

12-14676-FF

IN THE
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 AMICUS CURIAE
THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, *amicus curiae* The Association of American University Presses, Inc. (“AAUP”) makes the following disclosures.

AAUP is a non-profit incorporated trade association that does not have any parent, subsidiary, or affiliated companies. In addition to those identified in Appellants’ brief, the following trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations are known to have an interest in the outcome of this appeal:

- The Association of American University Presses (“AAUP”), *Amicus Curiae*
- Steinman, Linda, Davis Wright Tremaine LLP, Counsel for *Amicus Curiae* AAUP.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

Dated: February 4, 2013

/s/ Linda Steinman

Counsel for *Amici Curiae* The
Association of American University
Presses

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BRIEF OF *AMICUS CURIAE*
THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES
IN SUPPORT OF PLAINTIFF-APPELLANT

This brief is respectfully submitted by the Association of American University Presses (“AAUP” or “amicus”),¹ urging reversal of the order below.

STATEMENT OF ISSUES

Did the district court err in its application of the fair use doctrine to the copying and distribution of substantial excerpts of academic works in electronic course readings without permission from the copyright holder?

INTEREST OF AMICUS

AAUP is a trade association comprising 130 nonprofit academic presses, both large and small. The vast majority are university presses affiliated with their parent universities in the United States and Canada. AAUP’s members also include museums, societies and other nonprofit publishers of scholarly works. AAUP’s member presses currently have more than 220,000 titles in print across virtually all scholarly disciplines in the humanities, social sciences, arts, and sciences, with 10,000 new titles added each year. Since university professors frequently assign readings from books published by academic presses, the resolution of this test case has a direct impact on AAUP’s members.

¹ This brief is submitted on behalf of the AAUP. It does not necessarily represent the views of each and every member of the organization and should not be construed as the individual views of any given member.

The parties have consented to the filing of this *amicus curiae* brief. *See* Fed. R. App. P. 29(a).

SUMMARY OF ARGUMENT

It is critical to understand the factual backdrop to the current dispute. For many decades, university students purchased books assigned by their professors, providing important remuneration to the books' publishers. Starting in the 1980's, it became common practice for universities to assign course readings in the form of customized paper "coursepacks," which were anthologies comprising excerpts from various copyrighted works. To compensate publishers for these uses, permissions fees were regularly paid to the publishers of the excerpts – in part, as a result of lawsuits brought by the publishing community. Today, however, times have radically changed. Advances in technology have made it easy to select and distribute individual chapters from multiple books, rather than relying primarily on a limited number of texts – and thus the practice of creating anthologies has become even more widespread. Unfortunately, as course readings have migrated to the electronic realm, some institutions have neglected to pay permissions fees. The problem this poses for academic publishers has become progressively more dire as universities post increasing amounts of students' course reading electronically.

The district court below failed to understand these realities and the importance of scholarly publishing. In filing this brief as *amicus curiae*, AAUP does not intend to diminish the fair use doctrine, which is vital in fostering the scholarship and research published by university presses. AAUP also embraces the use of electronic texts in classrooms; indeed, many AAUP members are experimenting with innovative means of digital delivery and dissemination for their works. Rather, AAUP only objects to the taking of significant portions of its members' works without compensation beyond the bounds of "fair use." AAUP believes that the district court fundamentally misapplied the four fair use factors in assessing fair use and thus improperly immunized GSU's practices.

To start, the district court concluded that the first factor heavily favored Georgia State University ("GSU") because the preamble to Section 107 of the Copyright Act lists "teaching (including multiple copies for classroom use)" as an illustrative example of potential fair use. But when Section 107 was enacted in 1976, the paradigmatic image of "classroom copying" was a teacher handing out a few sheets for discussion within the four walls of the classroom. Even in the 1970's, Congress was concerned about the potential adverse impact of new photocopying technology on publishers. Since that time, the threat to academic publishers has grown exponentially, as electronic course materials have become a

primary means of assigning out-of-the classroom reading on the college and graduate school level.

Likewise, the district court fundamentally misapplied the second factor by concluding that, because academic works are “informational” rather than “fictional,” this factor should automatically favor those who want to make verbatim reproductions of scholarly works without paying permissions fees. This analysis cannot stand under the U.S. Supreme Court’s decision in *Harper & Row Publ’rs v. Nation Enter.*, 471 U.S. 539 (1985). As the Court eloquently expressed in that case, which involved a biography, “It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of the greatest importance to the public,” such as books intended to educate and inform. *Id.* at 559.

