1998


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I. INTRODUCTION

Imagine you are a professor in charge of teaching an esoteric course that is being offered for the first time at your institution. Scouring the literature, you discover no textbook that completely encapsulates all the ideas you wish to present. Therefore, you decide to supplement your chosen textbook with selected readings from a wide variety of sources. Not wishing to inflict the cost of purchasing all of these works on your students, you decide to have the local copy shop prepare an anthology of the excerpts in booklet form. This allows the students access to all of these ideas at once for a minimal fee. You’re happy because you can now teach the class the way you feel is best, and your students are happy because they have saved some time and money.

Unfortunately, the publishers of the copyrighted works you have excerpted are not very happy. The copy shop has not paid for the privilege of copying these works, so the publishers feel cheated out of their licensing revenue. They send letters to the copy shop threatening litigation unless it pays a substantial fee for a license. The copy shop, frightened by the possibility of litigation and unwilling to pay for a license, agrees to halt

* J.D. expected 1999, University of Kentucky.

1 Without the income from licensing fees, the value of the publisher’s copyright is diminished.
preparation of the "course packs."\(^2\) This leaves you with a difficult decision. Unable to prepare the anthologies, you are left with only two choices: cease teaching those concepts not covered by the textbook, or inflict the burden of finding and copying all the outside readings onto your students.

Neither approach is very appealing. Unfortunately, these are the only choices available. Publishers have attempted to "impose a nation-wide halt on the production of educational course packets without permission of copyright holders,"\(^3\) despite the fact that the Copyright Act of 1976 contains a specific fair use exemption for the copying of educational materials.\(^4\) Several commentators\(^5\) have asserted that these attempts to obtain compensation through licensing fees for educational copying frustrate the underlying purpose of copyright. Indeed, the constitutional purpose of copyright is "[t]o promote the Progress of Science and useful Arts"\(^6\) rather than to "reward the labor of authors."\(^7\) The guiding rationale of copyright law is that by granting authors a limited monopoly over the use of their works, we give them an economic incentive to produce more works, thereby accelerating the growth and dissemination of knowledge.\(^8\) This purpose is frustrated when publishers force copy shops (and by extension, professors and students) to pay fees for the fair use of copyrighted works. By forcing copy shops to pay unnecessary fees, the pursuit and dissemination of knowledge in our colleges and universities is needlessly stifled, not enhanced.\(^9\)

\(^2\) See infra note 93 and accompanying text.
\(^4\) See 17 U.S.C. § 107 (1994); see also infra Part III.
\(^5\) See Paul J. Heald, Payment Demands for Spurious Copyrights: Four Causes of Action, 1 J. INTELL. PROP. L. 259, 261 (1994); see also L. Ray Patterson, Copyright and "the Exclusive Right" of Authors, 1 J. INTELL. PROP. L. 1, 42 (1993) (stating that copyright owners are "asserting their limited rights 'in absolute terms to the exclusion of all else' as a part of their campaign to create what is tantamount to a black market consisting of unlawfully claimed copyright rights" (quoting Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 432 n.13 (1984))).
\(^6\) U.S. CONST. art. I, § 8, cl. 8.
\(^7\) Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (holding that although an author may create an original compilation of facts that is copyrightable, the facts themselves are not original and may not be copyrighted).
\(^8\) See Heald, supra note 5, at 261.
\(^9\) See id. (arguing that "[w]hen consumers are induced to pay for materials unnecessarily, the cost of using [expressive materials] rises and the intent of the Framers of the Constitution and of Congress is frustrated").
Publishers have recently resorted to decidedly unsavory tactics in their attempts to control educational copying. For example, they have sent letters threatening to sue copy shops for infringement unless they agree to pay royalties or licensing fees. They have, in effect, bullied copy shops into believing that they have an unimpeachable claim of copyright, even in situations that did not warrant such a belief. Their position has unfortunately been enhanced by recent case law.

The United States Court of Appeals for the Sixth Circuit held in *Princeton University Press v. Michigan Document Services, Inc.* that a copy shop infringed the copyrights of several publishers by reproducing and selling "course packs" containing numerous excerpts from the publishers' copyrighted works. Students used the course packs for educational purposes in their college classes. The copy shop had refused to pay the licensing fees requested by the publisher. The district court held that there had been willful infringement of the publishers' copyrights, but a Sixth Circuit panel vacated that decision. The Sixth Circuit subse-

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10 *See* Letter from Virginia Antos, Director of Copyright Compliance, Association of American Publishers, to Bel-Jean Copy/Print Center (Mar. 1, 1993), *reproduced in* Patterson, *supra* note 5, at 44. The following is an example of the language used in the letter:

We call on you to agree . . . to cease and desist from copying, without permission, multipage excerpts of copyrighted works for sale to students. In addition, the scope of the infringement identified above, committed in the face of the widely publicized decision in Basic Books v. Kinko's, warrants a payment of $2,500 to help defray the costs of the AAP's copyright enforcement program in this matter and to impress on your business the need to operate in compliance with controlling law. *Id.* at 47.

11 *See* Heald, *supra* note 5, at 259-60. A similar problem occurs when publishers attempt to claim copyrights in works already in the public domain, such as when copyrights are claimed in a Bach cantata or a Shakespeare play. *See id.*


13 *See id.* at 1390-92.

14 *See id.* at 1384.


quently granted a rehearing en banc and reversed the panel in an 8-5 decision, holding that the copy shop’s use of the copyrighted materials “did not constitute fair use.”\footnote{Michigan Document Serv., 99 F.3d at 1383.}

This Note will consider the application of the fair use defense in \textit{Michigan Document Services}. This issue was one of first impression,\footnote{See id. at 1394.} and nothing has changed to undercut its importance since. Part II\footnote{See infra notes 23-37 and accompanying text.} of this Note will briefly recapitulate the origin and purpose of copyright law. Part III\footnote{See infra notes 38-91 and accompanying text.} will analyze, in general terms, the fair use doctrine—its history, conceptual underpinnings, and previous applications in the educational copying context. Part IV\footnote{See infra notes 92-246 and accompanying text.} will present an analysis of the fair use discussion in \textit{Michigan Document Services}. Part V\footnote{See infra notes 247-250 and accompanying text.} will analyze the impact of this decision. Finally, Part VI will summarize why the case was wrongfully decided.

\section*{II. BACKGROUND ON COPYRIGHT LAW}

The power to grant and regulate copyright is delegated to Congress in the United States Constitution. Article I, section 8, clause 8 provides:

\begin{quote}
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.\footnote{U.S. CONST. art I, § 8, cl. 8.}
\end{quote}

The Copyright Clause thus states its overriding goal: “To promote the Progress of Science and the useful Arts.”\footnote{Id.} Any analysis of a copyright problem must take into account the constitutional purposes behind copyright law.\footnote{See Howard B. Abrams, \textit{The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright}, 29 WAYNE L. REV. 1119, 1129 (1983).} The Copyright Clause is a limitation on, as well as a grant
of, legislative power. 26 This limitation is very important, as it enables Congress to impose the conditions that are necessary for copyright to accommodate the interests of three groups—authors, publishers, and members of the public—in order to promote learning. 27 The Committee Report accompanying the 1909 Copyright Act stated the purpose of copyright best:

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, . . . 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. 28

The 1961 Report on the Register of Copyrights on the General Revision of the U.S. Copyright Law also stated the underlying constitutional values protected by copyright: “As reflected in the Constitution, the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a means to that end.” 29 The courts have recognized the importance of analyzing copyright issues with these guiding principles in mind. 30 As the United States Supreme Court stated in Mazer v. Stein: 31

26 See Patterson, supra note 5, at 4.
27 See Abrams, supra note 25, at 1127.
28 H.R. Rep. No. 60-2222, at 7 (1909) (quoted in Sheldon W. Halpern et al., Copyright Cases and Materials 2 (West 1992)).
30 See, e.g., Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1974) (“The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims on the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts.” (citations omitted)); United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) (“The copyright law . . . makes reward to the owner a secondary consideration.”).
The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.\textsuperscript{32}

Although copyright does provide the author with protection, this protection is not without limits. There is a strict time limitation,\textsuperscript{33} and not all material is copyrightable.\textsuperscript{34} In addition, there are a set of requirements that a work must satisfy in order to be protectable.\textsuperscript{35} Further, the rights granted\textsuperscript{36} are not absolute in the way some property rights may be absolute. To the extent that copyright is a property right, it is properly vested with a public interest, since the "limited grant is a means by which an important public purpose may be achieved."\textsuperscript{37} One of the most important limitations on the copyright holder's statutory monopoly is the fair use doctrine at issue in {	extit{Michigan Document Services}}.

