

Nos. 12-14676-FF & 12-15147-FF
(Consolidated Appeals)

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

CAMBRIDGE UNIVERSITY PRESS, OXFORD UNIVERSITY PRESS, INC.,
AND SAGE PUBLICATIONS, INC.,

Plaintiffs-Appellants,

v.

MARK P. BECKER, IN HIS OFFICIAL CAPACITY
AS GEORGIA STATE UNIVERSITY PRESIDENT, ET AL.,

Defendants-Appellees.

On Appeal From the United States District Court
for the Northern District of Georgia
D.C. No. 1:08-cv-1425 (Evans, J.)

**BRIEF OF MARYBETH PETERS, RALPH OMAN
AND JON BAUMGARTEN AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS
RECOMMENDING REVERSAL**

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CERTIFICATE OF INTERESTED PARTIES

Amici curiae Marybeth Peters, Ralph Oman, Jon Baumgarten and their counsel hereby state that the following is to the best of their knowledge a complete list of the interested persons or entities required to be disclosed pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1-1 of the Eleventh Circuit Rules as having an interest in the outcome of this case in addition to the persons and entities identified in the Certificate of Interested Parties and Corporate Disclosure Statement provided by Appellants in their initial brief:

Baumgarten, Jon

Cengage Learning, Inc.

John Wiley & Sons, Inc.

Pearson Education, Inc.

Peters, Marybeth

Oman, Ralph

Reed Elsevier, Inc.

The McGraw-Hill Companies, Inc.

Wasoff, Lois F. *attorney for amici curiae*

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1997, S. Treaty Doc. No. 105-12, 36 I.L.M. 65.19

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STATEMENT OF INTEREST¹

Amici are the two former United States Registers of Copyright and a former General Counsel of the United States Copyright Office.

Marybeth Peters' tenure as Register, from 1994 through 2010, was the culmination of almost 45 years of distinguished service in the Copyright Office. During 1976 and 1977, Ms. Peters had the responsibility of training the Copyright Office staff and others about the terms of the then-new Copyright Act of 1976. As Register, Ms. Peters played a central role in crafting and implementing many of the changes made by Congress to the Copyright Act. She was directly responsible for the conduct of studies and the preparation of legislative recommendations on critical issues such as database protection, orphan works, library exceptions and digital distance education.

Ralph Oman was Register from 1985 through 1993, after having served for many years as counsel to members of the United States Senate who were directly responsible for the drafting, enactment and implementation of the Copyright Act of 1976. In 1982, Mr. Oman became Chief Counsel to the Senate Subcommittee on Patents, Copyrights, and Trademarks and it was from that position that he was appointed Register. During Mr. Oman's tenure as Register the United States

¹ This brief is being filed with the consent of Appellants and Appellees. *Amici* hereby disclose that Ms. Peters has, since February of 2011, been a member of the Board of Directors of Copyright Clearance Center, Inc., but the views expressed here are solely those of the *Amici*.

became a member, in 1989, of the Berne Convention. After Mr. Oman's retirement from federal service in 1993, he entered private practice and became an adjunct professor of law at the George Washington University Law School, where he teaches copyright.

Following a decade of private practice in copyright law and legislation, Jon Baumgarten served as General Counsel of the U.S. Copyright Office from 1976 through 1979, playing a pivotal role in the creation and administrative implementation of the Copyright Act of 1976. After leaving the Copyright Office, Mr. Baumgarten reentered private practice and, in the course of a distinguished career lasting for more than four decades until his retirement from the firm of Proskauer Rose in 2011, participated as counsel in many of the most important copyright cases decided during that period.

Ms. Peters, Mr. Oman and Mr. Baumgarten have devoted their entire professional lives to copyright and to the landmark law passed in 1976 that dramatically overhauled the system of copyright protection in the United States. From their unique and close vantage points, they guided and participated in the great effort made to achieve an appropriate balance of the interests of the disparate groups affected by the new law. They were deeply immersed in the painstaking effort, documented in the legislative history, to be certain that the language of Section 107 – the first statutory implementation of the judicial doctrine of “fair

use” – achieved that balance. In their governmental roles, each of them had fundamental responsibility for explaining to a worldwide audience the much-watched fair use doctrine of U.S. law. They have closely monitored the ways in which the courts have applied that doctrine and its application to changing technology. As former government officials who had critical responsibility for both the development and the implementation of congressional copyright policies, they have an interest in helping to insure that those policies are not superseded or undermined.

