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The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law

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The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law*

Michael G. Anderson** and Paul F. Brown***

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I. INTRODUCTION

Many who have looked at the relationship between copyright protection and the fair use defense¹ have concluded that finding a fair use is, at best, a matter of balancing hard-to-define equitable considerations, or at worst, a matter of luck.² Additionally, for those of the orthodox school, obtaining a fair use exception in court is simply a matter of marshalling more emotionally appealing equities *for* fair use than the creator of the work can offer *against* fair use. Most of the copyright commentators have argued that the fair use case law is largely unprincipled and unpredictable.³

1. Copyright law provides protection to authors and creators of certain original forms of intellectual property. Typically, the author of an original work is given the exclusive right to control subsequent copying and use of the original. The fair use doctrine provides an exception to the generally broad protection afforded to authors by copyright. It allows secondary users to utilize and copy an original work while neither obtaining permission nor paying any fee to the author. For a more complete explanation of copyright and fair use, see *infra* notes 80-137 and accompanying text.

2. See, e.g., MITCHELL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 10.6, at 298 (1989) (describing the common law as being in "disarray," and of "questionable applicability," and asserting that the modern copyright statute "has not led to predictable results"); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A] (1992) [hereinafter NIMMER] (arguing that the modern copyright law "does not, and does not purport, to provide a rule which may automatically be applied in deciding whether any particular use is 'fair'"); WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 362-63 (1985) [hereinafter PATRY] (arguing that the copyright statute "gives little guidance outside of certain examples of potential uses," and asserting that courts need not be limited to considering the four enumerated factors in the statute).

3. See *supra* note 2.

In this Article, we challenge the orthodox view of fair use. The central theme we develop is that fair use is a predictable, necessary, and principled exception to the general protection offered by copyright law. We believe that the case law exhibits an inner consistency that for too long has gone misunderstood, and we argue, additionally, that the case law reflects a strong tendency to take one overriding principle into account—the *principle of economic substitution*.⁴ We contend that the case law supports a fair use defense only when the secondary use⁵ does not act as an economic substitute for the original. If economic substitution is found, the fair use defense fails. On the other hand, if no economic substitution exists, the law allows the secondary use under the fair use exception.

We begin, in Section II, by defining the orthodox balancing analysis as it was applied in *Basic Books, Inc. v. Kinko's Graphics Corp.*⁶ Because *Kinko's* is an extremely useful case for understanding the failings of the current approach to fair use, in Section III we examine each prong of the balancing analysis used in that case. Although the *Kinko's* court may have reached the right answer, it did so for all of the wrong reasons. *Kinko's* shows that the orthodox gloss on fair use does not take into account the inner consistency of the common law, the federal copyright statute, and most importantly, the actual fair use cases. In Section IV, we examine the history of copyright and fair use and demonstrate the law's inner consistency and its recognition of the principle of economic substitution. Finally, we suggest a positive analysis of copyright and fair use as a solution.

Copyright and fair use, viewed from all directions, is a body of law that implicitly recognizes the principle of economic substitution. As this Article will demonstrate, the fair use critics are wrong. Our analysis suggests that a coherent theory of predictable law exists and that the law is understandable for lawyers, teachers, business people, and judges in analyzing copyright fair use.

II. BACKGROUND OF THE DECEPTIVE ORTHODOXY:

BASIC BOOKS, INC. V. KINKO'S GRAPHICS CORP.

A. *Fair Use Under the Copyright Act of 1976*

Congress codified the copyright and fair use case law in the

4. See *infra* part IV.D.

5. *Secondary use* in this Article refers to the use made of copyrighted material by a second user.

6. 758 F. Supp. 1522 (S.D.N.Y. 1991).

Copyright Act of 1976.⁷ Section 107 of the Act governs fair use. The preamble to section 107 lists several examples of what might be successful assertions of the fair use defense.⁸ Drawing on prior case law, Congress enumerated four factors for determining whether a use qualifies as a fair use. The four factors are formulated in section 107 as follows:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁹

In fair use cases decided after the 1976 Act, courts have focused their analysis on the four statutory factors of section 107. Although Congress had hoped that the Copyright Act would clarify the existing law and lead to a more uniform and predictable body of case law,¹⁰ courts have frequently had difficulty with the four-factor analysis.¹¹ Despite Congress's expressed intent not to enlarge the common law's approach to fair use law, some courts have accorded each of the four factors equal weight and applied a balancing test. Because of the ambiguity of section 107, many courts look to the section's legislative history for guidance in balancing the four factors.¹²

7. 17 U.S.C. §§ 101-801 (1992).

8. The statute states: "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (1976). These purposes can be regarded as uses that will not compete with the author's original work. See also Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) [hereinafter Leval].

9. 17 U.S.C. § 107 (1992). These factors closely parallel those announced by Justice Story in the early case of *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901); see also *infra* notes 111-23 and accompanying text.

10. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976) [hereinafter H.R. REP. NO. 1476].

11. Recent Supreme Court cases have been decided by five-to-four split decisions, with majority and dissenting opinions disagreeing on how each of the four factors supports the defendant's claim. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (finding defendant not guilty of infringement because the public was making fair use copies of the plaintiff's television programs); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (finding the defendant guilty of infringement even though news reporting is one of the uses given specific mention in the preamble to § 107).

12. Some prominent judges, however, have been highly critical of using legislative

B. Basic Books, Inc. v. Kinko's Graphics Corp.

1. Factual Background

A recently decided copyright infringement case, *Basic Books, Inc. v. Kinko's Graphics Corp.*,¹³ provides insight into the inadequacy of the orthodox balancing analysis. The plaintiffs, eight large New York publishers, produce and market books and sell licenses to others to use their copyrighted works. The defendant, Kinko's Graphics Corporation, owns and franchises about 500 copy shops throughout the United States, most of which are located near university campuses. Kinko's college campus shops specialize in serving the academic community.

At issue in *Kinko's* was the legality of a photocopying service known as the "Professor Publishing" program.¹⁴ For this program, two Kinko's photocopy stores in New York City began photocopying, compiling, and selling college course packets that included excerpts from twelve works owned by the eight publishers.¹⁵ The publishers filed suit against Kinko's to enjoin the Professor Publishing program, charging that the two Kinko's shops had reproduced copyrighted material in violation of the 1976 Copyright Act.¹⁶ The publishers specifically complained that Kinko's infringed on their copyrights when it copied excerpts from the

history to elucidate the black letter law. The most notable critics have been the "New Textualists," currently best represented by United States Supreme Court Justice Antonin Scalia. For example, Justice Scalia has argued that Congress probably never reads the so-called legislative history; that legislative intent is not discernible from legislative history; that the use of legislative history permits manipulation of the law; and that it is not the duty of courts to search for the legislature's intent. Instead, courts should apply the law as passed. See Justice Antonin Scalia, *The Use of Legislative History: Judicial Abdication to Fictitious Intent*, Speech for the Howard J. Trienens Visiting Judicial Scholar Program, Northwestern University School of Law (Sept. 12, 1991) [hereinafter Scalia].

13. 758 F. Supp. 1522 (S.D.N.Y. 1991).

14. *Id.* at 1528. The "Professor Publishing" program worked as follows: A professor selected the materials he or she wished to have photocopied and bound into a course packet and dropped them off at a Kinko's shop for copying. If any of the selected materials were copyrighted, the professor was required by Kinko's to make an independent determination of which copyrighted works needed permission for reproduction from the publisher. If Kinko's employees determined that the requested materials went beyond the permissible level of photocopying under the fair use doctrine, they required that the professor obtain permission before Kinko's would proceed further. Kinko's would assist with this process. Once the appropriate permissions were obtained or it was determined that the excerpts fell within fair use, Kinko's reproduced a number of copies corresponding to the number of students actually registered in the professor's class. The students were directed to Kinko's where they purchased the course packets. The packets were sold at the same rate as any copying project, about four cents per page.

15. Plaintiffs' Post-Trial Memorandum of Law at 5, *Kinko's*, (No. 89 Civ. 2807 (CBM)) [hereinafter Plaintiffs' Post-Trial Memorandum].

16. *Kinko's*, 758 F. Supp. at 1526.

plaintiffs' books without permission and then sold those copies for a profit to nearby college students.¹⁷ In answering the complaint, Kinko's admitted that it had copied the excerpts and that the plaintiffs' copyrights were valid. However, Kinko's argued that it had a right to copy and sell the excerpts of the plaintiffs' works under the doctrine of "fair use," as specifically codified in section 107 of the Copyright Act.¹⁸

2. The Orthodox Balancing Analysis

The court began its analysis by explaining that a historical common law interpretation of the fair use doctrine would be necessary because section 107 of the Copyright Act of 1976 was "intended to 'restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way.'"¹⁹ Citing two well known Supreme Court cases,²⁰ the court concluded that fair use is an "equitable rule of reason" and that "a common law interpretation proceeds on a case-by-case basis."²¹ Then, after stressing the unprecedented nature of the case, the court examined the Professor Publishing program under the fair use doctrine as codified in the Copyright Act.²²

The court employed an orthodox balancing analysis in which it examined the defendant's conduct in light of the four statutory factors,²³ the *Agreement on Classroom Guidelines*²⁴ contained in the legislative history, and other equitable policy considerations.²⁵ After finding that a majority of those factors weighed against Kinko's, the court held that Kinko's was not entitled to a fair use privilege and was liable for copyright infringement.²⁶ The following summary of the *Kinko's* court's analysis demonstrates how the practice of merely balancing the four statutory fair use factors, and viewing fair use as an equitable question in general, fails to yield a meaningful analysis.