The district court’s analysis of the third factor, namely the amount and substantiality of use, was equally tone deaf to the realities of scholarly publishing and the nature of electronic course materials. The verbatim reproduction of a full chapter of a book, without paying the publisher and author for their scholarship and all the attendant costs of editing and publication, is both qualitatively and quantitatively significant. A chapter can often contain a scholar’s complete – and complex – intellectual analysis of a given topic. Moreover, the district court erred by examining the amount and substantiality of the use from the narrow prism of an

excerpt-by-excerpt basis, rather than looking at “the collective action of a plurality of [users.]” *Infinity Broadcast Corp. v. Kirkwood*, 150 F. 3d 104, 110 (2d Cir. 1998). From a systematic standpoint, it is clear that universities like GSU are routinely providing a substantial portion of course reading assignments through the posting of electronic course anthologies comprised from an array of individual sources, leading to a large cumulative taking of copyrighted material across the university system year after year.

Lastly, as detailed herein, the district court fundamentally erred in applying the fourth factor related to market harm – both by imposing an erroneous, manufactured legal standard and more broadly in its failure to recognize the very real harm to scholarly publishing that arises when universities and students do not pay permissions fees. In contrast to most fair use cases, the posting of electronic course readings consisting of book excerpts is a wholly untransformative use. In other words, this case involves unaltered, verbatim reproductions of multiple pages of text. These postings obviously constitute a market substitute for the original work or excerpts thereof, since they are identical copies.

Further, the district court misunderstood the importance of permissions income – both to the plaintiff publishers and to smaller academic publishers. Permissions income is absolutely critical to AAUP’s members, many of whom operate on extremely tight margins. The loss of even a small amount of

permissions income therefore has a disproportionately negative effect on publishers. For smaller academic presses, permissions income from electronic course materials may make the necessary difference in keeping a part-time employee on staff or funding a scholarly series. Further, one of the key reasons that permissions income is low is that some universities have failed to pay required permissions fees for their electronic coursepacks. Publishers should certainly not be penalized because of the universities' failure to pay them the permissions to which they are entitled by law.

Finally, it is transparent that the district court's overall approach to the fair use determination was driven by a solicitude for cash-strapped public universities and their students, and a failure to sufficiently recognize the critical role that university presses and other scholarly publishers play in the larger university ecosystem. Scholarly publishing is integral to the modern university, both because it provides scholars with a means to publish their works and broadly disseminate their ideas, and because students and faculty derive an immense benefit from well-edited, peer-reviewed, highly sophisticated publications by true scholars in the field. Without the critical income from book sales to students and permissions fees for course materials, university presses will be unable to recoup their investment in publishing a diverse range of scholarly works, many of which are highly specialized, and hence less likely to publish such works – which in turn will

decrease the published scholarship available to students and faculty. In other words, the short-term benefit to a given university or its student population from decreased fees is outweighed by the injury to the broader university community and to the public's interest in high-quality education and the advancement of knowledge.²

² As Professor Nimmer explained some years ago in words that carry additional force today: "The unauthorized reproduction for scholarly or educational purposes of limited numbers of copies of copyrighted works has come to present one of the major problems of fair use. With ever greater technological advances in methods for the making of inexpensive photocopies, the problem each year becomes more acute The photocopying revolution has begun, but has yet to run its full course. Photocopying in general, and more particularly classroom and library reproduction of copyrighted materials, command a certain sympathy . . . in view of their socially useful objectives. What this overlooks is the tremendous reduction in the value of copyrighted works that must result from a consistent and pervasive application of this practice. One who creates a work for educational purposes may not suffer greatly by an occasional unauthorized reproduction. But, 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 educational materials would be almost completely obliterated. This could well discourage authors from creating works of a scientific or educational nature. If the 'progress of science and useful arts' is promoted by granting copyright protection to authors, such progress may well be impeded if copyright protection is virtually obliterated in the name of fair use." 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §13.05[E][1] (2012).

ARGUMENT

I.

THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE FAIR USE DOCTRINE

A. The Court Below Erred In Finding That The First Factor “Strongly” Favored The Defendant Under the Preamble To Section 107

1. The District Court’s Reliance on the Preamble is Misplaced

The district court concluded that the first fair use factor – namely the “purpose and character” of the use – weighed strongly in the defendant’s favor on the ground that Georgia State University is a nonprofit educational institution engaged in a noncommercial use of the excerpts in connection with classroom use. (Op. at 50.)³ It relied heavily on the fact that the preamble to Section 107 of the Copyright Act identifies “teaching (including multiple copies for classroom use),” as a *possible* fair use. (Op. at 49-50.) While it is true that classroom “teaching” appears in the preamble, the use that many university professors and students currently make of copyrighted materials in electronic course materials– as exemplified by GSU in this case – is far from what was contemplated by Congress. As the legislative history makes plain, Congress was focused on “*classroom*

³ As used herein, “Op.” refers to the May 11, 2012 decision of the United States District Court for the Northern District of Georgia, which is the subject of this appeal.

reproduction, particularly photocopying.”⁴ When Section 107 was drafted, the paradigmatic image of “classroom copying” was a teacher occasionally handing out copies of a short portion of a work for classroom discussion within the classroom. Advocates for the provision, who represented educational and scholarly organizations before Congress,

emphasized that teachers are not interested in mass copying that actually damages authors and publishers, but that they need to be free to make creative use of all of the resources available to them in the classroom, and that this necessarily involves some reproduction and distribution of copyrighted works such as contemporaneous material in the press, isolated poems and stories for illustrative purposes, and the like.

H.R. Rep. No. 83 at 30, 90th Cong. 1st Sess. (1967). While recognizing the need to protect teachers, Congress was equally cognizant of the potential harm to publishers, concluding that “a specific exemption freeing certain reproductions of copyright works for educational and scholarly purposes from copyright control is not justified.” H.R. Rep. No. 1476 at 66-67. The Report of the Senate Judiciary Committee likewise recognized the difference between the limited classroom

⁴ See H.R. Rep. No. 1476 at 66, 94th Cong. 2d Sess. (1976) (hereinafter “H.R. Rep. No. 1476”) (“Most of the discussion of section 107 has centered around questions of classroom reproduction, particularly photocopying”); *id.* at 67 (referring to “typical classroom situations arising [in the late 1960s and 1970s]”); *id.* at 66 (explaining that “the newly added reference to “multiple copies for classroom use” is a recognition that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for the members of a class,” but is not an attempt to broaden the fair use doctrine, or create an exemption for such uses).

copying it contemplated and the use of copying technology to supplant the need for course materials, as exemplified by GSU:

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. 473 at 63, 94th Cong. 1st Sess. (1976).

Both the House and Senate also accepted the “Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions With Respect to Books and Periodicals” (the “Classroom Guidelines”) “as part of their understanding of fair use.” H.R. Conf. Rep. No. 1733 at 70, 94th Cong. 2d Sess. (1976).⁵ The Classroom Guidelines represented a compromise between the interests of teachers in the classroom and the need to protect publishers from the

⁵ The Classroom Guidelines were collaboratively developed by representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, the Authors League of America, Inc. and the Association of American Publishers, Inc. *See* H.R. Rep. No. 94-1476, at 67-71.

market harm posed by advances in photocopying, and contemplated a type of “teaching use” that is far removed from electronic course materials such as those used at GSU. *See* H.R. Rep. No. 1476 at 68-71; Op. at 55-59.⁶ Critically, the Classroom Guidelines restrict classroom copying to those instances where “the copying does not substitute for the purchase of “books, publishers’ reprints or periodicals,” *id.* § III(C)(b), and expressly forbid the creation of anthologies, or customized compilations of copyrighted material from various sources, such as those at issue here. *Id.* § III(A). Further, as the Classroom Guidelines make clear, the paradigm for permissible classroom copying is “spontaneous” copying of a brief excerpt of a work for “classroom use or discussion.” *Id.* § II(A). In the Classroom Guidelines, “brevity” is defined as “an excerpt . . . of not more than 1,000 words or 10% of the work, whichever is less” and “spontaneity” means that “[t]he inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness [must be] so close in time that it would be unreasonable to expect a timely reply to a request for permission.” *See, e.g., Michigan Document Servs.*, 99 F.3d at 1390-91 (finding that, by its “systematic