SUMMARY OF ARGUMENT

This case arose from a dispute between Georgia State University (“GSU”) and several scholarly publishers over the inclusion, without permission or payment, of excerpts from copyrighted scholarly works in “electronic reserve” systems maintained by GSU. These “e-reserve” systems deliver assigned class readings to students in digital form, replacing the photocopied paper “coursepacks” that had been in widespread use for many years. Courts have previously considered the use of excerpts from copyrighted materials in paper coursepacks, and it is well-established that many such uses can be made only with prior permission and (if so determined by the copyright owner) payment. This case is the first to consider how those principles should be applied to similar uses in a digital context. *Amici* are concerned that the flawed reasoning and incorrect

holding of the district court will have implications far beyond the specific uses at issue here, and ask this Court to reverse the decision below.

The district court's decision is contrary to decades of copyright legislation and jurisprudence because it inappropriately favors uses for educational purposes over the other purposes of copyright. This recurring theme, which pervades the district court's May 11, 2012 opinion ("Opinion"), distorts the fair use analysis and leads to incorrect holdings, including on the first (nature of the use) and third (amount taken) fair use factors set out in Section 107 of the Copyright Act (17 U.S.C. § 107).

Section 107 sets out four factors to be considered, the first of which is "the purpose and character of the use, *including* whether such use is of a commercial nature or is for non-profit educational purposes." (emphasis added). The district court stated that because the challenged uses were for nonprofit educational purposes no further discussion of this factor was necessary. By overweighting the significance of defendant's nonprofit status and educational purpose, the district court has created the kind of blanket exception for uses for nonprofit educational purposes that Congress was explicitly asked, and refused, to enact. In so doing, the district court converted the equitable doctrine of fair use into a broad copyright exception that fails to reflect the balance in the language of Section 107 and other copyright exceptions.

ARGUMENT

I. THE DISTRICT COURT’S DECISION IS INCONSISTENT WITH THE LANGUAGE OF SECTION 107 AND OF OTHER STATUTORY EXCEPTIONS DEALING WITH EDUCATION AND SCHOLARSHIP BECAUSE IT INAPPROPRIATELY FAVORS USES FOR EDUCATION OVER THE OTHER PURPOSES OF COPYRIGHT

The goal of copyright is to promote the progress of knowledge, and the mechanism chosen to accomplish that goal was to “secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. 1, § 8, cl. 8. “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’” *Mazer v. Stein*, 347 U.S. 201, 219 (1954). The object is not just to increase knowledge, but to do so through the particular mechanism of encouraging the creation and dissemination of new works. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985); *Golan v. Holder*, 132 S. Ct. 873, 888-89 (2012). The district court showed a lack of understanding of this key point, stating that because the challenged uses were connected with education, they increased knowledge generally.² But by that reasoning, any distribution of copyrighted

² “Allowing the use of unpaid small excerpts of copyrighted works by students does help spread knowledge, because it reduces the cost of education, thereby

materials done with the general intention of “spreading knowledge” could be considered worthy of an exception to copyright. As the Supreme Court said in *Harper & Row* in rejecting that theory, any infringer “may claim to benefit the public by increasing public access.” 471 U.S. at 569.

A. Congress Never Intended to Create a Broad Copyright Exception for Nonprofit Uses in Education

Section 107 was carefully crafted by Congress to reflect the judicial origins of the concept of fair use. It is designed to provide a framework for determining when a particular use of a copyrighted work is “fair” and therefore not an infringement. The preamble of Section 107 sets out certain purposes to which fair use may apply, including “criticism, comments, news reporting, teaching (including multiple copies for classroom use), scholarship or research.”

The 1976 Copyright Act was the product of many years of study, discussion and negotiation. During that lengthy process, Congress on many occasions considered, and rejected, the argument that uses made for educational purposes should be the subject of a broadly worded exception. As stated in the Report of the House Judiciary Committee:

Although the works and uses to which the doctrine of fair use is applicable are as broad as the copyright law itself, most of the discussion of section 107 has centered around questions of classroom reproduction, particularly photocopying. . . .

broadening the availability of education.” Dkt#423 at 83. “Making small free excerpts available to students would further the spread of knowledge.” *Id.* at 86.