17. *Id.*

18. *Id.*; see also *supra* note 9 and accompanying text.

19. *Kinko's*, 758 F. Supp. at 1529 (quoting H.R. REP. NO. 1476, *supra* note 10).

20. *Id.* at 1530 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

21. *Id.* at 1529-30.

22. *Id.* at 1530.

23. *Id.* at 1530-34; see also text accompanying note 9.

24. *Kinko's*, 758 F. Supp. at 1535-37; see also *infra* notes 60-74 and accompanying text (discussing the *Agreement on Classroom Guidelines* found in the legislative history).

25. *Kinko's*, 758 F. Supp. at 1534-35.

26. *Id.* at 1547.

III. PROBLEM: THE BALANCING ANALYSIS—THE FAILURE OF THE *KINKO'S* COURT

A. *The Four Factors in Section 107*

1. Purpose and Character of the Secondary Use

The orthodox balancing analysis employed by the *Kinko's* court was problematic because each side could easily cite language from the Copyright Act that was favorable to its position. For example, although the first factor of section 107 sanctions fair use when the copying is educational, it prohibits fair use when the copying is commercial.²⁷ Because the copying was both educational and commercial in *Kinko's*, this case reveals the weakness of the orthodox balancing approach to fair use.

Both parties addressed their arguments to the court's orthodox balancing analysis. The publishers argued vehemently that *Kinko's*, as a profit-making company, was not entitled to a fair use privilege.²⁸ *Kinko's* countered that the professors' use of the photocopied material served nonprofit educational purposes.²⁹ *Kinko's* further argued that when teaching and education are involved, the scope of the fair use doctrine must be wider.³⁰

After an orthodox balancing of the equities, the *Kinko's* court held that the first factor of the fair use analysis tipped in favor of the publishers.³¹ The court relied on the fact that *Kinko's* made a profit.³² In ruling against *Kinko's* on the first prong of the four-part test, the court reasoned that commercial concerns and educa-

27. 17 U.S.C. § 107 (1992).

28. Plaintiffs' Post-Trial Memorandum, *supra* note 15, at 27 (citing *Harper & Row*, 471 U.S. at 562; *Sony Corp.*, 464 U.S. at 451). In *Sony Corp.*, the Court stated that "[t]he prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit. Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter." *Sony Corp.*, 464 U.S. at 450-51. Similarly, in *Harper & Row*, the Court stated that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562.

29. Defendant's Proposed Conclusions of Law at 3, *Kinko's*, (No. 89 Civ. 2807 (CBM)) [hereinafter Defendant's Proposed Conclusions]. *Kinko's* argued that since § 107 expressly mentions "teaching (including multiple copies for classroom use)" as a privileged use under the statute, the need to promote the vital public interest in education weighed heavily in favor of finding fair use. *Id.* (citing 17 U.S.C. § 107 (1992)).

30. *Id.* at 6. In this vein, *Kinko's* argued that denying educators the fair use exception would destroy the policy of broadly disseminating information that underlies the copyright laws. *Id.* at 23-25.

31. *Kinko's*, 758 F. Supp. at 1532.

32. *Id.* at 1531.

tional concerns were mutually exclusive.³³ In effect, the court reasoned that regardless of the end use, fair use had to be denied if the defendant stood to gain financially.

The court's analysis under the first prong of the balancing test defies logic. The *Kinko's* court suggested that if the professors had made their photocopies at a not-for-profit shop, the copying may have been permissible.³⁴ Thus, under the court's strained logic, a professor's use of a not-for-profit copy shop would constitute a valid fair use—even though the copyright holders would suffer identical injury and even if the students paid more for the copies.

2. Nature of the Copyrighted Work

Addressing the second factor in section 107, *Kinko's* presented four arguments: (1) some of the books were either out of print or unavailable; (2) all of the books were published; (3) the books were factual in nature; and (4) no evidence at trial suggested the books were "school text books."³⁵ *Kinko's* argued that when a book is "out of print and unavailable for purchase through normal channels, the user may have more justification for reproducing it."³⁶ Of the twelve books cited in the case, three were out of print and one was out of stock.³⁷ Thus, *Kinko's* reasoned that with respect to these four books, the second factor weighed in its favor.³⁸

In considering the second factor, the court agreed with *Kinko's* but assumed that the second factor turned on whether the original works were factual or nonfactual.³⁹ Finding that the plaintiffs' works were factual in nature, the *Kinko's* court stated, without argument, that the second factor weighed in favor of *Kinko's*.⁴⁰

3. Amount and Substantiality Used

Continuing its orthodox balancing analysis, the *Kinko's* court

33. *Id.* at 1531-32. The court stated that "[t]he extent of [*Kinko's*] insistence that theirs are educational concerns and not profit-making ones boggles the mind." *Id.* at 1532.

34. *Id.* at 1536 n.13.

35. Defendant's Proposed Conclusions, *supra* note 29, at 6-8.

36. *Id.* at 7 (quoting *Harper & Row*, 471 U.S. at 553).

37. *Id.*

38. *Id.*

39. *Kinko's*, 758 F. Supp. at 1533. The court noted that "the scope of fair use is greater with respect to factual than non-factual works." *Id.* at 1532 (quoting *New Era Publications v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir. 1990)).

40. *Id.* at 1533. The court never discussed the nature of the works as being "text-books" or essentially intended for use by students. Most textbooks are factual in nature.

proceeded to consider the third factor in section 107.⁴¹ Again, each litigant cited language from the Copyright Act in favor of its position. The publishers argued that Kinko's copied too much, both quantitatively and qualitatively, to be entitled to a fair use privilege.⁴² Kinko's countered that the portions copied were both quantitatively and qualitatively consistent with a fair use privilege.⁴³ Kinko's also denied the plaintiffs' assertion that the sections copied were so important that they represented the essence of the works.⁴⁴

After balancing the equities of the parties' arguments, the *Kinko's* court determined that the amount and substantiality of the copied portions weighed against Kinko's and in favor of the plaintiffs.⁴⁵ The court acknowledged that there were no absolute rules about how much of a copyrighted work could be copied and still remain within the protection of fair use.⁴⁶ Relying on *Harper & Row Publishers, Inc. v. Nation Enterprises*,⁴⁷ the court reasoned that both the quantity and the quality of the work copied should be considered.⁴⁸

41. *Id.* at 1533-34.

42. Plaintiff's Post-Trial Memorandum, *supra* note 15, at 31-34.

43. Defendant's Proposed Conclusions, *supra* note 29, at 9-12. Kinko's cited several prior decisions in support of its argument: In *Sony Corp.*, the Court held that "the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use." 464 U.S. at 449-50 (footnote omitted). In *Williams & Wilkins Co. v. United States*, the court stated: "It has sometimes been suggested that the copying of an entire copyrighted work . . . cannot ever be 'fair use,' but this is an over-broad generalization, unsupported by the decisions and rejected by years of accepted practice." 487 F.2d 1345, 1353 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975) (footnote omitted). In *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253, 1263 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987), the Second Circuit held that copying 4.3% of the plaintiff's work was fair use as a matter of law, even though the defendant continued to copy the material after the plaintiff had denied permission. Kinko's also relied upon *New Era Publications v. Carol Publishing Group*, 904 F.2d 152, 158 (2d Cir. 1990), in which the Second Circuit also found fair use when the defendant copied "a minuscule amount . . . 5-6% of 12 other works and 8% or more of 11 works, each of the 11 being only a few pages in length." Kinko's had copied between 5% and 14% of the works that were in print and 15% to 25% of the works that were out of print. Defendant's Proposed Conclusions, *supra* note 29, at 11-12. Kinko's argued that such copying was not quantitatively inconsistent with a finding of fair use. *Id.* at 12.

44. *Id.* Kinko's attempted to distinguish its copying from that in *Harper & Row*. In *Harper & Row*, the defendant's newspaper had copied a mere 300 words from the plaintiff's collection of letters. 471 U.S. at 548. The Supreme Court concluded that although the defendant had taken a small quantitative portion, the defendant had taken "what was essentially the heart of the book." *Id.* at 564-65.

45. *Kinko's*, 758 F. Supp. at 1533-34.

46. *Id.* at 1533. The court seemed to contradict this pronouncement in its discussion of the *Agreement on Classroom Guidelines*. See *infra* notes 68-70 and accompanying text.

47. 471 U.S. 539 (1985).

48. *Kinko's*, 758 F. Supp. at 1533.

Here again, the court's balancing analysis was inadequate. In a circular fashion, the *Kinko's* court proclaimed that the portions copied were the critical parts, precisely because they were the passages chosen for duplication by the professors.⁴⁹ Under this reasoning, a photocopy could never be considered fair use. Any photocopy would include "critical parts" of the original work by the mere fact that the part was chosen for photocopying. This type of reasoning is obviously not helpful for those attempting to understand and predict actual case outcomes.

The court also inquired whether fair use law permitted greater leeway for copying out-of-print materials.⁵⁰ Initially, the *Kinko's* court concluded that "longer portions copied from an out-of-print book may be fair use because the book is no longer available"; the court later reversed itself and stated "that damage to out-of-print books may in fact be greater since permission fees may be the only income for authors and copyright owners."⁵¹

The problem with this analysis is that it assumes its own conclusion: copyright owners are entitled to royalty payments. However, this conclusion is true only if a fair use is not permissible. The fact that royalty payments will be lost by the copyright owner is openly acknowledged in the doctrine of fair use. The whole point of the doctrine is to determine when a party can copy *without* making royalty payments. When the *Kinko's* court pointed out that allowing a fair use would deny the copyright owners a royalty payment, the court did nothing but restate the obvious.