\textsuperscript{32} Id. at 219 (quoting U.S. CONST. art. I, § 8, cl. 8).

\textsuperscript{33} The present Copyright Act fixes the end of the term at the life of the author plus fifty years for most works. See 17 U.S.C. § 302 (1994).

\textsuperscript{34} Generally, copyright protection extends only to works of authorship that are fixed in a tangible medium and meet the minimum threshold requirements of originality and creativity. See generally id. §§ 101, 102 (1976). As a result, facts and ideas themselves are not protectable. The current laws only protect certain expressions of those facts and ideas. See First Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991).

\textsuperscript{35} See infra notes 51-91 and accompanying text for a discussion of these requirements.

\textsuperscript{36} The copyright owner has the following five rights: (1) to reproduce the copyrighted work; (2) to prepare derivative works; (3) to distribute copies of the copyrighted work to the public by sale, rental, lease, or lending; (4) to perform the copyrighted work publicly; and (5) to display the copyrighted work publicly. See 17 U.S.C. § 106. In practice, authors commonly assign these rights to publishers in exchange for royalty payments and the publishers' production and marketing of the author's works. See Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 547 (1985).

III. THE FAIR USE DOCTRINE

A. Purpose

The fair use doctrine rests on the assumption that certain forms of copying are indispensable to the advancement of knowledge and hence should be exempt from a finding of infringement.38 As one may imagine, the question of exactly how far the doctrine extends has been difficult. In fact, the doctrine of fair use is generally regarded as the most troubling issue in the whole law of copyright.39 Courts and commentators have long been divided over precisely how this issue should be analyzed.40 The House Report on the 1976 Copyright Act sums up the difficulties in this area:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.41

The doctrine is best viewed as the inevitable consequence of a process of balancing the interests of a copyright holder against the public’s interest in the dissemination of information.42 As a practical matter, strict enforcement of the copyright monopoly would, in some cases, “inhibit the very ‘Progress of Science and useful Arts’ that copyright is intended to promote.”43 Ultimately, fair use is based on policy considerations that honor the purposes of copyright laws.44

43 Id. at 477 (quoting U.S. CONST. art. I, § 8, cl. 8).
44 See id. at 477-49 (Blackmun, J., dissenting).
B. History

The fair use doctrine has a long history. One of the earliest cases to raise the issue was *Gyles v. Wilcox*,\(^{45}\) decided in England in 1740. In this case, the court analyzed the defense of abridgement:

> Where books are colourably shortened only, they are undoubtedly within the meaning of the [copyright act], and are a mere evasion of the statute, and cannot be called an abridgement. But this must not be carried so far as to restrain persons from making a real and fair abridgement, for abridgements may with great propriety be called a new book, because not only paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author.\(^{46}\)

Fair use first appeared in American law in 1841, Justice Story's opinion in *Folsom v. Marsh*.\(^{47}\) Story eloquently summed up the major factors that have guided American judges ever since:

> In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.\(^{48}\)

In 1976, the fair use doctrine was finally codified in §107 of the Copyright Act.\(^{49}\) All of the factors Story had originally included in his analysis were written into this statute. Section 107 serves as a general limitation on all the rights codified in §106. Entitled "Limitations on Exclusive Rights: Fair Use," §107 provides, in relevant part:

> 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, teaching (including

\(^{45}\) Gyles v. Wilcox, 2 Atk. 141 (1740).

\(^{46}\) Id. at 143.


\(^{48}\) Id. at 348.

multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

1. “Purpose and Character of the Use”

According to the Supreme Court, courts must weigh the four statutory factors together, keeping in mind that the overriding purpose of copyright is to facilitate progress in science and the arts. In applying the first factor, “purpose and character of the use,” courts generally consider two important subfactors. First, they consider whether the use is commercial or nonprofit. The distinction between a commercial and nonprofit use “is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” Although the Supreme Court stated in *Sony Corp.* that commercial uses are presumptively unfair, the Court later clarified that the commercial or nonprofit character of the use is only one factor to be considered when analyzing the “purpose and character of the use.” The Court recognized that if commercial uses were presumed unfair, “the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of section 107, including . . . teaching, . . . since these activities ‘are generally conducted for profit in this country.’” The

50 *Id.*


52 See *id.* at 578.


55 See *Campbell*, 510 U.S. at 584.

56 *Id.* at 584 (Brennan, J., dissenting) (quoting *Harper & Row*, 471 U.S. at 592).
second prong of the "purpose and character" inquiry is whether or not the use is "transformative." Here courts examine "whether the new work merely 'supersede[s] the objects' of the original creation . . . or instead adds something new." For example, the Supreme Court held in *Campbell v. Acuff-Rose Music, Inc.*, that 2 Live Crew's version of the Roy Orbison classic "Oh, Pretty Woman" could "reasonably . . . be perceived as commenting on the original or criticizing it" and hence had transformative value. Other courts have applied similar tests to determine whether a use is truly transformative. The Supreme Court, while recognizing that a transformative use is not required to find fair use, has placed great weight on this concept. It recognized in *Campbell* that the "goal of copyright [is] . . . generally furthered by the creation of transformative works." The Court has even gone so far as to state that other factors, such as commercial use, carry less weight when the alleged by infringing work is highly transformative. Finally, the Court has also recognized an exception to the transformative use analysis for the "reproduction of multiple copies for classroom distribution."

2. *"The Nature of the Copyrighted Work"

Courts usually afford creative works more protection than works of fact because creative works are at "the core of intended copyright protection." Factual works, while protectable, are protectable only to the extent that the work contains original expression - the underlying facts themselves are not protected. In addition, the Court has observed that there is, in general, a

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57 *Id.* at 579 (quoting Leval, *supra* note 40, at 1111).
58 *Id.* (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (citations omitted). For a use to be "transformative" it "must be productive and must employ the quoted matter in a different manner or for a different purpose than the original." Leval, *supra* note 40, at 1111. Common transformative uses include parody, symbolism, and criticism. *See id.*
60 *Id.* at 583.
61 *See, e.g.*, American Geophysical Union v. Texaco, 60 F.3d 913, 923-24 (2d Cir. 1994) (noting the "significant independent value that can stem from conversion of original journal articles into a format different from their normal appearance").
62 *Campbell*, 510 U.S. at 579.
63 *See id.*
64 *Id.* at 579 n.11.
65 *Id.* at 586.
greater need to disseminate factual works for public benefit. While the dividing line between creative and factual works is inexact, courts have had little difficulty applying this factor correctly.

3. "The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole"

This third factor is more than a mechanical evaluation of the quantity of material taken from the original. It considers the quality and importance of the material used. The putative test is whether the excerpts supersede the original work or constitute the heart of the work. Even if the quantity of the material used is relatively small, this does not necessarily mean that this factor will weigh in favor of fair use. In fact, courts have refused to grant fair use even when the amount of material used was miniscule, if the material was judged to constitute the heart of the work.

