Case Nos. 12-14676 and 12-15147 (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 *AMICI CURIAE* TEXT AND ACADEMIC AUTHORS ASSOCIATION AND THE AUTHORS GUILD IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Text and Academic Authors Association and the Authors Guild hereby state that each does not have a parent corporation, and that no publically held corporation owns 10% or more of their stock. Further, pursuant to Rule 26.1-1 of the Eleventh Circuit Rules, counsel for *amici curiae* certifies that 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, the following persons and entities have an interest in the outcome of this case:

Text and Academic Authors Association

The Authors Guild

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Pursuant to Federal Rule of Appellate Procedure 29(b), A*mici Curiae* Text and Academic Authors Association and the Authors Guild respectfully submit this brief in support of the appeal of Plaintiffs/Appellants Cambridge University Press, Oxford University Press, Inc., and Sage Publications, Inc. (collectively, "Appellants" or "the Publishers"). This brief is filed with the consent of the parties. This brief was authored entirely by counsel for A*mici Curiae*, not in any part by counsel for the parties. *Amici Curiae* and their counsel alone contributed money to fund preparing and submitting this brief. *See* Fed. R. App. P. 29(c)(5).

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The Text and Academic Authors Association ("TAA") is the only nonprofit membership association dedicated solely to assisting authors of scholarly books, textbooks, and journal articles. Formed in 1987, the TAA has over 1,400 members, primarily consisting of authors or aspiring authors of scholarly books, textbooks, and academic articles. Many of the TAA's members serve on college or university faculties. The TAA's mission is to enhance the quality of educational materials and to assist text and academic authors by, for example, providing information on tax, copyright, and royalty matters; and fostering a better appreciation of their work within the academic community.

The Authors Guild, Inc. (the "Guild") founded in 1912, is a national non-profit association of more than 8,200 professional, published writers of all genres.

The Guild counts historians, biographers, academicians, journalists and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interest of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business and other areas; they are frequent contributors to the most influential and well-respected publications in every field. In the copyright area, the Guild has fought to procure satisfactory domestic and international copyright protection and to secure fair payment of royalties, license fees, and non-monetary compensation for authors' work. Guild attorneys annually help hundreds of authors negotiate and enforce their publishing contracts.

Amici are concerned that the district court's decision will cause significant harm to individual authors of scholarly books and other academic materials that serve a critical role in education. Royalties and permissions income are important contributors to authors' and publishers' ability to produce and disseminate scholarly works.[1] The erosion of permissions income inevitably will force academic presses to reduce the number of scholarly works they publish, which poses a significant threat to *amici's* members' opportunities to produce and

[1] "Scholarly works" generally include, among others, anthologies, annual review or conference proceedings books, literature reviews, reference works, handbooks, and monographs (published dissertations and theses).

disseminate scholarly works. The reduction in the publication of scholarly works will deprive academic authors of publication credit, which has a direct effect on promotion and tenure decisions, resulting in a substantial financial impact on a faculty member's salary over an entire career. Moreover, the district court's presumption that scholarly writing is solely informational and not highly expressive grossly underestimates the creative value and originality inherent in most scholarly writing. Academic works that are used in the classroom are chosen precisely because of their original, expressive content. *Amici* therefore file this brief to address the practical impact of this case on their members.

STATEMENT OF THE ISSUES

1. Did the district court err in holding that the fair-use doctrine allows Georgia State University ("GSU") instructors to copy and distribute to students via online course reading systems substantial, nontransformative excerpts from Appellants' books without a license, thereby supplanting Appellants' core market.

2. Did the district court err in failing to enjoin the unauthorized "anthological" copying, i.e., the combination of excerpts from multiple works of Appellants and other publishers into digital coursepacks, that has been occurring at GSU?

SUMMARY OF THE ARGUMENT

The district court committed several key errors in analyzing the fourth "market harm" factor. First, the court made the erroneous assumption that its finding under the first factor – namely, that the uses were educational – should inform its analysis of the fourth factor, and in doing so overlooked the fact that the primary market affected in this case is the educational market. Such oversight severely damages both the Publishers' bottom line and the ecosystem that exists in academic publishing, and on which academic authors rely for their livelihoods. Second, the court failed to sufficiently consider both the existing and potential markets for excerpts of scholarly works, where there was an existing, mature licensing market for hard copy excerpts of these works and a smaller, but growing market for digital excerpts already in existence. Finally, rather than consider the potential adverse market impact of unrestricted, widespread conduct similar to GSU, as instructed by *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590-91 (1994), the district court narrowly focused on the potential losses of each individual use during three academic terms in 2009 and acted as a rate-maker – deciding that students should be a class protected from paying more than zero dollars for excerpts even though they had already been paying fees for hard copy excerpts for years.

