In *Addison-Wesley Publishing v. New York University*,¹ nine publishers alleged that New York University (NYU), nine NYU professors and lecturers, and a photocopying store located near NYU's campus had infringed copyrights owned by the publishers.² The publishers, all members of the Association of American Publishers (the AAP), claimed that the educators illegally used photocopies of copyrighted works in their classes.³ The case marks the first time a university and its faculty members were sued for copyright infringement under the Copyright Act of 1976 ⁴ (the Act).

The case settled in 1983,⁵ with the publishers agreeing to dismiss their claims against NYU and its nine faculty members in exchange for the institution of a new photocopying policy at NYU.⁶ The new policy severely limits the freedom of NYU edu-

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1. 1983-1984 Copyright L. Dec. (CCH) ¶ 25,544 (S.D.N.Y. 1983) (stipulated order and final judgment pursuant to settlement agreement between the publishers and the photocopy store). The settlement between the publishers, NYU, and the NYU faculty members, signed April 7, 1983, No. 82 Civ. 8333 (hereinafter cited as the NYU settlement or the NYU Settlement Agreement), is unpublished. The NYU settlement is reprinted in part below. See infra notes 6-12 and accompanying text.


3. The publishers charged the parties with 13 counts of copyright infringement under the Copyright Act of 1976 (the Act) for producing copies of copyrighted works, creating anthologies from the copies, and distributing them to students. Plaintiff's Complaint at 3-4, *Addison-Wesley Publishing v. New York Univ., 1983-1984 Copyright L. Dec. (CCH)* ¶ 25,544 (S.D.N.Y. 1983). The NYU professors allegedly arranged for a photocopy store, Unique Copy Center, Inc., to copy the materials, to assemble course packages of these materials, and to sell these packages to the students. These packages, or "creative anthologies," allegedly were used to supplement or substitute for textbooks in NYU classes. *Id. See also* McDowell, *supra* note 2; *Time*, Dec. 27, 1982, at 49.


6. NYU Settlement Agreement, Exhibit A, Policy Statement on Photocopying of
cators and researchers to photocopy copyrighted works. Under the settlement, all photocopies made of copyrighted material for classroom and research use at NYU must conform to specific guidelines. These guidelines require each NYU faculty member


In addition to instituting the photocopying policy, NYU agreed to distribute it to faculty, to post announcements concerning the policy prominently about the University, and to take measures designed to ensure compliance with the policy. NYU Settlement Agreement, supra note 1, at 3-6. In case NYU does not adequately enforce the policy, however, the publishers reserved the right to bring legal action against teaching personnel violating the policy. Id. at 7.

7. The guidelines contained in the NYU Policy Statement, supra note 6, are as follows:

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

A. A chapter from a book;
B. An article from a periodical or newspaper;
C. A short story, short essay or short poem, whether or not from a collective work;
D. A chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion, provided that:

A. The copying meets the tests of brevity and spontaneity as defined below; and
B. Meets the cumulative effect test as defined below; and
C. Each copy includes notice of copyright.

Definitions

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages, or (b) from a longer poem, an excerpt of not more than 250 words.
(ii) Prose: (a) Either a complete article, story, or essay of less than 2,500 words, or (b) 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.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and
(ii) The 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.

Cumulative Effect
to seek written permission from the copyright owner if, in the
individual faculty member's estimation, the proposed use is not
in full compliance with the very restrictive brevity, spontaneity,
and cumulative effect tests set out in the guidelines. If the
copyright owner does not authorize the use or if the faculty
member considers the conditions of the authorization inappro-
priate, the faculty member may request a review of the matter
by the University's general counsel. The NYU Policy Statement
asserts that should the faculty member make copies without first
receiving approval from either the copyright owner or the gen-
eral counsel, the faculty member will be held individually liable
for damages arising from any copyright infringement. The Uni-
versity maintains that it will defend and indemnify only those

(i) The copying of the material is for only one course in the school in
which the copies are made.

(ii) Not more than one short poem, article, story, or essay or two ex-
cerpts may be copied from the same author, nor more than three
from the same collective work or periodical volume during one class
term.

(iii) There shall not be more than nine instances of such multiple copy-
ing for one course during one class term.

III. Prohibitions as to I and II Above
Notwithstanding any of the above, the following shall be prohibited:

A. Copying shall not be used to create or to replace or substitute for
anthologies, compilations, or collective works. Such replacement
or substitution may occur whether copies of various works or ex-
cerpts therefrom are accumulated or reproduced and used
separately.

C. Copying shall not:
(a) substitute for the purchase of books, publishers' reprints, or
periodicals; (b) be directed by higher authority; (c) be repeated
with respect to the same item by the same teacher from term to
term.

D. No charge shall be made to the student beyond the actual cost of
the photocopying.

NYU Policy Statement, supra note 6, at I-1 to -4, reprinted in NYU Faculty Handbook,
at 136-E to -H.
8. NYU Policy Statement, supra note 6, at I-1 to -3, reprinted in NYU Faculty
Handbook, at 136-E to -G.
9. NYU Policy Statement, supra note 6, at I-3 to -5, reprinted in NYU Faculty
Handbook, at 136-C to -D.
10. NYU Policy Statement, supra note 6, at I-5, reprinted in NYU Faculty Hand-
book, at 136-D. It is unclear whether NYU or any university may shield itself from liabil-
ity in this way. A university may be held vicariously liable as a contributory infringer
for causing or merely permitting its faculty to infringe copyrights. See Sony Corp. of Am. v.
Universal City Studios, 464 U.S. 417, 434-42 (1984); Shapiro, Bernstein & Co. v. H.L.
Green Co., 316 F.2d 304 (2d Cir. 1963); Dreamland Ball Room Inc. v. Shapiro, Bernstein
& Co., 36 F.2d 354 (7th Cir. 1929); M. Nimmer, Nimmer on Copyright § 12.04[A] (1985);
Conley, Copyright and Contributory Infringement, 23 IDEA 185 (1980). For a discussion
of damages available under the Act, see infra note 53.
faculty members who act within the guidelines or upon the general counsel's advice. As a consequence, the NYU faculty simply will not be able to make any non-minimal use of photocopies without permission from the copyright owners or the general counsel, unless faculty members are willing to risk individual liability.

Although the NYU settlement has little precedential value, it has assumed a disproportionate prominence. Because it was the first, and so far the only, copyright infringement case against a university, it plays a significant role in the growing debate between publishers and universities on the future of university photocopying. Publishers in the AAP, threatened by increasing photocopying, immediately began using the NYU settlement to campaign for the imposition of photocopying policies similar to NYU's at colleges and universities across the country. Because

11. NYU Policy Statement, supra note 6, at I-4 to -5, reprinted in NYU Faculty Handbook, at 136-C to -D.

12. Determinations of whether a particular use is within the guidelines are putatively left to individual faculty members in order to "minimize intrusiveness and over-centralization." NYU Policy Statement, supra note 6, at I-3, reprinted in NYU Faculty Handbook, at 136-B. The NYU Policy Statement also claims that it seeks to preserve the individual faculty member's ability to benefit from the doctrine of fair use. NYU Policy Statement, supra note 6, at I-3, reprinted in NYU Faculty Handbook, at 136-B; see infra notes 40-59 and accompanying text. These aims are hardly served by the Policy as a whole. By placing NYU faculty members in the dilemma of either copying and risking individual liability or seeking approval from the general counsel for all uses arguably unauthorized by the guidelines, the Policy discourages most photocopying. The Policy effectively leaves most university photocopying questions with the general counsel.

13. The publishers' action was dismissed without prejudice as to NYU and the NYU faculty members, but not as to the photocopy store, pursuant to FED. R. Civ. P. 41(a)(2). Exhibit C, NYU Settlement Agreement, supra note 1. Because the settlement was not signed by all parties, the dismissal required court approval. FED. R. Civ. P. 41(a)(2). The publishers and the photocopy store settled after the NYU settlement was reached. Addison-Wesley Publishing v. New York Univ., 1983-1984 Copyright L. Dec. (CCH) ¶ 25,544, at 18,203 (S.D.N.Y. 1983).

14. See McDowell, supra note 2 (quoting Parker Ladd, Director, AAP, College Division: "[T]he problem on campus has greatly worsened in the last five years. . . . The effect is to deprive both publishers and authors of payment to which they are entitled."); But see id. (quoting Shirley Echelman, Executive Director, Association of Research Libraries: "[W]e do not agree that there is massive infringement of the law. . . . In fact, we think the law has achieved the proper balance between the rights of copyright holders and the public welfare.").

15. In the summer after the NYU settlement, the AAP began a letter-writing and speech-making campaign to inform colleges and universities of the Association's views. The AAP's campaign against university photocopying, however, did not begin with the NYU case. In May 1978, shortly after the Act's effective date, the AAP and the Authors League of America (ALA) issued a position paper on photocopying. ASSN OF AM. PUBLISHERS, INC. AND AUTHORS LEAGUE OF AM., INC., PHOTOCOPYING BY ACADEMIC, PUBLIC AND NON-PROFIT RESEARCH LIBRARIES (1978). This paper, available from the AAP, advocates the adoption by educational institutions of the photocopying policy agreed to in the NYU agreement. The terms of the policy itself are taken from guidelines formulated and
NYU's photocopying practices prior to the settlement were representative of practices at colleges and universities generally,16 by bringing suit against NYU, the publishers let it be known that they were willing to challenge such photocopying.17 The publishers have made the terms of the NYU settlement a "safe harbor" in which complying institutions may be free from the threat of potentially expensive and embarrassing litigation.18

submitted to Congress during consideration of the 1976 Act by the AAP and others. See infra notes 60-77 and accompanying text.

16. "NYU is not necessarily the worst violater but is 'representative' of schools that violate the copyright act [sic]." N.Y. Times, Dec. 15, 1982, § 1, at 1, col. 5 (quoting Carol Risher, Director of Copyright, AAP). See also Publishers Sue New York University, 57 Wilson Libr. Bull. 457, 458 (1983). An NYU professor commented that it was "terribly unfair to single out N.Y.U. for practices that are common on every campus." McDowell, supra note 2.

17. The AAP's president, Townsend Hoopes, commented that the NYU case "will make the academic community aware that they are violating the law so that they will change their photocopying procedures. A.A.P. member publishers will vigorously enforce their rights." N.Y. Times, Dec. 15, 1982, § 1, at 1, col. 5. Carol Risher, Director of Copyright for the AAP, stated after the AAP's announcement of its suit against NYU: "Universities must recognize that they have a responsibility for what their employees and faculty members do, and the faculty members must recognize their individual responsibilities as well." Publishers Sue New York University, supra note 16, at 458. See also Time, Dec. 27, 1982, at 49 ("The association clearly hoped that news of the suit would shock other schools and professors into compliance.").