⁶ Courts have frequently referenced the legislative history, and the Guidelines in particular, in deciding fair use issues. *See, e.g., Harper & Row*, 471 U.S. at 549-53; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574-78 (1994); *American Geophysical Union v. Texaco*, 60 F.3d 913, 919 n. 5 (2d Cir. 1994) (hereinafter *Texaco*); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1535-36 (S.D.N.Y. 1991); *Princeton University Press v. Michigan Doc. Servs.*, 99 F.3d 1381, 1390-91 (6th Cir. 1996) (hereinafter “*Michigan Doc. Servs.*”).

and premeditated character, its magnitude, [and] its anthological content . . .” the copying engaged in by defendant “goes well beyond anything envisioned by the Congress that chose to incorporate the guidelines in the legislative history”).⁷

Thus, a proper reading of the preamble, in light of the legislative history, strongly rebuts the district court’s conclusion that Congress intended a strong blanket presumption in favor of nonprofit, educational uses. Instead, it is clear that Congress was deeply concerned about the adverse impact on academic publishers if educators began to use copying technologies to supplant the market for course materials and textbooks. In the years since 1976, this threat has grown exponentially, as advances in technology make it easier, faster and cheaper to electronically disseminate copies of copyrighted works as the core curricular materials for college and graduate school courses. Thus, the “fair use” of works by teachers in the classroom contemplated by the 1976 Congress are a far cry from today’s digital reality, when electronic course materials have become a predominant means of assigning *out-of-classroom* reading on the college and graduate school level. As such, they often replace or substitute for the purchase of

⁷ While the Opinion below acknowledged the Classroom Guidelines in its discussion of the third factor, it discounted them as a compromise that “was satisfactory only to some of the negotiators” (Op. at 58) and declined to accord them any weight. (Op. at 55-59.) Amicus respectfully submits that whether every stakeholder was in 100% agreement with the overall consensus position is beside the point, and does not change the fact that the Guidelines inform the meaning of “fair use” and “classroom copying” as used in the Copyright Act.

books and textbooks – the very harm that Congress sought to avoid. Far from spontaneous, electronic course readings are typically chosen and assigned at the beginning of the semester as part of an electronic course “anthology” (and often the same readings are assigned semester after semester) – precisely the type of use for which universities have typically paid permissions for “hard copy” coursepacks. On the facts of this case, the district court’s heavy reliance on the preamble to Section 107 was, quite simply, misplaced.

In sum, Georgia State University’s systematic uses of electronic course materials across its curriculum are extremely different from the paradigm envisioned by Congress in the preamble to Section 107. The radical changes of the digital revolution require a far more nuanced approach than the district court employed in construing the preamble and the first factor.

2. The Copies are a Non-Transformative, Market Substitute for Books and Licensed Excerpts of Books

The district court compounded its error on the first factor by failing to place significant weight on the fact that GSU’s use of the excerpts is wholly nontransformative. “[T]he Supreme Court has explicitly ruled that the concept of a ‘transformative use’ is central to a proper analysis under the first factor.” *Texaco*, 60 F.3d at 923 (quoting *Campbell*, 510 U.S. at 579). The Supreme Court has instructed that:

[t]he central purpose of this investigation is to see, in Justice Story’s words, whether the new work *merely* ‘*supercede[s] the objects*’ of the original creation [citations omitted], 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.

Campbell, 510 U.S. at 579 (emphasis added).⁸ It is these types of new, creative works – not verbatim copying – that the fair use doctrine is principally designed to foster. As this Court has stated, “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. . . .” *Letterese & Assoc. v. World Inst. of Scient.*, 533 F. 3d 1287, 1310 (11th Cir. 2008) (citation omitted). Accordingly, it is well-established that where the infringing work serves the same function or purpose as the original use, a finding of fair use is far less likely. *See, e.g., Weissman v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (“where, as here, appellee’s use [of professor’s journal article] is for the same intrinsic purpose as

⁸ While acknowledging that the University of Georgia’s use was “nontransformative” (Op. at 65), the district court failed to properly consider this issue based on a footnote in *Campbell v. Acuff-Rose* which reads: “‘The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.’” (Op. at 50 (quoting *Campbell*, 510 U.S. at 579 n. 11)). However, for all the reasons set forth in Section I(A)(1) of this brief, this case does not concern the sort of unsystematic in-classroom use contemplated by the preamble to Section 107 to which the Supreme Court alludes in this footnote, and thus the Supreme Court’s footnote cannot properly be read to mean that broadscale, substantial, market-substituting mirror image copying in electronic course material of the sort reflected in record here is fair use.