There are no real guidelines on exactly how much of a copyrighted work a person may copy and still be protected by the fair use doctrine, and decisions regarding this issue have been inconsistent. For example, the Supreme Court has held that a reproduction of an entire copyrighted work was protected by the fair use doctrine. Generally, however, the larger the portion of the copyrighted work used, the more likely the court will refuse to find fair use.

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Factual works, such as biographies, reviews, criticism and commentary, are believe [by courts] to have a greater public value and, therefore, uses of them may be better tolerated by the copyright law .... Fictional works, on the other hand, are often based closely on the author's subjective impressions and, therefore, require more protection.

Using these "general rules of thumb," the court appropriately found that the works copied in this case were of a factual rather than creative nature. Id.

69 See Campbell, 510 U.S. at 586.
71 See id. at 565.
72 See Kinko's, 758 F. Supp. at 1533-34. The court concluded that "the portions copied were critical parts of the books copied, since that is the likely reason the college professors used them in their classes." Id. at 1533.
74 See Leval, supra note 40, at 1122.
4. "The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work"

In applying this fourth factor, the courts evaluate the extent to which the copy will compete with the original in the marketplace. The courts must consider the extent of market harm caused by the particular use. The harm to the market for derivative works must also be considered. Finally, the courts should consider whether or not similar conduct on a broad scale would adversely affect the potential market for the copyrighted work. Although the Supreme Court has never spoken on the matter, the Michigan Document Services courts included the loss of licensing revenues in their analysis of the fourth factor. Some courts consider this factor to be the most important, reasoning that the economic concerns it embodies lie at the heart of copyright protection. Applications of this factor in the educational context include the analysis in Basic Books v. Kinko's Graphic Corp. In Kinko's, the district court held that a copy shop's reproduction and sale of course packs to college students was not a fair use of the copyrighted material. Many of the court's arguments regarding the four factors were later repeated in Michigan Document Services. The Kinko's court found that the first fair use factor, the "purpose and character of the

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76 See id.
77 See id. Derivative works are those "based upon one or more preexisting works, such as translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed or adapted." 17 U.S.C. § 101 (1994).
81 See Campbell, 510 U.S. at 592 ("The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."); Harper & Row, 471 U.S. at 568 (noting the fourth factor is concerned with "use that supplants any part of the normal market for a copyrighted work").
83 See id. at 1526.
FAIR USE AND EDUCATIONAL COPYING

use," weighed against the copy shop, because it was a commercial entity.84 Reasoning that a commercial use and an educational use are mutually exclusive, the court concluded that a fair use could not exist if the copy shop stood to gain financially.85 The court did not consider the students’ use at all.86

The court analyzed the second factor, “the nature of the copyrighted work,” in favor of Kinko’s, due to the primarily factual nature of the copied works.87 With regard to the third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” the court noted that the copying was substantial – the defendant often copied entire chapters and duplicated critical portions of the original works. As a result, the third factor weighed against Kinko’s.88 Finally, in looking at the fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,” the court, like the Michigan Document Services court, focused primarily on the plaintiffs’ loss of potential licensing fees.89 The court concluded that the fourth factor weighed against fair use simply because the plaintiffs lost potential royalty income when the defendant copied the material without paying them permission fees.90 The court concluded, however, that the plaintiffs had lost the permission fees before first determining whether they were even entitled to them. The Sixth Circuit in Michigan Document Services used the same circular reasoning to reach a similar conclusion against a finding of fair use.91

84 See id. at 1531-32.
85 See id.
87 See Kinko’s, 758 F. Supp. at 1533.
88 See id. at 1533-34. The court concluded that “the portions copied were critical parts of the books copied, since that is the likely reason the college professors used them in their classes.” Id. at 1533. Under this reasoning, however, a photocopy could never constitute fair use because any copy would include the critical parts merely as a result of the choice of that part for copying. See Anderson & Brown, supra note 86, at 152.
89 See Kinko’s, 758 F. Supp. at 1534-35.
90 See id. at 1534.
IV. THE SIXTH CIRCUIT’S FAIR USE DISCUSSION IN MICHIGAN DOCUMENT SERVICES, AND ITS FLAWS

A. Facts

Michigan Document Services ("MDS") is a copy shop that provides general photoreproduction services to the public. In addition, MDS sells "course packs," which are compilations of various copyrighted and uncopyrighted materials, such as journal articles, sample test questions, course notes, and book excerpts, to college students. Professors select the contents of these course packs and give the material to MDS along with an estimated number of students expected to enroll in the particular course. MDS requires all of the professors to sign a declaration that they would not have requested copies of excerpts if they would otherwise have assigned the entire work. MDS then produces a master copy of the materials, creates a table of contents, identifies excerpts by title and author, numbers the pages, and binds them together. The course packs are priced on a per-page basis, regardless of content. The professors assign the materials contained in the course packs to students enrolled in their courses and inform the students they can purchase the course packs at MDS. Alternatively, the students may copy the excerpted materials at the library, copy them from another student, or purchase the original works. MDS sells the course packs only to students in the particular courses and does not sell them to the general public. Any unsold course packs are discarded. Following the direction of several professors who submitted materials, MDS produced course packs containing excerpts from works in which the plaintiff publishers own the copyrights. Each publisher operates a department designed specifically to receive and process requests for

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93 See id.
94 See id. at 907.
95 See Michigan Document Servs., 99 F.3d at 1388 (Ryan, J., dissenting).
97 See Michigan Document Servs., 99 F.3d at 1398 (Ryan, J., dissenting).
98 See id. (Ryan, J., dissenting).
99 See id. (Ryan, J., dissenting).
100 See id. (Ryan, J., dissenting).
101 See id. (Ryan, J., dissenting).
102 See id. (Ryan, J., dissenting).
permission to use any of its copyrighted works. MDS, however, did not seek permission from the plaintiffs to copy any of the excerpts and did not pay any permission fees for the use of the excerpts before selling the course packs to the students.

B. The En Banc Court's Analysis

The Sixth Circuit began its analysis by recognizing the obvious: the fair use doctrine "creates an exception to the copyright monopoly," which allows "courts to avoid [the] rigid application of the copyright statute" when such application would defeat the very purpose the law was designed to foster. Noting that fair use was originally a purely judicial creation, the Sixth Circuit focused on the fair use doctrine codified in § 107 of the Copyright Act. This section was designed to codify the existing understanding of fair use, not to expand or dilute it in any way. The majority quickly concluded that § 107 does not provide "blanket immunity for 'multiple copies for classroom use,'" despite the plain language in the Act's preamble. They went on to apply the four statutory factors, and determined that all four factors weighed against a finding of fair use. In addition, the court found that the legislative history of § 107 weighed against a finding of fair use. The court thus concluded that MDS was liable for copyright infringement.

103 See id. at 1398-99 (Ryan, J., dissenting).
104 See id. at 1384.
105 Id. at 1385 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 570 (1994)).
106 See id.
107 See Campbell, 510 U.S. at 577.
110 See Michigan Document Servs., 99 F.3d at 1385-90. Judge Ryan stated in his dissent that whether a challenged use constitutes a fair use is determined by the four statutory factors, along with any other relevant considerations. See id. at 1399 (Ryan, J., dissenting). In contrast, Judge Merritt argued in his dissent that the plain language of the copyright statute allows for "multiple copies for classroom use," and thus found the four statutory factors to be inapplicable in this particular case. Id. at 1394-95, & n.1 (Merritt, J., dissenting) (quoting 17 U.S.C. § 107).
111 See id. at 1390-91.
112 See id. at 1390-92.
1. "The Effect upon the Potential Market for or Value of the Copyrighted Work"

