

CASE NOS. 12-14676(FF) & 12-15147(FF)
(CONSOLIDATED APPEALS)

United States Court of Appeals
for the
Eleventh Circuit

CAMBRIDGE UNIVERSITY PRESS, et al.,

Plaintiffs-Appellants,

v.

MARK P. BECKER, in his Official Capacity as Georgia State University
President, et al.,

Defendants-Appellees.

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA IN CASE
NO. 1:08-cv-01425-ODE (Hon. Orinda D. Evans)*

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Cambridge University Press, et al. v. Mark P. Becker, et al.

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Cambridge University Press, et al. v. Mark P. Becker, et al.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees are prepared to present oral argument if it would be of assistance to the Court.

The copyright doctrine of fair use is codified at 17 U.S.C. §107. The district court properly applied the fair use factors in a manner that is consistent with existing Supreme Court and other precedent. Nonetheless, in view of the extensive record, the district court's thorough decision, and the fair use issues raised by the Appellants, oral argument may be of assistance to the Court. If the Court does desire oral argument, Appellees respectfully seek guidance as to what issues or topics would be of assistance to the Court.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT	C-1
STATEMENT REGARDING ORAL ARGUMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF CITATIONS	v
TABLE OF RECORD REFERENCES	x
STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION	xxiii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
I. NATURE OF CASE.....	2
II. THE COURSE OF PROCEEDINGS AND THE DISTRICT COURT’S RULINGS	2
A. The Focus On “Ongoing And Continuous” Alleged Infringement	3
B. Summary Judgment Narrows The Issues.....	4
C. Trial And Order	5
D. Post-trial	6
III. STATEMENT OF THE FACTS	7
A. Parties	7
B. USG’s Adoption Of The 2009 Copyright Policy.....	9
C. GSU Implements The New 2009 Copyright Policy.....	10
D. The Works At Issue	13
E. The Amount And Substantiality Of The Uses	14
F. Classroom Guidelines Are Not The Law	17
G. One Chapter Is Not An Entire Work.....	17
H. The Market For The Works.....	19
IV. STANDARD OF REVIEW.....	22
V. SUMMARY OF THE ARGUMENT	25

VI.	ARGUMENT.....	28
A.	The Right Of Fair Use.....	28
B.	The District Court Did Not Err In Its Fair Use Analysis	29
1.	The District Court Properly Found That The First Factor Weighed Heavily In Favor Of Fair Use.....	33
a.	GSU’s nonprofit educational use is central to Factor 1 analysis	34
b.	Transformative use is not required	36
2.	The Excerpts At Issue Are Factual In Nature; Factor 2 Favors Fair Use.....	42
3.	The District Court Properly Determined That Factor 3 Weighs In Favor Of Fair Use.....	46
a.	The Publishers improperly elevate the Classroom Guidelines beyond their intended purpose.....	49
b.	The district court’s analysis of Factor 3 properly considered the educational purpose.....	51
c.	The district court’s Factor 3 analysis is supported by the record	52
4.	The Fourth Factor Primarily Weighs Primarily In Favor Of Fair Use	56
5.	The District Court Properly Undertook A Work-by-Work Analysis.....	65
6.	The Photocopy For Profit Cases Are Not Controlling...	65
7.	“Media Neutrality” Is Not Relevant	69
C.	Injunction.....	70
D.	Attorneys’ Fees.....	71
VII.	THE RELIEF SOUGHT BY PUBLISHERS IS NOT AVAILABLE UNDER THE NARROW EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY PROVIDED BY <i>EX PARTE YOUNG</i>	76

VIII. CONCLUSION.....	82
CERTIFICATE OF COMPLIANCE.....	85
CERTIFICATE OF SERVICE	86

TABLE OF CITATIONS

<u>CASES</u>	<u>Page(s)</u>
<i>A.V. v. iParadigms, LLC</i> , 562 F.3d 630, 640 (4th Cir. 2009)	42, 43
<i>American Geophysical Union v. Texaco, Inc.</i> , 60 F.3d 913 (2d Cir. 1994).....	31, 32, 45, 63
<i>Arthur Kaplan Co. v. Panaria Int’l, Inc.</i> , No.96CIV.7973(HB), 1999WL253646, at *2 (S.D.N.Y. Apr. 29, 1999)	75
<i>Artisan Contractors Association of America v. Frontier Insurance Co.</i> , 275 F.3d 1038 (11th Cir. 2001)	75
<i>Basic Books, Inc. v. Kinko’s Graphics Corp.</i> , 758 F. Supp. 1522 (S.D.N.Y. 1991).	45, 49, 53, 66, 67
<i>Bateman v. Mnemonics, Inc.</i> , 79 F.3d 1532 (11th Cir. 1996)	28
<i>Bill Graham Archives v. Darling Kindersley Ltd.</i> , 448 F.3d 605 (2d Cir. 2006)	36, 52
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569, 114 S. Ct. 1164 (1994).....	<i>passim</i>
<i>Coles v. Wonder</i> , 283 F.3d 798 (6th Cir. 2002)	75
<i>Data Gen. Corp. v. Grumman Sys. Support Corp.</i> , 825 F. Supp. 361 (D. Mass. 1993)	75
<i>Dionne v. Floormasters Enters., Inc.</i> , 667 F.3d 1199 (11th Cir. 2012)	24
<i>Encyclopedia Britannica Educ. Corp. v. Crooks</i> , 542 F. Supp. 1156 (W.D.N.Y 1982).....	39, 40, 41

<i>Ex parte Young</i> , 209 U.S. 123, 28 S. Ct. 441 (1908)	xxiii, 77, 78, 81
<i>Fed. Maritime Comm’n v. S.C. State Ports Auth.</i> , 535 U.S. 743, 122 S.Ct.1864, 1877 (2002)	79
<i>Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340, 111 S.Ct. 1282 (1991)	43
<i>Fogerty v. Fantasy, Inc.</i> , 510 U.S. 517, 114 S. Ct. 1023 (1994).....	71, 72, 73, 74
<i>Friends of the Everglades v. S. Fla. Water Mgmt. Dist.</i> , 678 F.3d 1199 (11th Cir. 2012)	24
<i>Greenberg v. National Geographic</i> , 533 F.3d 1244 (11th Cir. 2008)	70
<i>Harper & Row, Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539, 105 S.Ct. 2218 (1985).....	22, 29, 30, 42, 52, 54, 55, 58, 65
<i>Invessys, Inc. v. The Mc-Graw Hill Cos.</i> , 369 F.3d 16 (1st Cir. 2004).....	75
<i>Int’l Soc’y for Krishna Consciousness of Atlanta v. Eaves</i> , 601 F.2d 809 (5th Cir. 1979)	79
<i>Klay v. United Healthgroup, Inc.</i> , 376 F.3d 1092 (11th Cir. 2004)	23
<i>Lil’ Joe Wein Music, Inc.</i> , No.06-20079-CIV, 2008, U.S. Dist. LEXIS 112730 (S.D. Fl. June 6, 2008).....	75
<i>Lucero v. Operation Rescue</i> , 954 F.2d 624 (11th Cir.1992)	24

<i>Luckey v. Harris</i> , 860 F.2d 1012 (11th Cir. 1988)	79, 80
<i>Manuel v. Convergys Corp.</i> , 430 F.3d 113 (11th Cir. 2005)	23, 24
<i>Marcus v. Rowley</i> , 695 F.2d 1171 (9th Cir. 1983)	38, 40, 45, 46
<i>MiTek Holdings, Inc. v. Arce Eng'g Co.</i> , 198 F.3d 840 (11th Cir. 1999)	73, 74
<i>Morrisette-Brown v. Mobile Infirmary Med. Ctr.</i> , 506 F.3d 1317 (11th Cir. 2007)	23
<i>Owens v. Wainwright</i> , 698 F.2d 1111 (11th Cir. 1983)	23
<i>Pennington Seed, Inc. v. Produce Exchange No. 299, L.L.C.</i> , 457 F.3d 1334 (Fed. Cir. 2006).....	80-81
<i>Peter Letteresse & Assocs., Inc. v. World Inst. of Scientology Enters.</i> , 533 F.3d 1287 (11th Cir. 2008)	29-30, 38, 39, 40, 45, 56
<i>Princeton University Press v. Mich. Document Servs., Inc.</i> , 99 F.3d 1381 (6th Cir. 1996)	31, 49, 53, 58-59, 67, 68, 69
<i>Proudfoot Consulting Co. v. Gordon</i> , 576 F.3d 1223 (11th Cir. 2009)	22
<i>Scquare Int'l, Ltd. v. BBDO Atlanta, Inc.</i> , 455 F. Supp. 2d 1347 (N.D. Ga 2006).....	46
<i>Sherry Mfg. Co. v. Towel King of Fla., Inc.</i> , 822 F.2d 1031 (11th Cir. 1987)	24, 71, 72, 74
<i>Society of the Holy Transfiguration Monastery, Inc. v. Gregory</i> , 689 F.3d 29 (1st Cir. 2012).....	38, 39

<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417, 104 S.Ct. 774, 792 (1984).....	37, 52, 57-58, 65
<i>Stewart v. Abend</i> , 495 U.S. 207, 236, 110 S.Ct. 1750, 1768 (1990).....	42
<i>SunTrust Bank v. Houghton Mifflin Co.</i> , 268 F.3d 1257 (11th Cir. 2001)	31, 33
<i>Thomas v. Bryant</i> , 614 F.3d 1288, 1307 (11th Cir. 2010)	22
<i>Thoroughbred Software Int’l, Inc. v. Dice Corp.</i> , 488 F.3d 352 (6th Cir. 2007)	71
<i>Weissmann v. Freeman</i> , 868 F.2d 1313 (2d Cir. 1989).....	38, 39
<i>Williams & Wilkins Co. v. United States</i> , 487 F.2d 1345, 1354, 1356-58 (Ct. Cl. 1973).....	30-31
<i>Women’s Emergency Network v. Bush</i> , 323 F.3d 937 (11th Cir. 2003)	80
<i>Worldwide Church of God v. Phila. Church of God, Inc.</i> , 227 F.3d 1110 (9th Cir. 2000)	38, 39

CONSTITUTIONS

U.S. CONST. amend. XI.....	xxiii, 81
U.S. CONST. art. I., §8, cl.8	28

STATUTES

17 U.S.C. § 107 *passim*

17 U.S.C. § 108 28

17 U.S.C. § 505 24, 71, 75

28 U.S.C. § 1821 75

28 U.S.C. § 1920 75

Fed. R. Civ. P. 52(a) 22, 23, 24

OTHER AUTHORITIES

4 Melville B. Nimmer & David Nimmer,
NIMMER ON COPYRIGHT (2012) 41, 42, 71

H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. (1976) 49, 50, 70

Paul Goldstein, GOLDSTEIN ON COPYRIGHT (1996) 41

TABLE OF RECORD REFERENCES

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
1	Complaint for Declaratory Judgment and Injunctive Relief	4, 7, 15
39	First Amended Complaint for Declaratory Judgment and Injunctive Relief	15
58	Defendants' Motion for Protective Order and Memorandum of Law in Support	3-4
87	Defendants' Renewed Motion for Protective Order and Memorandum of Law in Support	3-4
111	Order	4
118-2	Exhibit A to Joint Notice of Filing Stipulations - Stipulation of Fact Regarding Eres and Ulearn Usage at Georgia State University	8, 10-13
142-2	Attachment 2 to Motion for Summary Judgment by Cambridge University, et al. – Plaintiffs' Memorandum in Support of Motion for Summary Judgment	15
160	Defendants' Motion for Summary Judgment with Memorandum in Support with Brief in Support	78
160-2	Attachment 2 to Motion for Summary Judgment by J.L. Albert, et al. - Memorandum in Support of Defendants' Motion for Summary Judgment	4
210	Reply Brief in Support of Defendants' Motion for Summary Judgment	4
226	Order	4, 48
227	Order	4, 48

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
228	Plaintiffs' Supplemental Filing in Response to the Court's August 11, 2010 and August 12, 2010 Orders	4, 18, 73
228-1	Exhibit A to Response to Orders – Plaintiff Works Infringed at GSU (2009)	18
228-2	Exhibit B to Response to Orders – Plaintiff Works Infringed at GSU (2009)	18
228-3	Exhibit C to Response to Orders – Plaintiff Works Infringed at GSU (2009)	18
230	Defendants' Response to Plaintiffs' Supplemental Filing	73
233	Supplement to Defendants' Response to Plaintiffs' Supplemental Filing	72
235	Order	4, 71, 73, 78
240	Scheduling Order	48
249	Order	5
265	Scheduling Order	48
266	Joint Filing Concerning Allegations of Infringement at GSU in response to Court's November 5, 2010 and March 4, 2011 Orders	4, 14, 18, 73
266-1	Exhibit A to Joint Filing Concerning Allegations of Infringement at GSU in response to Court's November 5, 2010 and March 4, 2011 Orders– Plaintiff Works Alleged to be Infringed at GSU (2009)	18

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
266-2	Exhibit B to Joint Filing Concerning Allegations of Infringement at GSU in response to Court's November 5, 2010 and March 4, 2011 Orders– Plaintiff Works Alleged to be Infringed at GSU (Summer 2009)	18
266-3	Exhibit C to Joint Filing Concerning Allegations of Infringement at GSU in response to Court's November 5, 2010 and March 4, 2011 Orders– Plaintiff Works Alleged to be Infringed at GSU (Fall 2009)	18
276	Attachment E to Pretrial Order – Stipulated Facts Filed Under Seal	7, 8, 19, 21, 61
300-1	Proposed Injunctive Relief	71-72
316	Deposition of Mark P. Becker, Ph.D taken August 22, 2011 (excerpts)	7-8, 12, 15, 78
324	Deposition of Daphne Greenberg, Ph.D. taken April 21, 2011 (excerpts)	19
337	Plaintiffs' Proposed Findings of Facts	18
361	Revised Filing Concerning Plaintiff Works Alleged to be Infringed at GSU During the 2009 Maymester, Summer 2009, and Fall 2009 Academic Terms	15
393	Transcript of Proceedings held on May 31, 2011 Volume 10	19
394	Transcript of Proceedings held on June 1, 2011 Volume 11	7-8, 10-13, 22, 41-43
395	Transcript of Proceedings held on June 2, 2011 Volume 12	8-12, 16, 77

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
396	Transcript of Proceedings held on June 3, 2011 Volume 13	15, 56
397	Transcript of Proceedings held on June 6, 2011 Volume 14	9-10, 77
399	Transcript of Proceedings held on May 17, 2011 Volume 1	21, 43, 62
400	Transcript of Proceedings held on May 18, 2011 Volume 2	7, 19, 21, 59-62
401	Transcript of Proceedings held on May 19, 2011 Volume 3	7, 19, 21, 59-62
402	Transcript of Proceedings held on May 20, 2011 Volume 4	7, 11-12, 62, 78
403	Transcript of Proceedings held on May 23, 2011 Volume 5	19, 44, 47
404	Transcript of Proceedings held on May 24, 2011 Volume 6	22, 47
405	Transcript of Proceedings held on May 25, 2011 Volume 7	12, 47
406	Transcript of Proceedings held on May 26, 2011 Volume 8	5, 42, 47
407	Transcript of Proceedings held on May 27, 2011 Volume 9	19, 22, 41, 43, 59, 69
420	Plaintiffs' Exhibit List	
	Exhibit 2 (Rights and Permissions – Americas, 2009)	60
	Exhibit 3 (Royalties Totals, 12/10/10)	20

