

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

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

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

The following trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations are known to have an interest in the outcome of this case or appeal:

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## **STATEMENT REGARDING ORAL ARGUMENT**

Appellants respectfully request that this case be scheduled for oral argument. This case involves an issue of enormous significance to educational publishers such as Appellants and to colleges and universities across the country: To what extent does the copyright fair-use doctrine allow Georgia State University (GSU) to copy and distribute to students substantial excerpts of copyrighted books via online course reading systems without permission from or payment to the copyright owners? The district court found that GSU’s nonprofit educational status and the nonprofit educational purpose of the copying entitled GSU to wide fair-use latitude, rejecting other courts’ holdings that the same nontransformative copying, albeit in paper “coursepack” form, does not constitute fair use. Oral argument will assist the Court in determining, *inter alia*, the validity of the distinction drawn by the district court between GSU’s digital copying and that involved in the paper coursepack cases, as well as the consequences of drawing such a distinction for Appellants and for fundamental principles of copyright law.

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PX0608	Fair Use Checklist	21
PX0613	Fair Use Checklist	21
PX0629	Fair Use Checklist	21
PX0639	Fair Use Checklist	21
PX0643	Fair Use Checklist	21
PX0647	Fair Use Checklist	21

<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
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PX0660	Fair Use Checklist	21
PX0661	Fair Use Checklist	21
PX0662	Fair Use Checklist	21
PX0675	October 31, 2006 Email string between J. Palmour and N. Kropf re: Spring course pack (Pl. Ex. 48, Palmour Dep.)	17-18
PX0938	Fair Use Checklist	21
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<u>DOCKET/ TAB #</u>	<u>DESCRIPTION</u>	<u>BRIEF PAGE #</u>
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DX0428	Fair Use Checklist	21
DX0429	Fair Use Checklist	21
DX0464	Fair Use Checklist	21
DX0473	Fair Use Checklist, Marai Davis, 11/29/10, HIST 7010, Fall 2009, "Ideology and Race in American History"	21
DX0474	Fair Use Checklist	21
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## **STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION**

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This Court has jurisdiction pursuant to 28 U.S.C. § 1291 over this direct appeal from a final order on the merits and a final judgment of the District Court of the Northern District of Georgia. Jurisdiction was proper in the district court pursuant to 28 U.S.C. § 1338(a).

## **STATEMENT OF THE ISSUES**

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

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

3. Did the district court err in holding that Appellees were the "prevailing party" and entitled to attorneys' fees and costs even though this lawsuit resulted in an injunction following findings that Appellees infringed certain of Appellants' copyrights?

## **PRELIMINARY STATEMENT**

This lawsuit involves the application of well-established copyright principles to a course of conduct that is, at its core, uncontested, and, when properly evaluated, legally indefensible. Its focus is upon GSU's decade-long practice of providing its 30,000 graduate and undergraduate students, via online distribution systems (the "ERes" and "uLearn" systems), with

copies of copyrighted course reading materials, including numerous excerpts from books published by Appellants, without permission from or payment to the copyright owners of those works. The practice has been widespread and pervasive, involving, for each academic term, faculty-selected takings from thousands of copyrighted works for hundreds of courses. Within a given course, these takings often comprise a substantial portion, and in some cases all, of the assigned readings.

The effect of these practices has been to create digital anthologies or “coursepacks” of unlicensed course reading materials. Since at least 2003, not a single license (“permissions”) dollar has been paid by GSU for the right to use book excerpts in this fashion. The direct supplanting of book sales and licensing fees as a result of this practice is obvious, as is the threat to these academic publishers’ core, higher-education market and hence to their ability to continue to publish scholarship on which schools like GSU depend. GSU’s efforts to avoid paying the customary price for use of Appellants’ books come after Appellants have gone to great lengths to make electronic access to their works for educational use more convenient and affordable than ever before; indeed, every one of Appellants’ works the unauthorized taking of which was analyzed by the district court has been

available not only for purchase but also for licensing by GSU in electronic format for a reasonable fee.

What makes GSU's disregard for copyright law in relation to the creation and dissemination of digital coursepacks even more remarkable is its stark contrast to GSU's legally compliant conduct when it supplies the same readings in physical form. It is stipulated that when GSU faculty make *precisely the same* uses of excerpted copyrighted books to create *paper* coursepacks for students, GSU *has* paid permissions fees to Appellants and the other publishers of those works. This practice comports with settled law establishing that it is *not* fair use to copy and distribute for free to entire classes of students what amount to custom anthologies of copyrighted reading materials; that such practice poses a substantial risk to academic publishing; and that copyright law instead requires the purchase or licensing of the works. The fact that the use serves an educational purpose does not alter this requirement. Indeed, because the academy is Appellants' core market, endorsing an educational fair-use safe harbor would directly undermine their businesses.

