

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

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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Cambridge University Press,  
Oxford University Press, Inc.,  
and Sage Publications, Inc.,

Plaintiffs-Appellants,

v.

Mark P. Becker, in his official capacity as  
Georgia State University President, et al.,

Defendants-Appellees.

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

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**REPLY BRIEF OF APPELLANTS  
CAMBRIDGE UNIVERSITY PRESS, OXFORD UNIVERSITY  
PRESS, INC., AND SAGE PUBLICATIONS, INC.**

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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
TABLE OF RECORD REFERENCES IN THE BRIEF .....	vii
PRELIMINARY STATEMENT .....	1
ARGUMENT .....	6
I.    THE COURSEPACK PRECEDENTS ARE DISPOSITIVE AND NOT DISTINGUISHABLE.....	6
II.   APPELLEES’ DEFENSE OF THE DISTRICT COURT’S FAIR-USE ANALYSIS HAS NO MERIT .....	11
A.  Factor One: Appellees’ Reliance on GSU’s Nonprofit Educational Status Is Wrong as a Matter of Law .....	11
B.  Factor Two: Appellees Misstate the Law and the Facts in Seeking To Render the “Informational” Nature of the Works Legally Dispositive .....	17
C.  Factor Three: Appellees Fail to Justify Wide Latitude for Nontransformative Educational Copying .....	21
D.  Factor Four: Appellees Cannot Negate the Undisputed Market Harm Caused by the Nontransformative Copying .....	26
III.  THE INJUNCTION SOUGHT BY THE PUBLISHERS IS NOT BARRED BY THE ELEVENTH AMENDMENT.....	30
A.  Appellees Failed To Preserve Their Eleventh Amendment Argument .....	30

B. The District Court Correctly Rejected Appellees' Eleventh Amendment Argument .....	31
C. Appellants' Proposed Injunction is Necessary and Reasonable .....	34
IV. APPELLEES' DEFENSE OF THE DISTRICT COURT'S ATTORNEYS' FEE RULING HAS NO MERIT.....	36
CONCLUSION.....	40
CERTIFICATE OF COMPLIANCE.....	42
CERTIFICATE OF SERVICE.....	43

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<i>A&amp;M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001) .....	9
<i>Am. Geophysical Union v. Texaco Inc.</i> , 60 F.3d 913 (2d Cir. 1994) .....	28, 29, 38
<i>Artisan Contractors Ass’n of Am., Inc. v. Frontier Ins. Co.</i> , 275 F.3d 1038 (11th Cir. 2001) .....	39
<i>Basic Books, Inc. v. Kinko’s Graphics Corp.</i> , 758 F. Supp. 1522 (S.D.N.Y. 1991) .....	2, 36, 38
<i>BellSouth Adver. &amp; Publ’g Corp. v. Donnelly Info. Publ’g, Inc.</i> , 719 F. Supp. 1551 (S.D. Fla. 1988), <i>aff’d</i> , 933 F.2d 952 (11th Cir. 1991) .....	24
<i>Cable News Network v. Video Monitoring Servs. of Am.</i> , 959 F.2d 188 (11th Cir. 1992) .....	38
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994) .....	<i>passim</i>
<i>Campbell v. Wainwright</i> , 726 F.2d 702 (11th Cir. 1984) .....	31
<i>Cariou v. Prince</i> , __F.3d __, 2013 WL 1760521 (2d Cir. Apr. 25, 2013) .....	12
<i>City of Mesquite v. Aladdin’s Castle, Inc.</i> , 455 U.S. 283 (1983) .....	34, 35
<i>Data Gen. Corp. v. Grumman Sys. Support Corp.</i> , 825 F. Supp. 361 (D. Mass. 1993) .....	40

<u>CASES</u>	<u>PAGE(S)</u>
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003) .....	4
<i>Ex parte Young</i> , 209 U.S. 123 (1908) .....	31, 32
<i>Grizzle v. Kemp</i> , 634 F.3d 1314 (11th Cir. 2011) .....	33
<i>Harper &amp; Row Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985) .....	<i>passim</i>
<i>Lawhorn v. Allen</i> , 519 F.3d 1272 (11th Cir. 2008) .....	30, 31
<i>Lil' Joe Wein Music, Inc. v. Jackson</i> , No. 06-20079-CIV, 2008 U.S. Dist. LEXIS 112730 (S.D. Fla. June 6, 2008) .....	39, 40
<i>Luckey v. Harris</i> , 860 F.2d 1012 (11th Cir. 1988) .....	31, 32, 33
<i>Majette v. O'Connor</i> , 811 F.2d 1416 (11th Cir. 1987) .....	31
<i>Marcus v. Rowley</i> , 695 F.2d 1171 (9th Cir. 1983) .....	20
<i>Maxtone-Graham v. Burtchaell</i> , 631 F. Supp. 1432 (S.D.N.Y. 1986), <i>aff'd</i> , 803 F.2d 1253 (2d Cir. 1986) .....	24, 25
<i>Pac. &amp; S. Co. v. Duncan</i> , 744 F.2d 1490 (11th Cir. 1984) .....	15, 19, 38
<i>Pennington Seed, Inc. v. Produce Exchange No. 299, L.L.C.</i> , 457 F.3d 1334 (Fed. Cir. 2006) .....	33

CASES

PAGE(S)

*Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*,  
533 F.3d 1287 (11th Cir. 2008) ..... 19, 20

*Pinkham v. Camex, Inc.*,  
84 F.3d 292 (8th Cir. 1996) ..... 40

*Princeton Univ. Press v. Mich. Document Servs., Inc.*,  
99 F.3d 1381 (6th Cir. 1996) ..... 2, 9, 15, 38

*Richardson v. Ala. State Bd. of Educ.*,  
935 F.2d 1240 (11th Cir. 1991) ..... 11

*Rogers v. Koons*,  
960 F.2d 301 (2d Cir. 1992) ..... 18, 21

*Salerno v. City Univ. of N.Y.*,  
191 F. Supp. 2d 352 (S.D.N.Y. 2001) ..... 33

*SCQuARE Int’l, Ltd. v. BBDO Atlanta, Inc.*,  
455 F. Supp. 2d 1347 (N.D. Ga. 2006) ..... 20

*Sikes v. Teleline, Inc.*,  
281 F.3d 1350 (11th Cir. 2002) ..... 31

*Soc’y of the Holy Transfiguration Monastery, Inc. v. Gregory*,  
689 F.3d 29 (1st Cir. 2012) ..... 9

*Sony Corp. of Am. v. Universal City Studios, Inc.*,  
464 U.S. 417 (1984) ..... 14, 27

*Summit Medical Associates, P.C. v. Pryor*,  
180 F.3d 1326 (11th Cir. 1999) ..... 33

*SunTrust Bank v. Houghton Mifflin Co.*,  
268 F.3d 1257 (11th Cir. 2001) ..... 12

CASES

PAGE(S)

*United States v. American Ry. Express Co.*,  
265 U.S. 425 (1924) ..... 31

*United States v. Concentrated Phosphate Export Ass’n.*,  
393 U.S. 199 (1968) ..... 35

*Wall Data, Inc. v. L.A. Cty. Sheriff’s Dep’t.*,  
447 F.3d 769 (9th Cir. 2006) ..... 8