The Sixth Circuit focused most of its attention on the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work." The majority ascribed great importance to this factor, and noted that the United States Supreme Court had described this element as the most important. Interestingly, even dissenting Justice Ryan felt that "the fourth factor is the single most important element of fair use." Based on United States Supreme Court precedent, the Michigan Document Services court reasoned that the burden of proof as to market effect rests with the copyright holder if the challenged use is noncommercial in nature. However, the burden rests with the defendant if the challenged use is commercial in nature, as the court believed it was in this case. Although the majority felt that the use of the copyrighted materials by the purchasing students was noncommercial, they focused on the commercial duplication and sale of the materials by MDS. The majority found that MDS's actions in this case were similar to those of The Nation magazine in Harper & Row, which the Supreme Court had found to constitute commercial

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113 See id. at 1385 (citing Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 566 (1985)).
114 Id. at 1407 (Ryan, J., dissenting).
116 See Michigan Document Servs., 99 F.3d at 1385-86. Finding the use of the copyrighted material noncommercial in nature, both Judge Merritt and Judge Ryan assigned the burden of proof to the plaintiffs. See id. at 1396 (Merritt, J., dissenting); id. at 1407 (Ryan, J., dissenting). According to the Supreme Court, fair use is an affirmative defense. See Harper & Row, 471 U.S. at 561. Therefore, the burden of proof for all factors should lie with the party asserting the defense, regardless of whether the nature of the use is commercial. See William F. Patry & Shira Perlmutter, Fair Use Misconstrued: Profit, Presumptions, and Parody, 11 CARDOZO ARTS & ENT. L.J. 667, 705 (1993).
117 See Michigan Document Servs., 99 F.3d at 1385-86.
118 See id. at 1386. Judge Merritt and Judge Ryan both disagreed with the majority's focus on the use of the excerpts by the copy shop in making copies; they asserted that the proper focus should be on the students' use of the excerpts. See id. at 1395 (Merritt, J., dissenting); id. at 1401 (Ryan, J., dissenting).
119 See id. (citing Harper & Row, 471 U.S. at 562).
activity.\textsuperscript{120} According to the majority, the students who purchased the course packs were similar to the purchasers of \textit{The Nation} who concededly had "not put the contents of the magazine to commercial use."\textsuperscript{121} The majority thus classified MDS's use of the excerpts as commercial by analogy. However, the majority went on to say that even if the challenged use was conceptualized as noncommercial and the publishers had the burden of proving market effect, they had effectively met that burden.\textsuperscript{122} One of the major tests of market harm developed by the United States Supreme Court\textsuperscript{123} was that the copyright owner "need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work.'"\textsuperscript{124} The court then explained that if copy shops across the nation followed the practices of MDS, the revenue publishers collected from licensing fees would swiftly dry up, thus compromising the value of the publishers' copyrights.\textsuperscript{125} The majority rejected MDS's argument "that it is circular to assume that a copyright owner is entitled to permission fees and then to measure market loss by reference to the lost fees," because the argument "proves too much."\textsuperscript{126} The court felt that it should consider licensing fees whenever the market is "'traditional, reasonable, or likely to be developed.'"\textsuperscript{127} The court concluded that the potential uses of the publisher's copyrighted works "include[d] the selling of permission to reproduce portions of the works for inclusion in course packs."\textsuperscript{128} Since the publishers stood to lose these fees if MDS was allowed to have its way, the court found that the market factor weighed against a finding of fair use.\textsuperscript{129}

2. "Purpose and Character of the Use"

The majority found that the first factor also weighed against a finding of fair use. First, the court found that the challenged use was primarily commercial in nature, and referred to the argument it made in its discussion

\begin{itemize}
  \item \textsuperscript{120} See \textit{Harper \& Row}, 471 U.S. at 562.
  \item \textsuperscript{121} See \textit{Michigan Document Servs.}, 99 F.3d at 1386.
  \item \textsuperscript{122} See \textit{id}.
  \item \textsuperscript{123} See \textit{id}. at 1386-88.
  \item \textsuperscript{124} \textit{id}. at 1387 (quoting \textit{Harper \& Row}, 471 U.S. at 568 (emphasis omitted)).
  \item \textsuperscript{125} See \textit{id}.
  \item \textsuperscript{126} \textit{id}.
  \item \textsuperscript{127} \textit{id} (quoting \textit{American Geophysical Union v. Texaco Inc.}, 60 F.3d 913, 930 (2d Cir. 1994)).
  \item \textsuperscript{128} \textit{id}. at 1388.
  \item \textsuperscript{129} See \textit{id}.
of the fourth factor. MDS argued that the copying would be considered "'nonprofit educational'" if done by the professor or students themselves, and that making the character of the use hinge on the character of the user was irrational and counter to the goals of copyright. In response, the majority emphasized that the copying "was performed on a profit-making basis by a commercial enterprise." The court next stated that "the degree to which the challenged use has transformed the original copyrighted works" is another element to consider under the first factor. The majority felt that there was clearly no transformative value in this case, since all that had been done was verbatim copying. In the court's opinion, this mechanical transformation had little resemblance to the creative metamorphosis accomplished by the parodists in the Campbell case.

3. "The Nature of the Copyrighted Work"

The court found that the second factor was largely undisputed. MDS conceded that "the excerpts copied for the coursepacks contained creative material" as opposed to factual material. Accordingly, these works lay at the heart of what copyright law was intended to protect, and the second factor thus weighed against a finding of fair use.

4. "Amount and Substantiality of the Portion Used"

The Sixth Circuit determined that the third factor also weighed against a finding of fair use. According to the majority, "the larger the volume (or the greater the importance) of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that a taking will qualify as a fair use." The majority noted that the excerpts included in

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130 See id. at 1388-89; see also supra notes 115-22 and accompanying text (describing the majority's allocation of the burden of proof to Michigan Document Services on the ground that the challenged use was commercial in nature).


132 Id. In addition, the majority indicated that it may even be doubtful whether copying by the students or professors themselves could constitute a fair use of the materials. See id.

133 Id.

134 Id.

135 See id.

136 Id.

137 See id.

138 Id. (quoting Leval, supra note 40, at 122).
the course packs easily surpassed the thousand-word safe harbor described in the legislative history of the Copyright Act. The court then observed that MDS used as much as thirty percent of one copyright work, and in no case used less than five percent of a copyrighted work. The court believed that these percentages were more than sufficient to qualify as substantial. Finally, the court concluded that the excerpts must have been important qualitatively to the copyrighted works in which they were embedded. After all, the professors had deliberately picked these passages out.

5. Legislative History

In addition to applying the four statutory factors, the Sixth Circuit relied on the legislative history of the 1976 Copyright Act in concluding that MDS’s course pack production did not constitute a fair use. The majority felt that it was necessary to refer to the legislative history because "[t]he statutory factors are not models of clarity, and the fair use issue has long been a particularly troublesome one." According to the majority, "[t]he House and Senate conferees explicitly accepted the Classroom Guidelines ‘as part of their understanding of fair use.’" In addition, the majority noted that the Supreme Court frequently had made use of the

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139 See id. at 1389 (citing H.R. REP. No. 94-1476, at 68-71 (1976)).
140 See id.
141 See id. In contrast, Judge Merritt felt that the excerpts “were a small percentage of the total work,” and emphasized that the district court had observed that the excerpts contained in the course packs “were ‘truly excerpts’ and [did] not purport to be replacements for the original works.” Id. at 1396 (Merritt, J., dissenting) (quoting Princeton Univ. Press v. Michigan Document Servs., Inc., 855 F. Supp. 905, 910 (E.D. Mich. 1994), aff’d in part, vacated in part, 99 F.3d 1381 (6th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 1336 (1997)). Thus, Judge Merritt determined that the third factor weighed in favor of fair use. See id.
142 See id. Judge Ryan, on the other hand, argued that the professors’ selection and assignment of the excerpts was irrelevant in assessing the value of the material copied in relation to the whole work. See id. at 1405 (Ryan, J., dissenting).
144 See Michigan Document Servs., 99 F.3d at 1390-91.
145 Id. at 1390.
legislative history when faced with a fair use dilemma.\textsuperscript{147} Although the majority stated that “the Classroom Guidelines purport to ‘state the minimum and not the maximum standards of educational fair use,’”\textsuperscript{148} it nevertheless found that those guidelines offered “a general idea”\textsuperscript{149} as to the type of copying Congress believed would constitute a fair use. The majority concluded that MDS’s copying went “well beyond anything envisioned by the Congress.”\textsuperscript{150} Even recognizing that the Classroom Guidelines “do not have the force of law,”\textsuperscript{151} the majority nevertheless concluded that because MDS’s copying exceeded the thousand-word safe harbor provided for in the Classroom Guidelines, the legislative history weighed against a finding of fair use.\textsuperscript{152} Thus the Sixth Circuit affirmed the district court’s judgment in favor of the publishers, rejecting MDS’s fair use defense.\textsuperscript{153}