The Committee also adheres to its earlier conclusion, that “a specific exemption freeing certain reproductions of copyright works for educational and scholarly purposes from copyright control is not justified.” At the same time the Committee recognizes, as it did in 1967, that there is a “need for greater certainty and protection for teachers.” In an effort to meet this need the Committee has not only adopted further amendments to section 107³ but has also amended section 504(c) to provide innocent teachers with broad insulation against unwarranted liability for infringement.

H.R. REP. NO. 94-1476 at 66 - 67, 94th Cong., 2d Sess. 66-67 (1976) (emphasis added).

The final language of Section 107, along with the inclusion of the Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions (the “Classroom Guidelines”) in the legislative history,⁴ was part of a compromise.

During the revision process leading up to passage of the 1976 Act, educational groups repeatedly pressed for a broad not-for-profit exemption from copyright liability, a request that was repeatedly rejected by Congress . . . Congress also rejected requests that nonprofit uses be presumptively fair use or otherwise more favorably treated . . . In place of a more expansive fair use privilege for nonprofit educators, the House Judiciary Committee amended Section 107(1) to add the reference to nonprofit educational uses in the first factor.

William F. Patry, PATRY ON FAIR USE § 3:6 (2012).

³ The “further amendments” referred to here include the parenthetical reference to “multiple copies for classroom use” in the Section 107 preamble.

⁴ H.R. Rep. No. 94-1476 at 68, *et seq.*

In considering the application of the first fair use factor, and indeed throughout the Opinion, the district court gave disproportionate weight to the fact that the challenged uses were being made by a nonprofit educational institution. To say that the court’s “analysis” of the first fair use factor was cursory is an understatement. The court looked no further than the nonprofit status of GSU and the fact that teaching was involved to find that “the first fair use factor favors Defendants.” Dkt#423 at 49. But the language of Section 107 makes it clear that the inquiry into the “nature of the use” should *include* whether the use was for “nonprofit educational purposes.” 17 U.S.C. §107(1). A determination that copies of protected works are being made by a nonprofit entity for use in education should be the beginning, not the end, of the discussion. Section 107 deals with “fair” use (not “good” use or use for “good purposes”). Even with respect to the first factor, Section 107 is structured as a framework, designed to guide an inquiry that will lead to a balanced result. The court erred when it refused to even consider the possibility that the first factor might favor the copyright owner. That error distorted its entire fair use analysis.

The Report of the Senate Judiciary Committee on Copyright Law Revision discusses the reasoning behind the language of the first factor, and makes it clear that there was *never* an expectation that the first factor would favor all uses in nonprofit education, or that all nonprofit educational uses were to be deemed

“fair.” The Report recognizes the difference between the type of systematic copying shown by the record in *this* case and far more limited, spontaneous acts of copying:

The fair use doctrine in the case of classroom copying would apply primarily to the situation of a teacher who, acting individually and at his own volition, makes one or more copies for temporary use by himself or his pupils in the classroom. A different result is indicated where the copying was done by the educational institution, school system, or larger unit, or where the copying was required or suggested by the school administration, either in special instances or as part of a general plan . . .

* * *

Spontaneous copying of an isolated extract by a teacher, which may be a fair use under appropriate circumstances, could turn into an infringement if the copies were accumulated over a period of time with other parts of the same work, or were collected with other materials from various works so as to constitute an anthology.

S. REP. NO. 94-473, 94th Cong., 1st Sess. 63 (1976)

B. The District Court Inappropriately Failed to Consider Relevant Cases Involving Similar Uses

Because the district court refused to look beyond the nonprofit status of GSU, it also refused to give due consideration to two directly relevant cases. The district court gave little deference to the so-called “copyshop cases,” *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) and *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996), in its consideration of the first factor, off-handedly dismissing them because the

defendants were commercial rather than nonprofit entities. Both of those decisions involved the verbatim reproduction of portions of copyrighted works for inclusion in coursepacks of assigned readings for university courses. The court in *Princeton* did find that the copying was commercial, but that was not the only reason it concluded that the first factor weighed against the defendant. The court discussed the argument “that the copying at issue would be [deemed] to be ‘nonprofit educational’ if done by the students or professors themselves,” saying “as to the proposition that it would be fair use for the students or professors to make their own copies, the issue is by no means free from doubt.” *Princeton*, 99 F.3d at 1389.