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
	Exhibit 4 (Royalties Totals, 12/10/10)	20
	Exhibit 6 (Book, <i>Ancient Egyptian Materials and Technology</i> , 2000)	13
	Exhibit 15 (Book, <i>Assessing Grammar</i> , 2004)	13-14
	Exhibit 19 (CCC permissions for <i>Assessing Grammar</i> , 7/1/04-12/10)	21
	Exhibit 20 (Book, <i>Assessing Languages for Specific Purposes</i> , 2000)	13-14
	Exhibit 24 (Book, <i>Assessing Listening</i> , 2001)	13-14
	Exhibit 29 (Book, <i>Assessing Reading</i> , 2000)	13-14
	Exhibit 34 (Book, <i>Assessing Speaking</i> , 2004)	13-14
	Exhibit 38 (CCC permissions for <i>Assessing Speaking</i> , 7/2004-2/2011)	21
	Exhibit 39 (Book, <i>Assessing Writing</i> , 2002)	13-14
	Exhibit 44 (Book, <i>Assessing Vocabulary</i> , 2000)	13-14
	Exhibit 48 (CCC permissions revenue for <i>Assessing Vocabulary</i> , 7/2004-2/2011)	21
	Exhibit 53 (Book, <i>Cambridge Companion to Beethoven</i> , 2000)	13
	Exhibit 65 (Book, <i>Cambridge Companion to Mendelssohn</i> , 2004)	13
	Exhibit 75 (Book, <i>Cambridge Companion to Schumann</i> , 2004)	13
	Exhibit 79 (Book, <i>Cambridge History of China</i> , 2004)	13

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
	Exhibit 84 (CCC permissions revenue for <i>Cambridge History of China</i> (vol.8, part 2), 7/1/2004-12/1/2010)	21
	Exhibit 85 (Book, <i>Criterion-referenced Language Testing</i> , 2002)	13
	Exhibit 90 (Book, <i>Five-Minute Activities</i> , 1992)	13
	Exhibit 103 (Book, <i>A History of Feminist Literary Criticism</i> , 2007)	13
	Exhibit 108 (Book, <i>International Health Organizations and Movements 1918-1939</i> , 1995)	13
	Exhibit 114 (Book, <i>Keep Talking</i> , 1983)	13
	Exhibit 119 (Book, <i>Language Acquisition and Conceptual Development</i> , 2001)	13
	Exhibit 125 (Book, <i>Learning Vocabulary in Another Language</i> , 2001)	13-14
	Exhibit 130 (Book, <i>Liszt Sonata in B Minor</i> , 1996)	13
	Exhibit 134 (Book, <i>More Grammar Games</i> , 1995)	13-14
	Exhibit 138 (Book, <i>Pronunciation Games</i> , Undated)	13
	Exhibit 142 (Book, <i>Understanding Trauma</i> , 2007)	13-14
	Exhibit 147 (Book, <i>A World of Babies</i> , 2000)	13
	Exhibit 199 (Copyright Clearance Center, Royalties, 12/10/2010)	20
	Exhibit 200 (Copyright Clearance Center, Royalties, 12/10/2010)	20
	Exhibit 202 (Book, <i>African American Single Mothers</i> , 1995)	13

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
	Exhibit 209 (Book, <i>Black Children</i> , 2002)	13
	Exhibit 217 (Book, <i>Black Families</i> , 2007)	13
	Exhibit 231 (Book, <i>Critical and Indigenous Methodologies</i> , 2008)	13
	Exhibit 239 (Book, <i>Ethnography</i> , 2001)	13
	Exhibit 243 (Book, <i>Handbook of Feminist Research</i> , 2007)	13
	Exhibit 258 (Book, <i>Handbook of Narrative Inquiry</i> , 2007)	13
	Exhibit 265 (Book, <i>Handbook of Qualitative Research</i> , 2000)	13
	Exhibit 267 (Book, <i>Qualitative Research</i> , 2005)	13
	Exhibit 288 (Book, <i>Handbook of Social Theory</i> , 2001)	13
	Exhibit 293 (Book, <i>Inside Interviewing</i> , 2003)	13
	Exhibit 298 (Book, <i>Qualitative Research Practice</i> , 2004)	13
	Exhibit 305 (Book, <i>Theoretical Frameworks in Qualitative Research</i>)	13
	Exhibit 316 (Book, <i>Utilization-Focused Evaluation</i> , 1997)	13
	Exhibit 346 (Royalties Total, 12/10/10)	20
	Exhibit 347 (Royalties Total, 12/10/10)	20
	Exhibit 349 (Book, <i>Approaches to Qualitative Research</i> , 2004)	13

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
	Exhibit 354 (Book, <i>Awakening Children's Minds</i>)	13-14
	Exhibit 359 (Book, <i>Behavior, Society, and Nuclear War</i> 1989)	13
	Exhibit 368 (Book, <i>Crabgrass Frontier</i>)	13
	Exhibit 372 (Book, <i>The Craft of Inquiry</i> , 1998)	13
	Exhibit 388 (Book, <i>Evolution of Infectious Disease</i>)	13
	Exhibit 406 (Book, <i>Fundamental Considerations in Language Testing</i> , 1990)	13-14
	Exhibit 418 (Book, <i>Language Testing in Practice</i> , 1996)	13
	Exhibit 423 (Book, <i>Living Ethics Across Media Platforms</i>)	13
	Exhibit 427 (Book, <i>The Music of Berlioz</i> , 2001)	13
	Exhibit 433 (Book, <i>Newspapers</i>)	13-14
	Exhibit 437 (Book, <i>North German Church Music in the Age of Buxtehude</i> , 1996)	13
	Exhibit 441 (Book, <i>The Organ as a Mirror of Its Time</i> , 2002)	13
	Exhibit 445 (Book, <i>The Politics of Public Housing</i>)	13
	Exhibit 448 (Book, <i>The Power Elite</i> , 1956)	13
	Exhibit 452 (Book, <i>Regimes and Democracy in Latin America</i> , 2007)	13
	Exhibit 458 (Book, <i>Role Play</i>)	13-14

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
	Exhibit 473 (Book, <i>Television, The Critical View</i> , 1976)	13
	Exhibit 477 (Book, <i>The Unpredicle Past</i> , 1993)	13
	Exhibit 512 (Syllabus, Issues and Interpretations in American History, Fall 2009)	15
	Exhibit 513 (Syllabus, Qualitative Research in Education III, Fall 2009)	15
	Exhibit 522 (Syllabus, Evaluation and Technology, Fall 2009)	15
	Exhibit 523 (Syllabus, Romantic Music, Summer 2009)	15
	Exhibit 528 (Syllabus, Military Conflict and International Security, Fall 2009)	15
	Exhibit 530 (Syllabus, Social Theory I, Fall 2009)	15
	Exhibit 533 (Syllabus, Film Theory and Criticism, Fall 2009)	15
	Exhibit 535 (Syllabus, Media Ethics and Society, Fall 2009)	15
	Exhibit 536 (Syllabus, Epidemiology and Anthropology, Fall 2009)	15
	Exhibit 539 (Syllabus, Cross-Cultural Encounters in World History, Fall 2010)	15
	Exhibit 540 (Syllabus, Classroom Practices in Second/Foreign Language Teaching, Maymester 2009)	15
	Exhibit 545 (Syllabus, Nursing 8035, Fall 2009)	15

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
	Exhibit 547 (Syllabus, EPSF 8280-005, Summer 2009)	15
	Exhibit 549 (Syllabus, Political Science: US Foreign Policy, Fall 2009)	15
	Exhibit 550 (Syllabus, The Materiality of Ancient Egyptian Painting, Fall 2009)	15
	Exhibit 554 (Syllabus, Advanced Developmental Psychology: Social and Personality Development Fall 2009)	15
	Exhibit 555 (Syllabus, Latin American Politics, Fall 2009)	15
	Exhibit 557 (Syllabus, Introduction to Cross-Cultural Psychology, Fall 2009)	15
	Exhibit 872 (Syllabus, The African American Family, Fall 2009)	15
	Exhibit 901 (Syllabus, Latin American Politics, Fall 2009)	15
421	Defendants' Exhibit List	
	Exhibit 14 (Fair Use Checklist)	16
	Exhibit 130 (Letter from Errol Davis, dated 10/31/08)	9, 77
	Exhibit 160 (Electronic Reserves Request Form)	11-12, 78
	Exhibit 325 (Electronic Reserves Policy, filed 6/1/09)	15, 56
	Exhibit 528 (Stipulation, filed 7/26/10)	3, 10, 12, 42
	Exhibit 545 (Sociology Course Description, Fall 2009)	15

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
	Exhibit 599 (English 4200 Course Description, Fall 2009)	15
	Exhibit 605 (Psychology Course Description, Fall 2009)	15
	Exhibit 610 (Seminar in Psychology Course Description, Fall 2009)	15
	Exhibit 623 (Political Science Course Description, Fall 2009)	15
	Exhibit 739 (Handbook of Qualitative Research, 1994)	13
	Exhibit 740 (Handbook of Adult Development, 2006)	13
	Exhibit 749 (Book, <i>Black Families</i> , 1997)	13
	Exhibit 765 (Book, <i>A Semiotics of the Cinema Film Language</i> , 1974)	13
	Exhibit 769 (Book, <i>Region Race and Recognition</i> , 1982)	13
	Exhibit 773 (Book, <i>Handbook of Mixed Methods in Social & Behavioral Research</i> , 2003)	13
	Exhibit 776 (Book, <i>Cases in U.S. Foreign Policy</i> , 2005)	13
	Exhibit 788 (Book, <i>Grammar Practice Activities</i> , 1988)	13-14
	Exhibit 808 (Book, <i>Assessing Speaking</i> , 2004)	13
	Exhibit 812 (Book, <i>A History of Feminist Literary Criticism</i> , 2007)	13

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
	Exhibit 906 (Using Electronic Reserves, March 2011)	17, 54
423	Order with the Court's Findings of Fact and Conclusions of Law following non-jury trial	<i>passim</i>
426	Plaintiffs' Memorandum of Law in Support of Their Post-Trial Proposed Declaratory Judgment and Permanent Injunction	6
432	Defendants' Opposition to Plaintiffs' Request for Injunctive Relief	6, 70
441	Order Directing Defendants to maintain copyrighted policies for GSU which are not inconsistent with the Court's Findings of Fact and Conclusions of Law and this Order	3, 5-6, 47-48, 73-74
462	Order	3, 48, 75
JX0005	Joint Filing Concerning Allegations of Infringement at GSU in Response to Court's November 5, 2010 and March 4, 2011 Orders	4-5, 14-15, 17, 48-49, 65, 72
PX0460	<i>The Slave Community</i> by John W. Blassingame	13
PX0516	Professor Kaufmann's EPRS 8500; CRN 53043 Syllabus (Summer 2009)	15
PX0517	Professor Kaufmann's EPRS 8510; CRN 52356 Syllabus (Summer 2009)	15
PX0518	Professor Kaufmann's EPRS 8500; CRN 84548 Syllabus (Fall 2009)	15
PX0519	Professor Kim's AL 8550 Syllabus (Fall 2009)	15

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
PX0524	Professor Orr's MUS 8840 Syllabus (Fall 2009)	15
PX0534	Professor Gabler-Hover's ENG 4200 Syllabus (Fall 2009)	15
PX0537	Professor Lasner's PERS 2001 Syllabus (Fall 2009)	15
PX0542	Professor Dixon's AAS 3000; SOC3162 Syllabus (Fall 2009)	15
PX0553	Professor Kruger's EPY 7090 Syllabus (2009- 2010)	15
DX0145	E-mail from B. Newsome to N. Seamans re Regents Guide to Copyright	9, 77

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

Appellees respectfully submit that but for the protection afforded by the Eleventh Amendment, U.S. Const., amend. XI, this Court would otherwise have subject matter jurisdiction over the copyright infringement claims in this case. Although Appellees contested jurisdiction below, the district court found it had subject matter jurisdiction pursuant to the *Ex parte Young* exception, 209 U.S. 123, 28 S. Ct. 441 (1908). Appellants are not entitled to the benefit of the *Ex parte Young* exception. As the prevailing party, Appellees did not expressly appeal that ruling, but Appellees have not and do not waive subject matter jurisdiction in this case or this appeal.

STATEMENT OF THE ISSUES

1. Did the district court, as demonstrated by its detailed findings of fact and conclusions of law, correctly conclude that for 94 out of 99 alleged copyright infringements, Georgia State University professors' use of book excerpts for teaching at the nonprofit, state educational institution was fair use under 17 U.S.C. §107?

2. Did the district court abuse its discretion by declining to permanently enjoin all Georgia State University faculty, staff, and students regarding all uses of Appellant-Publishers' copyrighted works on the basis of its finding of 5 infringing uses over the course of three academic terms?

3. Did the district court rightly conclude that Defendant-Appellees are the "prevailing party" and reasonably exercise its discretion to award attorneys' fees and costs?

4. Whether the court has subject matter jurisdiction under the *Ex parte Young* exception to Eleventh Amendment immunity?

STATEMENT OF THE CASE

I. NATURE OF CASE

This appeal arises from the district court's opinion regarding Georgia State University (GSU) professors' educational fair use of small excerpts of scholarly works published by Cambridge, Oxford, and Sage ("Publishers") in courses of study offered at GSU. GSU prevailed on 94 of the Publishers' 99 alleged instances of infringement with the vast majority of the uses deemed fair use. This case also concerns the Publishers' request for an overly restrictive injunction in place of the district court's narrowly drawn injunction designed to prevent future infringement. Given GSU's fair use of decidedly small excerpts for nonprofit educational purposes and the Publishers' overreaching claims of infringement coupled with their frequent failure to establish even a *prima facie* case of infringement, the district court properly exercised its discretion to award GSU its fees and costs as the prevailing party.

II. THE COURSE OF PROCEEDINGS AND THE DISTRICT COURT'S RULINGS

The proceedings below involved extensive discovery, numerous motions (including cross motions for summary judgment), hearings, trial and post-trial motions. The parties presented 30 witnesses and hundreds of documents, and filed detailed post-trial findings of fact and conclusions of law. After hearing the

witnesses and considering the evidence, the district court found infringement in only 5 of 99 allegations. Dkt#423 at 338-39. The district court repeatedly found that GSU's use of small excerpts of scholarly works for nonprofit educational purposes constituted fair use under §107. Because it found a few isolated cases of infringement, the district court directed GSU to "maintain copyright policies...which are not inconsistent with the Court's Orders of May 11, 2012 [Dkt#423] and August 10, 2012 [Dkt#441]," Dkt#462 at 11, and rejected the Publishers' request for injunctive relief that was unduly burdensome and overly restrictive. Dkt#441 at 10-11.

The district court's May 11, 2012 Order provides a thorough discussion of the history of the case through trial. Dkt#423 at 1-9. GSU highlights certain events particularly relevant to this appeal.

A. The Focus On "Ongoing And Continuous" Alleged Infringement

GSU implemented a new Copyright Policy on February 17, 2009. DX#528. On February 20, 2009, GSU's counsel proposed staying the case to allow the parties to evaluate the new Copyright Policy. Dkt#58 at 6. The Publishers refused and insisted on proceeding, including discovery on pre-2009 practices under the prior policy. Dkt#87 at 6-12. GSU objected because under *Ex parte Young*, the Publishers were entitled only to injunctive relief based on any "ongoing and continuous" copyright violations. *Id.* at 15-17. The district court granted GSU's

motion to limit discovery (Dkt#58; Dkt#87), in part because the Publishers had already obtained a “substantial amount of discovery regarding [GSU’s] past copyright policy.” Dkt#111 at 5.

B. Summary Judgment Narrows The Issues

GSU moved for summary judgment based on 31 infringement allegations identified in the Complaint or discovery. Dkt#1; Dkt#160-2 at 3-4. In response, the Publishers alleged 270 new instances of alleged infringement over an extended time frame. Dkt#210 at 8. The district court directed the Publishers to specifically identify all instances of alleged infringement during three academic terms, per the Protective Order. Dkt##226, 227. The Publishers initially identified 126 alleged infringements, but narrowed their claims to 99 alleged infringements in pre-trial filings. Dkt#228; Dkt#266; JX5.