STATUTES AND LEGISLATIVE MATERIAL

17 U.S.C. § 505 ..... 36, 39

17 U.S.C. § 107 ..... *passim*

28 U.S.C. § 1821 ..... 39, 40

28 U.S.C. § 1920 ..... 39, 40

H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. (1976) ..... 23

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) ..... 23

OTHER

4 Patry, William F., PATRY ON COPYRIGHT § 10.13 (2013) ..... 8, 15

## TABLE OF RECORD REFERENCES

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
167	Deposition of James Daniel Palmour taken on April 23, 2009 (excerpts)	8
261	Transcript of Proceedings	37
276	Attachment E to Pretrial Order – Stipulated Facts Filed Under Seal	7, 32
300-1	Proposed Injunctive Relief	35
300-3	Attachment 3 to Proposed Injunctive Relief – Amended Judgment and Permanent Injunction <i>Princeton University Press, et al. v. Michigan Document Services, et al.</i> Case No. 92-CV-60464-AA (BKH)	36
316	Deposition of Mark P. Becker, Ph.D taken August 22, 2011 (excerpts)	32
349	Notice of Introducing Deposition Testimony of James D. Palmour	8
358	Notice of Introducing Deposition Testimony of Mark P. Becker	32
393	Transcript of Proceedings held on May 31, 2011 Volume 10	8, 19
394	Transcript of Proceedings held on June 1, 2011 Volume 11	8, 19
395	Transcript of Proceedings held on June 2, 2011 Volume 12	10



<b><u>DOCKET/ TAB #</u></b>	<b><u>DESCRIPTION</u></b>	<b><u>BRIEF PAGE #</u></b>
396	Transcript of Proceedings held on June 3, 2011 Volume 13	35
399	Transcript of Proceedings held on May 17, 2011 Volume 1	20
400	Transcript of Proceedings held on May 18, 2011 Volume 2	20
401	Transcript of Proceedings held on May 19, 2011 Volume 3	20, 27
404	Transcript of Proceedings held on May 24, 2011 Volume 6	19-21
405	Transcript of Proceedings held on May 25, 2011 Volume 7	19
406	Transcript of Proceedings held on May 26, 2011 Volume 8	33
407	Transcript of Proceedings held on May 27, 2011 Volume 9	8
423	Order with the Court's Findings of Fact and Conclusions of Law following non-jury trial	7, 11, 18, 21-22, 27-28, 31, 37
432	Defendants' Opposition to Plaintiffs' Request for Injunctive Relief	34
436	Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Request for Injunctive Relief	35
462	Order	34
	PX 975	32

**DOCKET/  
TAB #**

DX 906

**DESCRIPTION**

**BRIEF PAGE #**

25

## **PRELIMINARY STATEMENT**

Although Appellees’ briefing seeks to avoid it, the issue presented in this appeal is whether a nonprofit educational institution enjoys a safe harbor from copyright infringement liability under the doctrine of fair use where its faculty systematically compile unlicensed digital coursepacks containing complete chapters of copyrighted scholarly books. As a matter of law, the answer is “no.” The wholesale, indisputably nontransformative copying engaged in by Georgia State University (GSU) is but a technological variant of a practice that has long been condemned by the courts in connection with paper coursepacks and that has the identical effect of depriving academic publishers of license fees and other revenue necessary to their commercial viability. To sanction GSU’s practices under the rubric of fair use on the grounds urged by Appellees – GSU’s nonprofit status and the importance of Appellants’ works as teaching tools – would undermine fundamental tenets of copyright law by effectively dedicating the works of scholarly publishers to the public domain.

The unquestionable importance of higher education does not justify GSU’s exploitation of digital technology at the expense of the publishers and authors of scholarly books. Appellants (the “Publishers”) serve the needs of higher education by producing and disseminating important works of

scholarship that fuel the learning process, including by offering content through new digital media in response to evolving market demand. Having “risked their capital to achieve dissemination,” *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1391 (6th Cir. 1996) (en banc) (citation omitted), the Publishers and their authors are entitled to protection from unlicensed takings of their works that so plainly exceed the bounds of fair use.

Fair use does not permit systematic, nontransformative takings of academic works simply because the works serve an educational purpose. Rather, it imposes on the proponent of fair use the burden of demonstrating the limited nature of the unauthorized use and that it does not simply supersede the originals but instead “adds something new, with a further purpose or different character . . . .” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). GSU’s widespread digital copying of Appellants’ works in connection with ERes and uLearn clearly fails this test.

The coursepack cases – *Princeton University Press*, 99 F.3d 1381, and *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) – firmly establish that the copying in which GSU has engaged requires consent of the book publishers whose works are used. That GSU is a nonprofit educational entity and now undertakes this copying in electronic

rather than paper form makes no difference as a matter of law. The reasoning of the prior coursepack cases, grounded in established principles of copyright law, together with the doctrine of media neutrality dictate the same outcome here.

Appellees' fair-use defense cannot survive the concession by GSU administrators and faculty that ERes readings substitute directly for coursepacks. In compliance with the coursepack cases, GSU pays permissions fees when the campus bookstore assembles excerpts from copyrighted books into paper coursepacks. Now, however, to avoid these fees, GSU urges faculty to place course readings on ERes or uLearn, for which GSU pays no permission fees to book publishers, on the fallacious premise that the same copying, now in electronic form, is fair use. This blatant end-run of copyright law not only threatens to undermine the established legal norms that have long governed coursepack copying, but it comes at a time when Appellants and other academic publishers are investing heavily in publishing and delivering content in digital form. These publishers cannot hope to recoup their investments if institutions like GSU are permitted to make exact digital copies of their works, semester after semester, for entire classes of students across the university, without compensation to the works' authors and publishers.

Appellees are not entitled to the unprecedented fair-use latitude they seek on the ground that GSU is engaged in “disseminating knowledge.” Copyright law does not encourage the dissemination of knowledge by any means; it aims to do so *through the creation and dissemination of new works of authorship*. See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (copyright “spur[s] the creation and publication of new expression”). Consistent with this policy, the Supreme Court has placed transformative value at the heart of fair use and rejected the proposition that the alleged social or cultural benefits of disseminating knowledge suffice to make a nontransformative use “fair.” See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985) (“[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work”). GSU has implicitly conceded the error in its position by paying the requisite permission fees for paper coursepacks, which serve the same educational purpose for the same nonprofit educational user as the digital coursepacks for which Appellees claim sweeping fair-use protection.

Also baseless is Appellees’ suggestion that being required to pay reasonable and customary compensation to publishers in connection with digital course readings will bring higher education to its knees. GSU’s experience with paying permissions fees for paper coursepacks without any

disruption to its educational mission belies this claim. What is more, the estimated levels of license fees that would afford GSU, its faculty, and students widespread access to well over a million copyrighted works (including on ERes and uLearn) – some \$3.75 per student per year – pales in comparison to the more than \$800 per semester GSU students already pay to cover, among other items, library, technology, and football program support fees.

The Court should not be distracted from the legal principles and undisputed facts that properly control this case by Appellees' unduly narrow focus on the fair-use status of specific acts of copying in connection with unlicensed digital coursepack creation at GSU. In any event, as addressed in Appellants' opening brief and further in Point II below, the district court's work-by-work fair use determinations are marred by numerous reversible errors.

For these reasons, explained further below as well as in Appellants' opening brief, the district court's ruling should be reversed and judgment entered in Appellants' favor.