What the *Princeton* court found persuasive in connection with the first factor analysis was the non-transformative nature of the use:

It should be noted, finally, that the degree to which the challenged use has transformed the original copyrighted works -- another element in the first statutory factor -- is virtually indiscernible. If you make verbatim copies of 95 pages of a 316-page book, you have not transformed the 95 pages very much -- even if you juxtapose them to excerpts from other works and package everything conveniently. This kind of mechanical "transformation" bears little resemblance to the creative metamorphosis accomplished by the parodists in the *Campbell* case.

99 F.3d at 1389.

In both *Princeton* and *Basic Books*, the first factor was found to weigh against fair use not only because the defendants were commercial entities, but because defendants’ verbatim reproduction of excerpts of protected works for use

by students was clearly not the type of transformative use that contributes to the creation and dissemination of works of authorship and therefore is consistent with copyright's underlying purpose of encouraging creativity. *Princeton*, 99 F.3d at 1389; *Basic Books*, 758 F. Supp at 1530.

C. The District Court Erred in Refusing to Consider the Non-Transformative Nature of the Challenged Uses

It is well established that the first factor is more likely to favor the defendant when the “nature of the use” is transformative. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“The central purpose of [the first factor enquiry] is to see . . . whether the new work merely ‘supersede[s] the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’ . . . [T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”) (citations omitted); *see also Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int’l*, 533 F.3d 1287, 1310 (11th Cir. 2008) (“[A] work that is not transformative . . . is less likely to be entitled to the defense of fair use because of the greater likelihood that it will ‘supplant’ the market for the copyrighted work. . . .”) (citation omitted).

The uses at issue here were *not* transformative. They were verbatim copies

of portions of works created for use by scholars and students, which copies were made for the purpose of distributing them *to the same users for which those works were created*. These uses “supersede [] the objects” of the originals, *Campbell*, 510 U.S. at 579, and therefore supplant “the market for the copyrighted work.” *Letterese*, 533 F.3d at 1310. Yet the district court sidestepped the clearly non-transformative (and therefore disfavored) nature of the uses made by defendants, by placing undue emphasis on a single footnote in the Supreme Court’s decision in *Campbell* and ignoring well-established judicial precedent.

In *Campbell*, the Supreme Court described the nature of the inquiry to be conducted under Section 107. Fair use determinations are intended to achieve a balanced result because the court is expected to review and appropriately weigh *all* of the relevant factors:

The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. . . . The text employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the ‘illustrative and not limitative’ function of the examples given . . . which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.

Campbell, 510 U.S. at 577 (citations omitted).

Notwithstanding this clear statement, the district court quotes footnote 11 in the *Campbell* opinion (which says that “straight reproduction of multiple copies for

classroom use” is an “exception” to the “focus on transformative uses” *Campbell*, 510 U.S. at 579) and then leaps to the conclusion that it need not even *consider* whether the challenged uses in this case are transformative. The uses at issue here are not directly equivalent to “straight reproduction” for “classroom use.” The copyrighted materials are being made available to students in digital form to download at the student’s convenience as a substitute for textbooks and paper coursepacks, not for student use in the course of a classroom session. But, in any event, footnote 11 in *Campbell* does not have the meaning imputed to it by the district court.

In 1976, Congress was very concerned about the threat posed to authors and publishers by photocopiers; in fact, “most of the discussion of section 107 . . . centered around questions of classroom reproduction, particularly photocopying.” H.R. REP. NO. 94-1476 at 66. The copying Congress was then concerned with was time-consuming, expensive and produced copies with the limitations inherent in paper copies, but its implications for copyright were acknowledged in the language of Section 107 and the Classroom Guidelines. Current technology has dramatically streamlined the mechanics of copying, making the creation of perfect copies (which can themselves be perfectly replicated and further distributed) instantaneous and essentially effortless. The creation and dissemination of digital copies of excerpts of much greater length than could be used in a classroom

session, as part of assigned readings in college courses, differs significantly from “straight reproduction” for “classroom use.” The impact on the copyright holder of such widespread and systematic copying is potentially far greater than that of handing paper copies to students during a classroom session.⁵