The district court granted GSU summary judgment as to direct infringement and vicarious infringement, but denied GSU’s motion as to the claim of contributory infringement. Dkt#235 at 19, 24, 29-30. The district court ruled that any claims arising before the adoption of the 2009 Copyright Policy were irrelevant based on *Ex parte Young*, and that “Plaintiffs must put forth [at trial] evidence of a sufficient number of instances of infringement of Plaintiffs’ copyrights to show such an ongoing and continuous misuse [of the fair use defense].” *Id.* at 30.

The district court later granted the Publishers' motion for partial reconsideration, reviving the Publishers' claim of direct infringement subject to proof of respondent superior. Dkt#249 at 5.

C. Trial And Order

The May 2011 trial entailed 15 days of testimony. Professors explained the educational purpose for their uses of the book excerpts. Dkt#423 at 6-7. The court reviewed the works at issue, considered professors' fair use checklists, examined course syllabi, and judged the credibility of 30 witnesses. Dkt#423.

While the Publishers alleged 99 infringements at the start of trial, they offered evidence on only 75. JX5, Dkt#423 at 8. After the Publishers' case, the district court granted GSU's motion for partial judgment of no contributory infringement. Dkt#406, Tr.8/95-96.¹ Thus, the only remaining claim was whether the 2009 Copyright Policy caused direct copyright infringement (or misuse of the fair use defense).

In its May 2012 Order, the district court found that the Publishers failed to prove a *prima facie* case as to 26 alleged infringements.² Dkt##423, 441 at 14. As

¹ Trial transcripts are cited using the docket entry (Dkt#406), trial transcript volume number (Tr.8), and page number(s) (/95-96).

² Of those 26 instances, the Publishers failed to prove copyright ownership in 16 instances and the court found *de minimis* infringement in the other cases because the excerpts were either not accessed by or not assigned to students.

to the other 49 alleged infringements, GSU prevailed in its fair use defense on all but five. Dkt#423. The Publishers failed to show a methodical, systematic and widespread misuse of the fair use defense.

D. Post-trial

Following the district court's May 2012 Order, the University System of Georgia (USG) promptly revised its 2009 Copyright Policy. Dkt#432 at Exh. A&B. The Publishers proposed an injunction based largely on the so-called "Classroom Guidelines" (Dkt#426) that was unduly restrictive, threatening nearly impossible burdens on GSU. *Id.*; Dkt#441 at 10-11 n.2. The district court rejected the Publishers' "highly regimented" injunction finding, *inter alia*, that "[t]here is insufficient reason to impose a burdensome and expensive regime of record keeping and report-making based on the totality of the circumstances." Dkt#441 at 10-11. The district court noted GSU's good faith and ordered GSU to "maintain copyright polices...which are not inconsistent with the Court's Order of May 11, 2012 and this Order" and to "disseminate to faculty and relevant staff...the essential points of this Court's rulings." *Id.* at 11. The district court also awarded GSU its attorneys fees and costs. *Id.* at 12-14.

The U.S. Department of Justice (DOJ) considered filing an Amicus Brief, but did not. The DOJ has, however, previously issued a memorandum regarding fair use. *See* www.loc.gov/flicc/gc/fairuse.html.

III. STATEMENT OF THE FACTS

A. Parties

Three publishers of scholarly works - Cambridge University Press (“Cambridge”), Oxford University Press, Inc. (“Oxford”) and Sage Publications, Inc. (“Sage”), (collectively, “Publishers”) - initiated this lawsuit in 2008. Dkt#1. The actual parties in interest included the Copyright Clearance Center (CCC) and the Association of American Publishers (AAP) who funded this litigation. Dkt#394,Tr.11/169-170. The CCC is a copyright broker to which publishers have granted reproduction rights. Dkt#402,Tr.4/6-7. The CCC grants “permissions” for use of some of the Publishers’ works. *Id.* The AAP is a trade association of American book publishers; each appellant is a member. Dkt#400,Tr.2/43,57; Dkt#401,Tr.3/125-126.

The Appellees are members of the Board of Regents of the University System of Georgia and select administrators of GSU. Dkt#276-3 at 6. The Board of Regents is responsible for overseeing Georgia’s thirty-one public institutions of higher learning. Dkt#276-3 at 6. GSU is a public research university in Atlanta and a unit of the University System of Georgia (USG). Dkt#276-3 at 6; Dkt#316 at 8. Although it serves more than 31,000 students, GSU provides housing for only 4,000 students. Dkt#316 at 8-9. While some of the remaining students live near campus, a significant portion commute or participate through distance education

and only occasionally visit the campus. Dkt#316 at 8-9; 13. GSU employs in excess of 1,000 full-time, tenure track faculty members and hundreds of part-time non-tenure track faculty. *Id.* at 9-10.

GSU maintains a substantial university library. Ms. Nancy Seamans, the Dean of Libraries, oversees an annual budget in excess of \$11 Million. Dkt#395,Tr.12/85. In 2009, close to \$4 Million of that budget was spent on electronic materials, including licensed content such as journals, databases and e-books. Dkt#395,Tr.12/88-89. GSU students pay a library fee of \$35 to cover debt incurred for renovations made to the GSU library; that fee does not go to the library's operating budget. Dkt#395,Tr.12/117-118, 149-150.

The GSU library maintains a conventional "reserve desk" from which students may check out books for review (Dkt#394,Tr.11/14), and an electronic reserve or "ERes" system, which is the technological equivalent of the reserve desk. ERes allows students to remotely access excerpts for review. Dkt#118-2, ¶¶1-2; Dkt#394,Tr.11/119-120. To provide remote access, GSU professors and instructors use either an electronic reserve system known as "ERes" or an electronic course management system known as "uLearn." Dkt#276, ¶¶43, 74. For example, a professor may post the course syllabus or cause a book excerpt to be posted (if appropriate) on ERes so that students have online access to those class materials. Dkt#118-2 ¶¶ 1-2; Dkt#394,Tr.11/119-120.

B. USG's Adoption Of The 2009 Copyright Policy

After this lawsuit was filed, the USG Chancellor appointed a committee (“Committee”) to review and revise the existing Regents Guide to Copyrights to accommodate electronic technologies. Dkt#395,Tr.12/59-68; DX130; DX145. Formation of the Committee was spurred in part by this lawsuit but decisions were made independent of the lawsuit. Dkt#395,Tr.12/64-65; DX145. Nine people from different state research institutions³ were selected to represent various University functions, including library, faculty, administration, research and information technology. DX130; Dkt#395,Tr.12/54-57; Dkt#397,Tr.14/97-103.

The Committee reviewed copyright policies of other institutions, including Duke University, University of Minnesota, Emory University and Columbia University, as well as materials from the CCC. Dkt#395,Tr.12/56; Dkt#397,Tr.14/98. The Committee adopted an approach similar to that of Columbia University, including use of a four-factor fair use checklist. Dkt#395,Tr.12/57; Dkt#397,Tr.14/98-99;104-105;106;108-109;110-111. The Committee used the Columbia checklist as a starting point, and revised it to suit USG needs. Dkt#395,Tr.12/57; 63-64; Dkt#397,Tr.14/98;104-105;106;108-111. The Committee determined that faculty members, being both the creators and users

³ Medical College of Georgia, GSU, Georgia Institute of Technology, Kennesaw State University, and the University of Georgia. DX130.

of copyrighted materials, are in the best position to perform a fair use analysis regarding materials to be used in their teaching (Dkt#395,Tr.12/58-59; Dkt#397,Tr.14/114-115), and limited the library's role to providing tools for the professors to use in evaluating fair use. Dkt#395,Tr.12/62. The new Copyright Policy included a checklist that faculty would use as an aid to determine whether a particular use was fair. Dkt#395,Tr.12/63-64; Dkt#397,Tr.14/98,104-105,108-111.

The Committee provided the Chancellor with a comprehensive copyright policy, including the checklist. Dkt#397,Tr.14/111-114;121;134; DX528. The Chancellor approved the policy and placed its text on a publicly-available website: www.usg.edu/copyright. Dkt#395,Tr.12/152. The site links to other websites, including Columbia University's policy and CCC's website (www.usg.copyright/additional_resources/collective_licensing_agencies), to assist faculty in both determining fair use and, if deemed necessary, obtaining permission. Dkt#395,Tr.12/77-81.

C. GSU Implements The New 2009 Copyright Policy

After the Chancellor's approval, GSU implemented the new policy, under which a GSU professor can electronically provide course materials to a student enrolled in her class using the ERes system. Dkt#118-2, ¶¶1-2; Dkt#394,Tr.11/119-120. Such course materials may include syllabi, class notes, exam questions, homework assignments, handouts, journal articles (fees paid by

library) and excerpts from books. Dkt#118-2, ¶¶ 1-2; Dkt#394,Tr.11/119-120, 146. ERes also permits professors to inform students regarding the availability of course materials such as hardcopy books. DX160 at 4-6; Dkt#394,Tr.11/140-141; Dkt#402,Tr.4/129-130.

Under the new policy, a “Course Reserve Page” (CRP) is established on ERes for each course. Dkt#118-2 ¶3; Dkt#402,Tr.4/106,113-114; Dkt#394,Tr.11/124. Professors submit to the Library material proposed to be posted on the CRP. DX160; Dkt#402,Tr.4/96-97; Dkt#395,Tr.12/75; Dkt#394,Tr.11/117-118. Before doing so, professors are required to verify that a copy of the underlying work is owned by the professor or the GSU library and must identify one of the five following reasons for authorizing posting on ERes: the library has a license for the electronic version of the material; the material is in the public domain; the use would qualify as fair use utilizing the Fair Use Checklist; the professor held the copyright; or the professor obtained permission from the copyright holder. DX160 at 1; Dkt#402,Tr.4/97. Typically, the material is scanned and uploaded to the CRP by a library employee. Dkt#394,Tr.11/125-126.

Each professor at GSU is responsible for determining if the use of an excerpt is a fair use. Dkt#402,Tr.4/97;103;123-124; Dkt#394,Tr.11/121-122; 142. The professor must agree to follow USG’s Copyright Policy, including completing a

fair use checklist. DX160 at 1; Dkt#402,Tr.4/97; 99. In fact, the failure to complete the checklist is a failure to comply with the 2009 Copyright Policy. Dkt#316, at 75-76.

While the library staff does not make an independent fair use determination, it does look for “red flag” issues such as a request that a whole book or a large portion of a book or a fictional work (such as a novel) be placed on e-reserves. Dkt#402,Tr.4/123-128; Dkt#394,Tr. 11/122-124. The library staff can also determine if a work is actually in the public domain. *See, e.g.*, Dkt#405,Tr.7/129.

A student can access the CRP only during the semester she is enrolled in the course. Dkt#118-2 at ¶ 3; Dkt#402,Tr.4/106; 110; 113-114; Dkt#394,Tr.11/120-124. The professor must provide the student with a password in order to access the ERes system. DX528; Dkt#394,Tr.11/120; 125-126; Dkt#402,Tr.4/112-113; Dkt#395,Tr.12/82; 93-94. Upon accessing the CRP, the student views a copyright notice and must agree (by click) to follow copyright law. Dkt#402,Tr.4/114; DX160. The CRP contains a list of accessible class materials. Dkt#402,Tr.4/113-114. The student can click on a link to view, download, and/or print the material. Dkt#402,Tr.4/113-114. The CRP is closed at the term’s conclusion. Dkt#394,Tr.11/120-121; Dkt#402,Tr.4/110. The ERes system tracks the number of times each individual item is accessed during a specific time period. That number appears in a “Hit Count” column for each item of course material found in

an ERes report. Dkt#118-2, ¶¶12, 18; Dkt#394,Tr.11/126-128. The Hit Count also includes each instance that: (1) a member of the library staff accessed the material for confirmation of correct uploading; (2) a professor accessed the material to verify a posting; and (3) counsel accessed the material during litigation discovery. Dkt#118-2, ¶19; Dkt#394,Tr.11/130-131.

By implementing the new 2009 Policy, GSU reduced the number of alleged infringements. Dkt#423 at 38.

D. The Works At Issue

The scholarly works in this case are “informational.”⁴ *Id.* They are not works of fiction. *Id.* “All of them are intended to inform and educate.” Dkt#423 at 52. Their topics “lend themselves to incorporation into the social science and language courses involved in this case.” Dkt#423 at 36. For example, *The Cambridge Companion to Beethoven* contains public domain material: an old musical score. PX53 at 174-175; 178-180.⁵ Other works, such as the English as a

⁴ All of the books at issue in this case are in the record. *See* PXs. 6; 15; 20; 24; 29; 34; 39; 44; 53; 65; 75; 79; 85; 90; 103; 108; 114; 119; 125; 130; 134; 138; 142; 147; 202; 209; 217; 231; 239; 243; 258; 265; 267; 288; 293; 298; 305; 316; 349; 354; 359; 368; 372; 388; 406; 418; 423; 427; 433; 437; 441; 445; 448; 452; 458; 460; 473; 477; DXs. 739; 740; 749; 765; 769; 773; 776; 788; 808; 812.

⁵ The following pages included in the Publishers’ allegations of infringing use present public domain material: PX65 at 96, 97, 99; PX427 at 260, 262; PX441 at 80-83, 89; PX437 at 24.

second language (ESL) works incorporate the prior work of other authors.⁶ *See e.g.*, PX134 at 63, 67-68, 74, 77, 80-82, 87-88.

E. The Amount And Substantiality Of The Uses

GSU professors used small portions of each work, narrowly tailored for the purposes of the particular class being taught. After claiming “massive” infringement,⁷ at trial the Publishers only attempted to prove infringing acts by 30 professors for using 99 excerpts (from 64 books). Dkt#266; Dkt#423 at 36. The average length of these excerpts was 10.1% of the entire work. Dkt#423 at 37. In fact, eliminating two of the professors’ uses drops the average to 7.5% and the median to 6.8% even using the Publishers’ narrow page count. JX5. Of the 99 excerpts presented for trial, 56 uses comprised one chapter or less (Dkt#423 at 37; JX5), demonstrating the conservative nature of GSU’s application of the 2009

⁶ The following pages included in Publishers’ allegations of infringing use contain primarily factual information and information from others’ works: DX788 at 5-46, 49-51, 56-61, 65-67, 69-71, 73-74, 76-77, 81, 83-88, 91-93, 95-97, 100-102; PX433 at 457-458; PX458 at 40, 42-44, 46-47, 53-54, 62; PX15 at 129-135, 137-138, 141-144; PX29 at 204-207, 211-218, 220-221, 223-232, 234-247, 250-254, 257-258, 260-264, 266-270; PX406 at 81-93, 95-105, 107; PX24 at 123-126, 129-130, 133-139, 142-145, 147, 149, 151; PX20 at 24-28 and 30-34; PX34 at 59-77, 80, 82-94, 140-143, 145-155, 157-162; PX125 at 344-346, 348-351, 353, 356-359, 361-365, 367-371, 373-375; PX44 at 152-155, 157-160, 163, 165-166, 168-169, 175, 180-181; PX39 at 77-91, 93, 95-106, 108-120, 122-126, 129; PX354 at 214-215, 217-218, 289 n.90, 290 n.96; PX142 at 234.

⁷ *See* JX5; Dkt#266.

Copyright Policy. Some other institutions permit use up to as much as 25% or more of a work. DX325; Dkt#396,Tr.13/28-38.

The Publishers focus on a few professors' uses to skew GSU professors' typical use. For example, the Publishers point to Professors Lasner's and Orr's use of ERes without requiring senior level students to purchase a textbook. Br. 23-24; PXs524,537. But these were the only two professors who did not require students to purchase a textbook. PXs512-513, 516-519, 522-523, 528, 530, 533-537, 539, 540, 542, 545, 547, 549, 550, 553-555, 557, 872, 901; DXs545, 599, 605, 610, 623. The average professor required students to purchase multiple textbooks; the average cost of books per student was \$500 per term. *See id.*; Dkt#316 at 11. The Publishers point to Dr. Kaufmann who used excerpts from eight works, but again, Dr. Kaufmann's use was not typical. Br. 24; JX5. Of the accused professors, 16 used no more than 2 excerpts from different works in a single course. JX5; Dkt#361. When considering more than 1,000 full time professors teaching an even greater number of classes, the 99 alleged infringements by 30 professors shows the Publishers' accusations of "massive" and "rampant" infringement are unfounded. Dkt#316 at 9-10; Dkt#361; Dkt#1, ¶3; Dkt#39, ¶1; Dkt#142-2 at 5.