\textbf{B. Flaws in the Sixth Circuit’s Analysis}

The Sixth Circuit’s decision in this case is fatally flawed. In reaching the conclusion that fair use did not apply, the court disregarded the constitutional purpose of copyright,\textsuperscript{154} misapplied the fair use factors, and erroneously gave weight to the legislative history of the 1976 Copyright Act.\textsuperscript{155} These errors resulted in a nonsensical decision that unduly restricts educational uses of copyrighted works.

\textsuperscript{147} See \textit{id.} The majority observed that the copyright statute was revised in an unusual manner in 1976. Congress and the Register of Copyrights initiated and supervised negotiations over specific legislative language among interested groups, including authors, publishers, and educators. See \textit{id.} The results of these negotiations were included in the statute or incorporated into the committee reports. See \textit{id.}

\textsuperscript{148} \textit{Id.} (quoting H.R. REP. NO. 94-1476, at 69 (1976)).

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Id.} at 1391.

\textsuperscript{152} See \textit{id.} The majority based its decision primarily on the “systematic and premeditated character, . . . magnitude, . . . anthological content, and . . . commercial motivation of the copying done by MDS” in producing the course packs. \textit{Id.} at 1390.

\textsuperscript{153} See \textit{id.} at 1393.

\textsuperscript{154} See infra notes 156-70 and accompanying text.

\textsuperscript{155} See Michigan Document Servs., 99 F.3d at 1391.
1. Purpose of Copyright

The purpose of copyright is not "to reward the labor of authors," but rather "[t]o promote the Progress of Science and useful Arts." Although it may seem unfair that copyrighted works may be used by others without compensation to authors, the Supreme Court has observed that this use is not "'some unforeseen byproduct of a statutory scheme'" but rather is "'the essence of copyright'" and a "'constitutional requirement.'"

Instead of focusing on the production of knowledge, the Sixth Circuit seemed obsessed with the economic interests of the publishers. The majority initially noted that the purpose of the copyright "monopoly" is to "stimulate artistic creativity for the general public good." They then proceeded to reject that rationale, focusing instead on the publisher's economic incentives to publish academic works. According to the majority, the writings of most academic authors have a very narrow appeal, and at least some of the excerpted works were only marginally profitable for the publishers. Thus, if the publishers could not receive permission fees, they would lack the incentive to continue publishing academic writings, and the overall production and dissemination of knowledge would thus suffer.

This argument is superficially appealing, until one realizes that it is simply unsupported by the record. There was no evidence in the record that publishers need the assurance of licensing fees to publish academic works. Judge Ryan argued in dissent that "it is far from clear that the licensing income is significant to publishers in their decisions about whether to publish marginally profitable books." In fact, the evidence

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159 Id.
161 See id.
162 See id.
163 See id.
164 See id. at 1410 (Ryan, J., dissenting).
165 Id. (Ryan, J., dissenting). Judge Ryan noted that there was no evidence in the record indicating that the expectation of licensing fees impacts publishers' decisions to publish in individual cases. See id. (Ryan, J., dissenting). Furthermore, he noted that the fees the publishers have collected to date from copy shops are too
actually presented in the case clearly indicates that the authors of academic works do not need licensing fees as an incentive to create additional works. These authors are far more concerned with their academic reputations than with money, and they know that the best path to a good reputation is the production of a large body of solid research. Since the publishers have not shown their need for licensing revenues, and since the authors have shown they don't need licensing revenues, it seems curious that the court placed so much emphasis on them in its analysis.

The implications of this case are potentially far-reaching. The fees publishers will require for copying excerpts of their copyrighted works will in turn be passed on to the students who use them. Furthermore, there is no guarantee that the publishers will grant permission to use all of their copyrighted works. If professors decide not to produce customized reading selections because of the added burden of seeking permission from every publisher, it is the students who will suffer. Neither the fair use doctrine nor the constitutional grant of the copyright monopoly requires this result; indeed, this result would seem to contravene the promotion of "Science and useful Arts." As Chief Judge Martin warned in his dissent, "[t]he majority's strict reading of the fair use doctrine promises to hinder scholastic progress nationwide."

2. Application of the Statutory Factors

Because the Sixth Circuit incorrectly applied three of the four statutory fair use factors, it erroneously concluded that these factors weighed against a finding of fair use. The court erred in its analysis of the first factor because it concluded that the use of the course packs was commercial in nature. In reality, the users were the students, and the use was actually "nonprofit educational." The court misapplied the third statutory factor because there was no evidence that the excerpts were substantial enough to

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166 See id. (Ryan, J., dissenting). According to the declarations on record of more than one hundred authors, "they write for professional and personal reasons" and the "receipt of immediate monetary compensation such as a share of licensing fees is not their primary incentive to write." Id. (Ryan, J., dissenting).

167 See id. at 1393-94 (Martin, C.J., dissenting).

168 See id. at 1394 (Martin, C.J., dissenting).


171 Id. at 1389 (quoting argument of MDS).
supersede the original works. There also was no evidence that the excerpts were important enough to constitute the heart of the original material. The court further failed to subject the excerpts to a work-by-work analysis as required by Supreme Court precedent,\textsuperscript{172} nor did it take into account the fact that not all of the excerpted material was original, and hence did not qualify as protected expression. Finally, the court misapplied the fourth factor when it assumed that the publishers were entitled to permission fees, despite the fact that this was precisely the issue in dispute in this case.

\textit{a. "Purpose and Character of the Use"}

The Sixth Circuit incorrectly concluded that the first factor weighed against a finding of fair use. In determining that the course packs constituted a commercial use of the publishers' copyrights,\textsuperscript{173} the court erred by disregarding the use of the course packs by the professors and students. MDS did not exploit the publisher's copyrights, but simply earned a fee for its services. The court also erred in concluding that the course packs had not "transformed the original copyrighted works."\textsuperscript{174}

The court found that the use of the copyrighted excerpts in the course pack was commercial in nature,\textsuperscript{175} but the student and professors' use of the course packs was entirely a nonprofit, educational use. Indeed, Congress specifically mentioned "teaching (including multiple copies for classroom use)" as an illustration of fair use.\textsuperscript{176} The course packs fall squarely within this statutory illustration of fair use, because MDS produced them at the professors' requests specifically for students to use in conjunction with courses taught by those professors.\textsuperscript{177} MDS sold the course packs only to students enrolled in the professors' courses; no course packs were sold for use outside the classroom.\textsuperscript{178}

Although MDS did make a profit by copying and selling the course packs, the mere existence of this profit should not preclude a finding of fair use.\textsuperscript{179} The Supreme Court has recognized that if the commercial nature of