Moreover, the court apparently failed to look at *Campbell’s* footnote 11 in the context of the sentence with which it is associated. Footnote 11 is attached to the first clause of this sentence: “Although such transformative use is not absolutely necessary for a finding of fair use, . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.” *Campbell*, 510 U.S. at 579. The Classroom Guidelines, which are specifically described in the House Report in which they appear as an example of fair use, do involve verbatim (i.e. non-transformative) copying of limited amounts of materials for classroom use. If the copying at issue in this case had followed the principles of the Classroom Guidelines (with respect to spontaneity, brevity and

⁵ Congress has acknowledged the potentially significant impact of digital distribution on copyright owners. Consider, for example, the statement in the Senate Judiciary Committee Report on the Digital Millennium Copyright Act (S. REP. NO. 105-190, 105th Cong., 2nd Sess. 61 (1998)), pointing out the necessity of imposing limitations on digital copies made under the library copyright exception (17 U.S.C. §108) “[i]n recognition of the risk that uncontrolled public access to the copies or phonorecords in digital formats could substantially harm the interests of the copyright owner by facilitating immediate, flawless and widespread reproduction and distribution”

cumulative effect), perhaps its non-transformative nature would have less relevance. But, clearly, it did not.

In the district court’s strained interpretation, that single footnote converted the language of the Section 107 preamble (which lists multiple copies for classroom use as one of a number of uses that may potentially be determined to be fair) into a “free pass,” eliminating the need to even consider the non-transformative nature of the challenged uses. This is inconsistent not merely with the language and the legislative history of Section 107, but with the Supreme Court’s reasoning in *Campbell*:

The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term “including” to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into “purpose and character.” As we explained in *Harper & Row*, Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence. . . . Accordingly, *the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement*, any more than the commercial character of a use bars a finding of fairness.

510 U.S. at 584 (citations omitted; emphasis added); *see also Letterese*, 533 F.3d at 1309 (“The first factor in the fair-use analysis . . . has several facets Two such facets are (1) whether the use serves a nonprofit educational purpose, as opposed to a commercial purpose; and (2) the degree to which the work is a ‘transformative’

use as opposed to merely superseding use of the copyrighted work. [citing *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001)] . . . [T]he commercial or non-transformative uses of a work are to be regarded as separate factor[s] that tend to weigh against a finding of fair use,’ and ‘the force of that tendency will vary with the context’” (citing *Campbell*, 510 U.S. at 585)).

The “insulation from a finding of infringement” warned of in *Campbell* is exactly what the district court has accomplished by refusing to consider the relevance of the verbatim digital copying done by GSU when analyzing the first factor. The court’s interpretation has the effect of creating a virtual rule of *per se* legality for educational takings so long as they do not exceed certain arbitrary limits set by the court. That interpretation cannot be correct, and is inconsistent with the history and purpose of Section 107.

D. The District Court’s Holding is Inconsistent with the Treatment of Copyright Exceptions in U.S. Law and International Treaties

In crafting copyright exceptions and incorporating them into U.S. copyright law, Congress has repeatedly shown its awareness of the need to balance the interests of creators and users. Courts considering the application of fair use have typically displayed a similar awareness, by avoiding “bright-line rules” (*Campbell*, 510 U.S. at 577) and displaying an understanding that the examples in the preamble to Section 107 serve an “illustrative and not limitative” function. *Id.* Read together, Section 107, its legislative history and the cases that interpret it

demonstrate that copyright exceptions must be applied in a manner consistent with copyright's goal of advancing knowledge while considering the interests of all the relevant parties. The district court's decision in this case does not reflect that balance.

The issue was stated clearly in testimony given before the House Judiciary Committee at its 1965 hearing on copyright law revision:

[W]e do not expect the builder of a nonprofit school building to construct it at no charge, nor the furniture merchant to donate school furniture, nor the supplier of school supplies to give his products gratis, nor the teacher to waive compensation. On what reasonable theory, then, can the creative writer and his publisher be expected in effect to donate books.

Copyright Law Revision, Hearing Before Subcommittee No. 3 of the Committee on the Judiciary, 89th Cong., 131 (1965) (statement of Horace S. Manges, Counsel to American Book Publishers Council, Inc.). Before creating an exception to copyright and, in effect, requiring “the creative writer and his publisher” to “donate books,” careful consideration must be given to all of the interests at stake.