And the use of a fair use checklist to arrive at a use of approximately 10% or one chapter was consistent with the CCC's own guidelines. In or around 2000, CCC published The Campus Guide to Copyright Compliance (the "Campus

Guide”) as a resource for academic institutions regarding copyright compliance.

Dkt#395,Tr.12/12-14;

www.copyright.com/Services/copyrighoncampus/content/library.html. The

Campus Guide included a Fair Use Checklist that was based on one created by Dr.

Kenneth Crews (GSU’s expert). Dkt#395,Tr.12/15-16; DX14. CCC provided the

Campus Guide to academic institutions as a tool from which to develop their own

policies. Dkt#395,Tr.12/20-21. For Factor 3 under “Favoring Fair Use,” the

CCC’s Campus Guide Fair Use Checklist includes three sub-factors: “Small

quantity;” “Portion used is not central or significant to entire work;” and “Amount

is appropriate for favored educational purpose.” DX14. The “Opposing Fair Use”

column for Factor 3 includes two sub-factors: “Large portion;” and “Portion used

is central to work” or “heart of the work.” DX14.

The CCC also produced a “White Paper” dated March 2011 titled “Using Electronic Reserves: Guidelines and Best Practices for Copyright Compliance”

(“CCC White Paper”). DX906. The CCC White Paper states that e-reserve

materials should be limited to “small excerpts” and acknowledges that “[m]ost

experts advise using a single article or chapter...of a copyrighted work....” DX906

at 3.

F. Classroom Guidelines Are Not The Law

The Publishers relied on the Classroom Guidelines to contend that 10% or one chapter of a multiple chapter work was not a “small amount.” Br. 63-64. The district court considered, but, discounted those Guidelines for multiple reasons.

The Classroom Guidelines reflect minimum standards or a “safe harbor (not a limit) for educational copying of copyrighted materials.” Dkt#423 at 56-59.

Moreover, the fair use statute “does not adopt any part of the Classroom Guidelines” and the “Classroom Guidelines were not prepared by the legislators.”

Dkt#423 at 57-58 (citing 17 U.S.C. §107; Jessica D. Litman, *Copyright,*

Compromise and Legislative History, 72 CORNELL L. REV. 857, 887-88 (1987)).

Application of the Classroom Guidelines would result in a “bright-line” restriction that is contrary to the statutory scheme in §107. Dkt#423 at 59.

G. One Chapter Is Not An Entire Work

Appellants now contend that, by using one chapter from an edited collective work, GSU appropriated an entire work. Br. at 66-67. At the start of trial, however, the Publishers agreed that the copying of an entire chapter in an edited work constituted use of a small percentage of that work. JX5. After trial started, the Publishers attempted to change tact and argue that use of a single chapter from an edited work constituted use of 100% of the ‘work.’ The district court correctly found that this argument was raised “far too late.” Dkt#423 at 64.

In fact, “[i]t was not until Plaintiffs filed their post-trial Proposed Findings of Fact and Conclusions of Law that Plaintiffs’ now-asserted theory was fleshed out.” Dkt#423 at 63-64. By comparison, in their August 11, 2010 filing, the Publishers listed each chapter used as a fraction of the entire work. Dkt#228-1; 228-2; 228-3. Again, in their updated list of ‘infringements’ filed March 15, 2011, the Publishers identified each chapter used as a percentage of the books as a whole. Dkt##266-1; 266-2; 266-3. As late as their Pre-trial Proposed Findings of Fact filed May 17, 2011, the Publishers continued to list the alleged infringements as a percentage based on the total number of pages in each book as a whole. Dkt#337.

The district court also properly evaluated the so-called “heart of the work” consideration. Dkt#423 at 67. As a result, one of the 99 excerpts at trial was found to comprise the “heart of the work.” *Id.* at 327-328. Other excerpts did not “bear an unusually striking relationship to the book as a whole.” *Id.* at 67. “The chapters in both the edited books and the single author books cover distinct, separately titled subtopics, so that almost none has a dominant relationship to the substance of the work as a whole.” *Id.* And, “the chapters of the edited books do not have greater value than the chapters of the single author books. The chapters of the single author books are stand-alone chapters, just as are the chapters of the edited books.” *Id.* at 70.

H. The Market For The Works

The works at issue here are books or “monographs.” The Publishers provided no evidence they had suffered or were likely to suffer a loss of book or monograph sales. Dkt#423 at 33; Dkt#400,Tr.2/28; Dkt#401,Tr.3/141. The district court properly found that “no book sales were lost.” Dkt#423 at 33.

In fact, the evidence at trial demonstrated that GSU’s use of the excerpts through ERes had the potential to increase book sales. Several professors testified that they believed that assigning excerpts would promote book sales. Dkt#403,Tr.5/99-100, 181-182; Dkt#407,Tr.9/77; Dkt#393,Tr.10/26-27, 47-48, 71; Dkt#324 at 19-20. Some professors had seen students bring books to class after they were assigned an excerpt to read, and some professors had purchased books when they were students after their professor assigned an excerpt as reading material. *Id.*

The district court also made several specific findings about the Publishers’ “permissions” market for the works at issue, in addition to the Publishers’ permissions market overall, which includes books as well as journals. Dkt#276, ¶¶12, 14. As the district court properly recognized, the “CCC offers numerous types of permissions services to various categories of users, including corporate, education, and institutional users.” Dkt#423 at 25. This case only involves three of those services: the Academic Permissions Service (APS), the electronic course

content service (ECCS) and the Academic Repertory License Service. Dkt#423 at 25-28. Each Publisher also has an in-house permissions department. Dkt#423 at 30.

Importantly, however, the Publishers failed to demonstrate that they have received significant revenue for works like those at issue here through these three CCC services or their in-house programs. While the Publishers' total earnings through CCC were "considerable," that total revenue "include[s] payments which have no demonstrated relevance to this case due to lack of supporting evidence." Dkt#423 at 31. Rather, these total earnings included permissions from other irrelevant services (the Foreign Authorization Service, Digital Repertory Amendment, Annual Authorization Service, Transactional Reporting Service, Non-Title FAS, Digital Permissions Service, Rightslink, and Republication Licensing Service). PXs3-4, 199-200, 346-47. The district court properly discounted the total revenues and looked instead at permissions revenues for only APS, ECCS, and AAAL. Dkt#423 at 31-33. When only these permissions services were considered, the revenues were minuscule compared to total revenue. *Id.* at 32-33. The trial court calculated that the Publishers' 2009 revenue from academic book and journal permissions from CCC's APS and ECCS services was less than ¼ of 1% of revenue (and the APS service did not provide for digital copying such as ERes). Dkt#423 at 78, 84.

Per the Publishers' financial records, several of the works have generated little permissions revenue from anywhere. For example, per CCC's records, for the 5½ years from July 2004 through the end of 2010, permission fees have been paid: (i) one time, for the use by one professor at one institution, of any excerpt of the Cambridge work "Assessing Grammar" (PX19); (ii) twice at one institution for any excerpt of the work "Assessing Speaking" (PX38); (iii) once at one university for any excerpt of "Assessing Vocabulary" (PX48); (iv) once from a licensing agency for the "Cambridge History of China" (PX84).

Cambridge's representative, Frank Smith, testified that the CCC is only capable of handling a portion of Cambridge's works and that Cambridge does not make all books, such as the ESL books, available through CCC. Dkt#399,Tr.1/69-70. Oxford's representative similarly testified that not all their works were available through CCC. Dkt#401,Tr.3/69-70. Evidently, Sage's works were available through the CCC, but Sage's representative did not state whether they were all available in 2009. Dkt#400,Tr.2/90.

Instead of offering evidence of market harm or a significant revenue stream for the three CCC services at issue, the Publishers rely essentially on a single out of context pretrial stipulation. GSU stipulated that "[p]ermissions represent a significant revenue stream for [the Publishers]." Dkt#276 at 15. But the previous stipulation in that document states that the Publishers' permissions revenue

includes books and journals – broader than the issues in this case. *Id.* at 14.

GSU’s stipulation is factually aligned with the evidence of the Publishers’ total permissions revenue stream. Dkt#423 at 31.

Finally, professors had several choices besides seeking a license for the works at issue. Many professors testified that they would not have used any excerpt if students were required to pay a licensing fee. *See, e.g.*, Dkt#404,Tr.6/45; Dkt#407,Tr.9/90; Dkt#394,Tr.11/ 90-91. Similarly, professors stated that if a given work could not be placed on ERes, they would simply place the hard copy book on traditional reserve. Dkt#394,Tr.11/90-91.

IV. STANDARD OF REVIEW

Fair use is a mixed question of fact and law. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560, 105 S.Ct. 2218, 2230 (1985) (citing *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984)). This Court reviews the district court’s factual findings after a bench trial for clear error and its legal findings *de novo*. *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1230 (11th Cir. 2009); Fed. R. Civ. P. 52(a)(6) (“Findings of fact...must not be set aside unless clearly erroneous”). “Clear error is a highly deferential standard of review.” *Thomas v. Bryant*, 614 F.3d 1288, 1307 (11th Cir. 2010). This Court will not disturb a district court’s factual findings following a bench trial unless, based on the entirety of the evidence, the Court is left with the “definite and firm conviction

that a mistake has been committed.” *Morrisette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1319 (11th Cir. 2007). Further, in accordance with Federal Rule of Civil Procedure 52(a)(6), “[a]ppellate courts reviewing a cold record give particular deference to credibility determinations of a fact-finder who had the opportunity to see live testimony,” *Owens v. Wainwright*, 698 F.2d 1111, 1113 (11th Cir. 1983); Fed. R. Civ. P. 52(a)(6) (“the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility”). “If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the case differently.” *Morrisette-Brown*, 506 F.3d at 319 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504 (1985)).

This Court reviews the award of an injunction for an abuse of discretion. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004). “A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous.” *Id.* (internal quotation marks and citation omitted). The abuse of discretion standard allows a range of choices for the district court, so long as any choice made by the court does not constitute a clear error of judgment.

Manuel v. Convergys Corp., 430 F.3d 1132, 1135 (11th Cir. 2005) (citation omitted).

Under the Copyright Act, attorneys' fees may be awarded to either plaintiff or defendant as the "prevailing party." 17 U.S.C. §505. Whether a party is the "prevailing party" and further interpretation of the statute are legal issues reviewed *de novo*. *Dionne v. Floormasters Enters., Inc.*, 667 F.3d 1199, 1203 (11th Cir. 2012). The court's factual findings underlying its prevailing party determination are reviewed for clear error. Fed. R. Civ. P. 52(a). And the court's ultimate decision to award fees is reviewed for an abuse of discretion. *Dionne*, 667 F.3d at 1203; *Sherry Mfg. Co. v. Towel King of Fla., Inc.*, 822 F.2d 1031, 1034 (11th Cir. 1987). An abuse of discretion is only found "when a decision is in clear error, the district court applied an incorrect legal standard or followed improper procedures, or when neither the district court's decision nor the record provide sufficient explanation to enable meaningful appellate review." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 678 F.3d 1199, 1201 (11th Cir. 2012). This Court reviews jurisdictional issues and other questions of law *de novo*. *Lucero v. Operation Rescue*, 954 F.2d 624, 627 (11th Cir.1992).

V. SUMMARY OF THE ARGUMENT

This case strikes at the heart of the right of fair use: the copying of excerpts of scholarly works solely for teaching purposes in a non-profit, higher-education setting. The district court did not err in finding that the overwhelming majority of GSU's uses were fair uses under the Copyright Act, or in awarding GSU its fees and costs.

GSU is a non-profit, public university in Atlanta that employs over 1,000 full-time faculty members and educates approximately 31,000 students. In 2008, the Publishers filed this suit, claiming that GSU had engaged in "massive infringement" on a "systematic" and "widespread" basis through certain professors' uses of book excerpts in teaching. After years of discovery, the Publishers' case was comprised of only 99 alleged infringements over three academic terms.

After hearing substantial testimony and evidence in a three-week bench trial, the district court issued a 350-page opinion analyzing in depth each work at issue and the nature of the professors' uses of those works. The court ruled decidedly in GSU's favor, finding that the Publishers were able to prove infringement for only 5 of the 99 alleged infringements.

The Publishers appeal that ruling, claiming, among other things, that the district court erred in its fair use analysis by failing to assign more weight to

factors one (the purpose and character of the use) and four (market harm) over other fair use factors, and by failing to give dispositive weight to the issue of transformativeness.

But that is not the law. The Supreme Court has expressly rejected the notion that certain fair use factors always predominate over other factors. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, 114 S. Ct. 1164, 1171 (1994) (“Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”). The Supreme Court has also recognized that the fairness of a use for classroom teaching does not turn on the transformative nature of the use. *Id.* at n.11.

Consistent with this controlling precedent, the district court thoughtfully considered the evidence pertaining to each of the factors for each work, and weighed those factors in reaching its ultimate fair use determination. The district court properly considered, as part of its analysis, the non-profit, educational use of excerpts from the works – a use at the heart of fair use and §107 – but it did not, as the Publishers allege, give unfair, dispositive weight to this factor.

Nor was the district court incorrect in ruling that the Publishers improperly relied on the commercial, for profit “copyshop” cases in arguing against fair use. This case does not involve a single commercial, for profit use of a copyrighted

work, and therefore the Publishers' commercial, for profit cases are both doctrinally and factually distinguishable from this case. There is no record support for the Publishers' sweeping claim that the accused electronic excerpts at issue in this case are "*precisely the same*" as those provided in bound paper coursepacks by commercial vendors. *See* Br. 3. The copyshop cases relied upon by the publisher's involve for profit, commercial uses. The copyshop cases do not involve "teaching," a favored purpose under the fair use statute. The copyshop cases do not address non-profit, educational uses of decidedly small excerpts that do not compete with the subject works.

In view of the Publishers' failure to narrow the issues for trial, and GSU's successful defense of all but 5 alleged infringements, the district court properly granted tailored injunctive relief and awarded GSU its costs and fees.

VI. ARGUMENT

A. The Right Of Fair Use

Educational fair use of a work is not an infringement of copyright. Fair use is a statutory right.⁸ 17 U.S.C. §107. Fair use has long been recognized as necessary to fulfill the purpose of copyright as outlined by the U.S. Constitution: “[t]o promote the Progress of Science and the useful Arts...” U.S. CONST. art. I., §8, cl.8. *See also, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575, 114 S.Ct. 1164, 1169 (1994). The right of fair use was originally a judge-made doctrine that Congress codified in 1976:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

⁸ Fair use is a right – not a privilege or an exception. *See* 17 U.S.C. §108(f)(4) (“the right of fair use as provided by section 107”); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. §107.

The preamble of §107 is particularly relevant. In the preamble, Congress set forth illustrative examples of uses that stand at the center of fair use, including reproduction for “purposes such as *criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research....*” 17 U.S.C. §107 (emphasis added). Educational uses – teaching, scholarship, research – are at the core of fair use because “[c]opyright is intended to increase and not to impede the harvest of knowledge.” *Harper & Row*, 471 U.S. at 545, 105 S.Ct. at 2223. Accordingly, while not dispositive, Congress clearly intended that educational uses should be regarded as directly within the purview of fair use. In accordance with the constitutional purpose, the district court properly addressed and applied §107.

B. The District Court Did Not Err In Its Fair Use Analysis

The district court conducted a proper work-by-work analysis that considered and weighed all four factors.