The district court also committed error in analyzing the second fair use factor – the nature of the works at issue. The court assumed that because the works at issue were non-fiction and educational in nature, they were on the low end of the spectrum of creativity, and thus weighed the "nature of the work" factor against the Publishers. In doing so, the court overlooked the extensive creative expressiveness of scholarly works used in classrooms. Rather than merely reporting facts, professors assign these works precisely because of the interpretive insights and richness they bring to the students' educational experience.

Particularly concerning to *amici* is the manner in which the court's analysis pitted students' interests in not paying for excerpts of scholarly works against authors' rights to control the use of and receive compensation from the use of their writings – a right recognized in the U.S. Constitution and designed to benefit creators and consumers alike. The perverse consequence of the decision is that ultimately fewer works will be created for educational instruction.

ARGUMENT

I. THE DISTRICT COURT MISAPPREHENDED THE "MARKET" AFFECTED BY GSU'S UNFAIR USE

The fourth fair use factor directs a court to look at "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). As the Supreme Court explained in *Campbell*, under the fourth factor, a court should consider "whether unrestricted widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market." 510 U.S. at 590. *Campbell* further explained that where the copies at issue are merely non-transformative duplicates, it is likely they will serve as a market replacement and "that cognizable market harm to the original will occur." *Campbell*, 510 U.S. at 591; *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287, 1316 n.31 (11th Cir. 2008); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1279 (11th Cir. 2001).

Instead of conducting a straightforward analysis under this framework – whether unrestricted widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market – the district court improperly framed its analysis of the fourth factor in light of its findings under the first factor – namely, that the uses at issue were educational. Dkt#423 at 20 ("The Court believes that the best way to proceed is first to decide how the four

fair use factors should be applied in a case such as this one…" – e.g., "where excerpts of copyrighted works are copied by a nonprofit college or university for a nonprofit educational purpose."). In so doing, the court disregarded the statutory requirement to analyze the "market for" the copyrighted work, preferring instead to allow the first factor to swallow the fourth. This, by itself, was error. *See, e.g.*, *Campbell*, 510 U.S. at 590 ("the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement."); *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983) (stating that a "nonprofit educational purpose does not automatically compel a finding of fair use," and that infringer's copying of educational material for the same educational "intrinsic purpose" was a "strong indicia of no fair use"); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (stating there are "no categories of presumptively fair use.").

By focusing on the use, rather than the market for the works being used, the district court disregarded both the market's consumer base and the nature of an important type of product within that market. Specifically, the district court ignored the key fact that the market for the works at issue in this case – scholarly works – is principally the higher education market, and that excerpt use is a significant part of that market. Because excerpt use of scholarly works is a common practice in educational settings, the rules the district court fashioned for

determining when an excerpt use is fair (using works in an educational setting, and copying essentially 10% or less of a work) places *amici* in a dire situation. If this Court finds that an educational market for excerpts is to be devalued merely because the works are, by their very nature, educational and likely to be used in excerpted form, then this significant market for the works, and eventually for the works as a whole, could be destroyed.

A. The Primary Market for the Works at Issue is Educational, and Excerpt Use is an Important Component of the Market

The primary market for scholarly works is academia – institutions such as GSU, as the Publishers testified, *see* Dkt#276, 5/17 Tr. 54:17-22 (Smith); 5/18 Tr. 91:8-10 (Richman); 5/19 Tr. 33:2-3 (Pfund). *Amici* concur.[2] The nature of this marketplace compels particular care because, by its nature, it rests on razor-thin margins that owe their existence almost exclusively to academic, classroom use – the type of use that GSU exemplifies. The low profitability of these works is directly tied to their purpose – to further research and learning for the public good, not to make a profit by entertaining and appealing to the mass-market consumer.

