important factor but since Acuff Rose it is now not determinative. However, it is arguable that in cases other than critical use where a licence would not be given, the effect on the market and licensing availability is a critical factor in fair dealing.

If the court maintains its current position on fair dealing and the availability of licensing, the law libraries will likely win. However, if the court sees the ~~effect of its ways~~ implication, then it might not be considered fair. ~~implications~~

(4) The statement is a persuasive defence to the patent system in theory in which ~~patents are only~~ monopolies are granted. The patent system was not designed to grant rewards just for having created something. Society wants to reward the creation of socially beneficial ~~or~~ inventions ~~only for~~ only by giving a monopoly only when such inventions would not have been disclosed but for the inducement of the patent. This "but for" test comes from the Graham v. John Deere case. The economic rationale behind this requirement is that monopolies are bad because they raise prices of goods. They are only to be tolerated if the monopoly provides an offsetting benefit to society which is the invention itself. If the invention would not have been created but for the lure of the patent then it is clearly better to have the invention at monopoly pricing than to not have it at all. The monopolies are not necessary because of the likelihood of ~~that~~ independent creation and the fact that it is not a defence

in the patent regime ~~[illegible]~~ as opposed to copyright. However, while the defence is good in theory, it is not in practice as the "but for" test for obviousness cannot be implemented easily. The court needs evidence as to non-patent residual incentives, & how quickly technology is changing and other data to ensure it is applying the test appropriately. However, this evidence does not make it before the courts. This is the "basic conundrum" of the obviousness requirement as it is central to promote innovation but it is impossible to apply. We know that if the invention would have come about one day after the patent that the patent is not warranted and that if it came one day before it expired that it is warranted. However, there is a magic point in the middle where the benefit of the earlier introduction just offsets the higher price for the remainder of the term which is obviousness point. Since we can't know exactly where this point is, there is inevitably bad patents out there that would have been created anyway without the lure of the patent and thus impede innovation through wasteful monopolies. Furthermore, as this obviousness standard is difficult to apply, the courts are moving the standard ~~from one of [illegible]~~ more towards the novelty standard. For example, the court in Beloit, essentially said that if it's not new, it's not obvious by adopting its "classical touchstone" of a robot totally devoid of any intuition. The problem policy-wise is that this standard is too low and it doesn't weed out bad patents ie. those that would have been created anyway. Thus, while the defence is good in theory, in practice it cannot be properly implemented to ensure innovation is not impeded.