[the appellant’s original use] . . . , such use seriously weakens a claimed fair use”); Nimmer on Copyright § 13.05[B][5] (“If . . . plaintiff’s and defendant’s works satisfy the same purpose, then . . . the defense of fair use should not be available.”).

There can be no doubt that electronic course materials serve the same function as, and compete with, the sale of books published by university presses, because they allow professors to duplicate chapters from many different academic works rather than assigning any given book. Similarly, electronic course anthologies obviously compete with licensed excerpts of books. Therefore, as a matter of common sense, the nontransformative excerpts created by the University are exceedingly likely to serve as a market substitute for the offerings of university presses. In sum, the district court erred by failing to properly consider the lack of a transformative use.

B. The District Court’s Analysis of the Second Factor Placed Undue Emphasis on the Factual Nature of the Works

In its assessment of the second factor of the fair use analysis, *see* 17 U.S.C. § 107(2), the district court placed undue weight on the fact that the works at issue were factual works, applying an all-or-nothing approach in which factor two automatically weighs in favor of the infringer whenever the works at issue are not fictional. (*See Op.* at 52.) Especially where, as here, the works being duplicated are scholarly books, the district court’s holding cannot stand under the U.S. Supreme Court’s decision in *Harper & Row*.

As the Supreme Court explained in *Harper & Row*, the second factor does not turn on a simplistic check list of whether the work is fact or fiction, but on the nature of the work:

[E]ven within the field of fact works, there are gradations as to the relative proportion of fact and fancy. One may move from sparsely embellished maps and directories to elegantly written biography. The extent to which one must permit expressive language to be copied, in order to assure dissemination of the underlying facts, will thus vary from case to case.

471 U.S. at 563. Thus, the second factor calls for a court to analyze the copyrighted works along a continuum. Moreover, even though “the scope of fair use is greater with respect to factual than non-factual works” (*see Basic Books*, 758 F. Supp. at 1532), scholarly works – which involve highly sophisticated learning and analysis – are entitled to robust copyright protection. As the Supreme Court eloquently expressed in *Harper & Row*, the aim of copyright is “to stimulate the creation of useful works for the general public good” – a “principle [which] applies equally to works of fiction and nonfiction.” 471 U.S. at 546, 558. “It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of the greatest importance to the public,” *id.* at 559, such as books “intended to inform and educate” (*Op.* at 52).

In light of the above considerations, many courts analyzing fair use in the context of more sophisticated factual works have found that the second factor weighs in favor of the plaintiff or is at worst neutral. In *Harper & Row*, which

involved President Ford’s autobiography, the Supreme Court found that the second factor weighed in favor of the publisher. 471 U.S. at 564 (finding that use of autobiography is “difficult to characterize as fair” under second factor). The Sixth Circuit reached the same conclusion in *Michigan Doc. Servs., Inc.*, 99 F.3d at 1389 (analyzing copying of non-fiction scholarly works in paper coursepacks and finding that the second factor “cuts against a finding of fair use”). In *Pacific & Southern Co., Inc. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984), the Eleventh Circuit reviewed the infringement of individual news stories that had been broadcast on the nightly news. This Court emphasized the need to “take care not to discourage authors from addressing important topics for fear of losing their copyright protections” and concluded that the second factor had a “limited impact.” *Id.* at 1497. Similarly, in *Weissman v. Freeman*, the Second Circuit considered the non-profit, educational use of journal articles on nuclear medicine and radioactive imaging. In view of the purpose of copyright – to “provide[s] the economic incentive to research and disseminate ideas” “whether in the nature of fiction or fact”– the court concluded that “the incentive interests, in our view, balance the equitable scales so that the nature of the work factor does not tip decidedly in favor of either party.” 868 F.2d at 1325.

Here, while the vast majority of the works published by the plaintiffs below, and by AAUP, are admittedly factual, rather than fictional, they are far more akin

to a biography than a “sparsely embellished maps.” *Harper & Row*, 471 U.S. at 563. These works are the result of extensive scholarship, analysis, creative input, peer review and the exercise of editorial judgment, and it is this creative scholarship that leads professors to choose one excerpt on a given non-fiction topic over another. As the Supreme Court found in *Harper & Row*, these are the very type of works that we as a society need to stimulate the publication of, to advance the public good. *Id.* at 557-59. In sum, the second factor properly leans in the publishers’ favor or, at the very worst, is neutral as to fair use.