The fair use doctrine is at its essence an “equitable rule of reason.” *Peter Letteresse & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287,

1308 (11th Cir. 2008). This equitable rule of reason “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Campbell*, 510 U.S. at 577, 114 S.Ct. at 1170 (alteration in original) (quoting *Stewart v. Abend*, 495 U.S. 207, 236, 110 S.Ct. 1750, 1768 (1990)). In a fair use analysis, all four factors must be considered. *Harper & Row*, 471 U.S. at 549, 105 S.Ct. at 2225. “The task is not to be simplified with bright-line rules,” for the copyright statute, like the fair use doctrine, requires a case-by-case analysis. *Campbell*, 510 U.S. at 577, 114 S.Ct. at 1170 (citing, *inter alia*, *Harper & Row*, 471 U.S. at 560, 105 S.Ct. at 2230; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448, 104 S.Ct. 774, 792 (1984)).

Moreover, a proper fair use analysis will make a determination of whether a particular use would “promote the Progress of Science and the useful Arts” taking into account an “ample view of the universe of relevant evidence.” *Campbell*, 510 U.S. at 584, 114 S.Ct. at 1174. The analysis must also make a determination of whether the benefits to the broader public interest sufficiently outweigh the costs of any reduction to the incentives for creativity. *See, e.g., Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1354, 1356-58 (Ct. Cl. 1973), *aff’d by an equally divided Court*, 420 U.S. 376, 95 S.Ct. 1344 (1975) (harm to scientific research of

finding infringement outweighed any financial harm to publishers as result of finding fair use).

The Publishers argue that the district court erred because it “ignored[d] authority that assigns greater weight to factors one...and four...in cases involving nontransformative copying.” Br. 48. That argument, which relies essentially on *Princeton University Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) and *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926 (2d Cir. 1994), misreads those two cases, and ignores the explicit teachings of *Campbell*.

Campbell abandoned any presumptions regarding weight to be attributed to individual factors. 510 U.S. at 577, 583-585; 114 S.Ct. at 1170, 1174. While the facts of any given case may more readily influence one or more factors, “[a]ll of the four factors are to be explored, and the results weighed together in light of the purposes of copyright.” *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001); accord, *Campbell*, 510 U.S. at 577; 114 S.Ct. at 1170.

Neither *Princeton* nor *Texaco* are to the contrary. Unlike here, both involve commercial photocopying – a commercial copyshop (Michigan Document Services) and a for-profit business (Texaco). Moreover, in *Texaco*, the Second Circuit specifically acknowledged *Campbell*’s teaching that presumptions in the fair use analysis are inappropriate:

Prior to *Campbell*, the Supreme Court had characterized the fourth factor as the “single most important element of fair use,” [citing *Harper & Row*, 417 U.S. at 566, 105 S.Ct. at 2233; 3 NIMMER ON COPYRIGHTS §13.05[A][4], at 13-183]. However, *Campbell*’s discussion of the fourth factor conspicuously omits this phrasing. Apparently *abandoning the idea that any factor enjoys primacy*, *Campbell* instructs that ‘all [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright.’ [510 U.S. at 578,] 114 S.Ct. at 1171.

Texaco, 60 F.3d at 926 (emphasis added)(alteration in original). The district court, thus, did not err in failing to give primacy to factors one and four.

However, when appropriate, the district court did give additional consideration to factor four. For example, in discussing Professor Kaufmann’s use of *The Sage Handbook of Qualitative Research (Third Edition)*, the district court determined that “upon revisiting the factor four analysis, an adjustment favoring [the Publishers’] position is warranted” despite having already found that the fourth factor “strongly” favored the Publishers in the fair use analysis of this work. Dkt#423 at 122. This Court should reject the Publishers’ invitation to contravene Supreme Court precedent and should not find that factors one and four are presumptively entitled to greater weight.

Analyzing all four fair use factors and applying them as an equitable rule of reason, the district court correctly assessed GSU’s use of decidedly small excerpts of larger works, in the non-profit educational environment of university courses, to

find that GSU's uses usually constituted fair use. Dkt#423. In accordance with applicable law, the district court did not treat any single factor as dispositive, including GSU's educational use. Instead, the district court properly examined each factor and then weighed the four factors together "in light of the purposes of copyright" to reach its fair use conclusion as to each alleged infringement.

SunTrust, 268 F.3d at 1268 (citations omitted).

1. The District Court Properly Found That The First Factor Weighed Heavily In Favor Of Fair Use

The district court did not err in its factor one analysis. The Publishers' arguments suffer from at least two fatal defects: (1) the Publishers effectively ignore the statutory mandate that consideration of the purpose and character of the use expressly includes "whether such use is of a commercial nature or for nonprofit, educational purposes" (17 U.S.C. §107(1)); and (2) the Publishers' focus on "transformative use," essentially to the exclusion of all else, advocating the type of bright-line test explicitly rejected by *Campbell*.

In analyzing the first factor, the Court must consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. §107(1). The inquiry requires a determination of whether a defendant's use is of a type that actually advances copyright's fundamental goal of promoting "the Progress of Science and the useful

Arts.” See *Campbell*, 510 U.S. at 575, 114 S.Ct. at 1169. The illustrative uses of the preamble, and the qualifying language of the first factor, are and must remain pre-eminent. See 17 U.S.C. §107. *Campbell* eliminated fair use presumptions and rightly placed the illustrative uses at the forefront of the fair use analysis. 510 U.S. at 577-578, 114 S.Ct. at 1170-71.

a. GSU’s nonprofit educational use is central to Factor 1 analysis

The district court correctly determined that GSU’s use constitutes favored purposes under the preamble examples in §107:

This case involves making copies of excerpts of copyrighted works for teaching students and for scholarship, as specified in the preamble of §107. The use is for strictly nonprofit educational purposes as specified in §107(1). The fact that the copying is done by a nonprofit educational institution leaves no doubt on this point.

Dkt#423 at 49. The Publishers’ argument that the district court “impermissibly exalted this consideration above all others” is incorrect. Br. 48. Specifically, the district court did not ignore the alleged non-transformative nature of GSU’s use of the excerpts, did not presume that the educational purpose required a finding of fair use, and did not “exalt” the nonprofit educational purpose of GSU’s use above all the other factors. Indeed, had the district court done so, it would not have found infringement of five works. In each of those five instances, the district court

determined that other factors, such as use of the “heart of the work” and potential harm to the market, outweighed the educational purpose of GSU’s use. Dkt#423 at 121-24, 138-140, 158-161, 326-29, 335-37.

The district court properly took into account the fact that the excerpts were not transformative but, consistent with *Campbell*, found that any non-transformative nature of the works did not outweigh the many educational benefits derived from GSU’s use of the works. Dkt#423 at 49-50. As expressly stated by the *Campbell* Court, while the goal of copyright is generally furthered by the creation of transformative works, a transformative use is “not absolutely necessary for a finding of fair use.” *Campbell*, 510 U.S. at 579, 114 S.Ct. at 1171 (emphasis added) (citing *Sony*, 464 U.S. at 478-80, 104 S.Ct. at 807-808 (Blackman, J., dissenting)). Indeed, requiring transformative use in order to find fair use as the Publishers advocate would create exactly the type of bright-line rule that the Supreme Court has rejected.

The Supreme Court in *Campbell* expressly recognized the special role of educational use in the analysis:

The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom use.

Id. at 579 n.11; 114 S.Ct. at 1171 n.11. In other words, an educational use may be fair even though it is not transformative.

A fundamental flaw of the Publishers’ fixation on transformative use is the refusal to recognize that “teaching” is a favored purpose under the statute, without the need to alter the underlying material. *Bill Graham Archives v. Darling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006)(use of entire copy of reduced concert poster in book was “transformatively different from the original expressive purpose”). Not only is teaching at the heart of the right of fair use, but non-transformative use of scholarly works is at the heart of teaching. In order for an educator to convey essential factual teachings, a verbatim copy of the work is often necessary. While the educator may then discuss the work – criticizing and commenting upon it – for the student to have an accurate appreciation of the underlying facts, verbatim copies are often necessary.

Transformative use is only one consideration in evaluating the purpose and character of the use as required by §107(a), and the district court properly considered the issue.

b. Transformative use is not required

The Publishers argue that “[t]he district court’s determination to ignore transformativeness and instead give dispositive weight to the nonprofit educational nature of the use runs counter to numerous rulings of this and other courts.” Br. 53. This argument fails on at least two separate grounds: (1) precedent does not

require transformative use in order to find fair use; and (2) the district court did not ignore transformativeness.

As *Campbell* and *Sony* demonstrate, transformative uses are not required for a finding of fair use. The fair use analysis is not “rigidly circumscribed” by a productive use requirement and while “[t]he distinction between ‘productive’ and ‘unproductive’ uses may be helpful...it cannot be wholly determinative.” *Sony*, 464 U.S. at 455 n.40, 104 S.Ct. at 795 n.40. The *Sony* Court also identified a number of non-productive (non-transformative) uses that could qualify as fair, specifically including “a teacher who copies for the sake of broadening his personal understanding of his specialty.” *Id.* Thus, the notion of a use being non-transformative is not and never has been determinative. Even *Campbell*, upon which the Publishers heavily rely, stated that “transformative use is not absolutely necessary for a finding of fair use.” *Campbell*, 510 U.S. at 579, 114 S.Ct. at 1171.

Rather than ignore transformativeness, the district court considered the excerpts used by GSU to be “nontransformative . . . (mirror images of parts of the books).” Dkt#423 at 49. The district court, however, gave weight to the Supreme Court’s statement in *Campbell*. Based on the Supreme Court’s teaching and the language of §107, the district court properly found that the non-transformative nature of GSU’s use of excerpts was not dispositive of the factor one analysis. Dkt#423 at 50.

But even so, the district court considered the non-transformative nature of the works in its factor three analysis to require quantitatively less use as might have been allowed had the district court found the excerpts to be transformative. Dkt#423 at 55 (“The fact that the excerpts were mirror-image copies favors market substitution (thus leaning against fair use), but this tendency is reduced when the excerpt is small.”).

Nor did the district court give “dispositive” weight to the nonprofit educational nature of the use. Instead, the district court correctly recognized that a “nonprofit education purpose does not automatically ensure fair use...other factors are important.” Dkt#423 at 50 (citing *Campbell*, 510 U.S. at 584, 114 S.Ct. at 1174). The district court then undertook an analysis of the remaining three factors, further demonstrating that GSU’s nonprofit educational use was not dispositive. Dkt#423 at 50-81; Br. 53.

Moreover, the cases upon which the Publishers rely are not inconsistent with the district court’s first factor analysis. The Publishers rely on *Soc’y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 37, 65 (1st Cir. 2012); *Letteresse*, 533 F.3d 1287; *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000); *Weissmann v. Freeman*, 868 F.2d 1313 (2d Cir. 1989); *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983); and

Encyclopedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1175 (W.D.N.Y 1982). Br. 53-54.

Importantly, in *Weissmann*, *Society of the Holy Transfiguration Monastery*, *Worldwide Church*, and *Letteresse*, the courts all found that the use was commercial in nature as the defendants all derived profit from use of the works. For example, in *Weissmann*, the defendant removed the plaintiff's name from the work and substituted his own, in effect attempting to pass off the work as his own. The Second Circuit objected to the defendant's conduct and noted that such conduct "severely undermines [the defendant's] right to claim the equitable defense of fair use." *Weissmann*, 868 F.2d at 1324. Moreover, the Second Circuit found that the defendant stood to gain recognition among his peers and authorship credit and thus the use did not meet the requirements for nonprofit use. *Id.* In *Worldwide Church*, the Ninth Circuit found that "[i]t is beyond dispute that [the defendant] 'profited' from copying" the plaintiff's work. 227 F.3d at 1118. In *Society of the Holy Transfiguration Monastery*, the First Circuit held that the defendant "profited" by use of the works. 689 F.3d at 60. In *Letteresse*, this Court found that both accused infringers' uses were commercial. 533 F.3d at 1310. It noted the fact that WISE "charged \$75 for each Sales Course pack clearly demonstrates the commercial purpose of the course materials." *Id.* Although another defendant did not directly charge a fee, this Court found it "undeniably

derived a commercial benefit” from use of the works by requiring a promissory note for a fixed donation price if the student using the materials left the Church.

Id. These commercial uses are directly at odds with GSU’s undisputed nonprofit educational use.

Rowley also fails to support the Publishers. In *Rowley*, the Ninth Circuit held that “[t]he critical issues here are the nature and extent of defendant’s copying.” 695 F.2d at 1175 n.6. As to this issue, nearly 50% of the defendant’s work was a verbatim copy of plaintiff’s work and contained “virtually all of the substance of defendant’s book.” *Id.* at 1177. The Ninth Circuit found these amounts to be both quantitatively and qualitatively “substantial.” *Id.* Accordingly, the case did not, as the Publishers would have it, turn on the non-transformative nature of the use but rather the size and quality of that defendant’s use. Here, the district court considered those factors in the third factor analysis – finding some uses quantitatively substantial and thus weighing against fair use; one qualitatively substantial (although a small percentage) and thus weighing against fair use; and the “mirror-image” nature of GSU’s use of the works. Dkt#423 at 49, 121-24, 136-140, 156-161, 323-29, 333-37.

Encyclopedia Britannica (a pre-*Sony*, pre-*Campbell* decision) did not focus on the non-transformative nature of the work. In fact, the word transformative does not appear in the case. *See generally* 542 F.Supp.1156. Instead, the court

focused on the fact that the defendant copied plaintiffs' entire television broadcast as well as the demonstrated market substitution caused by defendant's 100% copying. *Id.* at 1169-1174; 1179. Here, GSU used "decidedly small" excerpts and the record demonstrates that these excerpts do not act as a substitute for the Publishers' works.

Finally, GSU's use of excerpts is productive. Professor Goldstein has noted that the illustrative uses in the preamble to §107 "characteristically involve situations in which the social, political and cultural benefits of the use outweigh any consequent losses to the copyright proprietor...." Paul Goldstein, COPYRIGHT §10.2.1 at 10:19-10:20 (1996). Others have referred to the illustrative preamble uses as examples of "productive use." 4 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT §13.05[A][i][b] at 13-162 to 13-170 (2012). A productive use is akin to a transformative use.

The social and cultural benefits of GSU's uses outweigh any alleged consequent losses to the Publishers. *See* Goldstein, §10.2.1 at 10:19-10:20. The excerpts were used to enrich GSU's curriculum. At least one professor testified that if they had not found the use of one excerpt to be fair under the Georgia State Copyright Policy, they would have placed the book having the desired excerpt on hard copy reserve. Dkt#394,Tr.11/90-91, Dkt#407,Tr.9/71-72. The consequence

of such return to hard copy reserves illustrates the loss of convenience and access for students, with no revenue increase to the publishers since the library or the professor already owned a copy of the book. DX528.

2. The Excerpts At Issue Are Factual In Nature; Factor 2 Favors Fair Use

The second factor considers the “nature of the copyrighted work.” 17 U.S.C. §107(2). The second factor recognizes “that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.” *Campbell*, 510 U.S. at 586, 114 S.Ct. at 1175. It is generally recognized that under the second factor, “the more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff’s work, the broader should be the scope of the fair use defense.” Nimmer, §13.05[A][2][a]. As the *Harper & Row* Court noted: “[t]he law generally recognizes a greater need to disseminate factual works than works of fiction.” 471 U.S. at 563; 105 S.Ct. at 2232; *see also Stewart*, 495 U.S. at 237, 110 S.Ct. at 1769 (“fair use is more likely to be found in factual works than in fictional works”).

Professors chose the excerpts for their factual content – not their expressive content. Dkt#394, Tr.11/83-84; Dkt#406, Tr.8/126-27. *See A.V. v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009) (citing *Bond v. Blum*, 317 F.3d 385, 396

(4th Cir. 2003)). Multiple professors testified that if their use of a particular excerpt was not a fair use, they would have found another available source. Dkt#394,Tr.11/90-91; Dkt#407,Tr.9/90. Such substitution highlights the focus on the factual context of the works—as opposed to expressive content.