## ARGUMENT

### **I. THE COURSEPACK PRECEDENTS ARE DISPOSITIVE AND NOT DISTINGUISHABLE**

Appellees pay scant attention to the pattern and practice of copying that gave rise to this litigation, focusing instead on the asserted fair use of each work in suit viewed in isolation. Consistent with this blindered approach, they devote only passing attention to the coursepack cases, which should control the outcome of this case. These cases addressed the unauthorized creation of hardbound university coursepacks, and both cases held that such copying is not fair use. Neither the district court nor Appellees contend these cases were wrongly decided, nor were they: the courts applied well-established fair use principles to conclude that mechanical, nontransformative copying for university coursepacks is not fair use, especially where there is an existing permissions market for such copying.

This case, involving nearly identical material facts, should be resolved identically. As in those cases, there is no dispute that GSU's digital copying of the original works is nontransformative, *see* Appellees' Br. 35, 37; that ERes and uLearn are used by faculty to create digital compilations of excerpts from copyrighted books and other works, typically a chapter or more in length, *see* Appellants' Br. 15-18, 23-26; that these anthologies are



distributed to entire classes of students, *see id.*; that no permissions fees are paid, *see id.* 18-19; that the academic market is the core market for the sale and licensing of Appellants' works, *see id.* 28-30, 78-79; Dkt#276 SF12; that GSU's unlicensed copying substitutes for licensed uses and thereby threatens what is for Appellants a "significant revenue stream," Dkt#276 SF15; and that there exist multiple convenient license options for GSU's use of Appellants' works, *see Appellants' Br.* 29-35, Dkt#423 at 74-75.

Appellees, in line with the district court, cite two immaterial factual distinctions in purporting to distinguish the coursepack cases: (i) that GSU is a nonprofit entity, not a commercial copyshop, and (ii) that GSU's copying is digital. Appellants have explained why neither distinction has any bearing on the fair-use analysis, *see Appellants' Br.* 44-46, 67, and reprise that discussion only briefly here.

Concerning the first asserted distinction, it is stipulated that when GSU produces paper coursepacks, it pays permissions fees for copyrighted content. Dkt#276 SF52. Outside this case, therefore, GSU has recognized that its nonprofit status does not immunize it from the coursepack precedents. That recognition is consistent with the case law, which establishes that the fair-use inquiry turns on the nature of the use, not on the commercial or nonprofit identity of the copier. *See Campbell*, 510 U.S. at

584-85; Appellants' Br. 51-54; 4 William F. Patry, PATRY ON COPYRIGHT § 10.13 (2013) (noting that transformative-use inquiry "focuses on the use, not the user"). Moreover, the commercial/nonprofit distinction is not as literal as Appellees suggest; the relevant inquiry is not whether the defendant charges for the copies but whether it benefits by failing to pay for the use. *See* Appellants' Br. 56 n.14. GSU plainly so benefits.

James Palmour, who was responsible for clearing permissions for coursepacks at GSU, testified that GSU students are its "customers," Dkt#349 (introducing Dkt#167 at 144-145), and both Mr. Palmour and several GSU professors testified that a major impetus to provide course readings online was the desire to cut costs and to spare students the expense of paying for course readings. *See id.* at 144:13-24.<sup>1</sup> Unauthorized copying to "save the expense of purchasing authorized copies," *Wall Data, Inc. v. L.A. Cnty. Sheriff's Dep't.*, 447 F.3d 769, 779 (9th Cir. 2006), even by a

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<sup>1</sup> *See, e.g.*, Dkt#393, Tr. 10/75:5-11 (Professor Kruger: "I try to make [the] graduate experience as comfortable and doable for them as possible. . . ."); Dkt#407, Tr. 9/166:16-19 (Professor Moloney testifying that she tries to "find ways for [the students] . . . to get what they need without paying any extra money that they don't have to"); Dkt#394, Tr. 11/107:20-23 (Professor Duffield testifying he stopped using coursepacks because he was "concerned" that as a result of the cost students "might have been deterred from purchasing coursepacks and as a result not doing readings"); Dkt#407, Tr. 9/22:21-23:5 (Professor Gabler-Hover testifying that providing assigned readings to students in a coursepack "would have been prohibitively expensive" for the students).

nonprofit or government entity, is no less a commercial use for purposes of fair-use analysis than were the activities of the copyshops in the coursepack cases. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (“repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use”); *see also Soc’y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 61 (1st Cir. 2012) (holding that first factor weighed against fair use where Archbishop “profited” from posting near-verbatim copies of religious texts on his website “by being able to provide, free of cost, the core text of the Works to members of the Orthodox faith”).

Even if GSU’s use were deemed noncommercial, that label should have no bearing on the outcome of this case, as it does not change the nontransformative, market-usurping nature of the copying. The Sixth Circuit’s observation that “[i]f copyshops across the nation were to start doing what the defendants have been doing here, [the publishers’ permissions] revenue stream would shrivel and the potential value of the copyrighted works of scholarship published by the plaintiffs would be diminished accordingly,” *Princeton Univ. Press*, 99 F.3d at 1387, applies with at least equal force to GSU’s copying, whether or not it is technically deemed “commercial.” *See also id.* at 1386 (noting that even if the

copyshop's actions were considered noncommercial, the publishers had established a diminution in the potential market value of their works).

As for the second asserted distinction – digital versus paper – Appellants have explained that there is no legally material difference between digital and paper course-reading compilations. *See* Appellants' Br. 55-56. Appellee Seamans, GSU's head librarian who sat on the committee that promulgated GSU's 2009 copyright policy, conceded that it is "immaterial what form those coursepacks might take paper versus electronic in terms of permission requirements." Dkt#395, Tr. 12/109.

Indeed, numerous GSU witnesses testified that GSU professors are providing students with free electronic course reading materials that are functionally identical to –and substitutes for – paper coursepacks. Appellants' Br. 17-18. The facts that the electronic readings are not spiral bound and that students themselves print them out rather than having the copies made by the university bookstore have no legal significance. If anything, the distribution of high-quality, readily replicated digital copies *magnifies* the deleterious impact of the systematic unlicensed copying on Appellants and other similarly situated publishers.

In short, the coursepack precedents, applied to undisputed material facts, dictate a holding that Appellees' copying practices are not fair use.<sup>2</sup>

## **II. APPELLEES' DEFENSE OF THE DISTRICT COURT'S FAIR-USE ANALYSIS HAS NO MERIT**

### **A. Factor One: Appellees' Reliance on GSU's Nonprofit Educational Status Is Wrong as a Matter of Law**

With respect to the purpose and character of the use, the district court found, and Appellees concede, that GSU's copying is not transformative. *See* Appellees' Br. 35, 37; Dkt#423 at 55, 65.<sup>3</sup> This alone should be virtually dispositive of the fair-use inquiry. Appellees' effort to minimize the significance of transformativeness by ascribing decisive weight to the "teaching" and "nonprofit educational" purpose of the copying is contrary to law.

The Supreme Court has repeatedly made clear in addressing fair use that the purpose of copyright law is advanced primarily by new works – in particular by *transformative* new works – not by the dissemination of

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<sup>2</sup> Appellees' analogy to the library reserve desk, *see* Appellees' Br. 8, is inapt: GSU professors are providing permanent copies of multiple readings simultaneously to every member of the class, not single copies available only temporarily to one student at a time.