\textsuperscript{172} See id. at 1385-88.
\textsuperscript{173} See id. at 1389.
\textsuperscript{174} Id.
\textsuperscript{175} See id. at 1386.
\textsuperscript{177} See Michigan Document Servs., 99 F.3d at 1398 (Ryan, J., dissenting).
\textsuperscript{178} See id.
\textsuperscript{179} See Spalding, supra note 3, at 455 (recognizing profit motive of those involved in the copying process does not preclude finding of fair use). Similar uses, such as scholarship, research, and criticism, have been found to constitute fair uses
a use carries a presumption against fair use, "the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including... teaching,... since these activities 'are generally conducted for profit in this country.'" Consequently, the Supreme Court has stated that the distinction between commercial and noncommercial uses is not the profit motive of the user but "whether the user stands to profit from exploitation of the copyrighted material." In his dissent, Judge Ryan determined that a party profits from exploiting copyrighted material when that party "assesses the marketable potential from copyrighted material, selects material based on its content in order to reproduce those portions that will attract customers, and therefore profits from the substance of the copyrighted work." The majority criticized this assessment because the dictionary definition of "exploit" includes "to take advantage of" and "to utilize." However, the conclusion that MDS did not "exploit" the copyright of the works excerpted is no different even under the majority's definition. MDS was indifferent as to whether or not the material it copied at the direction of the professors was copyrighted, because MDS charged on a per-page basis and took no part in the selection of excerpts to copy. The money paid by the students to MDS was for the time, effort, materials, and expense that the students would otherwise have had to expend to make the copies themselves; it was not money that the students would otherwise have paid to the plaintiff publishers. Indeed, course packs like the ones MDS reproduced and sold represent a commercial use only in the most mechanical sense, in that money changed hands.

As both Judge Merritt and Judge Ryan pointed out in their respective dissents, the majority erred in focusing on MDS's mechanical reproduction of the excerpts without considering the use of the excerpts by the professors and students. Nothing in the 1976 Copyright Act implies that the distinction between fair and unfair use hinges on who is doing the

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182 Michigan Document Servs., 99 F.3d at 1401 (Ryan, J., dissenting).
183 Id. at 1386 n.3 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 801 (1986) (unabridged)).
184 See id. at 1398 (Ryan, J., dissenting).
185 See id. at 1395 (Merritt, J., dissenting).
186 See id. at 1394 (Merritt, C.J., dissenting); id. at 1397 (Ryan, J., dissenting).
copying. If the students or professors had made the copies themselves at a library, they still would have had to pay money to make copies and someone would therefore have made a profit from the copying process. MDS earned its profit in a similar manner, by simply providing a copying service rather than exploiting the content of the copyrighted works.

The majority asserted that if it considered the use of the excerpts by the professors and students, the manufacture of pirated editions of any academic copyrighted work could never be considered an unfair use. This slippery slope argument fails when one considers that in such cases, the people manufacturing these works are specially selecting them based on content, and moreover are selling them for a profit. In this case, MDS had no part in the selection of the material it copied, and therefore could not have profited from the content of a copyrighted work. MDS did not care if the work was copyrighted or not – it still got paid the same flat per-page fee.

The court further supported its conclusion that the use of the excerpts in course packs was commercial by comparing this case with Harper & Row. The majority noted that the Supreme Court focused on the "commercial" use of the copyrighted excerpts by the magazine publisher in Harper & Row, and not on their noncommercial use by the magazine purchasers. The majority analogized the students and professors in MDS to the magazine purchasers in Harper & Row. Thus, because the Harper & Row Court found the magazine publisher’s use to be commercial in nature, the majority in Michigan Document Services found it appropriate to characterize MDS’s use of the copyrighted excerpts as a commercial

188 See Michigan Document Servs., 99 F.3d at 1395 (Merritt, J., dissenting).
189 Some may argue that there is a distinction between students making copies at a library as opposed to a copy shop because a library is a nonprofit organization and a copy shop is usually a for-profit enterprise. This distinction is illusory, however, because it imposes an essentially unattainable requirement; indeed, such a requirement would prevent professors and students from photocopying copyrighted material for teaching and research purposes unless no one profited from the copying process.
191 See id. at 1386 n.2.
192 See id. at 1398 (Merritt, J., dissenting).
193 See id. at 1398 (Merritt, J., dissenting).
194 See id. at 1386 (citing Harper & Row, Publishers, Inc. v. Nation Enter., Inc., 471 U.S. 539 (1985)).
195 Id. at 1386.
196 See id.
However, *Harper & Row* is inapposite because the defendant in that case (like the hypothetical pirate manufacturers above) both directed and profited from the copying. The defendant in *Harper & Row* carefully selected the excerpts based on content, and sought to profit from that content rather than from the mechanical task of reproduction itself. Conversely, MDS had no interest in the content of the material it copied and did not stand to profit from that content.

Furthermore, the defendant in *Harper & Row* had engaged in highly unethical conduct with “the intended purpose of supplanting the copyright holder’s commercially valuable right of first publication.” In contrast to the magazine in *Harper & Row*, the course packs reproduced and sold by MDS did not supplant the publishers’ first publication rights, nor did they replace the publishers’ works. In addition, neither MDS nor the professors obtained the excerpted materials in an illegal and unethical manner. This lack of bad faith renders *Michigan Document Services* easily distinguishable from *Harper & Row*.

In addition to mischaracterizing the use of the excerpts as commercial in nature, the court erred in its application of the first factor by summarily concluding that the course packs did not have transformative value. Courts and commentators have recognized that significant independent value can result from the conversion of original works into formats different from their normal appearances. A course pack falls within this category.

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197 See id.


199 See id. at 543. The editor of *The Nation* “put together what he believed was a ‘real hot news story’ composed of quotes, paraphrases, and facts drawn exclusively from the manuscript.” *Id.* He clearly intended to benefit from the content of the works rather than their mere mechanical reproduction. Thus, the Court argued that *The Nation* was exploiting the copyrighted material. See *id.* at 543, 562. In contrast, MDS was utterly indifferent to the contents of the works it copied - it was being paid a flat fee per page. There was no attempt to manipulate the contents of the copied materials. See *Michigan Document Servs., Inc.*, 99 F.3d 1381, 1398 (Ryan, J., dissenting).


201 *Id.*

202 See *id.* at 1389.

203 See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) (acknowledging possible benefits from copying that might otherwise seem to serve no productive purpose); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 923 (2d Cir. 1994) (recognizing transformative value of photocopying that converts articles into useful format); Lloyd L. Weinreb, *Fair’s Fair: A
description, as it is a new product comprising selected portions of other works perfectly customized to the professor’s individualized purpose. Professors can produce a course pack when there is no existing text that meets their needs. In addition, professors can supplement a traditional text with current articles and non-traditional sources. By extracting from various works, arranging them in a particular way, and adding his or her own commentary, a professor can produce a course pack that is a unique product with no adequate substitute. The course pack may even be copyrightable itself as a compilation, if original enough. A casebook, after all, is nothing more than an extensive course pack. Thus, it is certainly possible for a course pack to have transformative value, and the majority erred by not considering that value.

Even if the course packs do not have transformative value, the majority failed to recognize that they clearly fall within a specific exemption. Congress clearly stated, in §7 of the 1976 Copyright Act, that “multiple copies for classroom use” is an illustration of a possible fair use.²⁰⁴ Relying on this statutory language, the Supreme Court in Campbell stated that “the straight reproduction of multiple copies for classroom distribution” is an “obvious statutory exception” to the transformative use analysis.²⁰⁵ Therefore, the Sixth Circuit should have concluded that the first factor weighed in favor of a finding of fair use.

b. “Amount and Substantiality of the Portion Used”

The court also erred in determining that the third statutory factor weighed against a finding of fair use. Unfortunately, no bright line rules exist for determining the amount of a copyrighted work a person may use and still not infringe.²⁰⁶ However, the court’s evaluation failed to take into account some important factors that should have been incorporated into the analysis.

First, there is no indication that most of the excerpts included in the course packs were so substantial as to supersede the original works. This

Comment on the Fair Use Doctrine, 103 HARV. L. REV. 1137, 1143 & n.29 (1990) (discussing potential value from non-transformative copying).