C. The District Court’s Analysis of the Third Factor was Fundamentally Flawed

In its review of the third factor, the court below erred in its analysis of both the qualitative and quantitative significance of the amount copied. The district court properly acknowledged that, “Taking into account the fact that this case involves only mirror-image, nontransformative uses, the amount used must be decidedly small to qualify as fair use.” (Op. at 65; *see also Letterese*, 533 F.3d at 1314 n.30 (“The inquiry is whether the amount taken is reasonable in light of the purpose of the use and the likelihood of market substitution.”).) Despite this, the court below concluded with very few exceptions that the amounts taken – typically a chapter or multiple chapters – were neither qualitatively nor quantitatively significant.

1. The Court Below Erroneously Analyzed the Qualitative Significance of the Portion Used In Relation To The Copyrighted Work as a Whole

As an initial matter, the court below erred by holding in almost all instances that the publishers had failed to show that the infringing excerpts were “critical parts” or the “heart” of the entire book. (*See Op. at 68-69; see also Op. at 67.*) However, as the court itself acknowledged, the chapters were critical to the treatment of a given *topic*, and thus should have been viewed as qualitatively significant. (*See Op. at 68-69 (“[a] chapter of an academic book is a unit which, in all likelihood, covers a particular theory or topic.”)*.) In *Basic Books, Inc. v. Kinko’s Graphics Corp.*, as here, excerpts of one to three chapters in length were copied from scholarly works and compiled into course packets or anthologies. The court properly concluded that:

[T]he portions copied were critical parts of the books copied, since that is the likely reason the college professors used them in their classes. While it may be impossible to determine, as the Court did in *Harper & Row*, that the quoted material was “essentially the heart of” the copyrighted material, it may be inferred that they were important parts. . . . In almost every case, defendant copied at least an entire chapter of a plaintiff’s book. This is substantial because they are obviously meant to stand alone, that is, as a complete representation of the concept explored in the chapter. This indicates that these excerpts are not material supplemental to the assigned course material but *the* assignment. Therefore, the excerpts, in addition to being quantitatively substantial, are qualitatively significant.

758 F. Supp. at 1533-34 (emphasis in original) (citing *Harper & Row*, 471 U.S. at 565); see also *Pacific & Southern Co., Inc.*, 744 F.2d at 1497 (finding a single news story is a “coherent narrative” and the relevant “work” for purposes of a fair use analysis, as opposed to the entire broadcast). Further, as the Supreme Court has held, “the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material.” *Harper & Row*, 471 U.S. at 565. For all these reasons, this Court should find that the electronic course offerings at issue are qualitatively significant.

2. The Court Below Also Erred in its Approach Regarding the Quantitative Significance of the Copied Portions

The district court also concluded in a wooden across-the-board analysis that electronic course readings containing excerpts of up to 10% of the work for a work of less than 10 chapters, and a full chapter for works of 10 or more chapters, were “decidedly small” and hence fair use. On several occasions, it also found that longer excerpts constituted fair use.

The uncompensated-for use of an entire verbatim chapter of a book, semester after semester, without remuneration to the author and publisher fails to recognize their contribution to scholarship and all the attendant costs of editing and publication. A chapter often contains a scholar’s complete – and complex – intellectual analysis of a given topic based on years of study and accumulated expertise. Courts routinely find that excerpts of the same length as those at issue

here weigh strongly in favor of the copyright holder. *See, e.g., Basic Books*, 758 F. Supp. at 1527 (where copied excerpts ranged from less-than-half to three chapters, comprising 5% to 20% or more of the book, “the amount copied weigh[ed] against the defendant”).

Moreover, the use of any one excerpt in an electronic posting of course readings cannot be viewed in isolation. As explained above, in today’s world, professors routinely use multiple one-chapter excerpts in electronic coursepacks to comprise the bulk of the course’s readings, and do so year after year. Viewed in this light, their far greater quantitative significance becomes clear.