Appellees' disregard of publishers' copyright rights in relation to the creation of *digitized* coursepacks reflects the mistaken belief that the use of

an electronic (versus paper) medium of copying and dissemination implicates different legal rules. It does not. As this Court, as well as the Supreme Court, has held, copyright law is “media neutral.” *Greenberg v. Nat'l Geographic Soc'y*, 533 F.3d 1244, 1257 (11th Cir. 2008) (en banc) (citing *New York Times Co. v. Tasini*, 533 U.S. 483, 502 (2001)). The law does not support the proposition that replacing licensed paper coursepacks with unlicensed digital coursepacks transforms the legal obligation to secure licenses into a sweeping fair-use safe harbor. Both forms of taking are intended to benefit the same parties (professors providing course readings to students); have the identical, nontransformative purpose (substituting for consumption of the originals); and threaten the same impact on Appellants and other academic publishers (displacing sales and permissions income on which they – and their authors – depend to ensure the continued creation and dissemination of scholarly works). The extensive record evidence that GSU and its faculty have recognized ERes and uLearn as direct substitutes for paper coursepacks underscores this reality.

Despite a largely stipulated factual record, the district court failed to recognize the direct parallel between GSU’s physical and digital coursepack practices. In rejecting the paper coursepack precedents as inapposite and

instead limiting its focus to a series of discrete, work-by-work fair-use assessments, the court missed the big picture: GSU’s systematic, institution-wide practice of replacing licensed paper coursepacks with unlicensed digital course-reading compilations. This failure to see the forest for the trees led the court to commit numerous errors of law that warrant reversal.<sup>1</sup>

In finding an unprecedented amount of verbatim copying to be fair use, the district court gave dispositive weight to the nonprofit educational nature and purpose of GSU’s conduct. In doing so, the court misread section 107 of the Copyright Act, which creates no such blanket protection. It also misapprehended the role of fair use in copyright law. Fair use is intended to be a narrow exception to copyright protection that primarily allows unlicensed uses of copyrighted works that are *transformative* – i.e., that serve a socially productive purpose as opposed to merely displacing the market for the original.

The district court recognized that Appellees’ takings represent nontransformative copying that presents the risk of lost sales and licensing

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<sup>1</sup> Because the district court applied its legal conclusions as to fair use to all the works for which it reached the fair-use defense, Appellants’ demonstration that those conclusions were erroneous applies to all such works.

income to Appellants. But the court treated transformativeness as irrelevant in view of GSU’s nonprofit educational mission. This error led the court to give insufficient weight to the evidence of the likely market harm caused by GSU’s large-scale unlicensed takings. The court’s resulting fair-use framework turns a blind eye to what should have been dispositive considerations – the nontransformative, market-supplanting nature of GSU’s conduct – and instead endorses the bulk of GSU’s copying as lawful so long as it falls within expansive quantitative limits that far exceed what Congress and other courts have found to be the outer bounds of fair use.

Although the district court purported to limit its decision to GSU’s digital copying activities, the practical impact of its ruling, if left to stand, would be far broader. It invites universities nationwide to accelerate the migration of coursepack creation from paper to electronic format, thereby avoiding the established obligation to obtain permission for the former. Such a result would risk undermining the efficient licensing markets that have evolved to serve the needs of academic users for both paper and electronic copies and, as a consequence, would threaten the ongoing ability of academic publishers to continue to create works of scholarship – to the detriment of the advancement of learning that is the object of copyright law.

The district court compounded its substantive legal errors by declaring Appellees to be the “prevailing party” and entitled to attorneys’ fees and costs based on a tally of the court’s (erroneous) rulings as to the individual infringement claims. Even applying its flawed reasoning, the court found five instances of infringement and that Appellees’ copyright policies enabled those infringements, and it entered an injunction directing GSU to conform its policy to the court’s rulings. All else to one side, assessing attorneys’ fees and costs against Appellants in such circumstance is reversible error that threatens to chill copyright owners who, like Appellants, choose vigorously to pursue good-faith copyright claims, from seeking to vindicate their rights.