Examples of that careful consideration can be found in statutory exceptions that involve teaching (17 U.S.C. § 110(1) - (2)), use by libraries and archives (17 U.S.C. § 108), and making copies for the visually impaired (17 U.S.C. § 121). Sections 110(1) and (2) are exceptions to the copyright owner's performance (rather than reproduction) rights and address the use of protected works in the course of face-to-face teaching and in distance education, respectively. These

provisions are intended to benefit education, but they incorporate protections for authors and publishers as well.⁶ Section 108 exempts certain reproductions by nonprofit libraries and archives, and incorporates a number of limitations designed to protect creators,⁷ as does Section 121, which benefits the visually impaired.⁸

Congress's decision to favor certain uses deemed to be beneficial to society did not result in a statute that ignored the interests of those who had created the materials being used. Under the district court's view of fair use, the exceptions in Sections 110, 108 and 121 would be superfluous because the activities sanctioned by those sections would surely be covered by fair use. Congress's adoption of these specific exemptions clearly demonstrates that it did not intend to stretch the bounds of fair use as far as the district court has in this case and further reinforces

⁶ For example, Section 110(2), which addresses classes conducted remotely (i.e. over a campus network or the Internet), applies only to performances "made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session" as part of "mediated instructional activities" (17 U.S.C. § 110(2)(A)), and lets teachers use copyrighted materials in on-line teaching in ways that are "analogous to the type of performance or display that would take place in a live classroom setting." (17 U.S.C. § 110)

⁷ Section 108 includes many provisions designed to balance the interests of libraries and archives with those of authors and publishers. It "contains complex and highly technical rules" (4 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 8.03) and is cited here as an example of the balancing process inherent in the crafting of copyright exceptions, even for uses that clearly benefit society as a whole.

⁸ For example, Section 121 requires that copies of works made under the exception must be made "in specialized formats exclusively for use by blind or other persons with disabilities" 17 U.S.C. §121(a).

the conclusion that Congress has never intended to create a “free pass” for uses in education and scholarship.

Exceptions and limitations in U.S. copyright law, including Section 107, must also be viewed in the context of the relevant U.S. treaty obligations. In 1989, the United States became a member of the Berne Convention for the Protection of Literary and Artistic Works (Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221, Paris Act 1971) (“Berne Convention”), the principal international copyright treaty. Article 9(2) of the Berne Convention addresses the nature and scope of copyright exceptions that its member states may incorporate in their laws, establishing a “three-step test” that such exceptions must satisfy: (1) they must relate to “certain special cases,” (2) they may not conflict with a normal exploitation of the work, and (3) they may not unreasonably prejudice the author’s legitimate interests.⁹ The three-step test provides a useful yardstick by which to measure the application of copyright exceptions such as fair use. The district court’s refusal to see beyond the nonprofit educational nature of the challenged uses influenced its refusal to acknowledge the extent of the takings and the resulting interference with the

⁹Although Berne article 9(2) refers only to reproduction rights, the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, to which the United States has also adhered, provide that all rights granted under those treaties are to be governed by the Berne article 9(2) standard. 34 WIPO, Copyright Treaty, art. 10, Apr 12, 1997, S. Treaty Doc. No. 105-12, 36 I.L.M. 65, 83 (1997); WIPO, Performances and Phonograms Treaty, art. 16, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76, 85-86 (1997).

Appellants' normal exploitation of their works and their legitimate interests.

II. THE DISTRICT COURT'S OWEWEIGHTING OF THE EDUCATIONAL NATURE OF THE CHALLENGED USES IN ITS FIRST FACTOR DISCUSSION DISTORTED ITS ANALYSIS OF THE THIRD FAIR USE FACTOR

After devoting only three paragraphs in a 350 page decision to the first factor, the district court concluded: "Because the facts of this case so clearly meet the criteria of (1) the preamble to fair use factor one, (2) factor one itself, and because (3) Georgia State is a nonprofit educational institution, factor one strongly favors Defendants." Dkt#423 at 50 (emphasis in original). Although the court did acknowledge that "a nonprofit educational purpose does not automatically ensure fair use," *Id.*, its erroneous finding on factor one was critical to its consideration of the other factors. As discussed below, the decision is replete with references to the educational nature of the uses that are used to justify extensive, unprecedented takings from protected works.