Further, the district court failed to recognize that in the case of edited books—*i.e.*, books where each chapter is authored independently by a different scholar—the posting of a chapter constitutes a taking of that scholar’s entire “work.” In doing so, the district court placed undue weight on the fact that such authors often assign their copyrights in the individual chapters to the publisher, holding that “where the publisher has the exclusive right to publish the entirety of a copyrighted book, it may not defeat the user’s fair use defense by arguing that too much of a particular chapter has been copied.” (Op. at 69-70.) This approach makes no sense, and is directly contrary to that taken by courts in other circuits. In *Texaco*, for example, the Second Circuit recognized that the individual articles within a journal constitute “discrete ‘original works of authorship’” precisely because they had

been independently authored, were independently copyrightable, and the authors had to transfer the copyright in the individual articles to the publisher. 60 F.3d at 926. The Second Circuit thus concluded that, in copying individual articles from a journal issue, “[defendant] has copied entire works.” *Id.* Indeed, the absurdity of any contrary result is illustrated by the fact that it is often the case in academia that an article that is originally published in a journal is later republished in, or becomes the basis for, a chapter in a book. It is wholly illogical to treat this as a freestanding work of authorship when published in a journal, but deny it the same protections when found in a book.⁹ Furthermore, in an online world in which the primary unit of research is increasingly the journal article or book chapter, rather than the full journal issue or complete book, the print context of a chapter in an edited volume is rapidly diminishing in relevance.

3. The Court Below Failed to Account for the Likelihood of Market Substitution In Its Assessment of the Third Factor

Lastly, the district court’s analysis of the third factor failed to account for the likelihood of market substitution. As this Court has noted, the third factor counsels

⁹ Additionally, the court below also bizarrely concluded that the “title page, dedications, the copyright information page, the table of contents, [and] acknowledgements” as well as material “appearing before and after the chapter text of the book,” for example, the index or glossary, should be included when determining “the percent amount of the book that was copied by defendants.” (Op. at 60-61.) *Amicus* is aware of no other case to reach this absurd result. If this were the standard, it would only create an incentive for publishers to include indices and tables of contents that are as brief (and unhelpful!) as possible.

against a finding of fair use where the copying “could have a substitution effect on the market for [the copyrighted work].” *Letterese*, 533 F.3d at 1315. Because the use at issue is wholly nontransformative, and because the use of a chapter often suffices to address a given topic, the likelihood that the excerpts will serve as a market substitute for books and excerpts is very high.

D. The District Court Erred in Finding that the Fourth Factor, Market Harm, Favors Defendant

The fourth fair use factor is “the effect of the use upon the *potential* market for or value of the copyrighted work.” § 107(4)(emphasis added). This factor “requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also *whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.*” *Campbell*, 510 U.S. at 590; *see also Texaco*, 60 F.3d at 927 n.12 (“[T]he fourth factor is concerned with the category of a defendant’s conduct, not merely the specific instances of copying.”). Further, the Supreme Court has held that “[t]he [market impact] enquiry ‘must take account not only of harm to the original but also of harm to the market for derivative works,’” *Campbell*, 510 U.S. at 590 (quoting *Harper & Row*, 471 U.S. at 569), “because the licensing of derivatives is an important economic incentive to the creation of originals.” *Id.* at 593.

The district court should have easily concluded that the fourth factor “weighs heavily against defendants.” *Basic Books*, 758 F. Supp. 2d at 1534 (finding coursepacks impact book sales and permissions fees); *Michigan Doc. Servs.*, 99 F.3d at 1387 (finding coursepacks impact permissions fees). It is transparently obvious that a university’s free posting of verbatim excerpts from books will inflict market harm on the publisher seeking to license those very excerpts.¹⁰ The fact that there exists a convenient and viable market for permissions through the Copyright Clearance Center as well as through the publishers themselves further supports a finding of market harm. *See Texaco*, 60 F.3d at 930-31; *Michigan Doc. Servs.*, 99 F.3d at 1388. Further, widespread conduct of the sort practiced by GSU will also cause market harm to publishers by decreasing their ability to sell books. While the district court concluded that the University’s practices could not impact book sales because “a 10% excerpt would not substitute for the original, no matter how many copies were made” (Op. at 74), this overlooks the fact that professors often have no need to assign full length

¹⁰ Both the U.S. Supreme Court and several circuit courts have recognized the common sense reality that where, as here, a secondary use is not transformative but rather a verbatim copy, it is far more likely to serve as a market replacement for the original. *Campbell*, 510 U.S. at 591 (noting that an exact duplicate of an original that serves as a market replacement for it makes it “likely that cognizable market harm to the original will occur”); *Video Pipeline v. Buena Vista Home Entertainment*, 342 F.3d 191, 202-03 (3d Cir. 2003) (nontransformative use “serve[s] as a market replacement,” “making it likely that cognizable market harm to the [original] will occur”); *Letterese*, 533 F.3d at 1315.

books if they are able to assemble and disseminate their own compendium of excerpts for free – thus leading to a contraction in book sales.