<sup>3</sup> In addition to having no merit, the assertion by several of Appellees' *amici* that electronic course reserves can be transformative has not been raised by Appellees on appeal and thus is not property considered. *See Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240, 1247 (11th Cir. 1991).

existing works for their intended purpose. As the Court has explained, a “central purpose” of the fair-use inquiry is an evaluation of “whether *the new work* merely ‘supersede[s] the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579 (emphasis added); *see also Cariou v. Prince*, \_\_F.3d \_\_, 2013 WL 1760521, at \*5 (2d Cir. Apr. 25, 2013) (“to qualify as a fair use, a new work generally must alter the original with ‘new expression, meaning, or message’”) (quoting *Campbell*, 510 U.S. at 579)). The use is inherently unfair where, as here, it consists of nontransformative copying that “merely supplants or supersedes another [and] is likely to cause a substantially adverse impact on the potential market of the original.” *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1274 n.28 (11th Cir. 2001) (citation omitted).

These principles compel the conclusion that although supplying students with free digital copies of book excerpts may disseminate knowledge, it does not advance the purpose of copyright law (and thus is not fair use) because it is not transformative. Although the Supreme Court in *Harper & Row* acknowledged that copyright “is intended to increase and not to impede the harvest of knowledge,” *see* Appellees’ Br. 29 (quoting *Harper*

& *Row*, 471 U.S. at 545), the Court held that the court of appeals, in erroneously finding fair use, had failed to give sufficient deference to “the scheme established by the Copyright Act for *fostering the original works that provide the seed and substance of this harvest.*” 471 U.S. at 545-46 (emphasis added). The district court made the same basic error here.

Appellees, citing *Campbell*, suggest that emphasizing transformativeness (and the market harm arising from nontransformative use) amounts to an impermissible “presumption[]” that conflicts with the court’s obligation to consider and weigh all four statutory factors. *See* Appellees’ Br. 30-33. This misstates *Campbell*: the Court rejected a presumption that the *commercial nature* of a transformative use tips either the first or fourth factors against fair use. *See* 510 U.S. at 584, 591. The Court did *not* identify ascribing significant weight to transformative value or to market harm as a “presumption” or otherwise indicate that recognizing their importance is inconsistent with proper consideration of the statutory factors.

Appellees also point to the dictum in *Campbell* that transformativeness is “not absolutely necessary for a finding of fair use,” 510 U.S. at 579 (quoted in Appellees’ Br. 37). But that dictum does not help Appellees here, where there is a pattern of wholesale nontransformative use

designed to avoid paying permission fees. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) – the only example Appellees cite – the Supreme Court found fair use despite a lack of transformative value because the copying involved *private* taping of free broadcast television programs which the viewer “had been invited to witness in [their] entirety free of charge.” *Id.* at 449. By simply “time-shifting” consumption of such programs, no discernible harm was caused to the copyright owners. This case, by contrast, involves making multiple copies available to a multitude of students who do not already possess lawful copies. Such copying directly replaces copies for which payment is customarily required.

Appellees’ statutory argument also fails. Neither the preamble of section 107, which identifies “teaching” as the sort of activity that may be fair use, nor the language in section 107(1) directed to whether the use is “of a commercial nature or is for nonprofit educational purposes,” justifies the district court’s conclusion that factor one “strongly” favors GSU. *See* Appellants’ Br. 51-54.

First, the illustrative fair uses set forth in section 107 are *not*, as Appellees claim, “at the forefront of the fair use analysis,” “pre-eminent,” “at the heart of the right of fair use,” or a “favored purpose under the



statute.” *See* Appellees’ Br. 34, 36. As *Campbell* explained, the illustrative fair uses provide “only *general guidance* about the sorts of copying that courts and Congress most commonly had found to be fair uses.” 510 U.S. at 577-78 (emphasis added); *see also Harper & Row*, 471 U.S. at 561 (the illustrative examples “give *some idea* of the sort of activities the courts might regard as fair use *under the circumstances*”) (emphasis added); *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984) (“[t]he preamble merely illustrates the sorts of uses likely to qualify as fair uses” should an analysis of all four factors warrant that result). They do not provide *per se* or even presumptive protection for entire categories of uses. *See Princeton Univ. Press*, 99 F.3d at 1385 (“This language does not provide blanket immunity for ‘multiple copies for classroom use.’”).<sup>4</sup>

Instead, the statute requires “case-by-case analysis” of the four statutory factors. *Harper & Row*, 471 U.S. at 561. Specifically, section 107

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<sup>4</sup> As two former U.S. Registers of Copyright and a former General Counsel of the U.S. Copyright Office explain in their *amicus* brief, Congress devoted particular attention to the issue of photocopying for classroom use and determined that exempting from copyright control reproductions of copyrighted works for educational and scholarly purposes in section 107 was “not justified.” *See* Brief of Marybeth Peters, Ralph Oman and Jon Baumgarten (“Registers Brief”) 6-9 (quoting H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66-67 (1976)). Congress “rejected requests that nonprofit uses be presumptively fair *or otherwise more favorably treated.*” 4 William F. Patry, *PATRY ON FAIR USE* § 10:18 (2013) (quoted in Registers Brief 7) (emphasis added).

provides that the illustrative uses must be shown to be “fair uses,” a determination that “shall” include an analysis of the four statutory factors. *See* 17 U.S.C. § 107. This point was driven home in *Harper & Row*, where the Court rejected the analogous argument that a news reporting purpose – another illustrative fair use – justified finding unauthorized copying from President Ford’s memoir to be fair use based on “the substantial public import of the subject matter.” 471 U.S. at 556. The Supreme Court held that “[i]t is fundamentally at odds with the scheme of copyright” to “accord lesser rights in those works that are of greatest importance to the public.” *Id.* at 559.

By the same logic, neither the importance of the Publishers’ works for teaching, nor the “loss of convenience and access for students” that Appellees claim would result from requiring permissions payments, Appellees’ Br. 42, warrants the infringement of the Publishers’ copyright rights. To the contrary, the importance of these works for teaching – their intended purpose – militates strongly *against* the district court’s expansive conception of fair use. The scope of copyright protection is defined primarily by the need to preserve the incentives of the copyright owner, not by the convenience of the secondary user or the social value of the secondary use. *See Harper & Row*, 471 U.S. at 558 (“it should not be

forgotten that the Framers intended copyright itself to be the engine of free expression” by “suppl[ying] the economic incentive to create and disseminate ideas”). The decisions the Publishers have cited involving nonprofit educational and/or religious uses demonstrate that a nonprofit educational purpose does not, by itself, override a lack of transformative value. *See Appellants’ Br. 53-54.*

Likewise, the directive in section 107(1) to consider whether the use is “of a commercial character or for nonprofit educational purposes” does not mean that a nonprofit educational purpose is favored without regard to the specific circumstances of the use. To the contrary, the statute identifies the commercial or nonprofit educational purpose as “only one element of the first factor enquiry,” *Campbell*, 510 U.S. at 584, and, as the cases Appellants have cited illustrate, “the mere fact that a use is educational and not for profit *does not insulate it from a finding of infringement.*” *Id.* (emphasis added). Accordingly, the district court’s factor-one analysis, and Appellees’ defense of it, is flawed as a matter of law.

**B. Factor Two: Appellees Misstate the Law and the Facts in Seeking To Render the “Informational” Nature of the Works Legally Dispositive**

The district court concluded that the second fair-use factor favors fair use on the ground that all of the books at issue are “informational in nature.”

Dkt#423 at 52. Appellants showed in their opening brief that the acknowledged creativity in their scholarly works warranted finding this factor to be at least neutral and not to weigh in favor of fair use. *See* Appellants' Br. 58-59. Appellees' tortured effort to show otherwise does not withstand scrutiny.