4. Effect of the Use on the Market for the Copyrighted Work

After deciding that two of the first three fair use factors favored the plaintiffs, the *Kinko's* court considered section 107's fourth factor.⁵² The publishers maintained that fair use was only permitted when the defendant's copying would not harm the copyright owner's "potential market for copyrighted work."⁵³ The plaintiffs

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1534.

53. See Plaintiffs' Post-Trial Memorandum, *supra* note 15, at 35 (quoting *Harper & Row*, 471 U.S. at 568). The plaintiffs maintained that the potential market value of copyrighted work comes from both direct sales of the work and also from licensing income (the sale of permissions). *Id.* at 36. Additionally, the plaintiffs claimed that Kinko's unauthorized copying denied them potential income from the sale of permissions and thus harmed the plaintiffs by reducing the potential market for the copyrighted work. *Id.* at 35. Therefore, because Kinko's had harmed the copyright owner's potential market for the copyrighted work, Kinko's was not entitled to fair use. *Id.*

argued that they suffered harm to their potential market when they lost permission fees.⁵⁴

Kinko's disputed the plaintiffs' argument that royalty income deserves consideration as a potential market for the copyrighted work.⁵⁵ Kinko's asserted that the plaintiffs' argument wrongfully "assumes what it is trying to prove."⁵⁶ Kinko's also disputed the proposition that there could be any meaningful harm to the sales of out-of-print books.⁵⁷

Adhering to the balancing test orthodoxy, the court stated that the fourth factor was "undoubtedly the single most important element of fair use."⁵⁸ The *Kinko's* court reasoned that the plaintiffs lost royalty income when the defendant copied the materials without first paying them a permission fee. The court found that this lost fee weighed against finding fair use under the fourth factor.⁵⁹

Once again, the balancing test failed. The court never seemed to realize that its reasoning was circular. The court failed to understand that fair use will always, by definition, diminish a copyright holder's royalty income. Thus, loss of royalty income alone cannot be a useful factor in determining a fair use in the *Kinko's* case.

B. Analysis of the Agreement on Classroom Guidelines⁶⁰

The district court concluded that after balancing the equities,

54. *Id.* at 35-40.

55. See Defendant's Proposed Conclusions, *supra* note 29, at 19-21.

56. *Id.* at 19. Kinko's used the following quotation to buttress its argument:

It is wrong to measure the detriment to plaintiff by loss of presumed royalty income—a standard which necessarily assumes that plaintiff had a right to issue licenses. That would be true, of course, only if it were first decided that the defendant's practices did not constitute "fair use." In determining whether the company has been sufficiently hurt to cause these practices to become "unfair," one cannot assume at the start the merit of the plaintiff's position, i.e., that plaintiff had the right to license. That conclusion results only if it is first determined that the photocopying is "unfair."

Id. at 20 (quoting *Williams & Wilkins*, 487 F.2d at 1357 n.19).

Kinko's also relied on *Wright v. Warner Books, Inc.*, 748 F. Supp. 105, 109 (S.D.N.Y. 1990), which noted that the plaintiff's observation that the defendant copied without permission "only begs the question: if [the defendant's] paraphrased use of the letter is fair, then permission was not necessary." *Id.*

57. Defendant's Proposed Conclusions, *supra* note 29, at 20.

58. *Kinko's*, 758 F. Supp. at 1534 (citing *Harper & Row*, 471 U.S. at 566).

59. *Id.*

60. The House Committee reported that while " 'a specific exemption freeing certain reproduction of copyrighted works for educational and scholarly purposes from copyright control is not justified. . . . ' there is a 'need for greater certainty and protection for teachers.' " H.R. REP. NO. 1476, *supra* note 10, at 66-67 (quoting H.R. REP. NO. 83, 90th Cong., 1st Sess. 30-31 (1967)). With this in mind, Congress amended 17 U.S.C. app. § 504(c), which limited the penalties for infringement by innocent teachers and other

the four fair use factors alone prohibited Kinko's conduct. However, the court also tried to buttress its decision with a discussion of the legislative history contained in the *Agreement on Classroom Guidelines* ("the *Agreement*").⁶¹ Although Congress was silent regarding how the courts should use the *Agreement*, the *Agreement* itself states that it cannot be cited as evidence of copyright infringement.⁶²

The parties testifying before Congress did agree that the "purpose of the following guidelines is to state the minimum standards of educational fair use."⁶³ Although the lobbyists equivocated on what the *Agreement* permitted as a safe harbor for teachers, they explicitly provided that it did not make any negative limitations on educational fair use.⁶⁴

nonprofit users of copyrighted material. *Id.* at 67. During committee hearings, representatives for teachers and publishers each presented opposing testimony on how fair use ought to affect photocopying for classroom use. The chairman of the subcommittee, along with other members, urged the two groups to meet and "achieve a meeting of the minds as to permissible educational uses of copyrighted material." *Id.* After considerable negotiation, the groups reached a tentative compromise on classroom photocopying and drafted a statement reflecting the negotiated agreement. The subcommittee inserted the text of the groups' compact into the Committee Report as the *Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions*. *Id.* at 68-70.

61. *Kinko's*, 758 F. Supp. at 1535-37.

62. The *Agreement on Classroom Guidelines* states that it is not intended to be a limitation on fair use:

The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 [T]he following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107

There *may* be instances in which copying which does not fall within the guidelines stated below *may* nonetheless be permitted under the criteria of fair use.

H.R. REP. NO. 1476, *supra* note 10, at 66-68 (emphasis added). The *Agreement* also states:

[T]he extent of permissible copying for educational purposes may change *in the future*; that certain types of copying permitted under these guidelines may not be permissible *in the future*; and conversely that *in the future* other types of copying not permitted under these guidelines may be permissible under *revised guidelines*.

Id. at 68 (emphasis added). While a cursory reading of these passages may confuse the casual reader, close inspection reveals that such language only discusses the parties' ability to modify the *Guidelines* in the future, without casting doubt on the purpose of the guidelines to state the minimum fair use standards.

63. *Id.*

64. *Id.* The following excerpt from the *Agreement on Classroom Guidelines* demonstrates why a party who copied in excess of the *Agreement* would not necessarily be guilty of copyright infringement:

[T]he following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision bill. There may be

Ignoring the stated purpose behind the *Agreement on Classroom Guidelines*, the court primarily focused on Kinko's for-profit status. The court asked whether Kinko's qualified for any educational consideration when it acted "as a for-profit corporation, and [with] its profitmaking intent."⁶⁵ Although the professors' and students' photocopying might have qualified as fair use, the court rejected Kinko's argument that it was in service to the educational community.⁶⁶ The court wrote: "Classroom and library copying are viewed more sympathetically 'since they generally involve no commercial exploitation and . . . [have] socially useful objectives. . . . [T]his is not true of photocopy shops, which reproduce for profit.'"⁶⁷

The court engaged in a balancing analysis of Kinko's conduct under the *Agreement on Classroom Guidelines* as if it were actually a controlling part of the law within the Copyright Act.⁶⁸ Though the court initially equivocated on whether the *Agreement* stated the minimum or maximum allowable copying under the fair use doctrine,⁶⁹ it ultimately determined that a "violation" of the *Agreement* was yet another factor to be weighed against the defendant in a fair use analysis.⁷⁰

instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

Id.

65. *Kinko's*, 758 F. Supp. at 1535.

66. *Id.* at 1536. "Kinko's is in the business of providing copying services for whom ever is willing to pay for them and, as evidenced in this case, students of colleges and universities are willing to pay for them." *Id.* "Kinko's intentionally and as a market strategy targeted college buyers and aggressively pursued their business through its Professor Publishing business." *Id.* at 1544.

67. *Id.* at 1536 (quoting NIMMER, *supra* note 2, § 13.05[E]). The court assumed that the socially useful objectives of a nonprofit university copy shop will always differ from a for-profit copy shop though each copy shop is producing exactly the same materials for exactly the same customer. Since each copy shop must compete against the other for the educational business, the socially useful utility provided to the educational community is identical.

68. *Id.* at 1535-36. The court suggested that the *Agreement on Classroom Guidelines* "indicates that Congress saw the maelstrom beginning to churn and sought to clarify, through broad mandate, its intentions." *Id.* For a sharply critical view of using this kind of legislative history to support a position such as this, see Scalia, *supra* note 12.

69. *Kinko's*, 758 F. Supp. at 1536. "There is dispute as to whether the Guidelines represent a maximum or minimum of allowable copying." *Id.* The notion of a controversy concerning whether the *Agreement of Classroom Guidelines* represents a maximum or minimum of allowable copying is erroneous. See *supra* note 62.

70. *Kinko's*, 758 F. Supp. at 1537. The facts are undisputed that Kinko's copying was clearly more extensive than the *Agreement* permits since it allows copying up to "1,000 words or 10% of the work, whichever is less." *Id.*; see also H.R. REP. NO. 1476, *supra* note 10, at 69. However, the court's opinion reveals that it saw Kinko's photocopying beyond that permitted by the *Agreement* as weighing against a finding for fair use.