Due to economic pressures, commercial publishers and not-for-profit academic presses alike are increasingly forced to publish only those scholarly books that have a reasonable chance of recouping their costs. TAA and Guild

[2] This is true whether such works are written by academic authors or non-fiction trade authors outside of academia, and for both the not-for-profit academic presses and the commercial publishing houses that publish scholarly works.

members find that they must convince publishers that a proposed work will pay for itself. Even small income reductions affect whether an academic publisher can recoup its publishing costs, and thereby will determine whether the publisher can afford to publish a particular book and offer it to the academic community.[3] A loss in excerpt permissions fees is precisely the kind of change that could take a book from breaking even or being profitable to becoming unpublishable.

The district court, in analyzing the market effect on entire books rather than excerpts, also failed to consider the existence of a robust excerpt market. (*See* Appellants' Br. at 24). Excerpt use is particularly common in academia, and has been since photocopying initially enabled the provision of excerpted chapters to students. The Copyright Act acknowledges the licensed market for excerpt use by explicitly removing from a live teaching exemption "activities that use" works such as "course packs . . . copies . . . of which are typically purchased or acquired by the students in higher education for their independent use and retention . . . ." 17 U.S.C. § 110(2).

The nature of scholarly works (which the district court also did not consider) lends itself to the practice of excerpt use in particular. Unlike novels, for example,

[3] Books concerning highly specialized fields tend to be particularly at risk here. Even when a book is likely to contribute enormously to scholarship in the field, publishers are unable to justify its publication if the book cannot pay for itself. *See* Dkt#399, Tr. 1/55-56 ("we cannot publish books just to make money, and we quite regularly decline to publish books that we know would make money but which we judge are not necessarily valuable works in scholarship and learning…").

these types of works are well-suited to higher education classroom use on a chapter by chapter basis. Many of the books at issue are collections of stand-alone articles, often authored by different individuals, which naturally lend themselves to chapter by chapter use. Dkt#423, Attachment pg. 1. Others are scholarly works by one or two authors for which there is frequently just one key chapter that represents the heart of the work, is most frequently cited and quite often represents most of the book's value. It is very common for professors to assign only the key chapter in such works and, accordingly, professors often distribute or provide access to the assigned, stand-alone excerpts, rather than have the students purchase the whole book.

The introduction of digital technologies has obviated the old practice of providing these excerpts in the form of hard copy course packs or by placing copies of the book or photocopies on reserve. Now, professors at most higher education institutions provide electronic copies through university electronic systems, such as GSU's ERes and uLearn systems. As a result, a robust market has developed to license and readily deliver scholarly work excerpts in many formats and combinations at reasonable costs. And many publishers and organizations, as well as some authors and their agents, offer licenses in both hard

copy and digital formats, in many cases catered specifically to users' requests, including the very type of use at issue here.[4]

GSU's directly substitutive use demonstrates that the district court's decision, if affirmed, will have a severe negative impact on the market. A decision making it acceptable to post online unlimited excerpts for a course under the rubric of fair use (so long as they do not exceed the district court's generous bright line rule for the permissible amount from one work) will encourage professors to assign more digital excerpts because they will be free, rather than require students to purchase books, physical reprints, or hard copy (or digital) course packets. The effect will be fewer purchases of books for classroom use. *See Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991) ("[w]hile it is possible that reading the [course] packets whets the appetite of students for more information from the authors, it is more likely that purchase of the packets obviates purchase of the full texts."). In this manner, the "fair" uses will completely usurp the market for paid excerpt use, and the excerpt market will inevitably become extinct for all but particularly long excerpts. *See* 4 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 13.05(E)(1) (explaining that "if every school room or library may, by purchasing a single copy, supply a demand for numerous copies through photocopying, or similar devices, the market for copyrighted

[4] *See* Appellants' Br. at 29-32.

educational materials would be almost completely obliterated."). This is precisely what consideration of the fourth factor is intended to prevent. *See, e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

Through its misunderstanding of the academic and excerpt markets, the district court effectively created a broad categorical educational or non-profit fair use exemption from copyright infringement. When the use becomes "widespread," anyone in GSU's position will no longer need to license excerpts (so long as the excerpt is only one chapter or appears in a book ten times the excerpt's length). The broader academic market will consequently suffer enormous losses. This case illustrates the evident reason courts have declined to create such categorical exemptions in the nonprofit or educational context: to prevent the fair use exception from swallowing the rule of copyright protection.

