groups in this subject area may be used to advise all relevant users of copyrighted information of the law and its parameters. Pamphlets are effective as quick guides for users of copyrighted material to assist in answering preliminary questions.

¹⁵⁵ See Harper, *supra* note 151 (advising a four step program to provide more guidance to faculty, students, and staff about copyright law and directing academic institutions to develop a long-term permission strategy along with a comprehensive copyright policy).

¹⁵⁶ See *Indiana and Purdue University's Copyright Management Center* (visited Nov. 20, 1998) <<http://www.iupui.edu/it/copyinfo>> (providing suggestions for ways in which to guide and assist employees and new on-line courses); see also *University of Texas Crash Course in Copyright* (visited Nov. 20, 1998) <<http://www.utsystem.edu/OGC/IntellectualProperty/cprtindx.htm#top>> (consisting of a comprehensive analysis of fair use protocol including a plain english copyright policy for readers).

B. Use

The important issues attendant to use of copyrighted information to which academics must have access are both the bright-lines and safe harbors. The Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions¹⁵⁷ was the initial effort to develop bright-lines and safe harbors.¹⁵⁸ The proposed guidelines emanating from the CONFU process represents another such effort.¹⁵⁹ While perhaps not safe harbors, the more liberal interpretations of the copyright laws (including the four-prong fair use test) arguably allow more liberal use, copying, and dissemination of copyrighted materials in the non-profit, education, and research environments, which if articulated clearly and effectively, can become bright lines for academics to follow. In this latter case, universities also must address and resolve the indemnification issues attendant to institutional policies which advocate or at least encourage a broader interpretation of fair use and copyright laws, permitting greater use and dissemination in classrooms, teaching, scholarship, and research.

Individual institutions may be unwilling to develop and approve internal policies and procedures which advocate or sanction a broader interpretation of the laws. Focus and support of collective efforts—legislative lobbying and otherwise, by groups representing academic institutions,¹⁶⁰ to enhance the use and dissemination of copyright information may be a necessary alternative.

¹⁵⁷ See SHELDON ELLIOT STEINBACH ET AL., AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS, H.R. REP. NO. 94-1476, at 70 (1976), reprinted in 1976 U.S.C.A.A.N. 5659, 5682 (discussing the evolution, content and purposes of the Classroom Guidelines).

¹⁵⁸ Certainly there is disagreement about whether "bright lines" should be the ultimate goal of academic institutions. CONCLUSION REPORT, *supra* note 26, at 5. While "institutionally" guidelines may create less risk, they may also serve to hinder and inhibit the teaching and research mission of colleges and universities. *Id.* at 5-6.

¹⁵⁹ See *supra* notes 28-30, 129-34 and accompanying text (identifying the three proposed guidelines in the areas of distance education, educational multimedia, and visual images—only the latter of which was deemed "workable").

¹⁶⁰ The Association of American Universities, Association of Reserve Libraries, and Committee on Institutional Cooperation, are among the leaders of these efforts.

C. Ownership

Where individuals (rather than institutions) own copyrighted material (a policy consideration), any guidance¹⁶¹ must of necessity be recommendations rather than mandates. Therefore, to the extent that retaining ownership of copyrighted materials is more viable than transfer of that ownership to publishers (which is now most common), academic institutions cannot demand such an approach, but must encourage it. Thus education and discussion of the issues in a variety of venues on campus is important and will enable academic owners of copyrighted materials to understand and consider the proffered guidance and recommendations.

The University cannot and is not interested in assuming a regulatory role which serves to dictate the manner in which an employee, as the owner of a copyright interest, should handle those interests. The University's interest must, instead be in assisting employees, to the extent possible, in finding ways to manage their ownership interests; resulting in freer use, sharing and dissemination of copyrighted material.¹⁶²

This does not, however, preclude a university from participating—individually or as part of a collective—in dialogue and action that furthers both institutional and individual interests. One such effort would be negotiations for retention of rights for on-campus and inter-institutional use of course packets for campus delivery of articles, interlibrary borrowing and lending, and any AAU or other consortial sharing arrangements which exist or may be put into place during the effective period of any contractual agreement with publishers. In order to facilitate the sharing and dissemination of copyrighted works within and outside a university pursuant to the negotiated retention rights, a database listing these works along with permissions and restrictions associated with them could be established at the institution with the ultimate objective of connecting to a yet-to-be-developed national database.¹⁶³

Another important issue for universities, colleges, and academic institutions to consider is identification and provision of university

¹⁶¹ Such individuals may try tactics such as negotiating with publishers to retain copyright, and submitting material to non-traditional electronic and printed journals where publishers refuse such negotiations.

¹⁶² REPORT OF THE TASK FORCE ON COPYRIGHT AT THE UNIVERSITY OF IOWA 8 (1995).

¹⁶³ *Id.*

resources to facilitate different approaches to development and dissemination of scholarly materials. This could mean that the academic institution would provide the necessary resources for university presses, libraries, and information technology offices to collaborate in the exploration, development, and implementation of alternate forum to publish scholarly research in print and electronic media. This last issue will raise concerns about tenure and promotion that will require extensive dialogue among the affected groups and individuals before meaningful resolution can occur.

VIII. CONCLUSION

This discussion is not exhaustive in its consideration of the long and growing list of issues and continuing concerns about the fair use of copyrighted information by and within the academy. However, it should suggest that institutions must be proactive in approaching these issues, selfishly but necessarily limiting institutional liability and encouraging compliance with the laws while vigorously enabling and facilitating teaching, research, and scholarship to the maximum extent possible.