Once again, the *Kinko's* court missed the point. Reliance on the *Agreement on Classroom Guidelines* for guidance about fair use is questionable at best. The *Agreement* was not included in the legislative history to change the law "in any way."⁷¹ It does not limit copying but instead sets forth bright line rules that indicate when teachers are within a safe harbor.⁷² Even as a safe harbor, though, the *Agreement* is not especially illuminating. It is so restrictive⁷³ that most classroom uses are outside this safe harbor anyway.⁷⁴ By design, the *Agreement on Classroom Guidelines* simply does not provide meaningful standards for determining when classroom uses infringe.

"Kinko's copying . . . is excessive and in violation of the Guidelines requirements." *Kinko's*, 758 F. Supp. at 1536. "Kinko's conduct appears to violate a specific mandate of the Classroom Guidelines . . ." *Id.* at 1537. "Kinko's appears to have exempted itself from the purview of the Guidelines altogether. To the contrary, being beyond the scope of the Guidelines, to this court, still renders Kinko's subject to fair use law." *Id.* at 1545.

71. H.R. REP. NO. 1476, *supra* note 10, at 66.

72. The *Agreement on Classroom Guidelines* permits the following:

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

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 a notice of copyright.

Id. at 68.

73. To be within the safe harbor, prose must be:

(a) [e]ither 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. . . . 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. . . . There shall not be more than nine instances of such multiple copying for one course during one class term. . . . Copying shall not be used to create or to replace or substitute for anthologies. . . . Copying shall not: . . . 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.

Id. at 68-70.

74. See Debra E. Blum, *Use of Photocopied Anthologies for Courses Snarled by Delays and Costs of Copyright-Permission Process*, CHRON. OF HIGHER ED., Sept. 11, 1991, at A19-20 [hereinafter Blum].

IV. SOLUTION: A POSITIVE ECONOMIC ANALYSIS OF FAIR USE LAW⁷⁵

Despite its good intentions in *Kinko's*, the court's orthodox balancing methodology will only generate confusion in future fair use cases. The *Kinko's* court should have found *Kinko's* liable for copyright infringement—but not merely because *Kinko's* made a profit.⁷⁶ Confusion will result from the court's conclusion that a review of the fair use precedent can yield no coherent, predictable interpretation of the fair use doctrine.⁷⁷ By reaching this conclusion, the court missed a valuable opportunity to logically articulate the existing fair use law. Additional confusion will result because the *Kinko's* opinion misstates the theoretical underpinnings of

75. In this section, we present an analysis of the fair use case law. There is not sufficient space to mention each and every fair use case that has been handed down by a federal court. We have examined all fair use cases decided by the Supreme Court and the circuit courts of appeals since 1976, and have found no holdings that refute our theory of economic substitution.

Our view of the case law does not purport to explain a line of copyright cases known as "Parody or Disparagement" where defendants have often claimed fair use. See, e.g., *Acuff-Rose Music v. Campbell*, 972 F.2d 1429 (6th Cir. 1992) (holding that there is infringement liability for defendant's rap song that parodied plaintiff's pop hit); *Eveready Battery Co. v. Adolf Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991) (holding there is no infringement liability for a defendant whose television commercial spoofed the plaintiff's Eveready "Bunny"); *Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990) (holding there is infringement liability for defendants whose sculpture duplicated and parodied the plaintiff's "Puppies" paragraph); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979) (holding there is infringement liability for defendants who produced a poster of a cheerleader similar to the plaintiff's poster but with topless cheerleaders); *Walt Disney Prod. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (holding there is infringement liability for defendant's comic books that parodied plaintiff's cartoon characters); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964) (holding there is infringement liability for defendant's magazine that parodied plaintiff's songs); *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956) (holding there is infringement liability for defendant's television skit that burlesqued plaintiff's movie); *Columbia Picture Corp. v. NBC*, 137 F. Supp. 348 (S.D. Cal. 1955) (holding there is no infringement liability for defendant's television skit that parodied plaintiff's movie).

76. After all, if the law allows educational institutions to engage in photocopying similar to that in *Kinko's* (i.e., fair use without permission and without royalty payments to copyright owners), then *Kinko's* photocopying business logically should also operate within the law.

The *Kinko's* court stated that "this court does not consider copying performed by students, libraries, nor on-campus copy-shops, whether conducted for-profit or not." *Kinko's*, 758 F. Supp. at 1536 n. 13. The perverse result of the *Kinko's* court's implicit approval of campus copying is that students might pay more for course packets produced by campus shops, and the copyright holders would still be injured. As this Article suggests, the siphoning off of demand for original works occurs whether or not the copy shop makes a profit.

77. *Kinko's*, 758 F. Supp. at 1530; see also Blum, *supra* note 74, at A19 (demonstrating the need to eliminate the uncertainty with respect to the fair use doctrine and to provide educators with a reliable and workable rule of law).

copyright law. As a result of dicta in the court's opinion, nonprofit photocopy shops and individual teachers will continue to copy protected material, publishers and authors will continue to suffer economic harm, and college students may continue to pay more for photocopied course packets.⁷⁸

Contrary to the court's statements in *Kinko's*, the doctrine of fair use is neither mysterious nor merely intuitive. Fair use need not be understood as an unorganized collection of exceptions to the rules of copyright. Instead, fair use should be understood as a rational and necessary part of copyright law, the observance of which is essential to achieve the goals of that law.⁷⁹ As this section will demonstrate, the cases reveal that economic substitution is the appropriate standard by which to analyze fair use.

A. *History of Copyright Law and Fair Use*

Copyright law vests a bundle of rights in the creator of certain kinds of intellectual property.⁸⁰ The term *copyright* literally means the exclusive right to copy.⁸¹ While some intellectual property, like computer software, is the product of cutting-edge technology, the doctrine vesting property rights in the creators of intellectual property is over three hundred years old.⁸²

Copyright law, both ancient and modern, is founded on the fundamental, though perhaps implicit, notion that adverse economic incentives are created if unrestricted copying of intellectual products is permitted. When adverse incentives exist, society will not have as much creative innovation as it wishes to encourage.⁸³ Therefore, the emphasis of copyright law is on the benefits derived

78. See *Kinko's*, 758 F. Supp. at 1536 n. 13. In reality, many university copy shops engage in practices identical to Kinko's. See Blum, *supra* note 74, at A19-20. At around five cents per page before royalty charges, Kinko's charges less than the ten to twenty-five cents many nonprofit university copy centers and self-service machines charge per copy.

79. Leval, *supra* note 8, at 1107.

80. See 17 U.S.C. § 106 (1992).

81. The owner of a copyright has the exclusive right to copy the work. See 17 U.S.C. § 106(1) (1992).

82. See LYMAN R. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968) [hereinafter PATTERSON]; see also AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS (1971) (discussing early copyright law).

83. See Statute of Anne, 8 Anne, ch. 19, § 1 (1710) (Eng.) (stating that its purpose is "the encouragement of learned men to compose and write useful books"); see also U.S. CONST. art. I, § 8, cl. 8 (stating that Congress has the power "[t]o 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").

by the public from the creative efforts of authors.⁸⁴ Reward to copyright owners or authors is a necessary but secondary consideration.⁸⁵ Historically, the exception to copyright protection, known as fair use, applied to circumstances where the policy of rewarding an author's creativity would not be undermined.⁸⁶

Some might ask how copyright monopolies can be tolerated in light of our society's general belief in the value of free markets. Copyright law might seem counterintuitive. The best explanation is that the monopolistic benefits conferred upon individual authors are acceptable because they encourage innovation.⁸⁷ Copyright law promotes a higher level of innovation than would normally exist if these "public goods" were not legally protected.⁸⁸

If intellectual property were not protected, many authors would wait for another to create a literary work and then take the work away from the innovator. Authors would be less likely to expend their own efforts because as soon as their efforts had been expended, some other person would steal the work.⁸⁹ Thus, creation of intellectual property presents a classic free rider⁹⁰ situation.

The common law of copyright and fair use implicitly recognized the tension arising from the free rider problem, disincentives, monopoly, and access to information in a free society. The fair use doctrine eventually developed to address this tension.⁹¹ In some limited circumstances, fair use permits someone other than the author to copy a copyrighted work without the author's permission. Although its roots go back much further, the doctrine of fair use

84. See Leval, *supra* note 8, at 1107-09 (underscoring the utilitarian principles that support the copyright laws).

85. *Sony Corp.*, 464 U.S. at 429. "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *Id.* (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948)).

86. See *infra* notes 111-23 and accompanying text.

87. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988) [hereinafter Fisher] (analyzing how the free goods theory is incorporated into the doctrine of fair use); ROY J. RUFFIN & PAUL R. GREGORY, *PRINCIPLES OF MICROECONOMICS* 24-25, 29, 705-06 (1985) [hereinafter RUFFIN & GREGORY] (discussing free goods and free riders); see also Leval, *supra* note 8, at 1107-09 (discussing the utilitarian and economic consequences of the fair use laws).

88. A "public good" is property for which the costs of protecting the property from misappropriation outweigh the benefits to be derived from owning the property. Because one cannot effectively benefit from ownership of a public good, one has no incentive to create or maintain a public good. See Fisher, *supra* note 87, at 1700.

89. *Id.*

90. A *free rider* is someone who gains the benefit of an undertaking without personal cost. See RUFFIN & GREGORY, *supra* note 87, at 24-25.