The practical impact of exempting the excerpt market from copyright is a loss of an important revenue source, one that may well make important works unpublishable. Publishers, even scholarly publishers, cannot afford to publish works that have no hope of recouping their publication costs, even if such works

are important to the scholarly community.[5] Publishers will have no incentive to prepare and distribute the works on which academia extensively relies. By cannibalizing the existing course pack (excerpt) market, the district court's ruling squelches the incentives the Founders put in place to encourage the creation of valuable works in the first place. *See Princeton Univ. Press v. Michigan Doc. Servs., Inc.*, 99 F.3d 1381, 1391 (6th Cir. 1996) (finding loss of licensing revenue could have a "deleterious effect upon the incentive to publish academic writings"). As the Sixth Circuit asked in *Princeton Univ. Press*, "if publishers cannot look forward to receiving permission fees, why should they continue publishing marginally profitable books at all?" *Id.*

It is therefore remarkable that rather than considering the marketplace realities, the district court accused publishers of seeking "to choke out nonprofit educational use" of chapters as fair use. Dkt# 423 at 69. In reality, the district court's disregard of the existing market for licensed excerpts of scholarly works instead has the potential to "choke" the entire academic publishing ecosystem: it deprives publishers, and by extension scholarly authors, of an important source of revenue – revenue which publishers could otherwise use to fund the publication of new works.

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[5] *See* Marlie Wasserman, The Specialized Scholarly Monograph in Crisis: Or How Can I Get Tenure If You Won't Publish My Book?, Association of Research Libraries, *available at* http://www.arl.org/resources/pubs/specscholmono/wasserman~print.shtml.

B. The District Court's Decision Harms the Incentive to Publish by Endangering the Academic Publishing Ecosystem

The district court presumed that because academic authors "value education," they are disinterested in financial compensation, and instead their main reward is the satisfaction of having their work distributed and seeing it contribute to the dissemination of knowledge. Dkt#423 at 82. Certain GSU professors testified that "royalties are not an important incentive for academic writers." Dkt#423 at 81. Those observations tell only part of the story. The ability to efficiently disseminate scholarly works for educational use relies on a healthy scholarly publishing ecosystem. Damage to this ecosystem directly harms the financial and other interests of academic authors, as well as publishers.

The district court's assumption that academics do not care about payment for use of their works reveals an overly narrow view of publishing's role in academia and how directly it is tied to professors' overall financial compensation.[6] Publishing with a scholarly press is the principal means by which academics in almost all fields secure tenure and promotion. Salary increases and merit pay in

[6] Another problem with this assumption is that it ignores the fact that not all books excerpted for classroom use are authored by academics who earn a university salary. Scholarly works by trade non-fiction (*i.e.*, not academic) authors are also used in the classroom; and these authors *do* rely on advances and royalties to earn a living.

most research institutions are tied directly to the professors' publishing record.[7] In some cases, there are very direct economic benefits to academics from publishing scholarly works.[8] The ability to "sell" one's work, for example, to an established academic publisher thus has very direct and immediate financial consequences for most academic authors. Indeed, *amici*'s academic members report that publishing in scholarly presses is the single most important factor to career advancement in academia and obtaining the financial rewards that follow. These benefits provide the incentives for our members to write.

The erosion of permissions income inevitably will force university and other scholarly publishers to cut back on the number of scholarly works they publish, or for some scholarly publishers, could sufficiently tip the profitability scales to put them out of business.[9] Our members report seeing some academic publishers starting to publish fewer academic books, focusing on those with broader audiences to make ends meet.[10] The reduction in the publication of scholarly works will deprive academic authors of scholarly publication credit required to advance their careers. This will have the greatest impact on young professors who

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[7] *See* University of California, Academic Personnel Policy, *available at* http://www.ucop.edu/academic-personnel/academic-personnel-policy/.

[8] For instance, the University of California provides a promotion that comes with an approximately $5,000 salary increase for each book published. That adds up to substantial compensation over a professor's career. *See* University of California, Academic Personnel Policy, *supra* n. 7.

[9] *See* Appellants' Br. at 34, 37.

[10] *See* Wasserman, *supra* n. 5.

are still seeking promotion and tenure. *See American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 927 (2d Cir. 1995) (citing *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (noting that in academia, recognition "so often influences professional advancement and academic tenure.")).