²⁰⁶ See Spalding, supra note 3, at 458 (“There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.”).
test is the quantitative test. The size of the excerpts ranged from five to thirty percent of each work. While there admittedly is no bright line, it is vital to examine each work separately and determine whether the excerpt from that particular work tends to supersede its original. That examination was not done in *Michigan Document Services*. In addition, the court misapprehended the qualitative inquiry. The majority simply asserted that the professors' assignment of the course packs as required reading was ample "evidence of the qualitative value of the copied material." There is no evidence, however, that any of the excerpts constituted the "heart" of the copyrighted works like the memoir excerpts published by *The Nation* in the *Harper & Row* case. Moreover, as Judge Ryan observed in his dissent, the mere fact that the professors required their students to read the excerpts of the copyrighted material in the course packs reveals nothing about the value of the materials copied in relation to their respective works. The only inference that may fairly be drawn from a professor's decision to include an excerpt in the course pack is that the excerpt is related to the professor's course, while the remainder of the work is not. The majority's rule, on the other hand, basically makes it impossible for academic copying ever to be a fair use, since one could always claim that the fact that a professor assigned the excerpt means the excerpt constitutes the "heart" of a work.

Finally, the court absolutely failed to conduct a case-by-case analysis to determine how much of the copied material was protectable. Originality is a condition precedent for copyright protection. The facts themselves (as opposed to their expression) are not protectable. In addition, protection is of limited duration, which means that some of the material copied may already have become part of the public domain at the time of its use. By failing to quantify how much of each excerpt was protectable, the court effectively punished MDS for doing something completely legal—copying unprotected material. This becomes especially important when one considers that some excerpts were, quantitatively at least, very small—

\[\text{See supra notes 69-74 and accompanying text.}\]


\[\text{See Harper & Row, 471 U.S. at 564-65 (finding that quotations used in 300-word excerpt of copyrighted book constituted "the heart of the book").}\]

\[\text{See Michigan Document Servs., 99 F.3d at 1405 (Ryan, J., dissenting).}\]

\[\text{See Amici Curiae Brief, supra note 37, at 24-26 (discussing importance of conducting work-by-work analysis and excluding unoriginal material).}\]
about five percent of their works.\textsuperscript{212} Consideration of the quantity of protected material might have been dispositive in those cases. Thus, the court erred in misconceiving both the quantitative and qualitative aspects of this inquiry.

c. "Effect of the Use upon the Potential Market for or Value of the Copyrighted Work"

The court erroneously concluded that the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, weighed against a finding of fair use.\textsuperscript{213}

The course packs sold by MDS did not harm the value of the publishers' copyrights, because the professors would not have required their students to purchase the entire copyrighted works if the professors had not included the excerpts in their course packs.\textsuperscript{214} Thus, the publishers could not claim that the market for book sales was affected by the course packs. Instead, the publishers relied on lost permission fees as proof of market impact. The publishers argued, and the majority agreed, that if other copy shops stopped paying permission fees, a substantial revenue stream for the publishers would shrivel, thereby diminishing the value of the copyrighted works.\textsuperscript{215} The Sixth Circuit, like other courts,\textsuperscript{216} followed the publishers' argument and made the mistake of assuming its own conclusion: copyright owners are entitled to royalty payments.\textsuperscript{217} Both Judge Merritt and Judge Ryan correctly recognized that this argument is circular.\textsuperscript{218} Before deciding whether the course packs effectively deprived

\textsuperscript{212} See Michigan Document Servs., 99 F.3d at 1389.
\textsuperscript{213} See id. at 1386.
\textsuperscript{214} See id. at 1396 (Merritt, J., dissenting).
\textsuperscript{215} See id. at 1387.
\textsuperscript{216} See American Geophysical Union v. Texaco Inc. 60 F.3d 913, 927 (2d Cir. 1994) (stating that authors commonly sell their works to publishers in exchange for royalties); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1531 (S.D.N.Y. 1991) (referring to a "copyright holder's commercially valuable right").
\textsuperscript{217} See Michigan Document Servs., 99 F.3d at 1387, 1391-92.
\textsuperscript{218} See id. at 1396 (Merritt, J., dissenting) (arguing that courts should not determine amount of economic harm to publishers by lost licensing fees because that assumes they are entitled to those fees); id. at 1407 (Ryan, J., dissenting) ("It is circular to argue that a use is unfair, and a fee therefor required, on the basis that the publisher is otherwise deprived of a fee." (quoting Princeton Univ. Press v. Michigan Document Servs., Inc., No. 94-1778, 1996 WL 54741, at *11 (6th Cir. Feb. 12, 1996), vacated, 99 F.3d 1381 (6th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 1336 (1997))).
the publishers of their permission fees, the court should first have determined whether or not the publishers were in fact entitled to those fees. The fact that a market for licensing fees may exist because the publishers have created one is not relevant in cases where the publishers are not entitled to licensing fees in the first place. The potential market for licensing fees cannot be relied upon as a market harm, because such reliance presupposes that non-licensed copying is not a fair use, which is the very question at issue. The majority claimed that no circularity problem existed because the sale of licenses to copy excerpts constituted a potential use of the copyrighted works, and asserted that "the circularity argument proves too much." The majority's approach, however, is equally culpable, since it would seemingly always result in a conclusion of market harm. To resolve this problem, the court limited its consideration of the lost permission fees to markets that are "traditional, reasonable, or likely to be developed." The majority then asserted that "the likelihood that publishers will actually license such reproduction is a demonstrated fact," because a licensing market was already in place.

The mere existence of a licensing market, however, does nothing to further the publishers' claim to permission fees, assuming MDS's copying constituted fair use. Indeed, the fair use doctrine openly acknowledges that copyright owners will lose such potential royalty payments. The purpose of the fair use doctrine is to determine when a party may reproduce copyrighted material without paying the copyright owner. The majority's argument, on the other hand, eviscerates fair use, transforming it from a

\[\text{\textsuperscript{219}} \text{See id. at 1387.} \]
\[\text{\textsuperscript{220}} \text{Id.} \]
\[\text{\textsuperscript{221}} \text{See id. at 1407 (Ryan, J. dissenting).} \]
\[\text{\textsuperscript{222}} \text{Id. at 1387 (quoting American Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994)).} \]
\[\text{\textsuperscript{223}} \text{Id. at 1388.} \]
\[\text{\textsuperscript{224}} \text{Judge Merritt argued in dissent that "[s]imply because the publishers have managed to make licensing fees a significant source of income from copyshops and other users of their works does not make the income from the licensing a factor" the court should consider. Id. at 1397 (Merritt, J., dissenting).} \]
\[\text{\textsuperscript{225}} \text{See Anderson & Brown, supra note 86, at 152. ("The fact that royalty payments will be lost by the copyright owner is openly acknowledged in the doctrine of fair use.").} \]
\[\text{\textsuperscript{226}} \text{See id.} \]
broad multi-issue inquiry into a narrow question focused on whether or not the plaintiff suffered economic harm.\textsuperscript{227}

In asserting that the loss of licensing fees is an appropriate consideration under the fourth factor, the court relied on three arguments, none of which is compelling. First, the majority declared that “Congress has implicitly suggested that licensing fees should be recognized in appropriate cases as part of the potential market for or value of the copyrighted work . . . .”\textsuperscript{228} One searches in vain for any support for that statement, as not even one example is cited. It is, to be charitable, far from clear whether Congress intended licensing fees to be considered in the analysis of the fourth factor.