One commentator summarized the purpose of the AAP's litigation: "The publishers have clearly decided to follow the example of the broadcasting and movie copyright holders who are waging legal warfare against home video recorders. And for much the same reasons—to stem the loss of what they say is hundreds of millions of dollars in potential revenues." McDowell, supra note 2. Allan Wittmore, chairman of the AAP's copyright committee, said, after reaching a similar settlement in a case involving a for-profit photocopy user, see infra note 18, that the publishers' litigation should "frighten people on and near campuses into understanding that publishers will defend their rights. They can't just throw material onto a copy machine and not pay the owners." Chron. Higher Educ., Dec. 8, 1982, at 1.

18. Carol Risher warned that "[the AAP] will continue to closely monitor photocopying done at colleges across the nation." Publishers Withdraw Lawsuit Against NYU, 57 Wilson Libr. Bull. 813, 814 (1983). See also N.Y. Times, Apr. 15, 1983, § 1, at 1, col. 2 (quoting Jon A. Baumgarten, AAP counsel: "The publishers are hopeful the principle [of the NYU settlement] will be taken to heart by other colleges and universities. . . . If our hopes are unfounded, we will take appropriate action.").

The NYU case is not the publishers' first attempt to shape photocopying law. In recent years, the AAP has brought several lawsuits against a variety of photocopy users as part of a larger strategy to stop alleged copyright infringement by both for-profit and not-for-profit users. Before the NYU case, the publishers concentrated their efforts on for-profit photocopying. The publishers had remarkable success, winning favorable settlement agreements from an impressive array of corporate photocopy users. In 1980, for example, AAP-member publishers won a settlement against Gnomon Corporation, a photocopying company with offices near many college campuses. Basic Books, Inc. v. Gnomon Corp., 1978-1981 Copyright L. Dec. (CCH) ¶ 25,145 (D. Conn. 1980). No educational institutions were named in the action. Gnomon agreed to be enjoined from making multiple copies of copyrighted materials unless the request for the copying is accompanied by an authorization from the copyright owner or a statement from the requesting faculty
The NYU settlement has had an unsettling effect at college campuses across the country. Because there has been no conclusive adjudication or clear legislative proclamation on the matter, many universities, uncertain whether their scholarly and educational photocopying constitutes an infringement or a legal use of copyrighted works under the Act, have either modified their existing photocopying policies or issued policies to reflect the terms of the NYU settlement. Compliance with the terms

member that the copying complies with the "Agreement on Guidelines." See supra note 61 and accompanying text. Gnomon stated that it was forced to settle for it could not afford the costs of litigation. McDowell, supra note 2. See also Harper & Row, Inc. v. Tyco Copy Serv., Inc., 1978-1981 Copyright L. Dec. (CCH) ¶ 25,230 (D. Conn. 1981) (settlement of case against photocopy store located near college; similar terms to Gnomon).

Between 1982 and 1984, members of the AAP settled with or received agreements from several large corporate users of photocopied material. The companies, American Cyanamid Co., Squibb Corp., Pfizer, Inc., Texaco, Inc., and General Electric Co., all agreed to participate in some fashion in the Copyright Clearance Center (the CCC). N.Y. Times, Oct. 6, 1984, § 2, at 19, col. 1; W. Patry, The Fair Use Privilege in Copyright Law 191-93 (1985). The CCC, established in 1978, collects and allocates fees for photocopying in a manner comparable to the American Society of Composers, Authors, and Publishers (ASCAP) and the Broadcast Music International (BMI), both private royalty collection services. The CCC lists mostly scientific periodicals and charges an average royalty of about $2 per copy. N.Y. Times, May 7, 1985, § 1, at 21, col. 1. Most of the companies listed above agreed to pay a per-page fee to the CCC for copying done by the corporations. In the settlement reached with the General Electric Company, the company agreed to pay over $100,000 to the CCC for a bulk license to photocopy scientific journals at the company's research facilities. For a transcript of the CCC's "Publisher Agreement" and "User License," see 1984 Copyright L. Rep. (CCH) ¶ 20,255.

19. Congress deferred to the courts to decide the extent of university photocopying allowable under the Act, see infra note 43 and accompanying text, and the courts have yet to decide a copyright infringement case involving university photocopying. See infra notes 78-156 and accompanying text. Congress intended that copyright owners and copyright users would negotiate usage agreements defining the amount and cost of photocopying. See infra note 76 and accompanying text. Copyright owners such as publishers and authors have been unable as yet to reach agreements with universities.


21. A sampling of university photocopying policies reveals three general approaches. Some schools adopted the publishers' proposed photocopying policy, the Agreement on Guidelines for Classroom Copying, see infra note 61, before the NYU case. Johns Hopkins University, for example, announced on January 12, 1978, that it was making the guidelines contained in the NYU Policy Statement, supra notes 6-7, the university policy, noting, however, that these guidelines stated minimum and not maximum standards of fair use. A second and larger group of universities instituted photocopying policies similar to the NYU Policy Statement only after the 1983 settlement. Some of these schools' policies, such as the Rutgers University "Interim Policy on Photoduplication of Copyrighted Materials" (copy on file with U. Mich. J.L. Rev.), even discuss the NYU case explicitly. Some of the universities that have adopted policies similar to NYU's have made some variations in specific guidelines, in the faculty indemnification provisions, and in the amount of faculty discretion to decide whether to copy. The third group of university policies does not follow the NYU Policy Statement. For a discussion of these policies, see infra note 170 and accompanying text.
of the NYU settlement by NYU and other universities raises considerable concern. Photocopying at institutions of higher learning is increasing with the demand for current information in teaching and scholarship, while the costs of published materials rise in contrast with declining costs, improved quality, and wider availability of photocopying. Not only does compliance with the NYU settlement threaten to restrict the benefits—such as an increased flow of information—made possible by inexpensive photocopying, but it also is contrary to the copyright laws. The settlement is far more restrictive of educators' and scholars' ability to photocopy copyrighted works than copyright law requires. The NYU Policy Statement denies the NYU faculty the flexibility to make copyright decisions as authorized by the copyright laws and offends the concept of academic freedom. The settlement largely ignores the university users' needs and rights of access to copyrighted works while plainly favoring the interests of authors and publishers. This Note argues that the NYU settlement should not be followed by other universities as it is contrary to both the letter and spirit of copyright law.

Part I of this Note describes copyright law as it applies to university photocopy users, including an examination of the relevant legislative histories. Part II addresses the case law on university photocopying, both prior to and following the adoption of the Act. Part III briefly discusses the policies underlying university photocopying. The Note concludes with an analysis of the NYU settlement in relation to copyright law.

I. STATE OF THE COPYRIGHT LAW

The Act does not explicitly address university photocopying. Analysis of the Act's language and intent suggests the extent of educational or scholarly photocopying of copyrighted works it allows. From this analysis, it is clear that the Act permits far more university photocopying than authorized under the NYU settlement.

22. Publishers claim that there is a substantial and ever-increasing amount of photocopying done at universities. By some accounts, however, the actual amount of photocopying by libraries is reported to be dropping. In 1981, 95.4 million copies were made by libraries, a decline of 10% from the 113.9 million copies recorded in 1976. Heller, Report to the Copyright Office by the American Association of Law Libraries, 75 LAW LIBR. J. 438 (1982).
A. The Copyright Clause and the Common Law

The copyright clause of the Constitution, which empowers Congress to enact copyright legislation, embodies two fundamental beliefs or presumptions of the Framers. The first is that society is benefited by the production and dissemination of creative works. The second is that, to guarantee the greatest production and disclosure of such works, creators should be provided with economic incentives in the form of commercially valuable copyrights. Accordingly, the exercise of rights granted copyright owners does not conflict with the public good but, to the contrary, promotes it by encouraging the future production and dissemination of creative works. In certain cases, however, the control that copyright owners exert over their works may be detrimental to the larger public interest in dissemination of information. Then, the societal interest in dissemination of information outweighs the interest in promoting the individual's creation of copyrightable works. A partial limitation of the rights granted copyright owners, therefore, is justified in order to provide the public with increased access to existing works.

The common law doctrine of fair use is the tool with which courts restrict the exercise of copyright owners' rights where the societal interest in dissemination outweighs the interest in the creator's incentives. Strictly speaking, fair use is a defense to a

23. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

24. The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but for the benefit of the public, such rights are given.

U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 5 (House Judiciary Comm. Print 1961) (quoting H.R. REP. No. 2222, 60th Cong., 2d Sess. (1909)). But see M. NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (1985). According to Professor Nimmer, the copyright clause's preamble should not be taken as a severe limitation on the exercise of the copyright power. It is more an indication of the purpose of this power. "[T]he primary purpose of copyright is not to reward the author, but is rather to secure 'the general benefits derived by the public from the labors of authors.'" Id.

25. See infra notes 157-60 and accompanying text. For a discussion of the economic aspects of copyright, see infra notes 161-66 and accompanying text.

26. "The doctrine of fair use . . . permits courts to avoid rigid application of the
charge of infringement. But, in practical terms, it is a privilege to use a copyrighted work in a reasonable manner without the copyright owner's consent. By balancing the competing interests in the copyrighted work, courts determine when a copyright owner's rights may be limited. While the NYU settlement purports to preserve fair use, the settlement leaves little room for the flexible case-by-case balancing required under the doctrine.

B. The Copyright Act

In 1976, after some twenty years of debate, Congress enacted the first substantial revision of the Copyright Act since 1909.
The 1976 Act effected significant changes in the law. Of particular significance was the Act's express recognition of the doctrine of fair use.\(^{31}\)

The Act grants broad rights to copyright owners. Section 106 of the Act grants copyright owners five exclusive rights in their creations: (1) the right to reproduce their works; (2) the right to prepare derivative pieces based on their works; (3) the right to publish and distribute copies of their works; and, where appropriate, (4) the right to perform their works; and (5) the right to display their works.\(^{32}\) These rights are, however, subject to the limitations contained in sections 107 through 118 of the Act,\(^{33}\) providing exemptions from copyright infringement for certain uses or users of works.

The broadest limitation is the Act's recognition of the fair use doctrine. Under section 107, any "fair use" of a copyrighted work is not an infringement of the copyright.\(^{34}\) Other exemptions from infringement contained in the Act are more particular. Section 108, for example, authorizes libraries and archives to make single copies of copyrighted works for security or research purposes.\(^{35}\) Similarly, section 110 authorizes the performance of


\(^{33}\) The approach of the [Act] is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made "subject to sections 107 through 118," and must be read in conjunction with those provisions.