Ultimately, this inability to publish and obtain publishing rewards will heavily dilute the incentives to write low- or no-profit works that further human learning. Allowing excerpt use as fair use "could well discourage authors from creating works of a scientific or educational nature." *See* Nimmer, *supra* § 13.05(E)(1). Eventually, it will impoverish the literature of scholarship at its most sophisticated, and revenue sensitive, margins. In short, the district court's decision, if upheld, is likely to have a direct impact on the copyright incentives to disseminate works that are specifically intended to further human knowledge – exactly the type of works the founders had in mind in securing copyright protection for authors in the Constitution.

II. BY FOCUSING ON ACCESSIBILITY, PRICE, AND FORMATS FOR LICENSED EXCERPTS, THE COURT MISCONSTRUED THE LEGAL MEANING OF "POTENTIAL MARKET"

The district court created an unprecedented, overly narrow interpretation of the fourth factor's inquiry as to the "potential market for . . . the copyrighted work." Citing *Texaco*, 60 F.3d at 930-31, the district court stated that "a particular unauthorized use should be considered 'more fair' when there is no ready market,"

but, without explanation or authority, added the requirement that the *Appellants* show that "licenses for excerpts of the works at issue are *easily accessible*, *reasonably priced*, and that they offer excerpts *in a format which is reasonably convenient* for users." Dkt#423 at 75 (emphasis added). This conclusion disregards the established, forward-looking meaning of "potential market." Likewise, the district court's conclusion ignores the fact that the market already exists – even if certain publishers in that market have chosen not to make their works available.

The court's adoption of this entirely new, unprecedented standard is troubling for multiple reasons. First, the district court, by looking at a moment in time, failed to consider the likely future market – including useful technologies that may develop to support new methods of distribution. Yet the statute plainly states that a court must look at "the effect of the use [on] the *potential* market…" 17 U.S.C. § 107(4) (emphasis added); *Sony*, 464 U.S. at 451 (stating that for a copyright holder to prevail on the fourth fair use factor, "[a]ctual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage."); *see also Texaco*, 60 F.3d at 930 (fourth factor calls for evaluating "potential licensing revenues for [a] traditional, reasonable, or likely to be developed market[]."). The exception is where the potential market is purely speculative, which was not the situation here. *Cf.*

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007) (hypothetical market for cell phone downloads of thumbnail images was not considered in the fair use analysis because too speculative).

The district court's decision to focus on the digital excerpt marketplace in 2009, Dkt#423 at 27-28, 75-80, particularly where the market not only existed but has since expanded, effectively read the word "potential" right out of the statute. The district court's insistence on looking solely at a moment in time is thus not only legally erroneous, it has the effect of stunting the robust growth of the digital market. *Compare A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001) ("lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the work."). Moreover, even then, it was clear that the digital licensing market for excerpts of scholarly works not only existed, but was strong and quickly growing.

The district court's heavy emphasis on accessibility and convenient formats led it to disregard the availability of hard copy course packs; in doing so, it created a new set of fair use rules that is more expansive for digital excerpts, and is inconsistent with those for hard copy excerpts of scholarly works. Dkt#423 at

30.[11] While it may be true that "[e]ducational users today want digital materials," Dkt#423 at 78, the medium and formats of the available license are irrelevant to whether there is a market under the fourth factor. There is simply no basis in law or equity for requiring a licensing market to provide works in the format and manner and at the price points a user might desire, even when the copyright owner has not chosen to do so. *See Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997) (stating that plaintiff need not show effect on an actual market for use at issue in the case; that the fourth factor favors plaintiff where it can show a "traditional, reasonable or likely to be developed" market); *see also Am. Broad. Cos., v. Aereo, Inc.*, 874 F. Supp. 2d 373, 404 (S.D.N.Y. 2012) (rejecting argument that public has any interest in accessing content via a specific method as "unpersuasive" and containing a "logical gap," where "there are numerous other methods through which the public can lawfully access Plaintiffs' content").

Second, the district court's focus on specific formats ignores the well-established requirement that it look at the market "in general." *See, e.g., Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998)

[11] The district court's decision improperly focuses on whether digital licenses were available via the Copyright Clearance Center's ("CCC's") ECCS service in 2009, and ignores that hard copy licenses for many of the works were available through CCC's APS service. Dkt#423, Attachment pgs. 1-3. The district court also failed to consider the availability of licenses (in 2009 and potential) from other sources, such as the publishers and authors themselves.