A key justification for this approach is that copyright extends only to the creative aspects of a work. *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361-62, 111 S.Ct. 1282, 1296 (1991). Works that are primarily factual contain less creative authorship than works of fiction. Another key justification is that the need to reproduce material of a factual nature is generally greater than for works of fiction. Because factual works are more deserving of public exposure, the district court found the factual nature of the works at issue here to favor fair use. Dkt#423 at 50-55.

Despite the effort that accompanies the collection, organization and preparation of scholarly reference material, such scholarly works remain “fact-based” works that other teachers will read, reference and use for teaching. Dkt#423 at 51-53; Dkt#399,Tr.1/52. It is customary and appropriate for the academic community to rely heavily on prior fact-based works. The doctrine of fair use encourages such activities. In the unique environment of higher education, teachers are necessarily and properly afforded latitude to use scholarly works to promote learning in accordance with copyright’s Constitutional purpose.

Here, the scholarly works at issue are not at the core of the educational purpose of Copyright law. Several professors testified that they used the excerpts to convey the facts and ideas described in them – not the expression of those ideas. For example, Professor Kaufmann used Chapter 1 of *The Sage Handbook of Qualitative Research* because it provided an historical overview of the field and the stages the field had gone through. Dkt#403,Tr.5/81. Being able to effectively convey such facts and ideas, which themselves are not copyrightable, is of critical importance in the educational context in which GSU uses the excerpts.

When the Publishers brought a viable claim, the district court evaluated first hand the nature of the work. *See, e.g.*, Dkt#423 at 217-19. The court considered that the works “are intended to inform and educate,” and recognized that some of the works were not “merely descriptive; they contain material of an evaluative nature.” Dkt#423 at 51. Indeed, rather than ignore the creative elements in some of the Publishers’ works, the district court gave credit to the Publishers’ witnesses who “testified to the tremendous amount of effort and expense which goes into creating high quality works of scholarship.” Dkt#423 at 52-53. The district court also noted that such a work “inevitably” involves some degree of creativity. Dkt#423 at 53.

The district court, however, properly concluded that *Feist* supported the conclusion that the cost, effort and work required are not relevant to the factor two

inquiry. Dkt#423 at 53. The district court adopted the approach taken in *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991), which found that the second factor weighed in favor of fair use because of the factual nature of the works at issue. Dkt#423 at 54. The district court's analysis is consistent with that in *Texaco*, which found that the second factor weighed in favor of fair use even though "a significant measure of creativity was undoubtedly used in the creation of the eight copied articles...their content immediately reveals the predominantly factual nature of these works." *Texaco*, 60 F.3d at 925. The *Texaco* court also distinguished *Weissmann* (upon which the Publishers rely) as being too broad as "nearly every category of copyrightable works could plausibly assert that broad copyright protection was essential to the continued vitality of that category of works." *Id.*

The Publishers' reliance on *Letteresse* for the proposition that the district court gave the factual nature of the works "too wide a berth" is misplaced. Br. 57. While the work in *Letteresse* was non-fiction, the facts in that work were presented with "a healthy dose of fiction." *Letteresse*, 533 at 1312-1313. The scholarly works here are created to pass on factual information in a learned manner; they do not contain a healthy dose of fiction. Dkt#423 at 52 n.37. *Rowley* is of no more

help to the Publishers as it contained factual and creative aspects, such as cake making “hints.”⁹ 695 F.2d at 1176.

Contrary to the Publishers’ argument, the district court did not adopt “an absolute rule that factor two favors a finding of fair use across the board.” Br. 57. The district court evaluated each work individually in reaching its factor two conclusions. Dkt#423 at 89-337. In its work-by-work analysis, the district court was careful to understand the nature of each work, often examining the book itself as well as looking to the description of each book’s contents to which the parties agreed in JX5. *See, e.g.*, Dkt#423 at 112, 114-27, 129, 211, 214.

In sum, the district court’s second factor analysis was soundly based on the evidence as well as precedent.

3. The District Court Properly Determined That Factor 3 Weighs In Favor Of Fair Use

The third factor addresses “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” (17 U.S.C. §107(3)), and asks whether ““the quantity and value of the materials used’ ...are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 586, 114 S.Ct. at 1175 (citations omitted). The district court analyzed each use to determine whether “the

⁹ *Scquare Int’l, Ltd. v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347, 1363 (N.D. Ga 2006) is of no help to the Publishers either, as the “creative elements” contained in the original work were never detailed—the sales training manual was not the type of scholarly work at issue in this case. *Id.*

extent of permissible copying” was consistent with or more than necessary to further the purpose and character of GSU’s educational use. *Campbell*, 510 U.S. at 586-587, 114 S.Ct. at 1175-76. Multiple GSU professors testified as to the purpose behind the choice of a particular excerpt and how use of that excerpt furthered the professor’s educational goals for a particular class. *See, e.g.*, Dkt#405,Tr.7/141-42, 151; Dkt#403,Tr.5/175; Dkt#404,Tr.6/82; Dkt#406,Tr.8/105-09, 113, 115-16, 120, 126-27. This testimony demonstrated that “all of the selections indeed did further the legitimate educational purposes of the course curriculum. Most were narrowly tailored to accomplish that purpose.” Dkt#423 at 71. This factual finding is not clearly erroneous.

Nor did the district court err in finding that as a starting point¹⁰ for the factor three analysis, no more than one chapter of a work containing ten or more chapters or 10% of a work containing less than ten chapters would be permissible. While the district court also noted that it would not select an upper numerical range that would constitute fair use, it was important to the district court that GSU’s

¹⁰ The one chapter or 10% finding was a starting point only. As the district court discussed in its August 8 Order, “the fair use analysis is quite fact intensive and specific to each individual case. There is no single formulation which would cover all cases.” Dkt#441 at 10-11.

professors used small excerpts.¹¹ *See, e.g.*, Dkt#441 at 10 (“The Court elects not to select an exact upper range number, but notes that the 18.52 percent amount [deemed to be fair] likely is close to loss of fair use protection.”); Dkt#462 at 12 (“Although in limited fact situations fair use may apply even where an unpaid excerpt is not “decidedly small,” as explained in the Order of August 10, 2012 [Dkt#441], significant caution is called for before determining that such a use is fair use.”).

The Publishers’ argument that the district court erroneously applied factor three is flawed for at least three reasons. First, the Publishers’ position is untenable – their argument that the Classroom Guidelines are the correct measure for what constitutes whether the quantity of an excerpt was reasonable would effectively eviscerate the use of scholarly works for educational purposes. The Publishers’ position takes a non-legislative minimum recommendation and elevates it to a primacy that neither Congress nor the courts ever intended it to have.

¹¹ The Publishers, after trial commenced, started asserting that certain individual chapters constituted works standing alone and that the professors had copied 100% of such works. This attempt to change positions, after years of acknowledging repeatedly that the professors used fractions of the relevant “works” (*see, e.g.*, JX5), was contrary to the district court’s prior orders (Dkt##226, 227, 240, 265) and unfair. The district court properly rejected the argument.

Second, the Publishers' argument that the district court incorrectly considered whether the amount copied was narrowly tailored to the purposes of the use is a fundamental misapplication of *Campbell*.

Third, the Publishers ignore key evidence and factual findings that demonstrate that the district court's findings regarding factor 3 were the result of an astute, well-considered decision.

a. The Publishers improperly elevate the Classroom Guidelines beyond their intended purpose

The Publishers overstate the Classroom Guidelines and the so-called "coursepack cases" (*Basic Books* and *Princeton*), which are merely photocopy-for-profit cases and of little assistance. VI B. (6). Indeed, the Publishers contended at trial that a remarkably small use, only 1.10% of an original work, was too great. JX5 at C-11. The Classroom Guidelines limit use to "not more than 1,000 words or 10% of the work, whichever is less." H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. (1976) (emphasis added). Such a restrictive edict would constrain educators' right of fair use to such an extent that it would be practically eliminated, contrary to the Congressional mandate of §107.

The Classroom Guidelines are a political artifact of the 1976 Copyright Act. They eliminate flexibility in the fair use analysis and therefore contravene the Constitutional purpose. Section 107 does not provide that multiple copies can be

made only if they do not exceed a certain quantitative amount. The analysis must remain flexible. “Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” H.R. REP. NO. 94-1476 at 66. The Classroom Guidelines were not authored by Congress, but rather the result of negotiations and compromise between some publishers and some academics. Dkt#423 at 56 (*citing* Litman, 72 CORNELL L. REV. at 862,865-67).

The legislative history states:

The purpose...is to state the minimum and not the maximum standards of educational fair use under Section 107...*the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill.*

H.R. REP. NO. 94-1476 at 68 (emphasis added).

The House Committee stated that the Guidelines are an interpretation “of the minimum standards of fair use.” *Id.* at 72. The Classroom Guidelines do not control the factor 3 analysis.

Moreover, after due consideration, the district court rejected the Publishers’ attempt to have the Classroom Guidelines adopted as law because they “establish numerical caps on how many words a teacher may copy” instead of following the multi-factored analysis set forth in §107. Dkt#423 at 59. The district court astutely noted that the Publishers were attempting to convert a minimum standard

into a maximum standard, *Id.* at 57-58, and correctly stated that the Classroom Guidelines were “so restrictive that no book chapters in this case...would qualify for fair use.” *Id.* at 70. Such “guidelines” do not promote learning. The fair use analysis must balance whether the use of a work for a non-profit educational purpose furthering the public’s knowledge outweighs the potential harm to the copyright holder. If the quantitative amount that can be used and still be considered “fair” is so restrictive that no educational purpose can be achieved, the public’s statutory right to fair use is denied.

b. The district court’s analysis of Factor 3 properly considered the educational purpose

After hearing approximately three weeks of evidence, the district court correctly found that “generally the purpose [of GSU’s use] was to enrich and add depth to the course curriculum.” Dkt#423 at 55. The Publishers’ argument that this finding was an erroneous “deference to GSU’s pedagogical purpose” is based on a flawed reading of *Campbell*. Br. 62. The fact that *Campbell* concerned a parody is irrelevant to the third factor inquiry of whether “the quantity and value of the materials used are reasonable in relation the purpose of the copying.” 510 U.S. at 586; 114 S.Ct. at 1175. *Campbell* explained that “the quantity and value of the materials used...are reasonable in relation to the purpose of copying” is merely a restatement of §107’s mandate that courts consider “the amount and substantiality

of the portion used in relation to the copyrighted work as a whole.” *Id.* at 586-87; 114 S.Ct. at 1175.

Moreover, *Sony* and *Harper & Row*, neither of which involved parody, recognized that under the third factor, “the extent of permissible copying varies with the purpose and character of the use.” *Id.* at 586-587; 114 S.Ct. at 1175 (citing *Sony*, 464 U.S. at 449-450, 104 S.Ct. at 792; *Harper & Row*, 471 U.S. at 564; 105 S.Ct. at 2253). Accordingly, the Publishers’ argument that *Campbell*’s emphasis on the amount used in relation to the nature of the use is helpful only for transformative uses is misplaced. The proper focus is on the use (*e.g.*, no more than necessary), as it may sometimes be appropriate to use an entire work. *Bill Graham Archives*, 448 F.3d at 613. Indeed, *Sony* involved nontransformative copying—the verbatim copying of entire television shows on video recorders. *Sony*, 464 U.S. at 421, 104 S.Ct. at 778. Hence, the fact that GSU professors used excerpts narrowly tailored to meet their educational purposes is not only consistent with a proper factor three analysis, it reflects a proper respect for the copyrights of authors and their assignees.

c. The district court’s Factor 3 analysis is supported by the record

The Publishers criticize the district court’s guidelines that use up to 10% of a work having less than ten chapters and use up to one chapter for books containing

ten or more chapters was a “decidedly small amount” in the context of this case. Br. 60. The Publishers’ criticism is based on overreliance on *Basic Books* and *Princeton*, two photocopy-for-profit cases (Publishers refer to them as “coursepack cases” VI. B. (6), and the Classroom Guidelines (discussed, *supra*), as well as a disregard of key evidence and legal reasoning supporting the district court’s decision.

The Publishers criticize the district court’s conclusion that because factor 1 “strongly” favors the nonprofit educational use of the excerpts, the amount of permissible copying “tends to push” to a “greater amount” than in *Basic Books* and *Princeton*. Br. 60; Dkt#423 at 66. The district court’s conclusion, however, is supported by the evidence and consistent with Supreme Court precedent. *See Campbell*, 510 U.S. at 578; 114 S.Ct. at 1170-1171. Moreover, *Basic Books* and *Princeton* involve crucial factual distinctions over this case. They both involved photocopying for profit—not for nonprofit educational use and, therefore, are more accurately characterized as photocopy for profit cases.

The Publishers ignore a critical legal component of the district court’s analysis. While acknowledging that the district court correctly considered “whether the amount taken is reasonable given the likelihood of market substitution” (Br. 60 (citing Dkt#423 at 55)), the Publishers overlook the district court’s conclusion. The district court considered market substitution, concluding

that the “fact that the excerpts were mirror-image copies favors market substitution (thus leaning against fair use).” Dkt#423 at 55. This finding, however, “is reduced when the excerpt is small.” *Id.* Thus, the district court considered and weighed the potential for harm based on market substitution.

The district court’s 10%/one chapter finding was supported by the record. For example, the CCC “White Paper” identifies “best practices” for electronic reserves, stating that e-reserve materials should be limited to “small excerpts” and that “[m]ost experts advise using a single article or chapter of a copyrighted work....” DX906 at 1. Thus, the Publishers (via the CCC) are instructing universities that electronic use of one chapter is a “best practice.”

Moreover, by holding that “a whole chapter of a book...likely will serve a more valuable educational purpose than an excerpt containing a few isolated paragraphs,” the district court’s analysis favors the Publishers when a work is under ten chapters. Dkt#423 at 68. For example, in a three chapter work, each chapter would average as 33% of that work. The district court’s guideline cautions a professor to use a “decidedly small” excerpt such as approximately 10% of the work—much less than the CCC Electronic Reserves Guidelines which would permit an entire chapter. DX906.

Further, the fact that the subject professors are also content creators was properly considered by the district court. As stated in *Harper & Row*, “the

author's consent to a reasonable use of his copyrighted works ha[d] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts....” 539 U.S. at 549; 105 S.Ct. at 2225. In the educational context, this is particularly relevant. The professors are themselves the authors of the types of works at issue here. Accordingly, looking to what they consider as a reasonable use of an existing work is consistent with the goals of fair use.

The fact that the professors are both content users and content creators implicates what Immanuel Kant called the “Categorical Imperative” or how Joseph McDonald paraphrased the Golden Rule: ““Take not from others to such an extent and in such a manner that you would be resentful if they so took from you.”” *Harper & Row*, 471 U.S. at 550 n.3; 105 S.Ct. at 2225 n.3 (quoting McDonald, *Non-Infringing Uses*, 9 BULL. COPYRIGHT SOC'Y 466, 467 (1962)).

In basic terms, the Categorical Imperative guides the determination of what is “right” (helping someone) as opposed to what is “good” (enriching oneself). That is, professors will act as users and creators of content as they wish other professors would act as users and creators of content—because they serve both functions in the university environment. In this context, when a professor, who is at least potentially an author of a similar work, uses a “decidedly small amount” (*i.e.*, 10% or less or 1 chapter of a multi-chapter book), the professor is recognizing

that as a content creator, she is acknowledging the propriety of such use when it is her work that is being used by another professor. Thus, the community standard of what is a “fair use” is set by professors who are both authors and users and who are guided by the Categorical Imperative. Hence, the Publishers’ criticism of the district court’s assessment of the average use by GSU professors is misplaced.