## **STATEMENT OF THE CASE**

### **I. COURSE OF PROCEEDINGS BELOW**

Cambridge University Press (“Cambridge”), Oxford University Press, Inc. (“Oxford”), and SAGE Publications, Inc. (“SAGE”) (collectively, “Publishers” or “Appellants”), leading academic publishers, brought this copyright infringement action on April 15, 2008, against a number of GSU officials in their official capacities, asserting claims for direct, contributory, and vicarious infringement and seeking declaratory and injunctive relief

against an ongoing pattern and practice of unauthorized copying and distribution of substantial excerpts of their copyrighted academic books in connection with online course reading systems operated by GSU. Dkt#1. An amended complaint filed on December 15, 2008, added as defendants the members of the Board of Regents of the University System of Georgia in their official capacities (together with the GSU officials, the “GSU Defendants”). Dkt#39. Among the affirmative defenses the GSU Defendants asserted in their Answer was fair use. Dkt#14.

On February 17, 2009, just before depositions were to start, GSU announced a new copyright policy in an effort to moot the litigation (the “2009 Policy”). The new policy delegated to GSU instructors the determination of whether contemplated digital course readings would qualify as fair use and thus not require permission of the copyright owners. The tool designed for these determinations was a “Fair Use Checklist” that faculty were required to complete. JX4.

After discovery, both sides filed summary judgment motions. Dkt##142, 160, 165, 185-87, 206, 210, 212-13, 218. While the cross-motions were pending, the district court, on its own initiative, ordered the Publishers to submit a list of all infringements alleged to have occurred

during the three academic terms immediately following GSU’s implementation of the 2009 Policy (the three-week 2009 “Maymester,” “2009 Summer,” and “2009 Fall” terms). Dkt##226, 227. In response, the Publishers identified 126 claimed infringements, and the GSU Defendants responded with various challenges relating to the Publishers’ ownership and registration of the identified works. Dkt##228, 230.

On September 30, 2010, the district court denied the Publishers’ summary judgment motion and granted the GSU Defendants’ motion as to the direct and vicarious infringement claims, leaving the contributory infringement claim to be tried. Dkt#235. The court ruled that only infringements occurring after implementation of the 2009 Policy were actionable and required the Publishers to make the novel showing that the 2009 Policy resulted in “ongoing and continuous misuse of the fair use defense” by proving “a sufficient number of instances of infringement of Plaintiffs’ copyrights to show such ongoing and continuous misuse.” *Id.* at 30. On December 28, 2010, the court granted the Publishers’ motion for reconsideration of the dismissal of their direct infringement claim and reinstated Count I of the First Amended Complaint, albeit construing it as an “indirect” infringement claim. Dkt#249.

Because the Publishers sought only prospective injunctive relief – in particular a prohibition on the use of Publishers’ and other works to create unlicensed digital anthologies of course readings – and not damages for past infringements, the Publishers proposed streamlining the trial by trying a small representative sample of infringement claims within the context of GSU’s overall ERes/uLearn practices. Dkt#268. The GSU Defendants refused to consent, and the court denied the Publishers’ motion. Dkt#269. This necessitated a three-week bench trial, which focused, at the court’s direction, on each alleged instance of infringement viewed in isolation rather than on the pattern and practice of past and ongoing infringement of which these takings were a part.<sup>2</sup>

At the close of the Publishers’ case, the court granted the GSU Defendants’ motion for judgment on the contributory infringement claim

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<sup>2</sup> This approach led the court to exclude numerous evidentiary proffers by the Publishers designed to establish, *inter alia*, the persistence and scope of GSU’s unlicensed takings prior to and after 2009, as well as the unauthorized copying of works of other publishers combined with works of the plaintiff Publishers to create digital coursepacks. *See, e.g.*, Dkt#401, Tr.3/79-80; Dkt#402, Tr.4/106-109; Dkt#403, Tr.5/121-123; Dkt#405, Tr.7/88-89, 118-119; Dkt#406, Tr.8/17-18, 154-155; Dkt#407, Tr.9/17-18; Dkt#394, Tr.11/10. (Trial transcripts are cited using the docket entry (Dkt#401), transcript volume number (Tr.3), and page numbers (/79-80).)

and denied their motion to dismiss on sovereign-immunity grounds.

Dkt#406, Tr.8/52-56.

On May 11, 2012, the district court issued a 350-page decision applying its conception of fair-use principles to 74 claimed infringements from 64 of Plaintiffs' works. Dkt#423. The court rejected 26 of those claims without addressing the issue of fair use, focusing instead on purported technical deficiencies relating to such matters as ownership and registration, as well as on instances of what it found to be *de minimis* access to the work.