("[t]he fourth factor must also 'take account . . . of harm to the market for derivative works,' defined as those markets 'that creators of original works would *in general* develop or license others to develop.'") (quoting *Campbell*, 510 U.S. at 592) (emphasis added). All of the works at issue in the case were in fact available in digital format in 2009. *See* Appellants' Br. at 2. But the fact that a particular publisher may have not yet chosen to place a particular work in the digital marketplace, *see* Dkt#423 at 36, 38, cannot be used to punish that publisher or others similarly situated to it. The requirement that the district court unilaterally added to the fourth factor – that the specific works involved be *easily accessible*, *reasonably priced*, and *in a format which is reasonably convenient* for users – disregards the inherent meaning of an exclusive right – the fundamental right to decline to license. *See Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 681 (S.D.N.Y. 2011) ("[a] copyright owner's right to exclude others from using his property is fundamental and beyond dispute.") (citing *Fox Film Corp v. Doyal*, 286 U.S. 123, 127 (1932) (stating a copyright owner "may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.")). An analysis of the fourth factor should not be dictated by a right holder's decision not to license; otherwise fair use would become a vehicle for denying copyright owners this fundamental right under copyright law. *See, e.g.*, *Castle Rock*, 150 F.3d at 146 (the need to assess the effect on the market

is not lessened by fact that copyright owner has not entered a specific market because "copyright law must respect that creative and economic choice."); *Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1242 (D. Colo. 2006) (similar).

There are many reasons that a right holder may decide not to distribute a work in digital form: digital formats create greater infringement risks for certain works, and owners may incur additional costs to make works digitally available. Moreover, the business models for allocating digital revenues between publisher and author are unsettled. For these reasons, some authors have sought to hold back digital rights from the rights they grant to their publisher; and a publisher cannot grant rights it does not have. To require an owner to offer a specific format to users is akin to a compulsory license, which is Congress' role, not the courts'. *See Authors Guild*, 770 F. Supp. 2d at 686.

III. THE DISTRICT COURT IMPROPERLY ASSESSED FINANCIAL BENEFIT TO USERS AS PART OF THE FOURTH FACTOR

The district court found that unlicensed uses of a "decidedly small excerpt" of the scholarly works caused "extremely small, though actual damage to the value of the books' copyrights." Dkt#423 at 79. On this basis, the district court concluded (without citing any authority) that such a "small" unlicensed use "will not discourage academic authors from creating new works" and will not harm the potential market for the scholarly works. *Id.* at 79, 81-84, 89. This conclusion is

based on legal error, just as the court's weighing of relative cost – and effectively redistributing money from publishers to students as a result – is unprecedented.

The law is settled that a plaintiff need not show great harm, or even any pecuniary harm, in the fair use context. Indeed, courts have rejected attempts to minimize the effect on the market where copyrighted works generate only a "small" amount of income, or no income at all: such an argument improperly "confuses lack of one item of specific damages with lack of adverse impact on a potential market." *Ringgold,* 126 F.3d at 81.[12]

In stark contrast to its dismissive view of harm to authors and publishers as a result of the loss of royalties, the district court concluded that the cost of licensing the scholarly works is prohibitively expensive for universities and students, such that students could not afford to pay permissions if the costs were passed on to them. *See* Dkt#423 at 33. Even under the district court's novel "reasonable price"

[12] Nonetheless, the district court was incorrect in disregarding permissions income in 2009 as a significant portion of the Publishers' overall income. Dkt#423 at 81-84. In our members' experience, permissions fees are important contributors to authors' and publishers' incomes and bottom lines. Moreover, the district court ignored the pass through of permissions revenue to authors, a revenue stream that is typically shared 50/50 with the author. Permissions revenue for some authors represents "a healthy portion of their income." *See Authors Guild v. Google*, 05-Civ-8136, Dkt#488, August 31, 2009 Letter from Stuart Bernstein, at 2 (S.D.N.Y.) ("Before copying or publishing copyrighted materials, a legitimate author, institution or publisher is required to make a formal request to a rights holder seeking *permission* to use a work protected by copyright, with the rights holder dictating the terms and, in many cases, the fee for such use. Many authors rely on these uses of copyrighted works for a healthy portion of their income.") (emphasis in original).