Appellees assert that GSU faculty chose the excerpts in suit "for their factual content – not their expressive content." Appellees' Br. 42. This implausible claim fails to advance their argument for multiple reasons. First, GSU's mechanical copying involves reproducing the selected excerpts *in their entirety* – facts, ideas, and original creative expression alike. *See, e.g., Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992) ("Koons went well beyond the factual subject matter of the photograph to incorporate the very expression of the work created by Rogers.") Appellees cite no authority for the proposition that wholesale copying can be excused if the copier assertedly was only "really interested in" the uncopyrightable aspects of the content taken.

Second, the record refutes Appellees' claim that the works were of value to the GSU faculty only for their facts. In attempting to justify their copying as pedagogically necessary, several professors acknowledged the

obvious: they chose the Publishers' works because of their interpretative originality and significance:

- Professor Esposito testified that the article she assigned from the *SAGE Handbook of Qualitative Research* was “considered seminal in the field” and that the author “does a critique of how we write about the people that we research.” Dkt#404, Tr. 6/84:24-85:7.
- Professor Davis testified that she chose her readings in part because they “will help . . . to think about different ways of doing history.” Dkt#405, Tr. 7/106:12-19.
- Professor Kruger testified that the chapter she assigned contained a “unique argument” that “isn’t found anywhere else.” Dkt#393, Tr. 10/61:15-62:22.
- Professor Duffield testified that he had not identified another work that “did a better job of introducing that perspective” than the chapter he assigned. Dkt#394, Tr. 11/97:18-98:11.

As a matter of law, moreover, endorsing wholesale copying based on reductively branding scholarly works as “informational” ignores this Court’s warning against allowing too wide a berth for fair use of factual works, and it reflects a failure to appreciate the singular contribution of the Publishers’ scholarly works to GSU’s educational mission. *See Pac. & S. Co.*, 744 F.2d at 1497 (noting that courts should “take care not to discourage authors from addressing important topics for fear of losing their copyright protections”).

The law in this Circuit does not support the district court’s binary informational/creative framework. In *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1312-13 (11th Cir. 2008), the

court found the “informational” character of a manual on sales techniques insufficient on its own to tip factor two in favor of fair use. The court cited *Harper & Row* for the proposition that the category of factual works contains “gradations as to the relative proportion of fact and fantasy,” ranging from directories to “elegantly written biography” that warrant consideration in assessing the second fair use factor. *Id.* at 1312 (quoting *Harper & Row*, 471 U.S. at 563). The Publishers’ works, many of which are standards in their field and winners of scholarly and literary awards, *see* Dkt#399, Tr. 1/53-54; Dkt#400, Tr. 2/110; Dkt#401, Tr. 3/48, 63; Dkt#404, Tr. 6/84-85, are surely nearer the “elegantly written biography” end of the spectrum.

In any event, there is no legally cognizable basis for Appellees’ suggestion, *see* Appellees’ Br. 45-46 & n.9, that Appellants’ scholarly works are entitled to less weight under factor two than the cake decorating manual at issue in *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983), or the instructional business manual at issue in *SCQuARE Int’l, Ltd. v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347, 1363 (N.D. Ga. 2006). In both cases, the courts found that the informational nature of the publications did not tip factor two in favor of fair use. *See* Appellants’ Br. 58.

**C. Factor Three: Appellees Fail To Justify Wide Latitude for Nontransformative Educational Copying**

In their opening brief, Appellants demonstrated that the district court's analysis of factor three – the amount and substantiality of the portion used – was wrong as a matter of law in several respects. *See* Appellants' Br. 60-67. Appellees fail to refute any of these arguments.

The district court grounded the significant leeway it afforded GSU faculty to copy book excerpts in its determination that the copied materials “further[ed] the legitimate educational purposes of the course curriculum” and that most of the copies were “narrowly tailored to accomplish that purpose.” Dkt#423 at 71. This rationale, loosely derived from *Campbell*, has no application to nontransformative copying and would have startling implications if it did. *Campbell* recognized the need for a parodist to “‘conjure up’ at least enough” of the original as needed to make his parodic purpose clear, 510 U.S. at 588, but this concept does not apply to GSU's nontransformative copying. *See* Appellants' Br. 62-63; *Rogers*, 960 F.2d at 311 (holding that because a sculpture copied from the plaintiff's photograph was not a parody, the defendants “cannot avail themselves of . . . heightened tolerance under a parody defense”).

Contrary to Appellees' suggestion, the proposition that “the extent of permissible copying varies with the purpose and character of the use,”

Appellees' Br. 52 (quoting *Campbell*, 510 U.S. at 586-87), does not support providing wide fair-use latitude to an indisputably nontransformative use that (unlike a parody) does not advance the purpose of copyright. To adopt the district court's premise would be tantamount to excusing all manner of unlicensed, market-harming copying on the ground that the copying furthered the teacher's educational purpose – which will be true of any assigned course reading. This would, in effect, adopt the very educational safe harbor Congress rejected. *See supra*.16 n.4.

The amount of copying the district court deemed “fair” is excessive as a matter of law. To characterize the district court's allowance of, at a minimum, the copying of one chapter or 10% of the work as merely “a starting point” (*see* Appellees' Br. 47) scarcely aids Appellees' position. This so-called “starting point” – let alone the even larger (20%) takings the district court allowed where it found no digital license available (*see* Dkt#423 at 253) – is far beyond what Congress had in mind and what the courts have, accordingly, allowed. *See* Appellants' Br. 63-66. Moreover, because copyright owners are not obliged to license their works, *see id.* 74-76, and do not control the licensing rights to all of the contributions to their works, *see* Dkt#423 at 29, the purported lack of availability of a license is



not a legitimate basis for *any* unauthorized copying, let alone copying in excess of what the court otherwise (wrongly) found to be reasonable.

Appellees attack the Classroom Guidelines on the grounds that they are (i) not legally binding and (ii) set forth only minimum standards of fair use. *See* Appellees’ Br. 49-51. They fail to note, however, that the Guidelines were developed at Congress’s behest<sup>5</sup> and were expressly endorsed by Congress. *See* H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. 70 (1976) (noting that the conferees “accept [the Guidelines] as part of their understanding of fair use”); Appellants’ Br. 63. Courts, accordingly, consistently have found no fair use where the copying far exceeds the Guideline parameters. *See* Appellants’ Br. 63-64. The district court stands alone in giving the Guidelines no weight and thereby substituting its judgment for that of Congress as to the limits on unlicensed classroom copying needed to protect educational publishers.

Appellees’ claim that relying on the Guidelines “would effectively eviscerate the use of scholarly works for educational purposes,” Appellees’ Br. 48, is baseless. GSU professors remain free to use them on ERes, just as

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<sup>5</sup> *See* H.R. Rep. No. 94-1476, 94<sup>th</sup> Cong., 2d Sess., at 67 (1976) (noting that in June 1975 members of the House Judiciary Committee urged the parties to arrive at a “meeting of the minds as to permissible educational uses of copyrighted material”).

they formerly used them in paper coursepacks, and to discuss, analyze, and quote from them; they just cannot give away free copies to students semester after semester in violation of Appellants' copyright rights. There is, moreover, no record support for the assertion that payment of modest permission fees will have any adverse effect on GSU. On the other hand, depriving the Publishers of much-needed permissions fees, at a time when usage of their works is shifting to digital formats, will deprive them of revenue that enables them to continue to publish works on which the academic enterprise depends. *See* Appellants' Br. 33-35.