Regarding the remaining 48 claims, the court found that five were not fair use because too much had been copied. The remaining 43 claims were held to be fair uses because the copying had occurred in a non-profit educational setting and met the following criteria established by the court without any supporting authority:

- As to 32 takings, the copying constituted less than 10% of a book with fewer than 10 chapters;
- As to three takings, the copying constituted one chapter or less from a book with ten or more chapters;

- As to two takings, the permissions revenues earned from other users of the works were, in the court’s estimation, too small to establish substantial market harm from GSU’s unlicensed use; and
- As to six takings, there was no evidence that digital licenses for the work were available in 2009.

The court found that the five infringements it identified were “caused” by the 2009 Policy’s failure to limit copying to “decidedly small excerpts” (as defined by the court); to prohibit the use of multiple chapters from the same book; or to “provide sufficient guidance in determining the ‘actual or potential effect on the market or the value for the copyrighted work.’”

Dkt#423 at 337-39. The parties submitted briefing on proposed injunctive relief. Dkt##426, 432, 436, 440.

On August 10, 2012, the court issued an order providing for declaratory and injunctive relief, essentially limited to ordering the GSU Defendants to “maintain copyright policies for Georgia State University which are not inconsistent” with the court’s May 11 and August 10, 2012 orders. Dkt#441 at 11. The court also held that the GSU Defendants were the “prevailing party” under 17 U.S.C. § 505 because they “prevailed on all but five of the 99 copyright claims which were at issue” when the trial

began. *Id.* at 12. This conclusion led the court to find that the GSU Defendants were entitled to reasonable attorneys' fees and costs because the Publishers' "failure to narrow their individual infringement claims significantly increased the cost of defending the suit." *Id.* at 14.

On September 10, 2012, the Publishers filed a notice of appeal from, *inter alia*, the district court's May 11 and August 10, 2012 orders. Dkt#449. On September 30, 2012, the district court awarded the GSU Defendants \$2,861,348.71 in attorneys' fees and \$85,746.39 in costs and entered a final judgment that also incorporated its prior rulings on the merits. Dkt#462 at 12. On October 2, 2012, the Publishers timely filed a notice of appeal from the September 30 order and from all previously appealed orders. Dkt#465. On December 18, 2012, this Court consolidated the appeals.

## **II. STATEMENT OF FACTS**

### **A. Digital Distribution of Course Reading Material at GSU**

#### **1. GSU's Recognition of Copyright Requirements in Creating and Disseminating Paper Coursepacks**

For more than twenty years, required reading for university students nationwide has included paper (i.e., "hardcopy") "coursepacks" – stipulated here to be "excerpts of copyrighted works – typically photocopied from various books and/or journals – which are compiled by a professor into a

custom anthology of course readings that students can purchase.” Dkt#276 SF50.<sup>3</sup> Coursepacks expose students to a variety of works without requiring the student to purchase the entire book or journal from which the excerpts were drawn.

Two key decisions from the 1990s, *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc), and *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) (the “Coursepack Cases”), established that the nontransformative, verbatim copying inherent in the preparation of coursepacks, with the resulting prospect of significant market harm to the authors and publishers of the materials, did *not* constitute fair use. Significantly, GSU stipulated that it has for years abided by these requirements for paper coursepacks, routinely seeking permission from copyright holders and paying the requisite fees when printing and selling paper coursepacks. Dkt#276 SF51-52; Dkt#349 (introducing Palmour deposition testimony, Dkt#167, at 16:14-17:7, 24:17-25:6, 30:17-31:14, 34:6-15, 147:16-148:2). GSU has never asserted that this

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<sup>3</sup> The Stipulated Facts were docketed under seal at #276; a public version was docketed at #278-3; citations to the Stipulated Facts are abbreviated “Dkt#276 SF\_.”

longstanding practice at GSU has impaired its educational mission or operations or caused its students economic hardship. Dkt#397, Tr.14/54.

## **2. GSU's Contrary Practice in Creating Digital Coursepacks**

In recent years, GSU professors have largely abandoned paper coursepacks in favor of supplying students with the same course reading materials in digital form. Notwithstanding the functionally identical use of the same copyrighted content, GSU concluded that permission fees were no longer required when its course readings migrated from paper to digital format. GSU has thus facilitated and encouraged, through university computer systems and websites, rampant unauthorized digital distribution of copyrighted material, which has deprived the affected Publishers of either permissions or sales revenue. *See, e.g.*, Dkt#276 SF53-59, 72-81; DX111 (ERes/uLearn stipulations); Dkt#402, Tr.4/94-96, 104-106; Dkt#349 (introducing Dkt#167 at 16:14-17:7, 128:16-129:25, 134:17-135:7, 139:1-9, 144:13-145:5).