91. See *infra* notes 111-23 and accompanying text.

did not fully emerge until the mid-nineteenth century.⁹²

1. The English Approach

Copyrights have been coveted property since the introduction of the printing press by William Claxton in 1476.⁹³ Copyright protection began when the Crown strictly regulated printing because of its fears of Protestantism. By 1680, however, the Crown's censorship of the publishing industry had begun to wane.⁹⁴ By 1695, the printing industry had fallen into chaos with the lapse of the Printing Act of 1662.⁹⁵ After over a hundred years of government protection, the stationers—previously the sole beneficiaries of the royal printing permit—were ill-equipped to compete in the marketplace. Thus, the stationers lobbied for new laws to protect them from competitive pressures.⁹⁶ Yielding to this appeal, Parliament passed the Statute of Anne,⁹⁷ the first copyright act, with the intent of extending the stationers' monopoly.⁹⁸ However, the stationers' hope of continued monopoly profits was never realized.⁹⁹ After the Statute of Anne was passed, the focus of copyright laws changed from protecting the Crown and printers to promoting authorship.¹⁰⁰ Writing in England had become respectable, and Parliament wanted to be seen as encouraging the literary arts.¹⁰¹ Thus, the Statute stood for "the encouragement of learned men to compose and write useful books."¹⁰²

Paralleling modern copyright law, the Statute of Anne rewarded authors with monopoly profits for a predetermined period of time.¹⁰³ Further parallels can be found in the Statute's provisions for infringement and registration. Infringement carried the penalty

92. See PATTERSON, *supra* note 82, at 16.

93. *Id.* at 20; BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2 (1967) [hereinafter KAPLAN].

The Crown regulated the new printing industry with strict licensing requirements. By 1558, the mere possession of an unlawful book was a capital offense. KAPLAN, *supra*, at 3. Privileged book publishers, known as stationers, were issued the first known copyrights, called "letters patents." *Id.* The letters patents granted to the stationers an exclusive right to publish any book. *Id.* Like any monopoly, these patents were extremely profitable for their owners. *Id.*

94. *Id.* at 5-6.

95. *Id.* at 6.

96. *Id.*

97. Statute of Anne, 8 Anne, ch. 19, § 1 (1710) (Eng.).

98. KAPLAN, *supra* note 93, at 7.

99. *Id.* at 6.

100. See PATTERSON, *supra* note 82, at 151.

101. *Id.*

102. Statute of Anne, 8 Anne, ch. 19, § 1 (1710) (Eng.).

103. See Howard B. Abrams, *The Historic Foundations of American Copyright Law:*

of statutory damages and destruction of the infringing material.¹⁰⁴ Finally, registration was also required for protection. Before they could enforce their copyrights, authors had to have the book's title registered with the Stationer's company prior to its publication.¹⁰⁵ With these provisions, the Statute of Anne eventually became a model for copyright law in the United States.

2. Copyrights in the United States

Based loosely on the Statute of Anne, each of the original American colonies adopted its own particular variant of copyright law.¹⁰⁶ Later, the Framers of the Constitution sought uniform laws for the new states.¹⁰⁷ Article I of the Constitution empowers Congress to enact laws "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."¹⁰⁸ One cannot ignore the clear utilitarian principles underpinning the Framers' choice of language: "To promote the Progress of Science and the useful Arts."¹⁰⁹ Historically, the constitutional reward of a monopoly to authors was a means of promoting public good by creating an incentive for authors to create.¹¹⁰ The Supreme Court gave the fullest expression to this policy in a classic case involving two biographies of George Washington.

3. *Folsom v. Marsh*: The Classic Statement of the Fair Use Doctrine

*Folsom v. Marsh*¹¹¹ still stands as the classic exposition of the fair use doctrine. It is authoritatively cited, even today, as valid law.¹¹² In *Folsom*, the plaintiffs were printers and publishers who

Exploding the Myth of Common Law Copyright, 29 WAYNE L. REV. 1119, 1140-41 (1983) [hereinafter Abrams].

104. Statute of Anne, 8 Anne, ch. 19, § 1 (1710) (Eng.). "[S]uch offender or offenders shall forfeit such book . . . to the proprietor . . . who shall forthwith damask and make waste paper of them; and further, That every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her or their custody. . . ." *Id.*

105. *Id.* ch. 19 § 2. "[B]ooks hereafter published shall, before such publication, be entred, in the register book of the company of stationers. . . ." *Id.*

106. See Abrams, *supra* note 103, at 1172-73.

107. *Id.*

108. U.S. CONST. art. I, § 8, cl. 8.

109. See Leval, *supra* note 8, at 1105 (describing the economic and utilitarian motives behind the copyright provision in the Constitution).

110. *Id.* at 1107-10.

111. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

112. *Folsom* was the first American case to recognize the fair use exception to copy-

had purchased a valid copyright from the author of *The Writings of George Washington*.¹¹³ The defendants were a book-selling company and the author of *The Life of Washington in the Form of an Autobiography*.¹¹⁴ The defendants admitted at trial that in writing their version of Washington's autobiography, they had copied 388 pages, or 5.7%, from the plaintiffs' treatise verbatim.¹¹⁵

Finding the defendants guilty of infringement, the circuit court, in an opinion written by Justice Story, distinguished the defendants' infringement from fair use.¹¹⁶ Justice Story explained that a third party could cite large portions from an original text in a critical review, if his clear use of the passages was for the purpose of criticism.¹¹⁷ However, if a third party cited the most important parts of a copyrighted work "with a view, not to criticise, but to supersede the use of the original work," that use was an infringement and would not be permitted.¹¹⁸

Justice Story wrote that allowing the copying of protected works "would operate as a great discouragement" to the creation of fu-

right law developed in England in the mid-eighteenth century. See *Harper & Row*, 471 U.S. at 550; *Sony Corp.*, 464 U.S. at 476. The English have cited Justice Story's *Folsom* decision as the best explanation of the common law fair use doctrine. See PATRY, *supra* note 2, at 3.

113. *Folsom*, 9 F. Cas. at 343. The full title of the work was: *The Writings of George Washington, being his correspondence, addresses, messages, and other papers, official and private, selected and published from the original manuscripts, with a life of the author, notes, and illustrations, by Jared Sparks*. *Id.* The work, 6763 pages bound into 12 volumes, consisted of both private and public letters of the first President. *Id.* The plaintiffs were the only known publishers of some of this material. *Id.* at 343-44.

114. *Id.* The full title was: *The Life of Washington in the Form of an Autobiography, the narrative being to a great extent conducted by himself, in extracts and selections from his own writings, with portraits and other engravings*. *Id.* The two book titles in *Folsom* demonstrate that at one time it was possible to judge a book by its cover.

115. *Id.* In *Folsom* the defendants argued that there was no infringement for the following reasons:

- I. The papers of George Washington are not subjects of the copyright.
 1. They are manuscripts of a deceased person, not injured by publication of them.
 2. They are not literary, and, therefore, are not literary property.
 3. They are *public in their nature*, and, therefore, are *not private property*.
 4. They were meant by the author for public use.
- II. [The Plaintiff] is not the owner of these papers, but they belong to the United States, and may be published by any one.
- III. An author has a right to quote, select, extract or abridge from another, in the composition of a work essentially new.

Id. at 344 (emphasis added). A similarity exists between the defendants' assertions in *Folsom* and the modern fair use defense. The basis of the arguments in both cases is that public policy requires that copying be allowed in order to satisfy the public good.

116. *Id.* at 349.

117. *Id.* at 344.

118. *Folsom*, 9 F. Cas. at 345 (emphasis added).

ture works if the copying would compete with the use of the original work.¹¹⁹ He reasoned that fair use should not apply to situations where creators of original works would be discouraged from investing in authorship.¹²⁰ Justice Story went on to state the now-famous test of fair use: “[W]e must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree to which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”¹²¹

One hundred and thirty-five years after Justice Story wrote the *Folsom* opinion, Congress codified the common law principles of copyright and fair use in section 107 of the Copyright Act of 1976.¹²² Acknowledging the importance of the fair use case law dating back to *Folsom*, Congress expressed its intent to “restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”¹²³

B. Policy Goals Behind Copyright and Fair Use

The Constitution plainly states that the “exclusive Right[s] to their respective Writings and Discoveries” given to authors exist only because of statutory enactment and are unmistakably tied to “the Progress of Science and useful Arts.”¹²⁴ Further, the fact that copyrights are only granted “for limited times” confirms that these exclusive rights are neither absolute nor morally necessary and that the rights may expire when they no longer serve the utilitarian goal of progress in science and the useful arts.¹²⁵

The original utilitarian principle underlying copyright law is still the accepted objective and foundation of recent decisions by the Supreme Court. In *Harper & Row*,¹²⁶ the Court explained that “[t]he rights conferred by copyright are designed to assure contrib-

119. *Id.* at 347.

120. *Id.* Justice Story stated:

What descendant, or representative of the deceased author, would undertake to publish, at his own risk and expense, any such papers; and what editor would be willing to employ his own learning, and judgment, and researches, in illustrating such works, if, the moment they were successful, and possessed the substantial patronage of the public, a rival bookseller might republish them, either in the same, or in a cheaper form, and thus . . . take from him the whole profits?

Id.

121. *Id.* at 348.

122. 17 U.S.C. §§ 101-801 (1992).