The clearest demonstration of this problem can be found in the court's discussion of the third factor, which looks to "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3) Although the court did not find that the third factor favored GSU in each instance (as indeed it could not, since each of the challenged uses presented separate fact patterns), the court established incorrect principles and applied them in analyzing

each use, which amplified and repeated those errors in each evaluation.¹⁰ In its third factor analysis, the court repeatedly looked at the impact of the uses on GSU's students and faculty and not, as is required by the statute, at the impact of those uses on the copyrighted works and their owners. The court erroneously favored GSU's current practices over fair use precedent and legislative history.

A. The District Court's Determination of What Constitutes a "Small" Portion Was Designed to Improperly Favor Uses for Educational Purposes.

In contrast to its first factor discussion, the court at least acknowledged the relevance of *Basic Books* (referred to in the Opinion as "*Kinko's*") and *Princeton* (referred to in the Opinion as "*Michigan Document Services*") in its third factor analysis. The court noted that in both cases takings of as little as 5% of the works at issue were deemed large enough to support a finding that the third factor weighed against the defendants.¹¹ The uses in those cases varied from as little as 5% of the underlying work to as much as 18% in *Princeton*, 99 F.3d at 1384-85,

¹⁰ Of 74 challenged uses, the court found only five to be infringing. Some uses found to be "fair" involved takings of 10% or more; some purportedly "fair" use was of entire separately authored contributions to anthologies, a 100% taking of the underlying work.

¹¹ Among the many problems presented by the third factor discussion, one of the most troubling relates to the court's definition of the "whole" work against which the amount of the taking is to be measured. The court includes non-expressive materials (such as tables of contents, copyright pages and indices) in calculating the length of each work, Dkt#423 at 60 – 61, then measures the size of the taking as a percentage of that "whole" work, thereby as a practical matter increasing that size of the takings that it deems to be "fair."

and from 5% to 28% in *Basic Books*, 758 F. Supp at 1527-28. But the district court went on to say:

Kinko's and Michigan Document Services are helpful as a beginning point in the factor three analysis in the instant case. *However, unlike the instant case, they did not involve nonprofit educational uses by a nonprofit educational institution. Here, fair use factor one strongly favors Defendants and tends to push the amount of permissible copying toward a greater amount than the under 5% amount which Kinko's and Michigan Document Services did not specifically reject, and into the 5%-14% range which Kinko's found weighed against, but did not "weigh heavily against" fair use. Kinko's, 758 F. Supp. at 1527.*

Dkt#423 at 66 (emphasis added).

Notwithstanding the examples of the *Princeton* and *Basic Books* decisions, which never sanctioned takings even close to those at issue here, the court went on to define excerpts of not more than 10% of a work containing less than 10 chapters or up to one chapter of a longer work as “decidedly small, and allowable as such under factor three.” Dkt#423 at 88.

It is particularly notable that the district court's definition of “small” was predicated on the status of the defendants and their uses (“nonprofit educational uses by a nonprofit educational institution,” *Id.*) and *not* on the impact of the uses on the plaintiffs and their copyrighted works (which, under language of the statute, is the whole point of the factor three analysis). When the first factor is found to favor the user because the use is *transformative*, there is a clear relationship between the first and third factors. A highly transformative use, such as the

parodies that were at issue in the *Campbell* and *SunTrust Bank* cases, may justify a larger taking. *See Campbell*, 510 U.S. at 587-88, and *SunTrust Bank*, 268 F.3d at 1273-74. Had the district court considered the issue of transformative use in its evaluation of the first factor, it likely would have been unable to find that factor “strongly favored” defendants, or indeed favored them at all.

B. The Classroom Guidelines are Relevant to the Consideration of the Third Fair Use Factor and Should Have Been Given More Weight by the District Court.

Notwithstanding the district court’s refusal to acknowledge the applicability of the Classroom Guidelines to its inquiry on the third factor, those Guidelines are relevant as an example of a balanced approach that permits, under fair use, certain uses of copyrighted content in connection with education, while not unreasonably interfering with the interests of those whose creativity and investment are the reasons that content exists. They document Congress’s intention to set certain limitations on such activities.

