

## **REVERSED: Fair Use Decision**

### **Georgia State University (GSU) E-Reserves Lawsuit**

**October 2014** – Based on its finding that “the District Court’s fair use analysis was in part erroneous,” the Eleventh Circuit Court of Appeals reversed the District Court’s judgment; vacated the injunction, declaratory relief, and award of costs and attorney fees; and remanded the case back to the District Court for proceedings consistent with the new opinion.

#### Fair Use Analysis:

1. Purpose and character of the use – The Court of Appeals agreed with the District Court that the non-profit educational character of GSU’s use favors fair use, even though the use of the works was not transformative.
2. Nature of the work – The Court of Appeals disagreed with the District Court’s sweeping finding that the nature of the works favored fair use.
3. Amount and substantiality of the portion used – The Court of Appeals objected to the District Court’s adoption of a mechanical standard to determine fair use.
4. Effect of the use on the potential market for or value of the copyrighted work – The Court of Appeals agreed with the District Court that the statute favors the plaintiff (publishers) when a digital license is available.

The Court of Appeals found that the District Court erroneously applied factors two and three, abdicating its responsibility to perform a nuanced, work-by-work analysis, and applied a legally flawed methodology to balance the four factors, giving each factor equal weight rather than making a determination on the use as a whole.

#### **BACKGROUND**

**April 2008** – Oxford University Press, Cambridge University Press, and Sage filed a lawsuit claiming that GSU’s use of unlicensed digital excerpts from academic books exceeded fair use. The Copyright Clearance Center (CCC) and the Association of American Publishers (AAP) organized the litigation and recruited the plaintiffs. In early 2009, GSU revised its e-reserves policy; the new policy requires faculty to complete a checklist to determine whether a proposed use qualifies as fair use.

**May 2012** – The plaintiffs submitted 75 excerpts for evaluation.<sup>1</sup> Judge Evans eliminated roughly a third of the excerpts because the plaintiffs could not prove copyright ownership or because GSU transaction logs revealed no one had used the excerpt.<sup>2</sup> She applied fair use analysis to 48 excerpts, ruled that five were infringing,<sup>3</sup> and estimated the lost licensing revenue for these uses was \$750.

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<sup>1</sup> The plaintiffs’ initial list of alleged infringing uses contained 99 excerpts, but they submitted only 75 for the judge’s evaluation.

<sup>2</sup> The Court ruled that if nobody reads it, the use is not infringing because no harm has been done to the plaintiff’s copyrights or to the author’s incentive to create.

<sup>3</sup> Four of the infringing uses were Sage publications; Sage licenses digital excerpts. The fifth infringing use was deemed the heart of the work because the chapter selected summarized the other chapters in the book.

Prepared by Denise Troll Covey, Scholarly Communications Librarian – June 2012; revised April 30, 2013; revised October 19, 2014.

## Judge Evans' Interpretation of the Fair Use Statute and Analysis of the Four Factors

1. Purpose and character of the use – The statute *strongly favors* non-profit educational use.
2. Nature of the work – The statute *favors* use of non-fiction. U.S. courts consider copyright protected works on a continuum ranging from those that are primarily factual or informational to those that are highly creative or expressive. Non-fiction falls on the factual/informational side of the continuum. Works that are primarily factual get less copyright protection under this factor than works that are highly expressive.<sup>4</sup>
3. Amount and substantiality of the portion used – The statute *favors* use of  $\leq 10\%$  of books with fewer than ten chapters and one chapter in books with ten or more chapters if the portion used is not the heart of the work.<sup>5</sup> *Otherwise, the statute favors publishers.*
  - The Court specified that all book pages are to be counted in determining the percentage of a work used (including acknowledgements, indexes, etc.), and that individual chapters are not separate works, even in books with chapters contributed by different authors.
  - The Court rejected the plaintiffs' claim that the 1976 Classroom Guidelines (designed as a minimum) set the maximum amount of copying allowed as fair use.
  - The Court rejected the plaintiffs' arguments that faculty selection of an excerpt indicates it is the heart of the work and that repeated use of the same work across semesters is not fair use.
4. Effect of use on the potential market for or value of the copyrighted work – The statute *strongly favors* the publisher if a reasonably priced license for digital excerpts is readily available. *Otherwise, the statute favors fair use* – unless the amount copied harms the market for the book.<sup>6</sup>
  - The Court held that users cannot be forced to license entire works to get an excerpt.
  - The Court emphasized that students would not have bought the assigned books as a substitute for the excerpts on e-reserves.

## The Math

When three of the four factors favor one party, that party wins. Ties are broken by closer scrutiny of factors three and four. Interesting tie-breaking calculus:

- If a book makes significant revenue from licensing, unlicensed use is unfair.
- If a license is readily available and the amount used exceeds the threshold, but the license is unpopular and the slight harm to the market caused by unlicensed use does not significantly harm the overall value of the work, the use is fair.

## Additional Points

- The Court addressed only use of excerpts from academic books. The Court found that royalty payments do not motivate academic authors to produce scholarship and that academic authors are the primary users and beneficiaries of e-reserve systems. Furthermore, publishers receive so little income from licensing excerpts as a percentage of their business that a decline in this income will have no noticeable effect on their will or ability to publish new academic works. Fair use of academic books promotes the dissemination of knowledge and serves the purpose of copyright.
- The Court's ruling is not binding on other libraries or other courts.

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<sup>4</sup> Facts themselves cannot be copyrighted in the United States.

<sup>5</sup> GSU exceeded the threshold in seven instances.

<sup>6</sup> If the excerpt chosen is large enough to harm the market for the book, the use is not fair even if no license is available.

- The Court's ruling distinguishes library e-reserves from commercial course packs.
- The Court emphasized the importance of limiting access to students enrolled in the course and only for the term of the course. The work must serve the course curriculum and copyright policy must prohibit students from distributing copies of the work.
- The Court emphasized that universities with a copyright policy governing use of protected works for educational purposes will be held responsible for the policy's contents and for educating its community about proper adherence to the policy. The Court found GSU's fair use checklist flawed, but a good faith effort to advise faculty.

### Some Possible Outcomes

- Publishers will publish books with lots of short chapters, make more licenses available for digital excerpts (likely through the CCC), or be more rigorous in the future about requiring faculty authors to sign contracts transferring copyright prior to the publisher.
- Libraries will make more preservation copies, dark archives, and use of orphan works (i.e., copyrighted works for which the copyright owner cannot be identified or located).
- The move to open access will accelerate.

### Status as of April 2013

The plaintiffs, AAP, CCC, and Association of American University Presses (AAUP) immediately issued statements decrying the Court's analysis and failure to recognize the threat to academic publishing posed by the cumulative practice of e-reserves.<sup>7</sup> In August 2012, the Court issued an [order](#) denying the plaintiffs' request for injunctive and declaratory relief for the five infringements and ordering them to pay GSU \$2,861,349 in attorneys' fees. The plaintiffs filed an appeal in October 2012. In April 2013, the American Library Association, the Association of College and Research Libraries, the Association of Research Libraries, and the Electronic Frontier Foundation filed a [Brief of Amici Curiae](#) in support of the defendants-Appellees.

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<sup>7</sup> The statement issued by the AAUP available at <http://www.aaupnet.org/news-a-publications/news/747-aaup-statement-on-gsu-ruling> provides links to the statements by the plaintiffs, AAP, and CCC.