1. The Court Below Improperly Focused on the Substantiality of Plaintiffs’ Permissions Income, Rather than the Substantiality of the Impact on that Income

In the face of these common sense conclusions, the district court invented significant new hurdles to a showing of market harm that cannot stand as a matter of law. First, while other courts have simply required that a plaintiff show that the licensing revenues at issue are in “those [markets] that creators of original works would in general develop or license others to develop” (*Letterese*, 533 F.3d at 1317), the district court below concocted a requirement that the licensing income constitute a material percentage of the plaintiff publishers’ income. This is not the law. Indeed, the district court’s formulation turns the analysis on its head. The issue is not whether the permissions income constitutes a substantial portion of the publishers’ income, but “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the [relevant] market.” *Campbell*, 510 U.S. at 590. Thus, in *Pacific & Southern Co.*, this Court found that the fourth factor favored the plaintiff even though sales of taped new stories from its nightly news broadcasts were a “small portion of [plaintiff’s] total profits” and the plaintiff was not actively exploiting the market for sale of copies of individual stories, because any exploitation of that market by

defendant would necessarily have a substantial adverse effect on plaintiff's ability to market those excerpts. 744 F.2d at 1493-94, 1496-97; *see also Infinity Broadcasting*, 150 F.3d at 110-11 (finding market harm although plaintiff Infinity had only offered listening lines to its customers at no additional cost and had not attempted to license the retransmission of its programs for the use made by defendant); *Los Angeles News Service v. Reuters Television Int'l Ltd.*, 149 F.3d 987, 994-95 (9th Cir. 1998) (fourth factor favored plaintiff despite no proof of loss of actual sales because both parties were in the business of providing audiovisual news material to the media).

Further, the court's requirement of a material loss in income turns logic on its head. Permissions income is often low because universities have failed to pay required permissions fees with the advent of electronic course materials. Their evasion of the law cannot be a basis to deny recovery to the rightful copyright owners, who have the exclusive right to exploit the rights in their works.

Finally, the district court's analysis disregards the fact that permissions income is critical income for many academic publishers, especially smaller university presses. The vast majority of AAUP's member presses operate on very thin budgets, where every dollar of income counts. Permissions income is particularly helpful because it carries with it none of the direct costs associated with income from book sales (such as manufacturing costs, warehousing costs,

etc.). While many academic presses rely in part on subsidies from their parent universities in order to publish, they are increasingly operating on reduced budgets and facing further cutbacks. In recent years, a number of university presses have faced closure or been forced to cut their offerings. *See, e.g., University of Missouri Press to Close, after 54 Years*, L.A. Times (May 24, 2012); *Facing Cutbacks, UC Press Will Suspend Poetry Series*, L.A. Times (July 19, 2011); Jennifer Howard, *Louisiana State U. Press Fights to Preserve its Essential Value*, *The Chronicle of Higher Education*, vol. 55 (June 5, 2009). The district court’s opinion threatens to increase the burden on cash-strapped presses, leading to a potential reduction in their lists and an impoverished scholarly communications landscape.

Finally, the district court erred as a matter of law by concocting the requirement that a publisher demonstrate that a “reasonably-priced license” is available for each of the works at issue. Again, this is not the law, as illustrated by the fact that the fourth factor explicitly takes account of *potential markets* – markets for which no means of licensing yet exists. *Letterese*, 533 F.3d at 317 (considering potential market for licensing of derivative works even though plaintiff had not, and stated it would not in future, exploit such a market). The notion of what constitutes a “reasonable price” is entirely subjective and hence unworkable.

CONCLUSION

The district court's decision, if left in place, would cause significant harm to AAUP's member presses and therefore to the larger purpose of scholarly communication and education. We respectfully urge this Court to reverse the decision below.

Dated: February 4, 2013

Respectfully submitted,

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

No. 12-14676-FF Caption: *Cambridge University Press et al. v. Becker et al.*

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I certify that on February 4, 2013, a copy of the above and foregoing Appellants' Brief was filed by CM/ECF with the Clerk of the Court for the U.S. Court of Appeals, Eleventh Circuit, and that a copy was also served by CM/ECF on counsel listed below.

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