123. H.R. REP. NO. 1476, *supra* note 10, at 66.

124. Leval, *supra* note 8, at 1108.

125. *Id.*

126. 471 U.S. 539 (1985).

utors to the store of knowledge a fair return for their labors"¹²⁷ and "to motivate the creative activity of authors . . . by the provision of a special reward."¹²⁸ Therefore, copyright law "rewards the individual author in order to benefit the public."¹²⁹ The Supreme Court has also confirmed that fair use limitations exist when exclusive intellectual property rights will not serve the progress of the useful arts. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Court stated that "[t]he monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. . . . 'The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.'"¹³⁰ When enforcement of copyrights would not advance the constitutional goals behind the law, a fair use defense will be successful.¹³¹

In *Folsom v. Marsh*,¹³² the court implicitly relied on classical economic principles when it denied the defendant the right to copy. Justice Story reasoned that unlimited copying of historically significant works would discourage the preservation of historical materials and that such materials "would become far more scanty" without copyright protection.¹³³ The keystone of Story's analysis was to determine if the secondary use could become a substitute for the original work. He stated that "if [the alleged infringer] thus cites the most important parts of the work, with a view . . . to supersede the use of the original work, and substitute [the secondary use] for [the original use], such a use will be deemed in law a piracy [or unfair use]."¹³⁴ If copies were allowed to substitute for original works, a disincentive for individual creativity would result. This disincentive is precisely what the Framers of the Constitution sought to prevent.

127. *Id.* at 546 (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

128. *Id.* (quoting *Sony Corp.*, 464 U.S. at 429).

129. *Id.* (quoting *Sony Corp.*, 464 U.S. at 477 (Blackmun, J. dissenting)).

130. *Sony Corp.*, 464 U.S. at 429 (emphasis added) (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)).

131. *Cf. Leval*, *supra* note 8, at 1110. Leval argues that the person claiming fair use has the burden of showing that the use "serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity." *Id.*

132. *Folsom*, 9 F. Cas. at 342.

133. *Id.* at 347.

134. *Id.* at 344-45.

C. *The Statutory Factors of the Copyright Act*

Justice Story is credited with being the first to outline the test of fair use eventually codified as the four statutory fair use factors of the 1976 Copyright Act.¹³⁵ In analyzing each of these four factors, the focus should remain on preventing a potential substitution of the original work by the secondary work.¹³⁶ In different cases, some factors will often be more illustrative of economic substitution than others. However, the factors should not be understood to be a mere litany of requirements that must be met or balanced. Rather, they should be understood to provide different perspectives of the central test: *Does the use by the defendant serve as a market substitute for the original?* If it does, then the copier is infringing. If not, the copier is entitled to the fair use defense. As will be shown in the following sections, courts have recognized this basic principle.¹³⁷

To determine whether copying is entitled to fair use protection, courts need not engage in vague balancing tests and assessments of equities. For example, because the course packets substituted for the original works, the copying in *Kinko's* was a classic case of an *unfair* use. In *Kinko's*, each and every one of the four factors demonstrates that Kinko's photocopying served as an economic substitute for the original work. Thus, regardless of whether or not Kinko's made a profit, its copying was an unfair use of the original materials.

D. *The Fair Use Case Law: A Recognition of Economic Market Substitution*

1. Purpose and Character of the Secondary Use

The first factor of the fair use provision of the Copyright Act directs the courts to examine how the purpose and character of the alleged fair use would affect the original work. One might rephrase this as a question of whether the purpose and character of the secondary use discourages the objective of copyright law to stimulate

135. See *supra* notes 111-23 and accompanying text.

136. As one federal district court judge has aptly written:

The [four] factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright [law].

Leval, *supra* note 8, at 1110-11.

137. For a more practice-oriented explanation of the market substitution theory, see Michael G. Anderson et al., *Market Substitution in Copyright: Understanding Fair Use Case Law*, 10 U. MIAMI ENT. & SPORTS L. REV. Issue 2 (forthcoming 1993).

creativity.¹³⁸

The key inquiry is whether the secondary and primary uses are so similar in nature that the one can serve as a substitute for the other. For example, if the purpose and character of both the primary and secondary use is educational, then the likelihood of a substitution occurring is increased. In this case, fair use would properly be denied. However, if the purpose and character of the primary use is political, for example, and the secondary use is entertainment, then a fair use is likely to be found. A court should *not* determine the purpose and character of the secondary use and then check it against a list of uses favored by a judge as good public policy.

Section 107 exemplifies a "nonprofit educational purpose" as a characteristic that will not interfere with the ordinary "commercial nature" of copyrighted work. However, a "nonprofit educational purpose" may not always indicate a fair use.¹³⁹ In *Marcus v. Rowley*,¹⁴⁰ for example, the defendant's employee, a public high school teacher, copied eleven out of thirty-five pages from the plaintiff's cake-decorating book.¹⁴¹ As was the case with many of the books copied in *Kinko's*, the purpose and character of both the primary and the secondary works in *Marcus* were educational. Furthermore, in *Marcus*, the purpose and character of the defendant's use were unquestionably nonprofit.¹⁴² Despite these considerations, the circuit court reversed the district court and held that the *Marcus* defendant infringed by copying the plaintiff's book.¹⁴³ The court stated that when a secondary use is created "for the same intrinsic purpose for which the copyright owner intended [the original work]," such a use "is strong indicia of no fair use."¹⁴⁴ Thus, the *Marcus* court recognized that nonprofit educational uses are mere *examples* of secondary uses that are unlikely to conflict with the purpose and character of the original use. Under *Marcus*, even if it is generally held to be a fair use under section 107, the secondary use is not likely to be considered fair if it overlaps with the purpose and character of the primary use.

The *Marcus* case is not an isolated example of this position. In

138. Leval, *supra* note 8, at 1111.

139. See 17 U.S.C. § 107(1) (1992).

140. 695 F.2d 1171 (9th Cir. 1983).

141. *Id.* at 1173.

142. The defendant's employee distributed the book to students at no charge. See *id.* at 1175.

143. *Id.* at 1179.

144. *Id.* at 1175.

Harper & Row,¹⁴⁵ the defendant copied the plaintiff's manuscript for a magazine article.¹⁴⁶ Section 107 of the Copyright Act lists criticism, comment, and news reporting as ordinarily fair uses.¹⁴⁷ However, the Supreme Court held that the defendant's use was not a fair use.¹⁴⁸ The outcome in *Harper & Row* is understandable if one recognizes that the purpose and character of both the plaintiff's and defendant's works were the same.¹⁴⁹ Both uses related to news reporting, and they were close enough for the secondary use to effectively substitute for the original work. Thus, while news reporting may not ordinarily conflict with the purpose and character of a primary work, in *Harper & Row* the defendant's secondary use was such a successful substitute that the market for the plaintiff's original copyrighted work was totally destroyed.¹⁵⁰

In *Harper & Row*, the Court also mentioned that "the fact that a publication was commercial . . . tends to weigh against a finding of fair use."¹⁵¹ Such dictum can be a trap for the unwary. The profit factor cannot explain why, when almost all newspapers operate for a profit, the general rule is that profit-making newspapers have a broad privilege with respect to fair use.

The court in *Hustler Magazine, Inc. v. Moral Majority, Inc.* underscored the fact that a defendant's profit should not be determinative.¹⁵² In *Hustler*, a caricature of the defendant Jerry Falwell was featured as a cartoon in *Hustler* magazine. Outraged, Falwell had a page from the plaintiff's magazine photocopied and mass mailed in an effort to raise money for the Moral Majority.¹⁵³ The *Hustler* court held that while the purpose and character of Falwell's use were certainly profitmaking or even purely commercial,¹⁵⁴ they were so different from the magazine's use that he and the Moral Majority were entitled to the fair use exception.¹⁵⁵ Be-

145. 471 U.S. 539 (1985).

146. *Id.* at 543.

147. See 17 U.S.C. § 107 (1992).

148. *Harper & Row*, 471 U.S. at 569.

149. *Id.* at 561-62.

150. The Court noted that "[w]ith certain special exceptions . . . a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." *Id.* at 568 (citation omitted).

151. *Id.* at 562.

152. 796 F.2d 1148 (9th Cir. 1986).

153. *Id.* at 1150.

154. *Id.* at 1152. As a result of the mailing, the defendants received at least \$717,000. *Id.* at 1150. Because the defendants used the cartoon for a profit-making purpose, the orthodox fair use reasoning would hold that their use was presumptively unfair. *Id.* at 1152.

155. *Id.* at 1156.

cause the purpose and character of Falwell's use, although for-profit, was different from the magazine's use, it could not substitute for the original work. Thus, even in *Hustler*, where the defendant's work was for a commercial purpose, the decisive factor was whether the purpose and character of the secondary work was sufficiently similar to that of the plaintiff's work that it could serve as a market substitute for the primary work.

In *Kinko's*, the purpose and character of both the college textbooks and the photocopied course packets created by Kinko's was educational. Because they covered the same subject matter and satisfied the same market demand as the textbooks, the course packets could become a total substitute for the copied textbooks. Had the course packets not contained excerpts from textbooks but rather excerpts from a law review not marketed for sale to students, for example, a fair use might have been allowed. With a law review article, a court could find fair use since the professor's secondary use of the article would not serve as a market substitute for the original work.

As in *Marcus*, *Harper & Row*, and *Hustler*, the question of whether *Kinko's* use was best characterized as commercial or non-profit and educational was misleading and unnecessary. In *Kinko's*, the key reason for denying fair use was that because the course packets and the plaintiffs' college textbooks were both educational, the course packets could serve as a substitute for the textbooks. Regardless of its profit-making status, or the educational values involved, Kinko's created an economic substitute for the original work. Consequently, Kinko's could not receive the benefits of the fair use exception.

Thus, the best understanding of the first prong of the fair use test is that the absolute purpose and character of the copyrighted work is not important. Only the purpose and character of the original work relative to the secondary use is relevant. Fair use is allowed when the purpose and character of the two works are so dissimilar that an economic substitution will not occur.