Second, the court looked to \textit{American Geophysical Union v. Texaco Inc.},\textsuperscript{229} where the Second Circuit found that the plaintiff publishers “demonstrated a substantial harm to the value of their copyrights” through lost licensing revenue.\textsuperscript{230} This reliance on \textit{Texaco} is questionable, because that court based its decision on the same circular reasoning that the Sixth Circuit used in \textit{Michigan Document Services}.\textsuperscript{231} In addition, the two cases are factually distinguishable.\textsuperscript{232} Finally, the majority relied upon \textit{Harper & Row} in arguing that the Supreme Court’s reasoning in that case “was obviously premised on the assumption that the copyright holder was entitled to licensing fees for use of its copyrighted materials,” since the plaintiff in \textit{Harper & Row} based its harm on the market for the licensing of excerpts.\textsuperscript{233} Judge Ryan noted in his dissent, however, that there was a key distinction between \textit{Harper & Row} and the facts of \textit{Michigan Document Servs.}, 99 F.3d at 1386-88.

\textsuperscript{227} \textit{See Michigan Document Servs.}, 99 F.3d at 1386-88.

\textsuperscript{228} \textit{Id.} at 1387.

\textsuperscript{229} \textit{American Geophysical Union v. Texaco Inc.}, 60 F.3d 913 (2d Cir. 1994).

\textsuperscript{230} \textit{Id.} at 931.

\textsuperscript{231} For an article criticizing the \textit{Texaco} majority for making a circular argument based on permission fees, see Karen L. Still, Comment, American Geophysical Union v. Texaco, Inc.: Expanding the Copyright Monopoly, 29 GA. L. REV. 1233, 1256-57 (1995); \textit{see also Texaco}, 60 F.3d at 937 (Jacobs, J., dissenting) (recognizing circularity problem when only identifiable market harm is loss of potential licensing fees).

\textsuperscript{232} The copying challenged in \textit{Texaco} consisted of entire articles copied for archival purposes. These copies then replaced the original articles. The copying in \textit{Michigan Document Services}, on the other hand, consisted of mere excerpts, because the professors did not want their students to purchase the entire works. The articles in \textit{Texaco} were substitutes for the originals, which damaged the market value of their copyrights. Conversely, the excerpts copied by MDS did not compete with the originals.

\textsuperscript{233} \textit{Michigan Document Servs.}, 99 F.3d at 1388.
Document Services: the copyright holder in Harper & Row had conceived of a specific derivative work and taken steps to create and profit from that work. In Michigan Document Services, by contrast, there was no evidence that the plaintiff publishers planned to create any derivative works that the course packs might devalue. Because there was no evidence that the publishers intended to produce any derivative works, such as their own course packs, the Sixth Circuit's reliance on Harper & Row to show market harm is misplaced. Thus the court should have concluded that the fourth factor weighed in favor of fair use, and that a finding of fair use was warranted.

3. Legislative History

The court erroneously resorted to the legislative history of the Copyright Act in deciding that the reproduction and sale of the course packs did not constitute fair use. The majority asserted that it should take legislative history into account because the "statutory factors are not models of clarity, and the fair use issue has long been a particularly troublesome one." Although courts may have difficulty applying the fair use doctrine and its factors, any confusion concerning fair use is more likely the result of the intense factual inquiry required in these cases than the result of an ambiguous statute. Generally, if a statute is unambiguous, courts should not expand or construct its meaning by looking to its legislative history. The majority failed to explain how § 107 of the Act

234 See id. at 1408 (Ryan, J. dissenting). The plaintiff in Harper & Row had already contracted with Time magazine to give it the exclusive right to print excerpts of President Ford's memoirs when the defendant illicitly obtained a copy of the unpublished memoirs and produced a short article based on them. See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 542 (1985). Judge Ryan observed that the publishers would be unable to create a market for the product MDS produced, because the existing market is created by professors with individual preferences. See Michigan Document Servs., 99 F.3d at 1408 (Ryan, J., dissenting).


236 See Michigan Document Servs., 99 F.3d at 1383.

237 Id. at 1390.

is ambiguous at all—in fact, on its face, this section seems to clearly outline which factors are to be considered in determining whether or not a use is fair.\textsuperscript{239}

Moreover, even if § 107 is ambiguous, the court was wrong to turn to the legislative history of the Copyright Act. The majority looked principally to the Classroom Guidelines contained in the legislative history,\textsuperscript{240} but as critics have noted, “reliance [on the Guidelines] for guidance about fair use is questionable at best.”\textsuperscript{241} Judge Ryan, for instance, argued in dissent that “it is entirely inappropriate to rely on the Copyright Act’s legislative history at all.”\textsuperscript{242} The Classroom Guidelines are presented in a committee report, which itself is “unreliable . . . as a genuine indicator of congressional intent.”\textsuperscript{243} Indeed, Congress actually considered the language of the Classroom Guidelines and rejected it; thus, reliance on the Guidelines is even more dubious.\textsuperscript{244}

Finally, the Classroom Guidelines themselves explicitly state that they cannot be cited as evidence of copyright infringement, declaring that they are “the minimum and not the maximum standards of educational fair use.”\textsuperscript{245} The Classroom Guidelines merely provide a safe harbor where copyright infringement will not be found—some copying may not fall within the safe harbor and yet still be considered a fair use.\textsuperscript{246} Thus, while the length of copyrighted excerpts reproduced in the course packs exceeded the safe harbor amount, a finding of fair use could nevertheless absolve

(\textit{explaining that the “plain meaning of legislation should be conclusive, except in the ‘rare cases [where] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’” \textit{Id.} (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).})


\textsuperscript{241} Anderson & Brown, \textit{supra} note 86, at 156. The Classroom Guidelines set forth “bright line rules that indicate when teachers are within a safe harbor.” \textit{Id.} Even as a safe harbor, however, the Guidelines do not “provide meaningful standards for determining when classroom uses infringe” on copyrights. \textit{Id.}

\textsuperscript{242} \textit{Michigan Document Servs.}, 99 F.3d at 1411 (Ryan, J., dissenting).


\textsuperscript{244} \textit{See} Michigan Document Servs., 99 F.3d at 1412 (Ryan, J., dissenting).


\textsuperscript{246} \textit{See} \textit{id.}
MDS of any copyright infringement irrespective of the Classroom Guidelines.

V. THE IMPACT OF MICHIGAN DOCUMENT SERVICES

The effect of the court's decision in Michigan Document Services is to transform the Copyright Act into a licensing act for publishers. The court's emphasis on market effect makes it virtually impossible to imagine a case where academic copying could be considered a fair use. Under the majority's rationale, even a student copying works on his own is an infringer—every copy made by this student takes money away from licensed copies. This broad interpretation is obviously to the publishers' economic benefit. In order to solidify their claims to a licensing market, the publishers have created the Copyright Clearance Center. This was done for two reasons. First, the publishers needed to establish a mechanism to license before they could claim licensing fees. Second, this licensing system would create a new market, making it easier for publishers to claim economic harm under the fourth factor. The problem with this in the educational context is that it undermines the guiding purpose of copyright—to promote the advancement and dissemination of knowledge. By interfering with professorial freedom to choose the manner in which their classes are taught, the Copyright Clearance Center strikes at the heart of America's universities in order to satisfy the greed of a very small portion of the populace.

VI. CONCLUSION

The Sixth Circuit incorrectly concluded in Michigan Document Services that the reproduction and sale of course packs solely for educational use is not a fair use of copyrighted materials. The court's fair use inquiry was flawed in several respects. The majority misapplied the statutory fair use factors, incorrectly relied on the legislative history of §107 of the Copyright Act, and disregarded the constitutional purposes of copyright law.

247 See Amici Curiae Brief, supra note 37, at 38.
248 See id. at 39-41. The Copyright Clearance Center is "an organization of publishers that collects and distributes licensing fees for photocopying materials registered with it." Id. at 21 n.17.
249 See id. at 39.
250 See id.
In response to *Michigan Document Services*, publishers have moved swiftly to consolidate their gains. Their attempts to achieve hegemony over educational uses of their copyrights must be halted. Thankfully, no amendment to the Copyright Act is necessary; all that is required is that courts correctly apply the current fair use factors.