\(^{35}\) Section 108 was intended primarily for isolated and unrelated copying by libraries and archives for the purposes of preservation, security, or interlibrary loans. Section 108 probably does not authorize large-scale, non-library, educational copying, but may authorize substantial photocopying in the higher education context. It authorizes a library or archives open to the public, or at least open to researchers in the field, to make a complete copy of a copyrighted work without risking liability for infringement, so long as the copy is not made for commercial gain. 17 U.S.C. § 108(a) (1982). Copies made for private study, scholarship, or research may be kept by the requesters and need not be destroyed after use. 17 U.S.C. § 108(a)(1), (d)(1) (1982). Libraries may copy entire works whenever an original cannot be obtained by the user at a "fair" price. 17 U.S.C. § 108(e) (1982). Section 108, however, limits copying by prohibiting "the systematic reproduction or distribution of single or multiple copies . . . of material . . . ." 17 U.S.C. § 108(g)(2) (1982). As a general matter, it is unclear how far a library may go before it has engaged in illegal, "systematic" reproduction.

The Senate Judiciary Committee found that "neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of 'sin-
a work in the course of face-to-face teaching in a non-profit educational institution.\textsuperscript{36}

Although the Act treats educational uses favorably,\textsuperscript{37} there is no general exemption in sections 108 through 118 for all educational or scholarly uses. Nor is there a specific exemption protecting non-library university photocopying for teaching or scholarship—like the photocopying done at NYU—from infringement.\textsuperscript{38} Therefore, section 107, the Act's fair use provi-

\textsuperscript{36} "S. REP. NO. 473, 94th Cong., 2d Sess. 70 (1975) [hereinafter cited as \textit{SENATE REPORT}]. The Committee was certain, however, that section 108 did not authorize a library to photocopy copyrighted works for distribution to an entire classroom. \textit{Id.} The Senate acknowledged that the needs of users require that "[i]solated single spontaneous requests . . . be distinguished from 'systematic reproduction.' The photocopying needs of such operations as multi-county regional systems must be met . . . . [T]he Committee is aware that . . . there will be a significant evolution in the functioning and services of libraries." \textit{Id.} at 70-71.

The House found the Senate's prohibition of "systematic reproduction or distribution" too restrictive. See \textit{HOUSE REPORT}, supra note 27, at 77-78, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5691. The House drafted the following proviso later added to the Act's systematic copying prohibition:

\textit{Provided, that nothing in this clause prevents a library or archives from partici-pating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies . . . does so in such aggregate quantities as to substitute for a subscription to or purchase of such work. 17 U.S.C. § 108(g)(2) (1982). The terms, "aggregate quantities" and "substitute for a subscription to or purchase of" a copyrighted work, give flexibility to university libraries in setting photocopying policies.

Section 108 also shields a library or archives from liability for any infringing use of photocopy machines located on an institution's premises so long as its unsupervised photocopying equipment displays a notice. 17 U.S.C. § 108(f)(1) (1982). This notice need only state that the individual user is subject to the copyright law and may be liable for any infringement. \textit{Id.} Therefore, even if a library is prohibited from photocopying a copyrighted work, an individual user is not prevented from exercising his or her judgment as to fair use. Given the inherent enforcement problems in this scheme, even clearly infringing photocopying cannot be prevented effectively.

36. Section 110 of the Act provides that the following are not infringing uses: "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a non-profit educational institution, in a classroom or similar place devoted to instruction." 17 U.S.C. § 110(1) (1982).

37. A prime example of the drafters' intent to favor educational users of copyrighted works is found in the Act's damages provisions. Section 504 of the Act, 17 U.S.C. § 504 (1982), provides that only the actual damages proven by the copyright owner may be collected from educators who copy copyrighted materials in the good faith belief that their use of a work is fair. In cases involving these "innocent" infringers, statutory damages are unavailable. See infra note 53 and accompanying text.

38. Problems presented by new technologies such as photocopying machines did, however, provide much of the impetus for revising the copyright laws. Congress in 1974 dealt with these problems by creating the National Commission on New Technological Uses of Copyrighted Works (CONTU). Pub. L. No. 93-573, 88 Stat. 1873 (1974). CONTU was established to "assist . . . in developing a national policy for both protecting the rights of copyright owners and ensuring public access to copyrighted works when they are used in computer and machine duplication systems." 

\textsuperscript{37} NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, \textit{FINAL REPORT} 3 (1978). To this end, CONTU
sion,\textsuperscript{39} is the primary basis for limiting copyright owners' rights by permitting photocopying by university users.

\textbf{C. Section 107—Fair Use}

The 1976 Act is the first copyright statute to recognize expressly the common law doctrine of fair use. Section 107 does not include a definition of "fair use" but instead contains examples of non-infringing fair uses such as producing multiple copies for the classroom.\textsuperscript{40} To determine whether any particular use

\begin{itemize}
  \item \textit{LIMITATIONS ON EXCLUSIVE RIGHTS: FAIR USE}

  Notwithstanding the provisions of section 106, 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, \textit{teaching} (including multiple copies for classroom use), \textit{scholarship}, or \textit{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—

  \begin{enumerate}
    \item the purpose and character of the use, \textit{including whether such use is of a commercial nature or is for nonprofit educational purposes};
    \item the nature of the copyrighted work;
    \item the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
    \item the effect of the use upon the potential market for or value of the
  \end{enumerate}

\textsuperscript{Id. at 55.}

\textsuperscript{CONTU was specifically prohibited, however, from studying "the reproduction and use of copyrighted works . . . by or at the request of instructors for use in face-to-face teaching activities." Pub. L. No. 93-573, § 201(b)(1)(B), 88 Stat. 1873 (1978), reprinted in \textit{NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT} 105 (1978).}


\textsuperscript{40. Section 107 provides in full:}

\begin{itemize}
  \item \textit{notwithstanding the provisons of section 106, 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, \textit{teaching} (including multiple copies for classroom use), \textit{scholarship}, or \textit{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—}
  \item \textit{1. the purpose and character of the use, \textit{including whether such use is of a commercial nature or is for nonprofit educational purposes};}
  \item \textit{2. the nature of the copyrighted work;}
  \item \textit{3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and}
  \item \textit{4. the effect of the use upon the potential market for or value of the}
\end{itemize}
of a copyrighted work is fair, section 107 contains a codification of the fair use balancing test developed at common law. Under section 107, courts assessing the fairness of a particular use are required to consider the relevant "factors" including but not limited to (1) the purpose and character of the use; (2) the nature of the work used; (3) the amount of the work used; and (4) the effect of the use on the market for the work.

While codifying the common law fair use doctrine, Congress intended neither to alter the doctrine nor to freeze its continued development by the courts. Instead, section 107 was intended to restate the fair use doctrine as developed by the courts up to 1976 and to permit further judicial development. In fact, however, Congress modified the fair use doctrine in its enactment of section 107. Some modification was the inevitable byproduct of restating common law. Other modifications in the fair use doctrine, however, were the intentional result of Congress's decision to provide favorable treatment for educational photocopying in section 107.

1. See infra note 43 and accompanying text. For a discussion of the fair use doctrine's development at common law, see supra notes 26-28 and accompanying text.


[T]he endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

44. See, e.g., Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1495 n.7 (11th Cir. 1984), cert. denied, 105 S. Ct. 1867 (1985):

[T]he House Committee on the Judiciary may have overstated its intention to leave the doctrine of fair use unchanged, because the statute clearly offers new guidance for courts considering fair use defenses. It establishes a minimum number of inquiries that a court must carry out, even if it leaves to the courts how to assign relative weights to each factor and how to supplement the first four factors.

See also W. Patry, supra note 18, at 362:

It must also be recognized . . . that despite the aforementioned congressional intent not to change the fair use doctrine as it existed prior to codification, Section 107 did in fact alter the doctrine. One such alteration is the sanctioning of reprographic or, as it is sometimes called, "passive" reproduction as a potential fair use.

45. In section 107, Congress provided protections from infringement for educators
Congress paid considerable attention to the copyright issues presented by university photocopying throughout the twelve years of congressional debate on section 107. Early in this debate, a coalition of twenty-five educational associations—the Ad Hoc Committee on Educational Organizations on Copyright Law Revision (the Ad Hoc Committee)—advocated a blanket ex-

going beyond the protections provided under the common law doctrine: "In an effort to meet this need [for greater certainty and protection for educators and scholars] the Committee has not only adopted further amendments to section 107, but has also amended section 504(c) [damages section] . . . ." HOUSE REPORT, supra note 27, at 67, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5680. See infra note 53 and accompanying text. The Conference Report accompanying the Act reinforces the Act's preference for educational uses:

The House bill amended [the Senate's] section 107 in two respects: in the general statement of the fair use doctrine it added a specific reference to multiple copies for classroom use, and it amplified the statement of the first of the criteria to be used in judging fair use . . . by referring to the commercial nature or nonprofit educational purpose of the use.

. . . . The conference substitute adopts the House amendments.


46. "[M]ost of the discussion of section 107 has centered around questions of classroom reproduction, particularly photocopying." HOUSE REPORT, supra note 27, at 66, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5680. "The specific wording of section 107 as it now stands is the result of a process of accretion, resulting from the long controversy over the related problems of fair use and the reproduction (mostly by photocopying) of copyrighted material for educational and scholarly purposes." HOUSE REPORT, supra note 27, at 66, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5679. See generally W. PATRY, supra note 18, at 211-332.

47. The following organizations were members of the Ad Hoc Committee:
American Association of Colleges of Teacher Education
American Association of Jr. Colleges
American Association of School Administrators
American Association of University Women
American Association of Teachers of Chinese Language and Culture
American Association of Teachers of French
American Association of Teachers of Spanish and Portuguese
American Council on Education
Association for Higher Education
College English Association
Council of Chief State School Officers
Department of Audiovisual Instruction, NEA
Department of Classroom Teachers, NEA
Department of Foreign Languages, NEA
Department of Rural Education, NEA
Midwest Program Airborne Television Instruction, Inc.
National Association of Educational Broadcasters
National Catholic Educational Association
National Catholic Welfare Conference
National Commission on Professional Rights and Responsibilities, NEA
National Council of Teachers of English
National Education Association of the U.S.
emptions for copying done for "non-commercial educational purposes." The amendment failed, in part, because some in Congress felt that the education exemption was unnecessary. Many of the uses for which the educators sought blanket protection, it was believed, would constitute fair uses under the common law fair use balancing test, later codified in section 107.