2. Nature of the Copyrighted Work

The second factor provides another perspective from which courts can determine whether a secondary use can serve as an economic substitute for the original work. Some have suggested that when the purpose of the work is factual in nature, the original

work is entitled to less copyright protection.¹⁵⁶ Though the creative versus factual distinction may seem consistent with the general rule that facts and ideas are not protected by copyrights, the distinction simply does not explain the case law unless one compares the primary use with the secondary use.

In *Hustler Magazine*,¹⁵⁷ the court admitted that the original work, a cartoon of Jerry Falwell, was "more creative than informational," and in dicta stated that the creative nature of the work restricted the scope of fair use.¹⁵⁸ Despite the creative nature of the plaintiff's work, the *Hustler* court found fair use because "the defendants did not use the parody for its creative value."¹⁵⁹ Thus, even though the plaintiff's work was creative, the defendant was entitled to a fair use privilege because he used the creative work in an informational way.¹⁶⁰

Another example of the substitution principle operating within this second factor can be seen in *Pacific & Southern Co. v. Duncan*.¹⁶¹ In *Pacific & Southern*, the defendant copied onto videotape excerpts from the plaintiff's news broadcast and then sold the tapes in a manner similar to a newspaper clipping service.¹⁶² The nature of news broadcasts is essentially factual. Thus, this factor, under the orthodox reasoning, would favor a fair use.¹⁶³ However, because the defendant's secondary use could substitute for the primary use, fair use was denied even though both works were factual.

The need to compare the primary and secondary uses was confronted again in *Iowa State University v. American Broadcasting Cos., Inc.*¹⁶⁴ In *Iowa State*, the defendant secondary user copied the plaintiff's short biographical film of a college wrestler.¹⁶⁵ Again, the orthodox approach to fair use would hold that since the original work was factual and informative, the second factor should weigh in favor of fair use.¹⁶⁶ Despite the factual nature of the film in *Iowa State*, the court held that ABC was an infringer.¹⁶⁷

156. See Leval, *supra* note 8, at 1117.

157. 796 F.2d 1148 (9th Cir. 1986).

158. *Id.* at 1154.

159. *Id.*

160. *Id.*

161. 744 F.2d 1490, 1493 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

162. *Id.* at 1493-94.

163. See Leval, *supra* note 8, at 1117.

164. 621 F.2d 57 (2d Cir. 1980).

165. *Id.* at 59.

166. See Leval, *supra* note 8, at 1117.

167. *Iowa State*, 621 F.2d at 62.

The court observed that "[w]here the two works in issue fulfill the same function . . . the scope of fair use is . . . constricted."¹⁶⁸

The *Kinko's* court, following the orthodox analysis, argued that the second factor weighed in Kinko's favor.¹⁶⁹ However, since the three other fair use factors outweighed the second factor, the court held that Kinko's was an infringer.¹⁷⁰ Unlike in *Hustler*, where the natures of the secondary and original uses were different, in *Pacific & Southern*, *Iowa State*, and *Kinko's* the nature of both the original and secondary uses was factual and informative. The *Kinko's* court reasoned that the second factor, the nature of the copyrighted work, weighed in favor of Kinko's because the nature of the copyrighted work was principally informative.¹⁷¹ However, in analyzing the nature of the copyrighted work, the second factor actually should have weighed against Kinko's. Since both the secondary use and the original work were factual, the secondary use could have served as a substitute for the original work. If the court in *Kinko's* had viewed the second factor as another perspective from which to determine whether the secondary use created an impermissible economic substitute for the original work, the court would have correctly found that the second factor weighed against fair use.

Dicta in some opinions have also suggested that an assessment of the second factor hinges on whether the copyrighted work was in print or out of print¹⁷² or whether the copyrighted work was published or unpublished.¹⁷³ These distinctions, however, can be viewed as further evidence of whether the copyrighted work will suffer an economic substitution by the secondary work.

For example, courts have considered the unpublished nature of the original work an important reason for denying fair use.¹⁷⁴ This reflects an implicit recognition that an unpublished work is especially susceptible to substitution by a secondary user. In *Salinger v. Random House, Inc.*,¹⁷⁵ the plaintiff, J.D. Salinger, sought to enjoin the publication of an unauthorized biography that contained quotes from his unpublished letters.¹⁷⁶ The Second Circuit denied

168. *Id.* at 61 (quoting NIMMER, *supra* note 2, § 13-05[B]).

169. *Kinko's*, 758 F. Supp. at 1532-33.

170. *Id.* at 1547.

171. *Id.* at 1532-33.

172. *See id.* at 1533.

173. *See Harper & Row*, 471 U.S. at 553-64.

174. *See id.* at 564. "The fact that a work is unpublished is a critical element of its 'nature.'" *Id.* (citation omitted).

175. 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

176. *Id.* at 92.

a fair use claim, stating that “[unpublished] works normally enjoy complete protection against copying any protected expression.”¹⁷⁷ As shown in *Salinger*, when a work is unpublished, a secondary user can deny a copyright holder the benefits of first publication. After the secondary user has published, the copyright owner cannot publish the original work without competing head to head with the copier. Consumers could, thus, substitute the secondary work for the original.

A correct understanding of the second factor can be summarized as follows: The absolute nature of the copyrighted work is not important; only its nature relative to the secondary use is relevant. Fair use is allowed when the nature of the two works is so dissimilar that a substitution will not occur.

3. Amount and Substantiality Used

The third statutory factor provides yet another perspective from which courts can compare the secondary use with the original use to determine if an economic substitution is likely. Congress’s concern over the substitution effect is evident from the statute’s emphasis on the comparison between the original and the secondary work.¹⁷⁸ The orthodox approach to analyzing this factor looks to the *volume* copied. The larger the volume or the greater the significance of the portion copied, the more likely it is that the secondary use will be found to infringe.¹⁷⁹ In *Marcus v. Rowley*,¹⁸⁰ for example, the defendant copied approximately half of the plaintiff’s cookbook.¹⁸¹ The defendant’s packet became such an effective substitute for the plaintiff’s original work that one student who enrolled in the plaintiff’s cooking class, and who had a copy of the defendant’s packet, actually refused to purchase the original cookbook.¹⁸² Thus, *Marcus* fits under the orthodox reasoning as an example of how extensive copying can defeat a claim of fair use.

As mentioned previously, however, the orthodox gloss is not always reliable.¹⁸³ To accurately predict case outcomes, the analysis must focus on the likelihood of substitution when evaluating the

177. *Id.* at 97.

178. The statute provides, in pertinent part, that a factor to be considered in determining whether a work is a fair use is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3) (1992).

179. See Leval, *supra* note 8, at 1122.

180. 695 F.2d 1171 (9th Cir. 1983).

181. *Id.* at 1173. The plaintiff had copied 15 of 35 pages.

182. *Id.* at 1177.

183. See *supra* notes 138-77 and accompanying text.

amount copied. By focusing, instead, merely on the *amount* copied, the usual understanding of the third factor fails to adequately account for the case holdings. In *Iowa State*,¹⁸⁴ for instance, the defendant telecast a mere two and one-half minutes of the plaintiff's twenty-eight minute film.¹⁸⁵ The defendant asserted that "such limited copying is [quantitatively] insignificant."¹⁸⁶ The court implicitly recognized, however, that since the defendant's secondary use could substitute for the sale of the plaintiff's film, the fair use defense would not be available.¹⁸⁷

When evaluating the third factor, the Supreme Court has applied an analysis similar to that used in *Iowa State*. In *Harper & Row*,¹⁸⁸ for instance, the Court denied the defendant's fair use claim despite the fact that the amount copied was quantitatively insignificant. The *Harper & Row* defendant had obtained an unauthorized copy of Gerald Ford's memoirs. Quoting a mere 300 words from the plaintiff's large book, the defendant published its own story.¹⁸⁹ Despite this de minimis copying, the Supreme Court refused to find a fair use.¹⁹⁰ Stating that the qualitative importance of the material taken must also be considered, the Court agreed with the district court judge that "the [defendant] took what was essentially the heart of the [original work]."¹⁹¹

However, the Court's dicta implying that courts should undertake a qualitative analysis may be misleading. In *Hustler v. Moral Majority*, Jerry Falwell had photocopied an entire cartoon from the plaintiff's magazine.¹⁹² Despite Falwell's 100% copying, the Ninth Circuit allowed Falwell a fair use because the cartoon, as it appeared in Falwell's fund-raising letter, was unlikely to siphon off demand for *Hustler* magazine.¹⁹³ The court in *Hustler* rightly focused not only on the qualitative and quantitative copying but also on the likelihood that the secondary use would substitute for the original work.

184. 621 F.2d 57 (2d Cir. 1980).

185. *Id.* at 58-59.

186. *Id.* at 61.

187. *Id.* at 62.

188. 471 U.S. at 569.

189. *Id.* at 543.

190. *Id.* at 550. The Court implicitly recognized the substitution analysis when it stated that "the fair use doctrine has always precluded a use that 'supersede[s] the use of the original.'" *Id.* (citations omitted). "With certain special exceptions . . . a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." *Id.* at 568 (citations omitted).

191. *Id.* at 564-65.

192. 796 F.2d at 1150.

193. *Id.* at 1156.

In *Kinko's*, as in *Marcus, Iowa State*, and *Harper & Row*, the argument that the packets became a substitute for the original works is strongest because the original works copied were textbooks. By selecting complementary chapters from a number of textbooks, a professor could assemble a packet that could substitute for any of the books individually—even though the professor copied only a small amount of text from any one textbook.