The Classroom Guidelines set forth several criteria for permissible unauthorized copying for classroom use, including: (i) brevity; (ii) spontaneity; (iii) limited copying; and (iv) non-substitution. They do not allow the unauthorized creation of “anthologies, compilations or collective works” or copying of “the same item by the same teacher from term to term.” H.R. REP. NO. 94-1476 at 69. The Guidelines have for decades been regarded as a valuable tool

and have been cited with approval by courts considering the application of fair use in education.¹²

In *Princeton*, the Sixth Circuit stated that the Classroom Guidelines provide “general guidance” as to the “type of educational copying Congress had in mind.” 99 F.3d at 1390. The court in *Basic Books* stated that the Classroom Guidelines were an attempt by Congress to clarify its intentions with respect to photocopying for classroom use. 758 F. Supp. at 1535. In holding that the third factor weighed against fair use, the courts in both *Princeton* and *Basic Books* made specific reference to the Classroom Guidelines, and noted that the copying at issue in both cases (involving systematic copying to create coursepacks) deviated materially from the copying sanctioned by the Classroom Guidelines. *See Basic Books*, 758 F. Supp. at 1536; *Princeton Univ. Press*, 99 F.3d at 1390.¹³

¹² One of the reasons given by the district court for its refusal to consider the Classroom Guidelines as relevant is that they are included in legislative history rather than in statutory language. Dkt#423 at 58-59. But given the structure of Section 107 as a framework requiring the balancing of various factors, the utility of examining legislative history in cases involving fair use is clear. The legislative history of the 1976 Copyright Act has informed the Supreme Court’s analysis in the three major cases in which it has considered the parameters of fair use under that Act. *See, e.g., Harper & Row*, 471 U.S. at 549-54, 561; *Campbell*, 510 U.S. at 574-78; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.31 (1984).

¹³ The *Princeton* court characterized the copying done in that case as being “light years away” from that sanctioned by the Classroom Guidelines. 99 F.3d at 1391. The same could be said of the copying done by GSU in this case.

The district court incorrectly states that the Appellants in this case were asking it to enforce the Classroom Guidelines as “maximum permissible use.” Dkt#423 at 57. But even if that had been the case, there is no inconsistency in acknowledging that the Classroom Guidelines do not necessarily set a “maximum” in the context of a fair use analysis while also using their provisions as a starting point for a proposed court-ordered injunction. The key point, acknowledged in both *Princeton* and *Basic Books*, is that the principles incorporated into the Classroom Guidelines continue to be useful both as a basis for crafting injunctive relief after a finding of infringement, and as a standard against which to measure the amount of taking that is permissible.

C. The District Court’s Discussion of “Substantiality” Demonstrates its Determination to Establish a Blanket Exception for Nonprofit Use in Education.

The district court’s determination to favor educational uses over the other purposes of copyright is particularly evident from the portion of the opinion discussing the “substantiality” of the taking (as distinguished from the amount taken). Rather than focus on the issue before it, the court instead viewed the issue entirely from the perspective of the user. “Because this case does involve strictly educational, nonprofit uses, it is relevant that the selection of a whole chapter of a book (either from a typical, single author chapter book or from an edited book)

likely will serve a more valuable educational purpose than an excerpt containing a few isolated paragraphs.” Dkt#423 at 68.

The district court decided that professors at GSU needed to reproduce entire chapters as part of e-reserves in order to fulfill “legitimate educational purposes of the course curriculum.” Dkt#423 at 71. It then constructed a mechanism, in the guise of the third factor analysis, to permit them to do that without permission or payment. That is not an application of the equitable doctrine of fair use – it is the creation of a broad copyright exception for educational use.

CONCLUSION

The district court decided to favor educational uses over the other purposes of copyright and implemented its decision through a selective and incorrect reading of the statute, the legislative history, and the prior case law. The inclusion in the decision of arbitrary and specific rules creates, in view of the broader implications of the decision, a risk that this decision will function as *de facto* legislation establishing new fair use standards for the type of uses at issue in this case that fail to incorporate balance between the interests of all stakeholders – a balance that has always been at the heart of copyright. This decision represents an expansion of certain narrow exceptions to copyright that is so dramatic that the underlying rights themselves are threatened. This decision is inconsistent with congressional policy

as set forth in the Copyright Act. It is without prior precedent in fair use jurisprudence, and it should be reversed.

Dated: Concord, Massachusetts
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because this brief contains 6,859 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word 2008 for Mac, the word processing software used to prepare this brief.

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/s/ Lois F. Wasoff
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Dated: February 4, 2013

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Cambridge University Press

vs.

Mark P. Becker
-----X

I, Elissa Matias , swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

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/s/ Robyn Cocho

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