Appellees contend that the district court's 10%/one-chapter rule is supported by the record, *see* Appellees' Br. 52-56, by which they mean current practice at GSU. Even if true, this does not make it compatible with fair use. Calibrating fair-use safe harbors to avoid disrupting the alleged infringing conduct is circular reasoning that amounts to rubber-stamping the defendant's reason for the unauthorized copying. Settled law is otherwise. *See, e.g., BellSouth Adver. & Publ'g Corp. v. Donnelly Info. Publ'g, Inc.*, 719 F. Supp. 1551, 1561 (S.D. Fla. 1988), *aff'd*, 933 F.2d 952 (11th Cir. 1991) (standard industry practice is "not relevant to the fair use defense"); *Maxtone-Graham v. Burtchaell*, 631 F. Supp. 1432, 1436 (S.D.N.Y. 1986),

*aff'd*, 803 F.2d 1253 (2d Cir. 1986) (fair use “cannot be subject to definition or restriction as a result of any . . . trade custom or practice”).

As a last gasp, Appellees fall back on what they call the “Categorical Imperative” as a brake on faculty copying. *See* Appellees’ Br. 55-56. But this argument – which relies on unsupported assertions concerning the economics of book publishing and the hollow assurance that the faculty will “do the right thing” – has no legal grounding and, if anything, bespeaks the weakness of Appellees’ legal position.<sup>6</sup>

Finally, as for the issue of whether a separately authored, separately copyright-protected chapter in a compilation should be treated as a “work” for purposes of factor three, Appellees argue only that Appellants should have raised the argument earlier. *See* Appellees’ Br. 17-18, 48 n.11.

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<sup>6</sup> Appellees’ attempt to portray non-party CCC as endorsing current practice at GSU (*see* Appellees’ Br. 54) is also unavailing. Indeed, the CCC “White Paper” Appellees cite undermines Appellees’ effort to justify unlimited one-chapter takings. DX906. The text, which Appellees misquote and then truncate, advises *the opposite* of what the district court did. After stating that most experts advise “using a single article or chapter, *or less*, of a copyrighted work” (emphasis added) – the “or less” being omitted by Appellees – the document advises that “even brief excerpts must be viewed in the overall context of other readings offered for a course. If the total effect is to create a compilation or ‘digital coursepack’ of unlicensed materials, *the case for treating individual excerpts as fair use is significantly weakened and permission should be sought.*” *Id.* (emphasis added). The paper also states that it “violates the intent, spirit, and letter of the law to use e-reserves as a substitute for the purchase of books, subscriptions, or other materials.” *Id.*

Appellees identify no prejudice arising from a legal argument that was raised at trial and to which they had ample opportunity to respond both during the trial and in post-trial briefing. *See* Appellants’ Br. 67 n.18.<sup>7</sup>

**D. Factor Four: Appellees Cannot Negate the Undisputed Market Harm Caused by the Nontransformative Copying**

Appellants’ opening brief demonstrates the multiple legal flaws infecting the district court’s analysis of factor four – the effect of the use on the potential market for or value of the copyrighted work. *See* Appellants’ Br. 74-81. Nothing in Appellees’ brief overcomes that showing.

As an initial matter, the issue of which party has the burden of proof with respect to market harm is not one on which the Court need dwell because the undisputed facts as to market harm are overwhelming. There is no dispute as to the direct substitution of Appellees’ unauthorized copies for copies that can be readily licensed at minimal cost from the Copyright Clearance Center (CCC) or purchased or licensed from the Publishers directly. Determining that GSU’s unauthorized use will affect “the potential market for or value of the copyrighted work,” 17 U.S.C. § 107, follows

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<sup>7</sup> Properly deeming a chapter in a compilation to be a “work” for purposes of factor three would moot the question of whether the “heart of the work” was taken. In any event, while taking the heart of the work counts against fair use, the converse is not true: taking something other than the heart of the work does not favor fair use, as Appellees imply. *See* Appellees’ Br. 18.

logically from the fact that GSU's copying usurps market transactions. *See* Appellants' Br. 68-71; Dkt#423 at 79 ("If available permissions are not paid, the value of the copyright is less than it otherwise would be."). This is how both courts in the coursepack cases analyzed factor four. *See* Appellants' Br. 69-70. Appellants are not obliged to prove specific lost book sales or permissions revenue to establish market harm, as Appellees suggest, *see* Appellees' Br. 59-61, let alone demonstrate lost revenues meeting an arbitrary standard of materiality.<sup>8</sup> Straight market substitution, with its foreseeable adverse impact on Appellants' businesses if it were allowed to become widespread, *see* Appellants' Br. 32-34, 79-81, tips factor four decisively against fair use. In short, Appellants' showing of a "meaningful likelihood of future harm," *Sony*, 464 U.S. at 451, is irrefutable without regard to whether GSU's practices are deemed noncommercial.

With respect to license availability, *see* Appellees' Br. 61-63, Appellants have shown that whether any of these works was available for licensing in 2009 is irrelevant; the relevant question is whether a *licensing*

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<sup>8</sup> The court's dismissive assessment of Appellants' lost revenues is refuted by the testimony of Appellants' witnesses, *see* Appellants' Br. 32-34, including that of Oxford's Mr. Pfund, who testified that permissions fees are particularly important to publishers in that they represent "heavy money" that drops right to their bottom lines because there are no associated costs. *See* Dkt#401, Tr. 3/83:17-22.

*market* exists that would be threatened were the copying at issue to become widespread. *See* Appellants’ Br. 74-75. The various convenient license options offered by CCC, *see* Dkt#423 at 24-30, show that GSU’s use is “less fair,” Appellants’ Br. 70 (quoting *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1994)), by demonstrating the lack of any justification for GSU’s rampant unauthorized copying. This argument is not “circular,” Appellees’ Br. 64, for the reasons explained in *Texaco*. *See* 60 F.3d at 930 and n.17.

It is worth noting, moreover, that not a single GSU professor investigated the possibility of licensing digital book excerpts or considered lost licensing fees as an element of market harm, nor did GSU budget a penny for permissions fees for digital course readings, *see* Appellants’ Br. 18-20, 22, 75-76 – all of which reveals Appellees’ license-availability critique to be completely disingenuous. In any event, license availability of particular works *in 2009* has no logical bearing on Appellants’ entitlement to a prospective injunction prohibiting GSU’s continued market circumvention.

The “adamant” testimony of several professors that they would not have used Appellants’ materials if permissions fees were required, *see* Appellees’ Br. 63, cannot justify unauthorized takings, nor does it negate a finding of market harm. What matters legally is not the likelihood that

professors will forego readings based on cost but the right of the Publishers to be compensated *should professors choose to copy their works* – the market in question indisputably being an existing market that the Publishers have the right to exploit. *See Texaco*, 60 F.3d at 930.

Similarly breathtaking is the assertion that “because the students have already paid hundreds of dollars for textbooks,” Appellees’ Br. 63, professors ought to be able to provide copies of the Publishers’ works for free. *Id.* Copyright law allows no such arbitrary determinations by users as to which – or how many – copyright owners deserve compensation for exploitation of their works.