Although unwilling to grant educators a blanket exemption, Congress perceived the chilling effect that uncertainty would have upon the educational use of photocopies. Thus, a major purpose of the Act was to provide educators and scholars with "greater certainty and protection" in the area of photocopying. To this end, Congress provided special treatment for educators and scholars in the Act's damages provisions. Congress also

National Educational Television and affiliated stations
National School Board Association (tentative)
National Science Teachers Association


The Committee also adheres to its earlier conclusion, that 'a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified.' House Report, supra note 27, at 66-67, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5680.

The doctrine of fair use, as properly applied, is broad enough to permit reasonable educational use . . . ." Id. at 32.

Although it does not represent an "exemption" to the copyright owner's exclusive rights under section 106, section 504 of the Act, 17 U.S.C. § 504 (1982), nonetheless acts to limit the rights granted to copyright owners. Section 504 provides that the infringer is liable for actual damages or, at the election of the copyright owner, statutory damages. Id. § 504(a). Statutory damages may range from $250 to $10,000 and are set at the discretion of the court. Id. § 504(c)(1). The court may allow up to $50,000 statutory damages if the copyright owner proves willful infringement. Id. § 504(c)(2). Damages may be reduced at the court's discretion to $100 for infringers who demonstrate that they were not aware and had no reason to be aware that they were infringing a copyright. Id. For any employee or agent of an educational institution, or for the institution itself, who in good faith believed the use of a copyrighted work was a "fair use" of the work, all statu-
modified the Act’s fair use provision expressly in response to the needs of educators and scholars. To provide them with greater certainty, copying copyrighted works for the purpose of “teaching (including multiple copies for classroom use), scholarship, or research” was added to section 107 as an example of a fair use.

Section 107’s balancing test was also amended to favor educational users. Congress modified the first factor—the purpose and character of the use—to include a determination of use as either commercial or non-profit educational.

damages must be remitted. Id. In fact, § 504 was amended “to provide innocent teachers and other non-profit users of copyrighted material with broad insulation against unwarranted liability for infringement.” House Report, supra note 27, at 67, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5680.

Therefore, when university professors photocopy copyrighted works believing that they are entitled to do so, but are found to have infringed the works’ copyrights, recovery is limited to actual damages. Generally, these damages are negligible unless the educator produced so many copies of a work that the owner was deprived of large potential profits.

The relatively small potential penalty for infringing educational copying has led one commentator to describe colorfully educational photocopying:

We may have to conclude that the safest refuge of the harried scholar or librarian, standing in front of a purring photocopier and needing a copy of a copyrighted work that he holds in his hand, is to rely on the Act’s express exculpation of the innocent copier who is free of profit motive. That is not a happy answer to the question, “What shall I tell my client?”

The innocent copier may be like the diplomat who violates the law but may not be arrested because the public interest in international communication transcends the value of punishing diplomats in local courts. “Copier’s exculpation” will become the diplomatic immunity of the scholar and the librarian, because Congress has decided that the public interest in education and research transcends the authors’ and publishers’ need for financial compensation when copying is done for those purposes.

Cardozo, supra note 20, at 78-79.

In the NYU case, the publishers requested in addition to injunctive relief that (1) the defendants be held accountable for all direct and indirect profits arising from their copying; (2) the defendants be required to pay the publishers actual damages or, at the publishers’ choice, statutory damages; and (3) the defendants pay the owners’ costs in bringing the action. Plaintiff’s Complaint at 3-4, Addison-Wesley Publishing Co. v. New York Univ., 1983-1984 Copyright L. Dec. (CCH) ¶ 25,544 (S.D.N.Y. 1983).


55. 17 U.S.C. § 107 (1982); see supra note 40. “[T]he newly-added reference to ‘multiple copies for classroom use’ is a recognition that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for the members of a class.” House Report, supra note 27, at 66, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5679.


The Committee has amended the first of the criteria to be considered—“the purpose and character of the use”—to state explicitly that this factor includes a consideration of “whether such use is of a commercial nature or is for non-profit educational purposes.” This amendment is not intended to be interpreted as any
While these two additions to section 107 did modify the common law fair use doctrine,\textsuperscript{57} the ultimate determination of fair use still requires the balancing of the section 107 factors.\textsuperscript{58} The outcome of this balancing in cases involving university photocopying is necessarily uncertain given the absence of conclusive judicial or legislative guidance.\textsuperscript{59} Even so, the Act evinces a strong preference for educational and scholarly uses of protected works, including the photocopying of these works.

\textbf{D. The Agreement on Guidelines for Classroom Copying}

The NYU settlement imposes guidelines\textsuperscript{60} for photocopying on the University that are identical to those contained in the "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals" (the Guidelines).\textsuperscript{61} The Guidelines were drafted by the AAP, the Ad Hoc Committee, and the Author's League of America, Inc. (the ALA). These groups first met in 1975 at the suggestion of Rep. Robert W. Kastenmeier (D-Wis.), chairman of the House Judiciary Committee (the Committee), the congressional committee responsible for drafting the Act.\textsuperscript{62} All-
though reprinted in the Committee's report on the Act, the Guidelines are not part of section 107 and were included in the Committee's report only as a "reasonable interpretation of the minimum standards of fair use." As with the House amendments to section 107 generally, Congress recognized the Guidelines in its efforts to provide greater certainty and protection for educational uses of copyrighted works.

In accepting these Guidelines, the Committee noted the strong objections of the American Association of University Professors (the AAUP) and the Association of American Law Schools (the AALS). The AAUP and the AALS criticized the Guidelines for being too "restrictive" of copying at the university level in light of copying needs and existing practices at universities across the country. The AALS and the AAUP stressed that the guidelines were unacceptable because of their negative impact on the doctrine of fair use. The Guidelines, it was argued, "restrict the doctrine of fair use so substantially as to make it almost useless for classroom teaching purposes." The AALS and the AAUP also

63. HOUSE REPORT, supra note 27, at 68-70, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5681-84. These Guidelines were also accepted by the conference committee considering the Act as partially reflecting the committee's understanding of the fair use doctrine. CONFERENCE REPORT, supra note 45, at 70, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5810, 5811.

64. HOUSE REPORT, supra note 27, at 72 (emphasis added), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5686.

65. See supra notes 52-56 and accompanying text.


68. HOUSE REPORT, supra note 27, at 72, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5685; AAUP Letter, supra note 67, at 404 (The Guidelines "would seriously interfere with the basic mission and effective operation of higher education and with the purpose of the Constitutional grant of copyright protection, which is designed to promote, not hinder, the discovery and dissemination of knowledge. . . . [They] threaten the responsible discharge of the functions of teaching and research."); AALS Letter, supra note 67, at 405-06 ("Requiring a law school teacher to meet all three tests of brevity, spontaneity and cumulative effect stifles the use of copyrighted material for classroom purposes. . . . [T]he teacher's choice is not between purchasing and copying; it is between copying and not using.").

69. AALS Letter, supra note 67, at 405; see also AAUP Letter, supra note 67, at 404 (The Guidelines "contradict the basic concept of fair use."). Two copyright experts, Prof. Leo J. Raskind of the University of Minnesota and Prof. Robert A. Gorman of the University of Pennsylvania, both also objected to the Guidelines and wrote letters in April 1976 to Rep. Kastenmeier. See AALS Letter, supra note 67, at 405.
argued that the Guidelines merely represented an agreement between representatives of publishers, authors, and some education associations, and that it would be improper to impose the terms of this agreement upon groups not present at the negotiations. Representatives of major higher education groups did not participate in the negotiations over the Guidelines. Indeed, the Ad Hoc Committee comprised primarily elementary and secondary education groups. The AALS even suggested that certain higher education groups were purposefully excluded from the negotiation of the Guidelines to facilitate agreement on the Guidelines.

The Committee answered the objections raised by the AAUP and the AALS by expressly restricting the Guidelines to their own terms. The Guidelines state that they are only minimum standards for educational photocopying and are not intended to replace determinations made under fair use criteria. Uses affirmatively allowed under the Guidelines are unquestionably fair, but other uses may also be fair. The Committee expressed its hope that the interested parties would meet in the future to develop new guidelines for areas where the Guidelines did not apply or were inappropriate. Contrary to their stated scope

70. Gorman Letter, supra note 57 ("The guidelines . . . were signed by representatives of publishers and some education associations and were designed as an unofficial understanding of the minimum reach of the fair use doctrine in the context of copying for classroom teaching purposes.").

71. AAUP Letter, supra note 67, at 402, 404:
We recognize, of course, the right of any given groups mutually to agree upon the terms and conditions by which they, and those they actually represent, will be guided in conforming to a statute such as this. To suggest, however, that such agreements should be binding upon other persons or groups or should, through the incorporation in a committee report, be given weight in the interpretation of the statute generally, is quite a different matter.

72. In its report, the Committee pointed out that some representatives of higher education were involved with the Ad Hoc Committee that helped write the Guidelines. HOUSE REPORT, supra note 27, at 72, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5685-86. The AALS and the AAUP, both representing major segments of higher education, were not members of the Ad Hoc Committee. See supra note 47.

73. See supra note 47.

74. See AALS Letter, supra note 67.

75. The purpose of the . . . guidelines is to state the minimum and not the maximum standards of educational fair use under section 107. . . . The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future. . . .

76. There may be instances in which copying which does not fall within the guidelines . . . may nonetheless be permitted under the criteria of fair use.
and purpose, the Guidelines were used in the NYU settlement to establish a maximum of allowable “fair” photocopying.77

II. THE CASE LAW

Fair use determinations under either the common law fair use doctrine or section 107 are made by balancing relevant fair use "factors," four of which are listed in section 107. Although there are no fair use cases involving university photocopying, several significant cases involve copying and photocopying by a variety of educational and non-educational users.78 An evaluation of the balancing of fair use factors—especially the four section 107 factors—in these cases demonstrates that much university photocopying of copyrighted works constitutes fair use, including perhaps much or all of the photocopying done at NYU before the NYU settlement. Section 107 explicitly favors the educational, noncommercial nature of university photocopying. Unless the work photocopied fits into one of a limited number of categories of works that have received individual attention in the past, the nature of the work copied also will weigh in favor of fair use in the university context. The amount and substantiality of the

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 for teachers. The Committee expresses the hope that if there are areas where standards other than these guidelines may be appropriate, the parties will continue their efforts to provide additional specific guidelines in the same spirit of good will and give and take that has marked the discussion of this subject in recent months. HOUSE REPORT, supra note 27, at 72, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5686.

77. The NYU Settlement establishes the Guidelines as a maximum of allowable photocopying by requiring faculty members wishing to produce photocopies not allowed under the Guidelines to seek the copyright owner’s approval. If approval is denied or granted in a way that the faculty member considered inappropriate, the faculty member may not photocopy unless the university general counsel approves the use. See supra notes 5-12 and accompanying text.