standard, *see* Dkt#423 at 75, it is unreasonable to suggest that zero is the only price that could be "reasonable." Indeed, there was ample evidence in the record that users were paying permissions fees, and that the amount of fees per student – $1.68, $3.12, etc. – was low, indeed miniscule as compared to the cost of a single course credit from a university today. *Compare* Dkt#423 at 26-27, 29-30 (licensing fees), *with* Dkt#423 at 34-35 (university budgets for library service alone). Students can pay, and always have paid, for course materials, including books and course packets, including through financial aid assistance provided by the school. *See* Dkt#423 at 30 (Cambridge charges $0.11 per page for hard copy course packets and $0.15 per page for digital formats through CCC; Sage and Oxford charge the same fee for hard copy and digital formats).

There is no precedent for considering a copyright *user's* licensing costs in the effect on the potential market analysis. Dkt#423 at 32-33. Rather, it is the "effect of the [unlicensed] use [on] the potential market" that the court must assess. 17 U.S.C. § 107(4). The nature of the user is irrelevant to an analysis under the fourth fair use factor; the district court's creation of a new class of insulated users is unexplained and unprecedented. Indeed, the only perceptible reason to consider the cost to the user in conjunction with the fourth factor is where complete market failure exists. *See Harper & Row*, 471 U.S. at 559 ("To propose that fair use be imposed whenever the social value of dissemination . . . outweighs any detriment

to the artist, would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.") (internal quotations and citations omitted). As explained above, there is no such market failure.

The decision ignores the copyright holders' right to set the price for use of their works and to allow the market to work it out. It improperly places the district court in the position of a rate court judge. Based on a single dispute between certain parties, the district court has pitted saving students' pennies against the future of scholarly writing – by non-academic trade authors, as well as professors at academic institutions. Instead of respecting the Publishers' right to decide whether to license certain works and at what prices, the district court took it into its own hands to determine the fair price for the works and allow free use under the guise of fair use where a work is not offered at the price the court deemed fair and in the formats and manner the court deemed most easily accessible. In other words, the court has created a compulsory licensing scheme, with a price fixed at zero, for excerpt use of scholarly works. If there were market failure in this market (and, as shown in the record, the broad availability of licenses shows there is not), price-setting would be for Congress, not the courts, to decide.

IV. THE DISTRICT COURT ERRED IN CLASSIFYING THE WORKS AT ISSUE AS INFORMATIONAL, RATHER THAN EXPRESSIVE AND LESS LIKELY TO BE PROTECTED BY FAIR USE

The district court made a bright line distinction between fictional work, deserving of greater copyright protection as expressive, and educational work, deserving less copyright protection as informational and educational, ignoring the expressive writing contained in the scholarly works at issue. As a result, the court concluded that the second fair use factor, nature of the work used, weighed in favor of the defendants in each instance. Dkt#423 at 54. This holding is contrary to the case law finding similar works are sufficiently original or expressive such that the second factor weighs in favor of the plaintiffs or, at worst, as neutral. *See, e.g.*, *Princeton Univ. Press*, 99 F.3d at 1389 (scholarly works found to contain "creative material, or 'expression,'" which disfavored fair use); *Rowley*, 695 F.2d at 1176 (cake decorating booklet contained "both informational and creative aspects," and thus second fair use factor was neutral); *Weissmann*, 868 F.2d at 1325 (second fair use factor favored neither party in case involving claim of infringement of copyright in medical research article); *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 72-73 (2d Cir. 1999) (stating that newspaper articles are predominantly factual in nature and that expressive elements do not dominate, but finding that the second fair use factor was at most neutral).

The district court's presumption that scholarly writing is solely informational and factual, and not highly creative, ignores the originality and creative value of scholarly writing. While the court acknowledges that some works contain "material of evaluative nature, giving the author's perspectives and opinions," the court then dismisses the expressive nature of the works by pointing to the language in the preamble of Section 107 referencing fair use of a copyrighted work for "criticism and comment" as deserving less protection. Dkt#423 at 52. Not only does the court misunderstand the preamble of Section 107 (which merely provides some examples and that it might be fair use to comment on or critique a work protected by copyright), it mistakenly concludes that expressive works that themselves comment on material and evaluate other works deserve less protection. There is no support for this interpretation of Section 107.