This principle becomes even more telling when out-of-print textbooks are introduced into the scenario. In a textbook that covers the fundamentals of some subject, often only a few chapters contain new or updated material. Textbooks by their very nature contain a great body of background information that is unlikely to change from year to year. A professor who wished to defeat an in-print copyright could simply copy large sections of background information from out of print textbooks and copy small sections of updated material from the most current textbooks. Thus, a primary work, such as a textbook, could easily be replaced by the secondary work. This underscores the principle that disincentives for new publications are created when secondary uses are allowed to become economic substitutes for originals.

Unfortunately, the *Kinko's* court reached its conclusions on the third factor without analysis.¹⁹⁴ Although the facts in *Kinko's* reveal that university professors copied between 5 and 14% of the plaintiffs' original in-print works, and between 15 and 23% of the original out-of-print works, no insight can be gleaned from the court's analysis.¹⁹⁵ Each party in *Kinko's* cited cases that found the disputed copying to be quantitatively permitted or excluded under a fair use analysis.¹⁹⁶ However, they introduced no evidence to indicate what types of books were copied or how easily the books could be substituted by a secondary use.¹⁹⁷ Had the court received evidence that revealed that some of the photocopying was taken from textbooks, then any copying would likely have been excessive under the third factor of the fair use analysis.

Thus, a correct understanding of the third factor can be stated as follows: The absolute amount copied by a secondary user is not important; what matters is the amount of the original that becomes

194. 758 F. Supp. at 1533. For example, the *Kinko's* court asserted, "This court finds and concludes 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.*

195. See *supra* notes 45-51 and accompanying text.

196. See *supra* notes 42-44 and accompanying text.

197. *Kinko's*, 758 F. Supp. at 1533-34.

substituted. Fair use is allowed when the amount copied from the original work is such that a substitution is not likely to occur.

4. Effect of the Use on the Market for the Copyrighted Work

The fourth factor, "the effect of the [secondary] use on the potential market for the copyrighted work,"¹⁹⁸ is the final, most important, and most obvious way to examine the problem of market substitution for an original work. It most succinctly captures the genius of Justice Story's *Folsom* decision. The Supreme Court recognized the importance of the fourth factor when it stated that "[t]his last factor is undoubtedly the single most important element of fair use."¹⁹⁹ This may reflect the Court's implicit understanding of the economic theory underlying fair use law. Of all the factors, the fourth is most highly correlated with the substitution effect, because a decrease in the demand for a product is often a direct result of a substitute product being introduced into the market.²⁰⁰

However, as Judge Leval stated, "[n]ot every type of market impairment opposes fair use."²⁰¹ The key is to ascertain whether the market impairment was the result of the substitution effect. For example, a criticism in a book review may impair a book's market, yet it would still be a fair use.²⁰² In *New Era Publications v. Carol Publishing Group*,²⁰³ the defendant published an unflattering biography of L. Ron Hubbard that included quotations from Hubbard's copyrighted works. Although the biography undoubtedly had a marginally negative effect on the sale of Hubbard's own works, the defendant was granted a fair use because the biography did not serve as a substitute in the marketplace for the original works.²⁰⁴ In *Hustler*, even though the defendant copied the plaintiff's copyrighted work in an open campaign to impair the market

198. 17 U.S.C. § 107(4) (1992).

199. See *Harper & Row*, 471 U.S. at 566.

200. *Id.* As product substitutes are introduced, the demand for the product decreases and the price falls. The decrease in price coupled with a possible decrease in total market share causes a loss of rent to the author. The loss of rent is the marginal disincentive on the production of textbooks that the copyright law seeks to prevent. See RUFFIN & GREGORY, *supra* note 87, at 393 (discussing market substitution). The degree of market substitution may be determined by calculating the cross-price elasticity of the primary use versus the secondary use. *Id.* at 395 (discussing the cross-price elasticity model); see also Michael G. Anderson & Paul F. Brown, *The Cross-Price Elasticity of Fair Use: Defining Market Substitution* (Oct. 9, 1992) (unpublished manuscript, presented at Brigham Young University to the Marriott School of Management, on file with the authors).

201. See Leval, *supra* note 8, at 1125.

202. *Id.*

203. 904 F.2d 152, 154 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990).

204. *Id.* at 160-61.

for the plaintiff's adult magazines, he did not seek to substitute his secondary use for the original work, and he was therefore entitled to a fair use privilege.²⁰⁵

When the secondary use is a substitute for the original work, the secondary use is inconsistent with fair use. In *Stewart v. Abend*,²⁰⁶ the plaintiff owned the copyright to a magazine story. Without permission, the defendants, Alfred Hitchcock and Jimmy Stewart, created the successful movie *Rear Window* based on the plaintiff's popular story.²⁰⁷ In finding the defendants' movie an unfair use of the plaintiff's original work, the Supreme Court stated "that re-release of the film impinged on the ability to market new versions of the story."²⁰⁸ In other words, if the plaintiff were to decide to make a movie based on his story, the defendants' movie would be a substitute in the market for the plaintiff's potential movie.

If the defendant in *Iowa State* had been allowed to broadcast the plaintiff's film as a fair use, no television network would have been willing to pay the creators of the film for it.²⁰⁹ Without the opportunity to own and market television rights, far fewer such films might have been created. If the defendant in either *Stewart* or *Iowa State* had been allowed to substitute his secondary use for the plaintiff's original work, the incentive for "authors" to create such works would have decreased.

In *Kinko's*, the professors copied textbook excerpts to create what amounted to a substitute textbook.²¹⁰ The unfairness in *Kinko's* was not the professors' finding a substitute for a textbook but rather was their using photocopies of the textbook's own pages to substitute for the textbook itself. Because in one instance a class had only three students, *Kinko's* tried to argue that the harm to the plaintiff was insignificant.²¹¹ However, as the Supreme Court stated in *Harper & Row*, "to negate fair use one need only show that if the challenged use 'should become widespread, it would ad-

205. *Hustler*, 796 F.2d at 1156. "[T]he Defendants used the copies to generate moral outrage against their 'enemies' and thus stimulate monetary support for their political cause." *Id.*; see also *Consumers Union v. Gen. Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983) (stating that where the copy does not compete with the original, the concern that creation of the original work will be discouraged is absent). *But see Pacific & Southern*, 744 F.2d at 1496 (finding against a fair use where the copy competes in a potential market with the original).

206. 495 U.S. 207 (1990).

207. *Id.* at 211-12.

208. *Id.* at 238.

209. 621 F.2d 57, 62 (2d Cir. 1980).

210. *Kinko's*, 758 F. Supp. at 1534.

211. See Defendant's Proposed Conclusions, *supra* note 29, at 15-16.

versely affect the *potential* market for the copyrighted work.'"²¹² Therefore, one can see how the extensive photocopying in *Kinko's*, whether done for profit or not, could "adversely affect the potential market for the copyrighted work."²¹³

A proper understanding of this fourth factor is as follows: The absolute amount of market harm caused by a secondary user is not important; only market harm that is caused by economic substitution matters.

V. CONCLUSION

For too long, fair use has been treated as a largely unprincipled, odd exception to the broad protection offered by copyright. Critics have been quick to deride the doctrine as a mere concession to conflicting interests. They have also been quick to dismiss, as wrongly decided, cases that do not fit into their particular theories of the case law. In this Article, we have argued for a different understanding of copyright fair use. We have sought to reach deeper into the case law to find an underlying rationality.

We have argued that the fair use cases recognize the principle of economic substitution as a guiding force. Courts presented with fair use questions find fair use when the secondary use does not act as a market substitute for the original work. When a secondary use siphons off demand for the original by acting as a substitute, however, the secondary use is found to infringe, and fair use is denied. The statutory factors of the Copyright Act should be seen as a way to reach this determination. The traditional, orthodox balancing of the statutory factors, as was done in *Kinko's*, is ill advised. This balancing is difficult to perform judicially and is not useful for those seeking to predict actual case outcomes. In contrast, assessing secondary uses in light of the economic substitution analysis we have presented is a highly accurate way to predict the outcome of actual cases. In fact, this assessment accurately accounts for all the fair use decisions handed down since 1976.

In *Kinko's*, the copy shop was liable for copyright infringement only because the professors were also guilty of a copyright violation. Because the professors' copying of original textbooks acted as a market substitute for the textbooks from which they copied, the publishers were harmed. Allowing this type of substitution would have defeated the purposes behind the copyright law. The court's

212. 471 U.S. at 568 (quoting *Sony Corp.*, 464 U.S. at 451).

213. *Id.*

orthodox and superficial analysis found that copying for classroom use is in the public's best interest. The real question in *Kinko's*, however, was whether the secondary use discouraged the creation of textbooks. If secondary uses, such as those in *Kinko's*, were to become pervasive, the day would eventually come when there would be far fewer textbooks for students to read, regardless of how or where they purchased them.

The logic and consistency of the fair use case law is a far better predictor of actual case outcomes than is the incomplete and deficient orthodox analysis used by the *Kinko's* court and favored by some commentators. To understand the logic and consistency of fair use, one must look to the facts and holdings of the cases. Those who are involved with copyright fair use should look to the cases and determine what the courts are *doing* rather than what they are *saying*. The cases reveal an understanding of economic substitution as the proper guiding force for fair use analysis. When it comes to assessing fair use, economic substitution is what counts.