78. Fair use cases decided at common law and pre-1976 copyright legislation continue to have relevance to fair use determinations formally made under the 1976 Act that codified the fair use doctrine as it existed in 1976. See supra note 43 and accompanying text. At the core of the common law fair use doctrine was the balancing of the general factors now listed in section 107. 17 U.S.C. § 107 (1982). See supra note 40. Congress intended the earlier cases to continue to have bearing on fair use determinations. It plainly expressed its intent not to alter the law as it had developed up to 1976. See supra note 43 and accompanying text. Cases decided before the Act’s 1978 effective date may therefore be examined for guidance on the application of the fair use doctrine to educational photocopying cases. M. NIMMER, supra note 24, § 13.05[A].
material photocopied may not weigh in favor of fair use, but will not necessarily weigh against it. The economic impact of photocopying on copyright owners' markets will necessarily depend on the precise interests in the case. The non-minimal harm that must be shown by the copyright owner in university photocopying cases is also likely to favor fair use unless, for example, the work was created exclusively for the educational market and the photocopying replaced significant sales of the work. Finally, consideration of additional factors permitted under section 107, such as first amendment and public interest concerns, also will heavily favor fair use in most university photocopying cases. Even if one factor is found to weigh against fair use, however, fair use may nonetheless be found. No one factor is determinative in the sensitive balancing called for under section 107.

A. The Purpose and Character of the Use

The most important case for evaluating university photocopying under the fair use doctrine is the landmark decision of the United States Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.* Although *Sony* involved copying by non-educational users, the Court's treatment of the first section 107 factor—the purpose and character of the use—has important implications for the fairness of university photocopying.

In *Sony*, owners of video cassette recorders (VCRs) were producing identical, complete copies of copyrighted television programs. The copyright owners charged that Sony, a VCR manufacturer, was liable for the alleged copyright infringement committed by VCR users. The Court, by a vote of five to four, held Sony not liable for contributory infringement. Justice Stevens reasoned that the private, noncommercial copying of complete television programs with VCRs constituted a fair use under the Act.

In its discussion of the "purpose and character of the use" factor, the Court held that a use is presumptively fair if its purpose is noncommercial and not-for-profit. The Court found that

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80. Id.
81. Id. at 456.
82. Although not conclusive, the first factor [of § 107] requires that 'the commercial or non-profit character of an activity' be weighed in any fair use decision. If the Betamax were used to make copies for a commercial or profit-making purpose,
copying television programs with a VCR was presumptively fair, because the primary purpose of the copying was for a noncommercial, not-for-profit use: timeshifting or recording of programs for viewing at more convenient times. Timeshifting merely allows viewers to watch at later times the same shows they could have watched earlier.

The Sony Court’s presumption of fair use under the first section 107 factor supports the application of the fair use doctrine to protect university photocopying. University photocopying for educational and scholarly purposes is plainly done for noncommercial, nonprofit purposes. University photocopying is analogous to timeshifting with a VCR because both are done for the convenience of the user. Both provide users with greater access to copyrighted works.

More important for the fair use evaluation of university photocopying was the Sony Court’s refusal to limit application of the fair use doctrine to uses with “productive” purposes, as had the Ninth Circuit in Sony. The appellate court had ruled that only socially productive uses could constitute “fair” uses. Reproducing a copyrighted work for the same intrinsic purpose as the original did not constitute a productive, or therefore a fair, use. The Sony Court dismissed this view of the fair use doctrine as “erroneous.” Congress did not distinguish between productive and non-productive uses in section 107, and the Court refused to read such a distinction into the section. Moreover, the Court found the distinction between productive and non-productive practically unworkable, especially in the education context.

such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court’s findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity.

Id. at 448-49.

83. The Court rejected the argument that timeshifting is a commercial use, because timeshifters do not buy video tapes of the copied works sold by the copyright owners. Id. at 450 n.33. The Court reasoned that a VCR owner’s use of a copyrighted program is identical to the program’s use by a viewer who sees the program at its originally scheduled time. Id.

84. Id. at 449-50.


86. 659 F.2d at 970.

87. Id.

88. 464 U.S. at 455 n.40. The productivity of a use is just one factor to consider in the fair use balancing. “The distinction between ‘productive’ and ‘unproductive’ uses may be helpful in calibrating the balance, but it cannot be wholly determinative.” Id.

89. “A teacher who copies to prepare lecture notes is clearly productive. But so is a
The *Sony* Court’s rejection of the productive/non-productive use distinction under the first section 107 factor is essential to a finding of fair use in university photocopying cases. It disposes of unfavorable precedents for treating university photocopying as a fair use under section 107.90 In particular, it substantially weakens, if it does not overrule, *Marcus v. Rowley,*91 the most recent fair use case actually involving copying for educational purposes. *Marcus* was decided by the Ninth Circuit just one year before the Supreme Court decided *Sony.* The *Marcus* court’s formulation of the fair use doctrine was similar to that applied by the Ninth Circuit and rejected by the Supreme Court in *Sony.*

In *Marcus,* the Ninth Circuit considered the use of eleven pages of *Cake Decorating Made Easy,* a 35-page copyrighted booklet prepared by a San Diego public school teacher and sold to her students for $2 each. The defendant, a former student of the plaintiff now teaching her own food services class, retyped eleven pages and incorporated them into a 24-page “learning activities package.” Only fifteen of these packages were assembled; they were used only for reference, and none were sold.92

In evaluating the purpose and character of the use, the court found that the educational purpose favoring a fair use finding was outweighed by other characteristics unfavorable to such a finding.93 Because the use served the same intrinsic purpose—albeit an educational purpose—as the copyrighted work, the use was unproductive and therefore unfair.94 The *Sony* Court’s rejection of this productive/non-productive distinction as a dispositive factor in fair use determinations severely dimin-

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90. The earliest copyright cases involving copying for educational purposes employed a very narrow fair use exception. *See, e.g.,* MacMillan Co. v. King, 223 F. 862 (D. Mass. 1914), where an economics tutor was enjoined from using a short section of a copyrighted economics textbook. The tutor prepared outlines to use in teaching that contained “frequent quotation of words, and occasional quotation of sentences from the book.” *Id.* at 866. The defendant neither sold nor profited directly from his outline. The copyright owner showed no injury to its book sales or economic well-being. The court found no fair use because the tutor quoted directly from the text, amounting to “an appropriation . . . of the author’s ideas and language more extensive than the copyright law permits.” *Id.* Under the court’s holding, fair use could be shown only for uses that created new works (productive uses).

91. 695 F.2d 1171 (9th Cir. 1983). The precedential value of the case as applied to university photocopying may be limited additionally because it was decided under the 1909 Act and not section 107 of the 1976 Act.

92. *Id.* at 1173.

93. *Id.* at 1175.

94. *Id.*
ishes the precedential value of cases like *Marcus* that read fair use narrowly in educational contexts.

One aspect of *Marcus* remains instructive in assessing the fairness of university photocopying. When considering the nature and purpose of the use of a copyrighted work, a court may consider the defendant's conduct for indications of bad faith.95 The *Marcus* court was plainly influenced by the defendant's conduct, which indicated bad faith despite her educational purpose. The court observed that the defendant made no effort to obtain the copyright owner's permission to use excerpts of the work or even to acknowledge the work's authorship.96 In contrast, most photocopying done for scholarly and research purposes does not involve bad faith.97 Because acknowledgement of a work's authorship is crucial to scholarly and educational uses of photocopied works, bad faith is unlikely. Unless such bad faith is found, *Marcus* should not weigh against the presumptive fairness of university photocopying for noncommercial, educational purposes.

The first and so far only fair use case to involve photocopying itself, not merely copying, is *Williams & Wilkins Co. v. United States*.98 There, the Court of Claims evaluated under the 1909 Act99 the copyright infringement claims brought by a publisher of medical journals against the United States for the copying of millions of pages of copyrighted materials.100 Two federal libraries—the library of the National Institutes of Health (NIH) and the National Library of Medicine (NLM)—performed the copy-

95. Harper & Row, Publishers, Inc. v. Nation Enters., 105 S. Ct. 2218 (1985). In *Harper & Row*, the Court held that the noneducational, commercial use of Gerald Ford's unpublished memoirs by *The Nation* magazine to "scoop" a competitor did not constitute a fair use. *The Nation* acquired copies of the copyrighted memoirs by uncertain means and printed excerpts shortly before *Time* was scheduled to print similar excerpts with the copyright owner's permission. Although a news reporting purpose of a use weighs in favor of a fair use, the Court found that *The Nation* had exceeded its news reporting function by exploiting the unpublished manuscript beyond what was necessary to report its contents. Fair use, the Court held, presupposes good faith and fair dealing. *Id.* at 2232. The Court found that *The Nation* 's conduct evinced bad faith, and therefore the purpose and character of the use of the memoirs was not fair. *Id.*


98. 487 F.2d 1345 (Ct. Cl. 1973), aff'd by an equally divided Court, 420 U.S. 376 (1975).

99. Although applying the 1909 Act, the *Williams & Wilkins* court used a fair use balancing test similar to that codified in the present Act, including the four section 107 factors, *see supra* note 40 and accompanying text, to find a fair use. 487 F.2d at 1352; *see supra* note 28.

100. 487 F.2d at 1347-49.
ing. These institutions regularly provided researchers, scientists, and physicians photocopies of copyrighted articles from the libraries' large collections of medical journals. Each library copied approximately 100,000 articles and a million pages each year.

After evaluating the circumstances of and balancing the interests in the photocopying, the Williams & Wilkins court held that the use was fair. The court's consideration of the "purpose and character of the use" was not affected by the fact that the defendants photocopied copyrighted works. Instead, the court concentrated on the larger purpose and character of the use, which weighed heavily in favor of fair use. The photocopying was requested and performed for the purpose of scientific research, untainted by commercial interests. The copies were only used to provide access to the articles and not to misappropriate the works. The court was also particularly concerned that its holding not impede medical research or impair the dissemination of medical advances to practitioners.

This analysis of the nature and purpose of the use has important implications for determining whether university photocopying constitutes fair use. The Williams & Wilkins court treated

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101. The NIH only copied for the use of its own staff, but its staff numbered over 12,000. The NLM, however, as a repository of much of the world's medical literature, copied articles for other libraries and similar research and education oriented institutions as part of its "interlibrary loan" program. Id.

102. Id.

103. Id. at 1362. The court listed eight characteristics of the use that it found to support its holding. These eight factors may be summarized as follows: (1) the purpose of the use was to promote science; (2) the libraries had reasonable restrictions on the quantity and use of photocopied works; (3) the libraries had been making copies of copyrighted works with general acceptance since the adoption of the 1909 Act; (4) medical research would be restricted if the copying were stopped; (5) the publisher failed to prove injury; (6) the court was uncertain as to the definition of "copy" under the 1909 Act; (7) Congress incorporated special treatment for library copying in its revisions of the 1909 Act; and (8) foreign countries permit this sort of copying. Because Congress left fair use decisions up to the courts, European laws may be examined. Id. at 1354-62.