Here, the practice of using excerpts is already widespread and the Publishers continue to flourish. In fact, the evidence showed that the GSU 2009 Copyright Policy is more conservative than many others. Dkt#423 at 42; Dkt#396,Tr.13/20; DX325. The Categorical Imperative as appropriately practiced at GSU ensures that in the unique academic environment, the professors, as both creators and users of content, demonstrate what can fairly be used to accomplish the educational purpose.

4. The Fourth Factor Weighs Primarily In Favor Of Fair Use

The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. §107(4). It entails two inquiries: “(1) ‘the extent of the market harm caused by the particular actions of the alleged infringer’ and (2) ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market.’” *Letteresse*, 533 F.3d at 1315. The adverse impact about which this factor is primarily concerned is market substitution. *Id.*

The Publishers' argument that this factor should be given predominant weight is incorrect. As noted above, *Campbell* shows that any former presumptions regarding factor predominance are abandoned; each factor is to be considered and the "task is not to be simplified with bright-line rules." 510 U.S. at 577; 114 S.Ct. at 1170.

Generally the burden of proof is on the accused infringer to prove that the defense of fair use applies. As the district court noted, however, some courts have held that, where the challenge is to a *noncommercial* use, the burden falls on the copyright owner to prove actual or potential harm from that use. While the district court ultimately concluded its "best interpretation" is that the burden stays with the alleged infringer, Dkt#423 at 72, 73 n.43, the better interpretation is that the burden is on the copyright holder where, as here, the use is noncommercial.

In *Sony*, the Supreme Court held that:

A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the ... work. Actual present harm need not be shown Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial use, the likelihood must be demonstrated.

Sony, 464 U.S. at 451, 104 S.Ct. at 794 (emphasis added).¹²

In *Campbell*, the Court restricted the statement in *Sony* (dictum) that there is a presumption of harm from a mere duplication for commercial purposes, holding that no such presumption or inference of market harm “is applicable to a case involving something beyond mere duplication for commercial purposes.”

Campbell, 510 U.S. at 591, 114 S.Ct. at 1177. And the Court indicated that the burden of proof is on the alleged infringer, holding that “it is impossible to deal with the fourth factor except by recognizing that a silent record on an important factor bearing on fair use disentitled the proponent of the defense...to summary judgment.” *Id.* at 594, 114 S.Ct. at 1179. As noted, however, the *Campbell* Court was dealing with a commercial use and it did not disapprove of the language in *Sony* about the burden in noncommercial cases.

In short, the holding of *Sony* regarding the burden in noncommercial cases appears to stand. After *Campbell*, the Sixth Circuit, citing *Sony*, opined that: “The burden of proof as to market effect rests with the copyright holder if the challenged use is of a ‘noncommercial’ nature. The alleged infringer has the burden, on the other hand, if the challenged use is ‘commercial’ in nature.” *Princeton*, 99 F.3d at 1385-86. Where, as here, the noncommercial use is for non-profit education, the

¹² In *Harper & Row*, the Court cited the language of *Sony* about what one must show regarding market harm to negate fair use, again implying the burden is on the copyright owner. 471 U.S. at 568, 105 S.Ct. at 2234

burden should certainly stay with the copyright holder. This Court has indicated that the burden is on the alleged infringer to prove an adverse market effect is unlikely, but the decisions involved commercial uses.¹³

Contrary to Publishers' arguments, there is no evidence of any actual lost sales of the books. Representatives of Cambridge and Oxford admitted they have no evidence of any actual losses of sales of books. Dkt#400,Tr.2/28; Dkt#401,Tr.3/141. Moreover, while the Publishers' witnesses made vague, conclusory statements of fear about such losses in the future, even fear about their viability, they presented no credible evidence of such future harm. The trial court correctly found that such testimony was glib and unfounded. Dkt#423 at 84.

There was no evidence that any professor would have the students buy the entire book (or even license an excerpt) if it was determined the excerpt could not be fairly used. The evidence was to the contrary. *See, e.g.*, Dkt#407,Tr.9/81-83, 90. The trial court's findings that the use by GSU professors of excerpts does not act as a market substitute for purchasing the book, the original work, and would

¹³ *See, Letterese, supra.*, 533 F.3d at 1310, 1318, 1319 (finding, in a case of commercial use, that the defendant "provided insufficient evidence" in support of its claim of lack of market harm and that, given lack of sufficient evidence that widespread distribution of the infringing work would not supplant the market for the derivative works, the fourth factor favored the plaintiff); *and Suntrust Bank, supra.*, 268 F.3d at 1269, 1276 n. 31 (concerning an "undoubtedly ... commercial" use and noting the burden of providing helpful evidence regarding the relevant markets is on the alleged infringer, but holding that, at the preliminary injunction stage, the burden is on the movant to rebut a prima facie fair use showing).

not cause substitution harm if the conduct were to expand elsewhere are well-grounded. Dkt#423 at 74.

Regarding the second consideration of the effect on the value or the potential market if the conduct complained of becomes widespread, Publishers exaggerated their permissions revenue and thus the potential harm. The Publishers argue that, in 2009, Cambridge received rights revenue (which includes permissions fees) of \$1.21 million (approximately 1% of Cambridge America's overall revenue). Br. 32; Dkt#400,Tr.2/35. But this figure includes revenues from corporations and other private businesses, as well as revenue from outside the United States. Dkt#400,Tr.2/31-2; PX2. The permissions income for academic books totaled *only* 1/3 of 1% of Cambridge's overall revenue in FY2009. Dkt#400,Tr.2/35-36. The trial court calculated that the Publishers' 2009 revenue from academic book and journal permissions from CCC's APS and ECCS services was less than 1/4 of 1% of revenue (and the APS service did not provide for digital copying such as ERes). Dkt#423 at 78, 84.

The large majority of Oxford's academic permissions income comes from CCC. Oxford received \$368,000 from CCC in 2009 for permissions for academic books. Dkt#401,Tr.3/129, 147. Permissions fees from academic books accounted for well less than 1% of Oxford's overall income in 2009. Dkt#401,Tr.3/129, 147. The Publishers cite Stipulated Fact (SF) 15, but that stated generally that

“[p]ermissions represent a significant income stream for Plaintiffs,” not that the subset of *academic* permissions constituted a significant income stream. Dkt#276, ¶15. The later SFs that the Publishers cite also were talking about permissions generally. SF 95 is plainly not limited to academic permissions for students’ use. *Id.*, ¶95. And as shown, the revenue figures they cited for permissions [*see, e.g.*, SF 98] include all permissions, not just the minority share comprised of academic permissions.

Notably, Oxford has not seen a decline in its overall revenues since the inception of E-Reserves. Dkt#401,Tr.3/142. In fact, Oxford has grown substantially in the 15 years leading up to 2009, doubling in size. *Id.*

The representatives of Cambridge and Oxford testified as designated representatives of their employers as to market harm. Neither of them could provide any analysis or study of market harm, and admitted they were not qualified to provide such testimony. Dkt#400,Tr.2/24-25; Dkt#401,Tr.3/139.

Regarding the issue of whether excerpts of all the works at issue were available, the Publishers’ arguments contain factual and legal errors. First, the Publishers’ claim that excerpts of all of the works at issue were available directly or through CCC, is false and contrary to the record. Br. 29-35. Cambridge’s representative, Mr. Smith, admitted that CCC is capable of licensing only approximately 60% of their works overall and that Cambridge does not make their

reference books, citing their English as a second language series of books specifically, available as excerpts through CCC. Dkt#399,Tr.1/69-70. Oxford's representative only testified that the "vast majority" (later saying mid-90s by percent) of Oxford's works "are" available through CCC, but did not say they were available in 2009. Dkt#401,Tr.3/69-70. Only Sage's representative testified that all of Sage's works "are" available through CCC, but she did not state they were available in 2009. Dkt#400,Tr.2/90.¹⁴ Similarly, regarding CCC's annual license program, the evidence showed that not all works were available, and Cambridge does not participate at all in the Annual License offering and did not in 2009; none of its works have been available under the Annual License. Dkt#402,Tr.4/56, 72, 74-76.

The Publishers now claim that JX5 constituted a stipulation that excerpts of all of the works at issue were in fact available via permissions from CCC. As the trial court found after presiding over the pre-trial proceedings and the trial, the license fee of JX5 was simply depicting what the permissions fees would be using the standard per-page rates charged by CCC for each of the Publishers. Dkt#423at 78. And as shown above (*see* Section III. H), the Publishers' records show that several of the works at issue have generated little permissions revenue from

¹⁴ The CCC representative only testified that each of the Publishers participates in the licensing program. Dkt#402,Tr.4/13.

anywhere in the country.

The Publishers question the credibility of the unrebutted testimony by several professors that they would not have used the excerpts at issue if permissions fees were required. Not only were the professors credible, they were adamant, and their testimony makes sense. It is precisely because the students have already paid hundreds of dollars for textbooks that the professors are reluctant to impose additional fees for excerpts of works that are important but not indispensable.

The Publishers' complaints about the trial court's nuanced consideration of the availability of licensed excerpts also lack merit. Their argument that availability should count against the user (making the use less fair) but that the converse should not be true is contrary to precedent and common sense. "[I]t is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use." *Texaco*, 60 F.3d at 931.

The Publishers protest too much when they argue the district court has imposed a compulsory licensing scheme. The court did not state that the lack of availability of excerpts means the use is fair. This was just one of many factors the court considered. The court has simply engaged in the 'sensitive balancing of

interests' called for in a fair use analysis,¹⁵ and that requires sifting through all the facts.

The Publishers' complaint that the court improperly shifted the burden to them to establish a ready market is unavailing. First, as discussed earlier, under *Sony*, the burden should be on the copyright holder to prove market harm when dealing with a noncommercial, particularly a non-profit educational, use. Second, as the court noted, the Publishers had touted the availability of ready and reasonably priced licenses and the court was simply evaluating if that had in fact been established for the works at issue. The Publishers also complained about the court's consideration of whether such permissions were available *in 2009*, but that is simply part and parcel of the decision to use the 2009 semesters as an exemplar, a common and prudent decision to make the trial manageable.

It bears repeating that the Publishers' argument regarding permissions fees is circular. Given they have developed a licensing scheme that can charge users for even one paragraph of a work, every instance of copying, no matter how small, may affect a potential market for the work to some degree. The fair use defense would mean nothing if it addressed only those uses for which Publishers have not yet developed a mechanism by which to charge fees for the use of a given portion.

¹⁵ See *Campbell*, 510 U.S. at 584; 114 S.Ct. at 1174 (quoting *Sony*, 464 U.S. at 455 n.40; 104 S.Ct. at 795 n.40)).

5. The District Court Properly Undertook A Work-by-Work Analysis

This case involved 99 alleged infringements. JX5. The district court tried and decided the case accordingly. The Publishers' argument that the district court erred in not considering the 99 individual allegations as part of a collective whole is misplaced. In fact, Supreme Court precedent dictates that the fair use analysis must be made on a case-by-case basis.

In *Sony*, *Harper & Row* and *Campbell*, the Supreme Court instructed that fair use must be conducted on a case-by-case analysis: "...the statute, like the [fair use] doctrine it recognizes, calls for case-by-case analysis." *Campbell*, 510 U.S. at 577; 114 S.Ct. at 1170 (citing *Harper & Row*, 471 U. S. at 560; 105 S.Ct. at 2230; *Sony*, 464 U. S. at 448, and n.31, 104 S.Ct. at 792 and n.31; House Report at 65-66; Senate Report at 62.). Supreme Court precedent, explicitly rejects the Publishers' argument and confirms the district court's work-by-work consideration of each alleged infringement.

6. The Photocopy For Profit Cases Are Not Controlling

The Publishers rely heavily on their so-called "coursepack" cases, arguing that *Princeton* and *Basic Books* "addressed fact patterns doctrinally indistinguishable from that presented here." Br. 44. In fact, these cases are nothing more than photocopy for profit cases that actually support the district court's decision below.

First, there are key factual differences between the photocopy for profit cases and the instant appeal. Importantly, both *Princeton* and *Basic Books* found a commercial purpose and rejected arguments that the defendant copyshop's use was for nonprofit educational use. Moreover, neither *Princeton* nor *Basic Books* held that the creation of coursepacks, even in the for-profit context, is invariably not fair use. Both cases were decided on a work-by-work basis, just as the district court did here.

In *Basic Books*, Kinko's photocopying and selling copies for profit was found to infringe; it was not fair for Kinko's to photocopy book chapters, compile them into permanently bound course packets and sell them for a profit to college students. *Basic Books*, 758 F. Supp. at 1526. As to the first factor, Kinko's argued its use was for nonprofit educational purposes. The court determined that Kinko's use was commercial: "Kinko's has not disputed that it receives a profit component from the revenue it collects for its anthologies." *Id.* at 1531. In assessing factor two, the court found that the works were of a "factual nature" and thus had "greater public value [than fictional works] and therefore, uses of them may be better tolerated by the copyright laws." *Id.* at 1533. As here, this factor weighed in favor of fair use.

In assessing the third factor, the court recognized that there could be varying degrees of "substantiality" and that "[t]he purpose of the use may be balanced

against the amount and substantiality of the use.” *Basic Books*, 758 F. Supp. at 1533. The court found that excerpts of up to 25% were both “quantitatively substantial [and] qualitatively significant.” *Id.* at 1534. Regarding the fourth factor, pre-*Campbell*, the *Basic Books* court held that the fourth factor was the most important element. *Id.* at 1534 (citing *Harper & Row*, 471 U.S. at 566). Importantly, the court found that the “competition for student dollars” was won by Kinko’s. *Id.* at 1534. In other words, Kinko’s sales substituted for sales of the plaintiffs works. *Id.* at 1534. The court refused to rule that all coursepacks are an infringement, and left open the question of fair use by the nonprofit educational institution. *Id.* at 1537 and n.13.

In the present case, there are no coursepacks; no compilation of photocopied works assembled into a work that competes with the Publishers’ works. Similarly, here, there is no commercial use. In addition, GSU put forth credible evidence that if permission or other fees were required for the excerpts used, the professors would not have used the excerpt. Thus, the district court rejected the Publishers’ argument that use of the excerpts substituted for the sale of an entire book.

The Publishers’ reliance on *Princeton* fares no better. As in *Basic Books*, the defendant in *Princeton* (Michigan Documents Services) was a for profit commercial copyshop. The Sixth Circuit held that “the defendants’ commercial

exploitation of the copyrighted materials did not constitute fair use.” *Princeton*, 99 F.3d at 1383. The works at issue were offered “for sale by a for-profit corporation that has decided to maximize its profits – and have a competitive edge over other copyshops – by declining to pay the royalties” requested by the plaintiffs. *Id.* at 1386. Moreover, the Sixth Circuit expressly declined to address the issue of whether it would be a fair use if the copying had been done by the students or professors. *Id.* at 1389. Thus, the *Princeton* court like the *Basic Books* court recognized a distinction between photocopying for profit and nonprofit educational use.

As to the second factor, the *Princeton* court recognized that the excerpts contained some degree of creativity, but weighed the qualitative aspect too highly: “the fact that the professors thought the excerpts sufficiently important to make them required reading strikes us as a fairly convincing “evidence of the qualitative value of the copied material.” *Princeton*, 99 F.3d at 1389. The professors at GSU thought the excerpt was important for the course being taught – not an important part of the book from which it came.

As to the third factor, the Sixth Circuit held that in the photocopy for profit context, coupled with the qualitative value of the excerpts, use of 5%-30% of the original work weighed against fair use. Much like the *Basic Books* court, however,

the Sixth Circuit noted that the greater use (30%) was more troubling than the lesser (5%) use. *Princeton*, 99 F.3d at 1390.

Largely ignoring *Campbell*, the Sixth Circuit gave particular emphasis to the fourth factor. Unlike the present case (*see, e.g.*, Dkt#407,Tr.9/90), there was no evidence in *Princeton* that professors would not have assigned the works if permission fees were required. *Princeton*, 99 F.3d at 1388. Once again, the court did not address the question of whether such activities may be fair use in a nonprofit, educational setting as opposed to a commercial copy shop. Even then, five judges dissented and would have found fair use. *Id.* at 1393-12.