Nor does the record support Appellees’ assertion that GSU’s educational mission will be impaired if it is not allowed to continue current practice. The undisputed evidence is that GSU faculty and students could access (including via ERes) some 1.3 million copyrighted works for an annual student fee of some \$3.75 (or some \$114,000 per annum across GSU’s student body). *See Appellants’ Br. 32, 34.* These modest sums contrast starkly with student assessments of more than \$800 per semester for library, technology, and football program fees and a more than \$11 million GSU library acquisitions budget, including some \$4 million for subscriptions to online journals. *Id.* 34-35. These facts underscore the

impermissibility of GSU's ongoing discrimination against book publishers and their authors.

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Under a correct application of the fair-use factors, as described above and in Appellants' opening brief, the challenged copying practices at GSU are not fair use either as to each work or considered in the aggregate. Three of the four statutory factors weigh heavily against fair use, and the fourth (factor two) is at worst neutral and, in any event, not determinative. The district court's contrary conclusion is wrong as a matter of law and should be reversed.

### **III. THE INJUNCTION SOUGHT BY THE PUBLISHERS IS NOT BARRED BY THE ELEVENTH AMENDMENT**

#### **A. Appellees Failed To Preserve Their Eleventh Amendment Argument**

Appellees argue that injunctive relief in this case is barred by the Eleventh Amendment. *See* Appellees' Br. 77-78. However, because this argument is outside the scope of Appellants' brief and was not raised by the Appellees on cross-appeal, it is not properly preserved for appeal. As this Court explained in *Lawhorn v. Allen*, 519 F.3d 1272, 1285 n.20 (11th Cir. 2008),

although a party may raise any argument in support of a judgment, a party who has not appealed may not bring an



argument in opposition to a judgment or attack the judgment in any respect, *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924), or “hitch a ride on his adversary's notice of appeal” to “enlarge his rights under the judgment or diminish those of the opposing party.” *Campbell v. Wainwright*, 726 F.2d 702, 704 (11th Cir. 1984). By failing to file a cross-appeal, Lawhorn failed to preserve these issues for appeal.

*See also Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1367 n.44 (11th Cir. 2002), *overruled on other grounds by* 553 U.S. 639 (2009).

The Eleventh Amendment is no exception to the cross-appeal rule. The Court need not consider (and should ignore) Eleventh Amendment arguments not properly raised on cross-appeal. *See Majette v. O'Connor*, 811 F.2d 1416, 1419 n.3 (11th Cir. 1987) (refusing to consider sovereign immunity defense “[b]ecause th[e] issue was not raised as a cross-appeal”).

**B. The District Court Correctly Rejected Appellees’ Eleventh Amendment Argument**

Even if Appellees’ Eleventh Amendment defense were properly before the Court, it has no merit for the reasons stated by the district court. *See* Dkt#423 at 10-18. All that is required to obtain prospective injunctive relief under the *Ex parte Young* exception to Eleventh Amendment immunity is that “‘by virtue of his office, [the named official] has some connection’ with the . . . conduct complained of.” *Luckey v. Harris*, 860

F.2d 1012, 1015-16 (11th Cir. 1988) (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). The district court correctly found this standard met here.

Appellees admit they have the authority and/or duty to ensure that GSU complies with federal copyright law. *See* Dkt#358 (introducing Becker deposition testimony, Dkt#316 at 26:15-27:6, 88:6-15) (GSU President testifying that the Provost and Board of Regents are responsible for ensuring that use of the electronic reserves systems complies with federal copyright law and that it is within his authority to “direct the faculty at the university to comply with federal copyright law”); Dkt#276 SF42 (GSU Provost is responsible for, *inter alia*, “correcting noncompliance with federal copyright law”); *id.* at SF45, 47; PX975 at Nos. 9, 18-19. Appellees also concede their authority to direct library staff to block access to or remove specific infringing materials on the ERes system if required to do so by court order and otherwise to ensure compliance with an injunction. *See* Dkt#276 SF47-49; PX975 at Nos. 3, 6-9, 12, 25-28, 59-61.

Appellees claim that “[n]one of them personally scanned, copied, or distributed the . . . works at issue” and “were not involved in selecting the professors’ course reading materials” or “completing the professors’ fair use checklists,” Appellees’ Br. 76, but such personal involvement “is not a necessary condition of injunctive relief against state officers in their official

capacity.” *Luckey*, 860 F.2d at 1015. Rather, “[a]ll that is required is that the official be responsible for the challenged action.” *Id.* at 1015-16.

As the district court found, Appellees “are in a position to do something meaningful to stop the violation” of federal law. Dkt#406, Tr.8/53. That is all the law requires. *See Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011) (holding that a state official is subject to suit in his official capacity “when his office imbues him with the responsibility to enforce the law or laws at issue in the suit”); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999) (holding that plaintiffs properly sued Alabama’s Governor and Attorney General and the District Attorney because they were authorized to enforce the criminal liability provisions of the challenged statute); *Salerno v. City Univ. of N.Y.*, 191 F. Supp. 2d 352 (S.D.N.Y. 2001).<sup>9</sup>

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<sup>9</sup> *Pennington Seed, Inc. v. Produce Exch. No. 299, L.L.C.*, 457 F.3d 1334 (Fed. Cir. 2006), does not bind this Court and does not, in any event, support a contrary result. That case was decided on a motion to dismiss, and the court found that the plaintiffs’ attempt to establish the defendants’ connection to patent infringement was marred by reliance on materials and argument outside the four corners of the complaint. 457 F.3d at 1342 n.4. Here, the pertinent facts concerning the role of each Appellee in overseeing ERes are conceded.

**C. Appellants' Proposed Injunction Is Necessary and Reasonable**

The injunction entered by the district court – which merely requires GSU to maintain copyright policies consistent with the court's orders, Dkt#462 at 11 – will not adequately ensure compliance with copyright law. GSU's gamesmanship throughout this litigation in seeking to avoid a ruling on the merits confirms the need for judicial supervision. After having adopted a new policy in 2009 in an effort to moot the case and then relying on a groundless Eleventh Amendment defense to evade liability for the continued infringement fostered by the new policy, GSU responded to the district court's request that the Publishers submit a proposed injunction consistent with the court's May 2012 order by adopting yet another revised copyright policy and arguing again that it mooted the need for an injunction. *See* Dkt#432 at 13. The "revised" policy (which the district court implicitly endorsed) consists of superficial tweaks to GSU's Fair Use Checklist, notably the inclusion under "Factor 3" of the court's 10%/one-chapter rule – which, even if followed, will permit continued rampant infringement of the Publishers' works in the form of unauthorized digital coursepacks. *See id.*

Ex. B.