104. Id. at 1354.

105. Id.

106. Williams & Wilkins, decided under the 1909 Act, involved library photocopying, now controlled by § 108. 17 U.S.C. § 108 (1982). Williams & Wilkins provided a strong impetus during the final stages of the Act's consideration for Congress to address the copyright problems presented by photocopying. The Court of Claims had urged swift legislative action to resolve the copyright problems of library photocopying. 487 F.2d at 1363. Congress addressed this primary concern with the passage of § 108, regulating library photocopying. 17 U.S.C. § 108; see supra note 35 and accompanying text. But § 108 only partially resolves the fair use issues raised by library and educational photocopying. Section 108 does not preclude the application of the fair use doctrine to library photocopying. More importantly, in codifying the fair use doctrine in § 107, Congress intended only to restate existing common law doctrine, leaving further development to
the "nature of the use" factor as an inquiry into why the work was used, not how it was used. Examining why photocopies are made at universities should weigh favorably in the fair use balance. Like the photocopy users in Williams & Wilkins, university photocopiers are engaged in education and research—both socially important functions that generally should outweigh the societal interest in protecting a copyright owner's exclusive rights.

B. The Nature of the Copyrighted Work

The second fair use factor in section 107—the nature of the copyrighted work—frequently has involved a determination of whether the work used is informational or creative. In cases involving informational works, fair use is favored; as to creative works, fair use is not favored. This distinction often has proved unworkable. Most works cannot be classified as either informational or creative. Besides being unworkable, this distinction is contrary to basic copyright principles. The distinction confuses fair use with determinations of copyrightable subject matter. Ideas and facts are not copyrightable. Copyrights only protect expression. Once a work is found to be copyrightable, the informational or creative nature of the work is simply irrelevant. The defense of fair use arises only after the infringement of a valid copyright has been established. By finding fair use to favor creative works, courts may in fact misuse the doctrine to redetermine the scope of copyright.

In addition to the informational/creative determination, other

the courts. Therefore, Williams & Wilkins retains precedential value in the university photocopying context.

107. 17 U.S.C. § 107(2); see supra note 40.

108. See M. Nimmer, supra note 24, § 13.05[A][2]. In Sony, the Ninth Circuit made a traditional evaluation of the nature of the copyrighted work used, inquiring whether the work was informational or creative. Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 972-73 (9th Cir. 1981), rev'd, 464 U.S. 417 (1984).

109. Works as simple as the 35-page cake decorating booklet in Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983), see supra text accompanying notes 92-97, could not be classified by the court. The Marcus court found both informational and creative aspects in the work and could not draw a fair use conclusion under this factor. 695 F.2d at 1176. If cake decorating booklets can stump the Ninth Circuit, then the ability of courts to classify more complicated materials photocopied by educators and scholars at universities is doubtful.

110. 17 U.S.C. § 102(b) (1982) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").
inquiries made under the second section 107 factor include whether the work is of a type that has received special treatment in the past, such as a map, an architectural drawing, or an unpublished work.\textsuperscript{111} The Sony Court, in its analysis under this factor, merely stated that it found the nature of televised works supportive of the fair use of the works by VCR owners.\textsuperscript{112} It is unclear exactly what this nature is however. Presumably, because televised works are broadcast in their entirety into private homes, there is greater latitude for using the works. Although analysis under this factor is necessarily specific to the particular work used, it can be assumed that the nature of the works photocopied for educational purposes will generally favor fair use findings. Such works are often scholarly in themselves and are generally available free of charge to library patrons.

\textbf{C. The Amount and Substantiality of the Material Used}

The third fair use factor under section 107—the amount and substantiality of the copyrighted work used\textsuperscript{113}—at first appears to weigh heavily against a finding of fair use in the university photocopying context. The photocopy of a copyrighted work, or a portion of the work, is identical to the work itself. More is at issue in the assessment of a use under the third section 107 factor, however, than the percentage of the original work used. After Sony, even the production of identical copies of entire copyrighted works may constitute a fair use under this factor.\textsuperscript{114} Thus, earlier cases holding that a fair use holding is precluded where substantial portions of works or entire works are copied are inapposite.\textsuperscript{115} Modern courts must consider more than the amount of the copyrighted work used.

\textsuperscript{111} W. Patry, \textit{ supra} note 18, at 417-49. In \textit{Harper & Row}, the Court was influenced by the unpublished nature of the copyrighted work used. 105 S. Ct. at 2232-33. The Court held that the fair use doctrine is much narrower when applied to unpublished works and that the defendant's publication of the unpublished manuscript was therefore not a fair use. \textit{Id.} at 2227-28, 2232. In fact, \textit{Harper & Row} may be viewed primarily as a case enforcing the author's right of first publication. The right of first publication was a common law right giving authors control over their works. The right has now been incorporated in the section 106 right of distribution. 17 U.S.C. § 106 (1982). See M. Nimmer, \textit{ supra} note 24, § 8.12.

\textsuperscript{112} 464 U.S. at 449-51.

\textsuperscript{113} 17 U.S.C. § 107(3) (1982); \textit{see supra} note 40.

\textsuperscript{114} \textit{See supra} notes 80-81 and accompanying text.

\textsuperscript{115} Several early fair use cases held that fair use is unavailable in cases involving substantial copying. \textit{See, e.g.}, Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962). In \textit{Wihtol}, a case decided under the 1909 Act, the Eighth Circuit considered the fair use defense as-
In Sony, the purpose and nature of the use was determinative of how much of the copyrighted works could be copied. Because timeshifting involved using the works as original viewers did, only at a later time, it was held a fair use. That timeshifting required the copying of entire copyrighted works did not outweigh the fair use finding, but was considered necessary to fulfill the noncommercial, not-for-profit objectives of the timeshifting use.

In Harper & Row, Publishers, Inc. v. The Nation Enterprises, the Court was concerned more about the significance of the part than the amount of a copyrighted work used. Although only excerpts of the copyrighted work were used, the Harper & Row Court held that the third factor of section 107 weighed against a finding of fair use in this commercial use case, because the defendant had taken the “heart” of the work. Under Harper & Row, courts must not only determine how much of a copyrighted work has been used but, at least for commercial use cases, also perform an intricate and necessarily subjective examination of the work to determine what its most im-

serted by a chorus teacher who made an unauthorized arrangement of the copyrighted song “My God and I.” The copyright owner scored the work for solo voice and piano. The chorus teacher arranged the song for use by a choir and reproduced multiple copies of his arrangement for use by local high school and church choirs. The court held that the use infringed the copyright and was not fair. The teacher had simply used the copyright owner’s entire song without giving any acknowledgement of authorship. Reading the 1909 Act strictly, the court held: “[T]he copying of all, or substantially all, of a copyrighted song can [not] be a ‘fair use’. . . . It must be kept in mind that the applicable law is purely statutory and that the Copyright Act has little elasticity or flexibility.” Id. at 780-82. The court gave no consideration to the educational nature of the use. Id. at 781-82.

Arguably, Wihtol has no application in the university photocopying context. Strictly speaking, Wihtol is not a copying case. The defendant made an arrangement of the plaintiff’s work—a derivative use—which he then reproduced. See 17 U.S.C. § 101 (1982):

A “derivative work” is a work based upon one or more preexisting works, such as a . . . musical arrangement, . . . or any other form in which a work may be recast, transformed, or adapted. A work consisting of . . . annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

Furthermore, the case may not have involved a purely educational use. The court suggests that the school teacher had a commercial motive. The teacher had offered to sell the copyright owner his arrangement, implying a for-profit purpose. 309 F.2d at 779.

116. 464 U.S. at 449-50: “[W]hen one considers . . . that time-shifting 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.”

117. Id.
118. 105 S. Ct. 2218 (1985); see supra note 95.
119. 105 S. Ct. at 2233-34.
120. Id.
portant parts are and whether they were used.

In a recent educational use case, *Encyclopaedia Britannica Educational Corp. v. Crooks*, a lower federal court rejected a fair use defense—in part the result of the court's analysis under the third section 107 factor. *Crooks* demonstrates the impact of the extent and frequency of copying on the fair use analysis. In *Crooks*, the allegedly infringing copying involved the noncommercial videotaping of educational television programs by the Board of Cooperative Educational Services (BOCES). BOCES is a nonprofit organization created under New York's Education Law for the purpose of providing educational services on a cooperative basis to nineteen school districts in BOCES's geographic area. BOCES made copies of television shows for use in classrooms at later times. BOCES provided its services to over 100 schools; owned equipment worth between $500,000 and $1,000,000; employed a staff of nine with a budget of nearly $300,000; and, as of 1976, kept a library of over 4,500 videotaped programs. The *Crooks* court acknowledged the educational purpose and character of the copying and held that while copying entire works was not necessarily unfair, the extent and regularity of the copying in this case was too unreasonable to permit a fair use finding.

Although the precedential value of *Crooks* may be limited in light of the court's presumption against the fairness of copying entire works, it is uncertain whether the outcome of the case would have been any different without this presumption, given the nature of the use.

Not all copying has been found unfair because of the magnitude and institutionalization of the copying involved. The pho-

121. 542 F. Supp. 1156 (W.D.N.Y. 1982). Although this case was decided after the effective date of the 1976 Act, the cause of action arose before 1978 and was therefore decided under the 1909 Act. Even so, the court used the § 107 factors to make its fair use determination. *Id.* at 1168.

122. The court's conclusion was based on a weighing of all four of the fair use factors. Although the court found the purpose of the use to favor a fair use finding, the court concluded that the nature of the work weighed against fair use. Under the nature of the work factor, the court was influenced by the general availability of the works. *Id.* at 1177. The copyrighted works' educational nature did not affect the finding against fair use because the films were made to be sold to schools. *Id.* at 1177-78. The court also found economic harm, *id.*, a finding that must be questioned after *Sony*. See infra notes 135-39 and accompanying text.

123. 542 F. Supp. at 1159.

124. *Id.* at 1162.

125. *Id.* at 1176.