Unlike the commercial copy shop, GSU does not derive profit by passing the cost of photocopying to students. The district court here properly considered the commercial nature of the photocopy for profit cases and, determined that they were of minimal assistance. Further, neither *Basic Books* nor *Princeton* undertook a detailed and thorough analysis regarding the qualitative value of the work as done by the district court here. The district court did not err in finding that *Basic Books* and *Princeton* did not control the fair use analysis in this case.

7. “Media Neutrality” Is Not Relevant

The Publishers’ reliance on the copyright doctrine of media neutrality is unjustified. Neither *Basic Books* nor *Princeton* held that there was a blanket prohibition against “coursepacks” based on the doctrine of media neutrality.

Congress established the doctrine of media neutrality to ensure that the use of new technology (perhaps not existing at the time of the 1976 Act) for fixing a work in a tangible media would qualify for Copyright protection. *See Greenberg v. National Geographic*, 533 F.3d 1244, 1257 (11th Cir. 2008). As the legislative history states, the media neutrality doctrine “is intended to avoid the artificial and largely unjustifiable distinctions...under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed.” H.R. Rep. No. 94-1476 at 5665. Thus, the doctrine of media neutrality certainly does not “dictate[] the conclusion” that this case is analogous to the so-called photocopy for profit cases.

C. Injunction

The Publishers’ argument that this Court should vacate the district court’s “unduly narrow injunction” is based on its inflation of the total instances of infringement. Not only is this position unfounded, the record demonstrates that the Publishers’ draconian proposed injunction is not necessary to curtail any alleged infringement as GSU promptly revised its 2009 Copyright Policy to conform with the district court’s Order. *See* Dkt#432 (Ex. A and B).

D. Attorneys' Fees

The district court properly concluded that GSU is are the “prevailing party” and reasonably exercised its discretion to award GSU its attorneys’ fees and costs. (The Publishers allege no error of fact.)

Under the Copyright Act, “a reasonable attorney’s fee [may be awarded] to the prevailing party as part of the costs,” and either plaintiff or defendant may be the prevailing party. 17 U.S.C. §505; *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523, 114 S. Ct. 1023, 1028 (1994). To identify the prevailing party, this Court (like others) “look[s] to the central issues in the case, not the periphery.” *Sherry*, 822 F.2d at 1034. Accordingly, a party may prevail “in part” and still be deemed the prevailing party; this includes a defendant that has suffered “adverse entry of judgment, [but] substantially beats back an oppressive plaintiff.” *Nimmer*, §14.10[B]; *Thoroughbred Software Int’l, Inc. v. Dice Corp.*, 488 F.3d 352, 362 (6th Cir. 2007) (finding error where court required party to prevail “in full” to constitute “prevailing party”).

Central to this case is the Publishers’ repeated assertion of “massive” and “rampant” copying at GSU allegedly sufficient to warrant permanently enjoining, *inter alia*, all faculty, students, and staff at GSU from ever making any copy of any part of any work in which any Plaintiff ever holds copyright rights. Dkt#235 at 30; Dkt#300-1; *see* Br. 15, 23, 40, 81-83. Ultimately, the Publishers’ allegations were

anchored to 99 individual allegations of infringement for trial. JX5. The issue was not whether the Policy had caused *some* infringements of Publishers' works, but whether the Policy had actually caused "rampant," "massive" infringement warranting broad injunctive relief. Br. 15, 23, 40, 81-83; Dkt#300-1. The case was decidedly not, as the Publishers would have it, an unmoored evaluation of the purported (de)merits of a university copyright policy, characterized only by sweeping, unproven claims of unlawful uses. Br. 1-3, 81-85.

In the end, three academic publishing houses alleging rampant infringement at a university with over 1,000 professors providing thousands of course offerings over three academic terms (Dkt#233 at 2) at best proved five individual infringements – *five*. They most plainly did not prevail on the central issue. And for GSU, "the litigation was an almost complete success," *see Sherry*, 822 F.2d at 1035 n.5, with defeat of 94 allegations of infringement during trial. As the court said, "Defendants were highly successful." *Id.*

Having properly found GSU to be the prevailing party, the court did not abuse its discretion in awarding fees. The Supreme Court and this Court have cited with approval a list of "several nonexclusive factors that courts should consider in making awards of attorneys fees to any prevailing party," including "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to

advance considerations of compensation and deterrence.” *Fogerty*, 510 U.S. at 534 n.19, 114 S. Ct. at 1033 n.19; *MiTek Holdings, Inc. v. Arce Eng’g Co.*, 198 F.3d 840, 842 (11th Cir. 1999). The district court found that the Publishers unreasonably refused “to narrow their individual infringement claims,” which “significantly increased the cost of defending the suit.” Dkt#441 at 14.

Within the court’s established framework of the case, the Publishers decided to pursue 126 allegations. Dkt#228. Over eight months before trial, GSU raised with the Publishers their failure to prove ownership of many works at issue, as well as other deficiencies in their claims. *See* Dkt#230 at 4-5. With knowledge of these complaints, the court ordered the parties to jointly identify a list of allegations for trial. Dkt#235 at 30. These negotiations reduced the allegations to 99 (Dkt#266) though by far they did not address all of GSU’s concerns. For example, the Publishers had not produced evidence of ownership or an exclusive license to a host of additionally asserted works. *See* Dkt#277 at 3-6, 8-10. Yet they persisted in their deficient claims.

GSU ultimately filed a motion *in limine* to exclude evidence of alleged infringement where the Plaintiffs were asserting copyright rights without evidence of even a *prima facie* case. Dkt#277. The motion was granted five days before trial, but the Publishers waited to mid-trial to drop an additional 25 allegations of

infringement, Dkt#441 at 14. Over the course of 15 days in trial, Publishers further failed to make their prima facie case on another 26 allegations. *Id.*

On the facts known, and in light of clear law on Publishers' burden to establish a prima facie case of infringement, it was "objectively unreasonable" (*Fogerty*, 510 U.S. at 534 n.19), for the Publishers to press their purported case of rampant infringement through trial when they could not establish a *prima facie* case of infringement in over 60% of their allegations. Based on the Publishers' dogged refusal to limit the scope of their claims, needlessly and significantly increasing GSU's costs, the court exercised its reasoned discretion to impose fees and costs upon the Publishers. And contrary to the Publishers' assertion, the court's finding that the Publishers acted in good faith in bringing the suit "[does] not mandate a denial of fees ... since it is not a precondition to an award to show that the losing party acted in bad faith or brought a frivolous claim." *Sherry*, 822 F.2d at 1034.

Further, the Supreme Court and this Court have expressly recognized that awarding attorneys' fees to defendants can further the interests of the Copyright Act by "encourag[ing] the raising of objectively reasonable ... defenses, which may serve not only to deter infringement but also to ensure 'that the boundaries of copyright law [are] demarcated as clearly as possible' in order to maximize the public exposure to valuable works." *MiTek*, 198 F.3d at 842-43 (quoting *Fogerty*).

Finally, the district court did not err in awarding Dr. Crews' expert witness fees as part of its attorneys' fees award. The court found that Dr. Crews' fees of \$142,038.54 were "necessary and incidental" expenses incurred as part of the attorneys' work on the litigation, providing detailed factual findings in support. Dkt#462 at 7-9. Such "necessary and incidental" fees are routinely awarded in courts across Circuits. *Invessys, Inc. v. The Mc-Graw Hill Cos.*, 369 F.3d 16, 22 (1st Cir. 2004); *Coles v. Wonder*, 283 F.3d 798, 803 (6th Cir. 2002); *Lil' Joe Wein Music, Inc.*, No.06-20079-CIV, 2008 U.S. Dist. LEXIS 112730 (S.D. Fl. June 6, 2008); *Arthur Kaplan Co. v. Panaria Int'l, Inc.*, No.96CIV.7973(HB), 1999WL253646, at *2 (S.D.N.Y. Apr. 29, 1999); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 361, 366-67 (D. Mass. 1993). The Publishers' sole contention is that *Artisan Contractors Association of America v. Frontier Insurance Co.*, 275 F.3d 1038 (11th Cir. 2001), is to the contrary. It is not. *Artisan* did not involve an award of attorneys fees under §505—only an award of costs – and hence did not consider expert fees as necessary and incidental to attorneys' fees. The costs taxable pursuant to §505 (addressed in *Artisa*) are limited by 28 U.S.C. §§ 1821, 1920, 275 F.3d. at 1039-40. The same is not true of attorneys' fees awarded in the court's discretion pursuant to §505.

VII. THE RELIEF SOUGHT BY PUBLISHERS IS NOT AVAILABLE UNDER THE NARROW EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY PROVIDED BY *EX PARTE YOUNG*

The Publishers sued eighteen members of Board of Regents and GSU's president, provost, associate provost, and Dean of Libraries. The Appellees, high-level administrators with general oversight authority over GSU and its policies, stand accused of copyright infringement based on the actions of twenty-three GSU professors. None of them personally scanned, copied, or distributed the copyrighted works at issue; rather the professors did. Even so, the Publishers contended that the administrators and Regents were liable for the alleged infringement because of their control over and responsibility for the challenged conduct.

The challenged conduct is the professors' determinations that each use of Publishers' copyrighted material was fair. Appellee were not involved in selecting the professors' course reading materials, completing the professors' fair use checklists, or determining that the professors' uses were fair. Despite this lack of involvement, the Publishers nonetheless claim these administrators are responsible for the professors' alleged copyright infringement.

Specifically, in making these determinations, the professors utilized the 2009 Copyright Policy and its four-factor fair use checklist. According to Publishers, the Copyright Policy fails to ensure compliance with the Copyright Act and these

administrators had an obligation to ensure each professor made the correct fair use determination.

Yet none of the administrators approved the Copyright Policy or its corresponding fair use checklist. Dkt#397,Tr.14/115, 134. Instead, the USG Chancellor created a select committee to draft the Copyright Policy, and then the Chancellor approved and implemented it. DX 145; Dkt#395,Tr.12/49-50 at Dkt#397,Tr.14/92-93; 112-13, 121, 134; DX 130.) Only one of the administrators, the Dean of Libraries, participated in the work of the select committee. Dkt#397,Tr.14/49-50, 102, 115, 134; DX145.

The Publishers' infringement position rests entirely on the legal argument that the *Ex parte Young* exception applies because (1) the Regents have general supervisory authority over the professors who are allegedly committing acts of copyright infringement; and (2) the Regents have general responsibility for enforcement of all university policies, including the Copyright Policy.

GSU disagrees. As defendants, GSU challenged the district court's subject matter jurisdiction multiple times because none of the named defendants are or were themselves violating federal law, and none have any meaningful connection to the alleged acts of infringement based upon their mere oversight role of GSU's personnel. *See, e.g.*, Dkt#239, Dkt#354. In denying their requested dismissal, the district court found that the *Ex parte Young* exception applied because "*some* of the

[Appellees] were responsible for the creation and implementation of the 2009 Copyright Policy,” that the policy “had at least the *tacit approval* of the Board of Regents,” and that the alleged copyright infringement violations “*may have occurred* as a result of application of that policy.” Dkt#423 at 17 (emphasis added). These findings do not support the application of *Ex parte Young*.

First and foremost, the Publishers cannot and did not establish that the Copyright Policy or its implementation violates any federal law. The Copyright Policy requires that each professor complete a fair use analysis prior to distributing copyrighted materials and to certify that he conducted a fair use analysis finding the use to be fair before materials are electronically posted. Dkt#160 at 1; Dkt#316 at 75-76; Dkt#402, Tr.4/97, 99. The Copyright Policy describes the Copyright Act’s four fair use factors and references other resources to consult for more information on fair use. DX160. The fair use checklist likewise includes the four factors. Thus, the Copyright Policy appropriately requires the professor to consider all of the fair use factors and provides the professor with additional tools to conduct a meaningful fair use analysis. In fact, the Court found that GSU’s “2009 Copyright Policy on its face does not demonstrate an intent by Defendants to encourage copyright infringement; in fact, *it appears to be a positive step to stop copyright infringement.*” Dkt#235 at 29 (emphasis added). There was no evidence whatsoever that the named Appellees had any involvement with the fair use

determinations at issue, that they were willfully blind to the same, or that the Copyright Policy caused infringement.

Second, the named Appellees are not sufficiently connected to the allegedly infringing actions to obviate their Eleventh Amendment protections by way of the *Ex parte Young* exception. “Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides *an immunity from suit.*” *Fed. Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 766, 122 S.Ct.1864, 1877 (2002) (emphasis added). The Eleventh Circuit has long recognized that “a plaintiff may sue only the particular official who has threatened to take some unconstitutional act against him or her.” *Int’l Soc’y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 819 n.4 (5th Cir. 1979). No such officials were named here.

Even *Luckey v. Harris* recognizes that “the state officer sued must, by virtue of his office, ha[ve] some connection with the unconstitutional act or conduct complained of.” 860 F.2d 1012, 1015-16 (11th Cir. 1988) (citation omitted). In *Luckey*, the Eleventh Circuit found a connection between the Governor of Georgia and certain Georgia judges and allegations of “systemic deficiencies” in the Georgia indigent criminal defense system that was sufficient to invoke the *Ex parte Young* exception to Eleventh Amendment immunity. *Id.* at 1013. The Eleventh Circuit, in finding a sufficient connection between the defendants and the

inadequate indigent defense system, provided a specific list of factors supporting this connection: (1) the Governor’s responsibility for law enforcement and his duty to execute the laws faithfully; (2) the Governor’s residual power to commence criminal prosecutions and his final authority to direct the Attorney General to prosecute on behalf of the state; and (3) the judges’ responsibility for appointing counsel to indigent defendants. *See id.* at 1016.

The allegations here are *not* analogous. The alleged misconduct here involves “supervisory authority” over creating a Copyright Policy that, to the Publishers, guarantees no infringement. The Publishers did not allege, much less prove, that the 2009 Copyright Policy encourages the professors to ignore the fair use factors or not to conduct a meaningful fair use analysis or that the Copyright Policy itself contravenes federal law. The Publishers did not show a connection between the named administrators and the alleged copyright infringement sufficient to support the *Ex parte Young* exception. *See, e.g., Women’s Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003) (affirming dismissal of Governor Bush because his general executive power not sufficient to confer jurisdiction).

The only meaningfully relevant case addressing whether the supervisory authority over a university’s copyright policy would be sufficient to meet the connection requirement of *Ex parte Young* is *Pennington Seed*, which directly deals with and disposes of the Publishers’ supervisory theory argument. *See*

Pennington Seed, Inc. v. Produce Exchange No. 299, L.L.C., 457 F.3d 1334, 1342-43 (Fed. Cir. 2006). The Federal Circuit found that “a nexus between the violation of federal law and the individual accused of violating that law requires more than simply a broad general obligation to prevent a violation; it requires an actual violation of federal law by that individual.” *Id.*

The administrators’ connection here is merely a generalized responsibility for all policies at GSU (and in this case, the Copyright Policy). This general power, however, is not sufficient to establish the necessary connection between GSU and the professors’ allegedly incorrect fair use findings to meet the *Ex parte Young* exception to Eleventh Amendment immunity. Accordingly, GSU is immune from suit pursuant to the Eleventh Amendment to the U.S. Constitution and this conduct does not give rise to an *Ex parte Young* exception to such immunity.

VIII. CONCLUSION

Appellees respectfully submit that the district court's judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as modified by this Court's October 11, 2012 Order, because this brief contains 17,678 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft Word 2010, the word processing software used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 18th day of April 2013, I have electronically filed the foregoing Appellees' Brief with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will automatically send e-mail notification of such filing to all attorneys of record. Additionally, a copy of the Appellees' Brief was served via First Class Mail upon the counsel listed below.

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