As the Supreme Court recognized in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1983), it is "well settled that a defendant's

voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” For a court to decline to enter an injunction on mootness grounds, the defendant must present evidence that makes “it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *United States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968). The evidence here shows the opposite. The slight changes made by GSU do not alter either the flawed design of the checklist or the proven inevitability with which the checklist produces erroneous affirmative fair-use determinations. *See* Appellants’ Br. 19-22. Indeed, even works found to be infringing by the district court would be deemed fair use under Appellees’ modified checklist. *See* Dkt#436 at 4-6.<sup>10</sup>

An injunction like that proposed by the Publishers (Dkt#300-1) is plainly warranted. The Publishers proposed injunction incorporates the brevity and “cumulative effect” sections of the Classroom Guidelines – thus

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<sup>10</sup> The district court failed to address the efficacy of the Fair Use Checklist notwithstanding the voluminous trial testimony demonstrating the futility of faculty efforts to apply it. Indeed, Appellees’ copyright compliance expert Kenneth Crews testified that he would never advise using such a checklist as the sole litmus test for fair-use determinations. *See* Dkt#396, Tr. 13/104:25-105:14. Dr. Crews also acknowledged a number of salient differences from the copyright policies at Columbia University which render Appellees’ implication that they were mirroring Columbia’s practices materially misleading. *See id.* at 98:15-123:21.

limiting GSU's ability to replace licensed coursepacks with unlicensed (but otherwise identical) digital compilations of course reading material – while pragmatically dispensing with the “spontaneity” requirement. *Id.* It is less restrictive than the injunctions entered in the coursepack cases, which limited unlicensed copying to a single page. *See, e.g., Basic Books, Inc. v. Kinko's Graphics Corp.*, No. 89 Civ. 2807, 1991 WL 311892 (S.D.N.Y. Oct. 16, 1991); Dkt# 300-3. It also includes provisions for monitoring and certifying GSU's copyright compliance – elements absent from GSU's current policy yet essential given Appellees' history and stated desire to assign responsibility for copyright compliance to the faculty. *See Appellees' Br. 76.*

#### **IV. APPELLEES' DEFENSE OF THE DISTRICT COURT'S ATTORNEYS' FEES RULING HAS NO MERIT**

The predicate for the district court's award of attorneys' fees and costs to Appellees – the finding that they were the “prevailing party” under section 505 of the Copyright Act, 17 U.S.C. § 505 – disappears if the court's erroneous merits ruling is reversed. However, Appellants have identified additional errors relating to the fee award which the Court could reach. *See Appellants' Br. 84-86.* Appellees' response on these points misrepresents the proceedings below as well as the law concerning recovery of expert witness fees.

Putting aside (i) the inappropriateness of using a tally of successful versus unsuccessful claims rather than whether an injunction was obtained as the measure of success and (ii) the district court's clear legal error in finding only five infringements, *see* Appellants' Br. 84-85, it is deliberately misleading for Appellees to hold up those five infringements relative to thousands of course offerings at GSU as a gauge of either GSU's copyright compliance or of the Publishers' success. *See* Appellees' Br. 72. The infringement claims that were tried involved works by only three publishers, suing on behalf of an entire academic publishing industry whose copyrights were being systematically trampled at GSU. The suggestion that all of the copying that was not specifically litigated was fair use ignores the express understanding that the litigated claims were representative of ongoing conduct, *see* Dkt#261, Tr. 9-10, 13-14, and it flies in the face of a record showing that GSU has never paid permissions fees for the use of book excerpts on ERes or uLearn. *See* Appellants' Br. 18. Moreover, many of Appellants' claims were rejected for reasons such as the inability to produce a contributor contract that had nothing to do with the fairness of the use. *See, e.g.*, Dkt#423 at 142.

Appellees accuse the Publishers of a "dogged refusal to limit the scope of their claims" that "needlessly and significantly increas[ed] GSU's

costs.” Appellees’ Br. 74. In fact, the Publishers proposed trying a much more limited sample of infringement claims as illustrative of the systematic infringement of the Publishers’ copyrights through the use of unlicensed digital coursepacks.<sup>11</sup> It was *Appellees*, seeking to deflect this focus in favor of work-specific infringement claims, who refused to adopt this more efficient approach, and the district court adopted GSU’s position. *See* Appellants’ Br. 10. In the end, the court’s entry of an injunction based on its finding of only five infringements implicitly validated the Publishers’ proposed approach.

Within the framework of a case quite different than the one the Publishers brought (including the court-ordered 2009 time frame, for which the Publishers were required to identify all claimed infringements under a policy adopted after they sued), the Publishers vigorously pursued the claims they deemed valid and conscientiously dropped those they reasonably

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<sup>11</sup> Such an approach has been common in copyright infringement litigation. *See, e.g., Pac. & S. Co.*, 744 F.2d at 1499 n.17 (rejecting argument that injunction could not sweep more broadly than the single work named in the suit); *Cable News Network v. Video Monitoring Servs. of Am.*, 959 F.2d 188 (11th Cir. 1992) (upholding injunction over all plaintiff works based on single infringed work); *Texaco*, 60 F.3d at 915 (case tried based on copying of eight articles by a single Texaco scientist); *Princeton University Press*, 99 F.3d at 1384-85 (addressing infringement of six representative scholarly books); *Basic Books*, 758 F. Supp. at 1526 (twelve instances of infringement alleged).



determined would be difficult to prove. They could not have ascertained in advance the success rate of these claims under the district court's novel approach to matters such as copyrightability and license availability, as Appellees, with the benefit of hindsight, suggest. Good-faith defense of copyright rights should not be burdened with the fear of being penalized by such second-guessing.

Finally, Appellees' attempt to justify the district court's determination that Dr. Crews' expert witness fees were properly awarded as "necessary and incidental" to the attorney's fees, *see* Appellees' Br. 75, fails. The court's ruling is plainly contrary to *Artisan Contractors Ass'n of Am., Inc. v. Frontier Ins. Co.*, 275 F.3d 1038 (11th Cir. 2001), which held that section 505 does not override the limits on recovery of expert witness fees specified in 28 U.S.C. §§ 1920 and 1821. *Artisan Contractors* cannot be circumvented by simply relabeling Dr. Crews' work as an element of attorneys' fees.

Appellees state misleadingly that "[s]uch 'necessary and incidental' fees are routinely awarded" as part of attorneys' fee awards, Appellees' Br. 75, but none of the cases they cite held that *expert witness fees* can be awarded as part of attorneys' fees. To the contrary, in *Lil' Joe Wein Music, Inc. v. Jackson*, No. 06-20079-CIV, 2008 U.S. Dist. LEXIS 112730 (S.D.

Fla. June 6, 2008), the court held that litigation expenses incurred by attorneys and normally charged to the client, such as phone charges, should be awarded as part of the attorney's fee award. The court cited *Pinkham v. Camex, Inc.*, 84 F.3d 292 (8th Cir. 1996), in which the Eighth Circuit held that it was harmless error to award attorney out-of-pocket expenses as costs under section 1920 "since these expenses, *unlike the expert witness fees*, were properly compensable as part of the attorney's fees." 2008 U.S. Dist. LEXIS 112730, at \*44 (emphasis added); *see also Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 361, 366 (D. Mass. 1993) (noting parties' agreement that expert witness fees in excess of the statutory minimum established by 28 U.S.C. §§ 1920 and 1821 "*are not recoverable under federal law*") (emphasis added).

### **CONCLUSION**

For the reasons explained above and in Appellants' opening brief, the district court's rulings as to (i) appropriate fair-use parameters for online course reading systems at GSU and (ii) Appellees' entitlement to attorneys' fees and costs must be reversed and the case remanded for the limited purpose of ordering an injunction consistent with that proposed by Appellants below.

Dated: May 20, 2013.

*s/ John H. Rains IV*

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**CERTIFICATE OF COMPLIANCE**

I certify that this Brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(A). This Brief contains 8,957 words.

I further certify that this Brief will be promptly uploaded in electronic format to the Court's website, pursuant to 11th Cir. R. 31-5(c).

This 20<sup>th</sup> day of May, 2013.

*s/ John H. Rains IV*  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on this 20th day of May, 2013, I have electronically filed the foregoing **APPELLANTS' REPLY BRIEF** with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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