126. Copying entire works "cannot be considered fair use in relation to the plaintiffs' copyrighted works." *Id.* at 1179. The *Sony* Court's interpretation of § 107 permits complete copying as a fair use under certain circumstances and rejects any presumption to the contrary. *See supra* notes 80-81 and accompanying text.
tocopying in Williams & Wilkins was on a scale equal to or greater than the copying in Crooks, but was found fair as a result of the circumstances surrounding the use. Both the NIH and NLM had photocopying policies limiting the copying that they would perform, although exceptions to these policies were frequently made. Neither library inquired into the ultimate use to which the copies were put or required that copies be returned after their use. Nonetheless, the court found that the libraries’ policies controlling photocopying made the copying reasonable. The court also found the large volume of photocopying reasonable in view of the number of individuals being served and the substantial sums paid by the libraries for subscriptions.

Therefore, the analysis under the third section 107 factor does not end with a determination of how much of the work at issue was photocopied. Courts must also assess the significance of portions copied, the institutionalization of the copying, and other circumstances such as the existence of copying policies and the importance of the copying to a noncommercial, not-for-profit purpose. Because most university photocopying is not as centralized as the copying in Crooks—most photocopying decisions at the university level are made by individual teachers or researchers—university photocopying cases should be distinguishable from Crooks. Furthermore, in view of the fact that most university photocopying resembles that done under the Williams & Wilkins facts, that case may be used as a favorable precedent.

D. The Effect of the Use Upon the Market for the Copyrighted Work

The fourth fair use factor under section 107—the “effect of the use upon the potential market for . . . the copyrighted

127. 487 F.2d 1345 (Ct. Cl. 1973), aff’d by an equally divided Court, 420 U.S. 376 (1975); see supra notes 98-105 and accompanying text.
128. 487 F.2d at 1348-49. These policies limited the frequency and length of requests that would be accepted from any one institution or individual. The policies also limited the number and length of requests that would be filled from any single journal. In addition, the NLM would only provide copies of journal articles not on a list of widely available publications.
129. Id. at 1348-49.
130. Id. at 1354-55.
131. Id. at 1355.
132. Id. at 1347. Large sums were paid for subscriptions, but neither library made royalty payments to the copyright owners whose articles were copied.
work"—may be the most important element of a section 107 fair use inquiry. Due to the Sony Court's construction, the final section 107 factor favors a fair use finding in university photocopying cases.

In its evaluation of the market effect factor, the Sony Court held that in cases involving noncommercial uses, copyright owners must prove by a preponderance of the evidence that the use causes or will cause non-minimal harm. The Sony plaintiffs failed to meet this burden of proof by neglecting to show actual or future non-minimal harm. The harm caused by copying television programs with VCRs was too speculative. The Court refused to find that the copying constituted infringement where the copyright owner could not establish non-minimal and non-speculative economic harm. Restricting the public's use of a work when that use does not harm the copyright owner economically does not serve copyright's purpose—the creation and protection of economic incentives for authors and creators. More-

134. "[T]he Act focuses on 'the effect of the use upon the ... market for ... the ... work.' This last factor is undoubtedly the single most important element of fair use." Harper & Row, Publishers, Inc. v. Nation Enters., 105 S. Ct. at 2234. The Harper & Row Court's treatment of the harm factor in the fair use test may be confined to commercial uses. After all, for commercial uses the economic aspect dominates and consequently affects the analysis under the other factors, such as the purpose of the use. The case may also be limited by the fact that the Court found definite economic harm to the copyright owner. Id. at 2235.
135. 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. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.
136. Id. at 454. The Court noted the trial court's finding that "[h]arm from time-shifting is speculative and, at best, minimal." 480 F. Supp. 429, 467 (C.D. Cal. 1979). It had even been suggested: "It is not implausible that benefits could also accrue to plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts. ... Television production by plaintiffs today is more profitable than it has ever been ...." Id. at 467-69.
137. 464 U.S. at 454.
138. The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted
over, restricting the public's use of a work when that use increased access to televised works and did not cause economic harm to the copyright owner does not serve the public interest in the dissemination of copyrighted works.\textsuperscript{139}

Under \textit{Sony}, the plaintiff in a university photocopying case bears the burden of proving that the photocopying has or will have a demonstrable negative effect on the actual or potential market for, or value of, the work. This burden of proof provides educators and scholars with a substantial advantage in asserting and maintaining a fair use defense. Where the educational photocopying of a particular work is so extensive as to replace effectively substantial numbers of purchases of the work, the copyright owner may meet the \textit{Sony} burden of proof. But, like timeshifting in the VCR context, the bulk of university photocopying is done merely for the temporary convenience of the user and does not replace the purchase of the work. Educational and scholarly copying most often is performed in order to provide fuller and easier access to copyrighted works. Except in cases involving photocopying on a very large scale, the harm to the copyright owner from specific instances of photocopying at the university level is likely to be speculative or, at best, minimal.

The \textit{Williams & Wilkins} court anticipated the Supreme Court's approach to the fourth section 107 factor in \textit{Sony}, basing its finding partially on the plaintiff's failure to prove any substantial economic injury. Despite the large amount of photocopying done,\textsuperscript{140} the court was not persuaded that the copyright owner had been harmed by the NIH's and the NLM's copying. The copying provided access to copyrighted works, and this did not injure the plaintiff. In fact, the court found that the publisher may have gained subscriptions as a result of the copying while increasing the availability of the copyrighted works.\textsuperscript{141} In

\textsuperscript{139} Work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.

\textsuperscript{140} Id. at 450-51.

\textsuperscript{139} "Concededly, that [public] interest is not unlimited. But it supports an interpretation of the concept of 'fair use' that requires the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law." \textit{Id.} at 454.

\textsuperscript{141} See \textit{supra} note 102 and accompanying text.

\textsuperscript{141} Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1357-59 (Ct. Cl. 1973), \textit{aff'd by an equally divided Court}, 420 U.S. 376 (1975). The court looked at the publisher's business and found it profitable throughout the period at issue in the case.
any case, the publisher had not shown that it had lost any business.\textsuperscript{142}

The Sony Court’s fourth factor analysis also may be used to limit Marcus and Crooks. In Marcus, in which educational copying was held not to constitute a fair use,\textsuperscript{143} the court’s harm analysis of the noncommercial use is simply inconsistent with that in Sony. The Marcus court did not find non-minimal harm and held that the absence of harm did not make the use fair.\textsuperscript{144} The only harm shown by the plaintiff was the loss of one sale of the copyrighted pamphlet as a result of the defendant’s copying.\textsuperscript{145} This loss amounted to $1, the profit realized from each pamphlet sold.

In Crooks, in which copying for educational purposes was also found not to constitute a fair use,\textsuperscript{146} the court found actual and substantial harm.\textsuperscript{147} The Crooks court’s findings of harm are in doubt, however, after Sony, because it is unclear whether the Crooks court applied the proper burden of proof.\textsuperscript{148} Sony’s non-minimal harm analysis must be the standard by which future noncommercial fair use cases are measured.

\begin{itemize}
\item \textsuperscript{142} 487 F.2d at 1357-59.
\item \textsuperscript{143} See supra text accompanying notes 92-94.
\item \textsuperscript{144} Marcus v. Rowley, 695 F.2d 1171, 1177 (9th Cir. 1983).
\item \textsuperscript{145} Id.
\item \textsuperscript{146} See supra notes 121-26 and accompanying text.
\item \textsuperscript{147} Encyclopaedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1169-74 (W.D.N.Y. 1982). Because the defendant provided the public schools with films taped from television, the copying caused a decline in rental payments to the plaintiff. Although the plaintiff’s business was profitable, the court found that the plaintiff’s profits would have been even larger were it not for the defendant’s copying. Id. at 1173.
\item \textsuperscript{148} The Crooks court held that the plaintiff’s potential market for videotaped copies of its films was injured. The plaintiff was in the business of providing videotaped copies of its works to schools. Schools would not rent or buy these copies if they could make them themselves for free. Id. at 1169.

This harm analysis took proof of harm for granted rather than imposing on the plaintiff the burden of showing non-minimal harm. In the court below, 447 F. Supp. 243 (W.D.N.Y. 1978), BOCES, the defendant, argued that there was no harm to the plaintiff because the plaintiff had already been compensated for its works, and any royalties paid to the plaintiff for each work copied from television broadcasts would represent a windfall. Their use of the works had already been paid for by the educational television stations that broadcast the films. BOCES owned copies of most of the films at issue and apparently made videotaped copies of films it owned for easier distribution and access. Ironically, then, had BOCES chosen to distribute the films in their original form instead of on video-cassettes, infringement would never have occurred.
\end{itemize}
Section 107's list of factors to consider in determining whether a use of a copyrighted work is fair is not exhaustive.\(^{149}\) A fair use determination, therefore, may involve the consideration of additional factors that take account of relevant circumstances and interests beyond those examined by the section 107 factors. Other factors taken into account by the courts in fair use determinations reflect first amendment and public policy concerns.

In its "'equitable rule of reason' balance,"\(^{150}\) the Sony Court considered the first amendment and the public policy concerns raised by the private videotaping of television programs. A holding that copying television shows was infringing would have restricted the free flow of ideas protected by the first amendment.\(^{151}\) In view of the fact that the copyright owners did not show economic harm, and to avoid restricting the public’s access to ideas, the Court held that the use was fair.\(^{152}\) The Court also found that the public benefits from increased access to television programming.\(^{153}\) This finding supported the Court’s fair use finding, although the Court realized that this interest was not unlimited.\(^{154}\)

The Williams & Wilkins court also performed a sensitive balancing of interests not included in the section 107 list. In particular, the court weighed the public interest in the use to support its fair use finding.\(^{155}\) The court found that photocopying medical journals for medical research was socially beneficial. The court’s consideration of the public interest weighed heavily in favor of fair use due to the court’s concern that it not impede this important research by finding infringement.\(^{156}\)

The consideration of additional factors similar to those addressed in Sony and Williams & Wilkins will favor a fair use finding in most cases of university photocopying. Photocopying at the university level perhaps is more deserving of favor under the first amendment than is videotaping television programs.

\(^{149}\) See supra notes 40-42 and accompanying text.


\(^{151}\) Id.

\(^{152}\) Id. at 450-51. The Court held that the use in Sony was fair because restricting the copying of the television shows would “inhibit access to ideas without any countervailing benefit.” Id.

\(^{153}\) Id. at 454.

\(^{154}\) See supra notes 138-39 and accompanying text.

\(^{155}\) Williams & Wilkins, 487 F.2d at 1356-57.

\(^{156}\) Id.
Like videotaping, university photocopying directly promotes the free flow of ideas. Unlike videotaping, however, the information circulated by university photocopying is more likely to involve ideas traditionally within the "core" of the first amendment—such as political speech—and entitled to greater protection. Consideration of the public interest will also favor university photocopying. Medical research, protected in *Williams & Wilkins*, is but one of many subjects of university teaching and research that is of primary societal importance.