Scholarly works that "inform and educate" are generally highly creative and expressive. Scholarship does not report on facts like the news does; it analyzes prior scholarship or facts and adds to prior learning through interpretation and expression. Much scholarly writing attempts to resolve issues and convincingly

persuade readers of a point of view.[13] This requires a high degree of originality and expressive writing. Non-expressive writing, such as a mere report of facts or data, by contrast, does not persuade and it does not teach.

Expressive writing is not limited to fiction and includes the types of works at issue, which do not merely report on acknowledged discoveries and concepts but rather provide clear and original expression, interpretation and often advocacy.– For example, one could list the known facts of Shakespeare's life practically on the back of an envelope, yet there are thousands of scholarly works on Shakespeare and his life. None of these numerous, and in some cases voluminous, scholarly works contain the same expressive elements.[14]

Indeed, scholarly writings are assessed based on their originality as well as quality. Our members attest that originality is the most important factor that peer reviewers assess when reviewing scholarly articles and books for publication. A work will not get published (and indeed is not usually deemed scholarly) if it is not

[13] That a work is educational does not make it any more "functional" than something that is fictional. While educational works may contain real information as opposed to fictional information, their functionality arises from the goal of educating, just like a fictional work's function may be to entertain. *Cf.* Dkt#423 at 51-52 (distinguishing educational works from fictional works).

[14] Professor Stephen Greenblatt, for example, wrote a 448 page biography of Shakespeare and yet, when asked to write down all the facts known about Shakespeare, produced a 13 page paper. *See, e.g.*, Stephen Greenblatt, Will in the World: How Shakespeare Became Shakespeare (W. W. Norton 2005); Stephen Greenblatt, *The Traces of Shakespeare's Life*, *in* The New Cambridge Companion to Shakespeare 1-13 (Margreta de Grazia & Stanley Wells eds., Cambridge University Press, 2nd ed. 2010).

original. Even the research requirement guidelines at many if not most research institutions specifically refer to the need to author "original" and "creative" publications.[15]

If the scholarly works at issue here were not expressive, then the professors would just teach the facts and ideas from the works rather than assign the works to the students to read via ERes or uLearn. Yet they do not. TAA and certain Guild members, who are teachers as well as academic authors, report that they assign readings for their classes based on the expressive content of the works. Consequently, these works are no less deserving of copyright protection than a work of fiction and should not be automatically categorized as less deserving because they serve an educational function.

Moreover, in creating a dichotomy between works that convey educational information and those that are fictional, the district court fundamentally

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[15] *See e.g.*, Carlson School of Management, *Promotion and Tenure Code, 7.12 Statement*, at 4 ("Research achievements will be judged primarily on the basis of *the creativity of the work*, quality of implementation, validity of results, importance of the findings, and influence on the candidate's field…The written work is *examined for evidence of originality* and importance …") (emphasis added); University of Colorado Denver, Communication Department, *Department By-Laws*, October 2011, at 43-44, 48 ("For promotion … candidates must demonstrate a sustained record of high-quality research. …the following six criteria will be used by the Department to assess research: … 4. The *degree of creativity and originality* of the research"; "All scholarly work will be evaluated based upon its quality (prestige, significance, programmatic nature, *creativity*, growth, etc.) as well quantity.") (emphases added).

misunderstands the purpose of the second fair use factor and the meaning of authorship and expression under the copyright law. Indeed, scholarly works are the very types of works that the founders and first Congresses had in mind in creating copyright laws. The Constitution's Copyright Clause uses the term "Progress of Science" to refer to copyright because the Founders were concerned with encouraging the production of works of authorship from which people could learn and spread knowledge.[16]

Particularly with the foregoing considerations in mind, this court should consider the far-reaching impact that affirmance would have on scholarly authors if other institutions follow the district court's lead and use the decision below to claim broad fair use over informational and educational scholarly works.

[16] U.S. CONST. art. 1, § 8, cl. 8.; *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

CONCLUSION

For the reasons set forth above, and for those set forth in Appellants' brief, *amici curiae* respectfully request that the decision below be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word 2007, the word processing software used to prepare this brief.

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I, Dharmendra Kapadia, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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Sworn to before me on February 4, 2013

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