III. A THEORETICAL APPROACH TO UNIVERSITY PHOTOCOPYING AND FAIR USE

The weighing by courts of the public interest in making fair use determinations highlights copyright's fundamental purpose—to promote the public good. Copyright promotes the public good, ensuring the production and dissemination of creative works by giving creators incentives to produce and to disclose their works.\(^{157}\) Providing creators with rights in their works as economic incentives, however, is not the primary purpose of copyright but only the means chosen to accomplish the primary goals of copyright.\(^{158}\) The incentives for creators are therefore closely related to these goals, because creators may not produce future works or release existing works in response to a reduction in the economic rewards from their works.\(^{159}\) But when an otherwise infringing use of a copyrighted work greatly increases the availability of new works or the dissemination of existing works and at the same time will not cause the copyright owner substantial economic loss, the goals of copyright are best served by permitting the use despite the limitation on creators' incentives. Fair use is copyright's mechanism to facilitate these uses and thereby further these goals.\(^{160}\)

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157. *See supra* notes 23-29 and accompanying text.


160. [T]he development of "fair use" has been influenced by some tension between the direct aim of the copyright privilege to grant the owner a right from which
effect, balancing society's interests in increased access and dissemination of creative works with the potential loss to creators' incentives. A court compares the stimulative effect of a particular use—the increased creation of works resulting from increased access and dissemination of existing works—with the use's depressive effect—the decreased creation of works resulting from limitations on the creator's economic incentive to create. Where society's interest in an otherwise infringing use of a work outweighs the harm to a copyright owner's incentives, copyright policies will be furthered by allowing the use to proceed.

Given the fundamental goals of copyright, university photocopying of copyrighted material for educational, scholarly, and research purposes is a particularly appropriate area for the application of the fair use doctrine. University photocopying both encourages the creation of new works and increases the access to and dissemination of existing works. University professors, researchers, and students are creators as well as users of creative works. Lessening the chilling effect of a potential threat of infringement by favoring the university user in the fair use balancing will allow greater dissemination and use of copyrighted material on university campuses. Greater access to copyrighted works without the threat of infringement will facilitate new creation.

Certain characteristics of the university environment act to minimize the impact of photocopying on copyright owners' incentives and thus make the application of fair use to university photocopying even more appropriate. While not replacing purchase, increased access to works made possible by photocopying may even encourage the interested student or teacher to purchase the original work. The harm to copyright owners' incentives from larger-scale photocopying is minimized at the university level by diffusion of the underlying economic incentives at the university. Many of the copyright users at the university level are also copyright owners. While some incentive to create

he can reap financial benefit and the more fundamental purpose of the protection "To promote the Progress of Science and the useful Arts"... To serve the constitutional purpose, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."

may be lost, the copyright owners themselves benefit substantially from the freer use of copyrighted works. In addition, government and academic grants, not to mention professional stature, often provide sufficient economic incentives for the creation of educational and scholarly works. Significant noneconomic incentives also operate in higher education to guarantee the production of creative works. Not infrequently, authors write and submit their works to publications free of charge. The reward of tenure or recognition within the profession may provide a greater push to create than copyright royalties.

Of course, the fact that market incentives are ineffective for many creators of scholarly works does not remove the need to protect some economic incentives at the university level. University photocopying should not be unlimited because some copyright owners are motivated by copyright's economic incentives and not all university uses may encourage the creation of future works or increase dissemination of existing works. In addition, copyright owners are often publishers, as was true in the NYU case, and any restriction on these publishers' rights may cause some publishers, especially those publishers at the margin of the market, to disseminate less information. For example, some works created only for the university market might not be published if unlimited university photocopying were permitted. But fair use does not contemplate unlimited use of copyrighted works. The function of the fair use analysis is to determine when photocopying should be permitted—when restrictions of copyright owners' rights are justified by the larger goals of copyright. Given the copyright goals of production and dissemination, university photocopying for educational and scholarly purposes should enjoy preferred status under the fair use doctrine.

Because copyright's incentives to creators are economic in nature, economic analyses of copyright are helpful in applying copyright policies in the fair use area. An economic analysis of copyright in the university photocopying context supports preferential treatment of the use under the fair use doctrine. Copyrights serve to correct the market's failure to value properly intellectual property. Intellectual properties are public goods that, like all public goods, are undervalued and, therefore, underproduced if the market remains uncorrected.

163. See generally J. HIRSHLEIFER, PRICE THEORY AND APPLICATIONS (1984). Intellec-
act to capture part of the value created by a work by granting the copyright owner commercially valuable rights in the work. Copyright awards a property right for authors and publishers so that the market will more fully compensate authors for creating and publishers for disseminating. 164

By a similar economic analysis, fair use is also a response to the failure of the market. 165 The fair use doctrine is applied when the market fails to promote society's goals of fostering progress in the arts and sciences, such as when the market fails to effectuate a desirable transfer between copyright holders and users. Such failures may occur due to public goods problems, high transaction costs, or unequal economic and bargaining power. 166

In the university context, the market fails to promote many desirable transfers. Universities are creators of public goods. Students, scholars, and educators are undercompensated for the benefits they confer on society. If the university is undercompensated for the benefit it produces, it cannot bid for all the resources it needs to continue to function. Because a system to internalize the benefits produced by universities is impossible, the fair use doctrine may take account of the market's failure to value these benefits fully.

CONCLUSION

The NYU settlement overlooks the historic flexibility of copyright and fair use. The balancing of copyright owners' and users' interests contained in the copyright clause of the Constitution that is developed in the common law doctrine of fair use and codified in the Act's section 107 is not found in the terms of the NYU settlement. The settlement replaces the balancing of interests with the rigid application of the Guidelines. While following

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164. Gordon, supra note 159, at 1613.
165. Id. at 1614.
166. See generally J. Hirshleifer, supra note 163.
the Guidelines will be easier for a faculty member than trying to assess the likely outcome of the fair use balancing, the Guidelines do not permit copyright users the flexibility to make uses that would be fair under section 107. The Guidelines, as designed, do not take account of the interests involved in photocopying in the university context.

The application of the Guidelines to photocopying in the higher education context is further inconsistent with copyright law in view of the changes made in favor of educators and scholars during the drafting of the Act's section 107. The Act now contains a marked preference for educational and scholarly uses of copyrighted works, a preference that favors a fair use finding for university photocopying. The NYU settlement's imposition of the Guidelines on university photocopy users frustrates these uses, rather than promoting them, and therefore is inconsistent with the Act's goals.

Besides omitting the fair use doctrine's flexibility and defeating the Act's preferences for educational and scholarly uses, the settlement's application of the Guidelines conflicts with the intended purposes of the Guidelines themselves. The Guidelines were designed to set the minimum and not the maximum amount of fair use photocopying. Under the NYU settlement, any photocopying that exceeds the amount permitted under the Guidelines must be done only with the copyright owner's permission or with the university general counsel's approval.

The best use of the Guidelines is to consider them as merely one interpretation of fair use. A court making a fair use determination need not consider the Guidelines because they are not codified in section 107.167 As the Guidelines are part of the Act's legislative history only, they need not be consulted for guidance, provided that a fair use determination can be made based on the plain meaning of the statute or on earlier precedent. If such a determination cannot be made, the Guidelines should be considered as a minimum of fair use and must not be used in place of the sensitive balancing of fair use factors mandated by section 107. To date, the only case to include an evaluation of the

167. Gorman Letter, supra note 57:

Courts may or may not rely on the legislative history, depending on whether they find the statutory language so vague or ambiguous as to need clarification. The legislative history is in addition to the statute and not a substitute for it. In light of the clear statement in the statute that multiple copying for classroom purposes is permitted and in light of the pre-existing judicial precedents for the fair use doctrine, it is possible that the courts may never need to refer to the guidelines.
Guidelines is Marcus. There the court concluded that its holding
was coincidentally in accord with the Guidelines.\textsuperscript{168} The court
did not base its decision on its consideration of the Guidelines.
The court properly found the Guidelines "instructive" and not
controlling.\textsuperscript{169}

As the Guidelines do not provide the solution to the photo-
copying problem, universities must develop their own solutions.
Careful balancing in cases involving university photocopying will
guarantee the greatest public good without unduly restricting
copyright owner rights. In the case of the university user, the
fair use decision cannot be simplified to a restrictive set of
guidelines.\textsuperscript{170} Neither can the determination be left to a central
arbiter, such as a university general counsel. The success of the
university is historically based on the academic freedom made
possible by relatively easy access to information. A centralized
system would cripple this freedom. It is advisable, however, for
universities to maintain photocopying policies to provide guid-
ance to faculty who must decide whether to copy. Policies
should emphasize the balancing nature of fair use determina-
tions. Policies should also highlight the potential prominence of
the economic harm factor in this balancing. Given that copyright
owners must show actual harm, and that their recovery will be
limited to actual harm, university policies should stress that

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\textsuperscript{168} Marcus v. Rowley, 695 F.2d 1171, 1178 (9th Cir. 1983).
\textsuperscript{169} Id.
\textsuperscript{170} While many universities have adopted the Guidelines as their photocopying pol-
ices, see supra note 21, several of the universities sampled have not followed the NYU
Settlement. Some of the latter have no policy governing photocopying, leaving faculty to
make photocopy decisions without guidance or at best with advice from a university offi-
cial on a case-by-case basis. Other universities, rather than following the NYU Settle-
ment, have adopted the sophisticated and responsible approach of educating their
faculty on the legal aspects of fair use. While these policies consequently are longer and
more complicated than policies that simply reprint the Guidelines, they are also more
responsive to the needs of faculty. One school surveyed had a policy that criticized the
NYU Settlement as "excessively restrictive" and provided its own guidelines that ex-
plained that excessive or repetitive copying weakened any potential fair use argument.
This school explained the damages available for infringement under the Act and stated
that its guidelines were "a point of reference from which the Faculty can enjoy unfet-
tered academic freedom within the letter and spirit of the law." Another university with
a similarly legally sophisticated policy statement fully explained the balancing nature of
fair use determinations and included the following:
The Copyright Revision Act of 1976 (the "Act") provides additional protection
to the author or other creator while at the same time providing some significant
clarification and extension of users' rights. It is not true that the Act imposes
new and onerous restrictions on the rights of teachers, scholars and libraries in
making use of copyrighted works; in fact, in most significant areas, the Act is at
least as generous to users as the old statute.

Author's survey of university photocopying policies (copy on file with U. Mich. J.L. Ref.).
photocopying should not be performed where it is used to replace the purchase of copyrighted works.

Whatever the solution chosen by a university, the flexibility of the sensitive fair use balancing must be preserved. The continued success of institutions of higher learning may well depend on the continued unrestrained access to and use of copyrighted materials.

—Eric D. Brandfonbrener