GSU's on-campus systems for the electronic distribution of course reading material are known as "ERes" and "uLearn." ERes (short for "E-Reserves") is an Internet website hosted on GSU computer servers that is devoted solely to distributing digital copies of course reading material to

GSU students, typically in portable document format (pdf). Dkt#276 SF43, 53-57; DX111 ¶¶ 1-2, 21. GSU students are given access to the ERes webpages specific to their courses, where they can find the reading assignments for the course listed by title. Dkt#276 SF54; DX111 ¶ 3; Dkt#402, Tr.4/112-113. Each title is accessible by hyperlink; when clicked, the student receives a copy of the excerpt that can be viewed, printed, downloaded and/or saved to the student's computer, and retained indefinitely. Dkt#276 SF55-57; DX111 ¶ 21; Dkt#402, Tr.4/113-117; Dkt#394, Tr.11/144.

uLearn, a "course management system" hosted on servers maintained by the Georgia State Board of Regents, likewise offers course-specific webpages through which students can obtain copies of reading material. Dkt#276 SF72-73, 79-80; DX111 ¶¶ 28-32. The only salient difference between the two systems for purposes of this appeal is that professors can upload digital copies of reading material directly to their uLearn pages rather than relying on library personnel. Dkt#276 SF74-76; Dkt#403, Tr.5/16-20, 29; Dkt#405, Tr.7/117-118; Dkt#395, Tr.12/129-130.

Through ERes and uLearn, course readings that once were bound together in a printed coursepack sold at the university bookstore are now provided to students for free electronically through links on the ERes or uLearn page. During the Spring 2009 term, for example, paper coursepacks were offered for only about fifteen courses, while instructors in hundreds of courses in 2009 made readings available on ERes. Dkt#349 (introducing Dkt#167 at 16:14-17:7, 88:24-89:7, 128:16-129:25, 134:17-135:7; 139:1-9; 143:15-25; 144:13-145:5); JX1, JX2, JX3; *see also* PX675 (“We do still offer the [coursepack] service but most faculty have been moving to using Electronic Reserves which is similar.”).

The copyrighted material made available on ERes and uLearn is indisputably equivalent to that previously made available in paper coursepacks, as numerous GSU instructors testified. *See* Dkt#381 (introducing Greenberg deposition testimony, Dkt#324 at 51); Dkt#394, Tr.11/108; Dkt#405, Tr.7/115-116, 91; Dkt#355 (introducing Dixon deposition testimony, Dkt#318 at 67:10-13). The functional equivalence of ERes and paper coursepacks was underscored by one professor who advised her students that “many of the prose and fiction items you will need for the

course are on library e-reserve for you to print out immediately, forming a course packet for yourself.” PX534 at 1.

The *only* difference of note between coursepacks and ERes/uLearn readings is that GSU has chosen to dispense with permissions and payments to copyright owners in connection with digital course readings. While GSU Dean of Libraries Nancy Seamans admitted at trial that it is “immaterial what form those coursepacks might take, paper versus electronic, in terms of permission requirements,” Dkt#395, Tr.12/109, GSU has in practice disregarded this principle. It has instead encouraged faculty members to distribute course materials by means of digital rather than paper coursepacks *specifically to avoid paying the copyright royalties associated with hard copies.* Dkt#349 (introducing Dkt#167 at 128:16-129:25, 134:10-135:7, 144:13-145:5); PX675. There is no evidence of any permissions having been paid for any of the many thousands of excerpts from copyrighted books posted on ERes at GSU, semester after semester, since at least 2003. Dkt#349 (introducing Dkt#167 at 4, 153:5-154:4); Dkt#402, Tr.4/111-112; Dkt#395, Tr.12/114-115. This reflects the fact that GSU has not budgeted for (and does not intend to budget for) licenses or permission fees for the

posting of copyrighted readings on ERes, uLearn, or any other online course reading system. Dkt#276 SF59; Dkt#395, Tr.12/114-115.

### **3. The Inherent Deficiencies in the 2009 Policy**

When this lawsuit was brought, the official position of the University System of Georgia on copyright law as applied to its member institutions was embodied in a 1997 “Regents’ Guide to Understanding Copyright & Educational Fair Use,” DX145; Dkt#395, Tr.12/50-51, which was aptly characterized by GSU’s expert witness as “just sa[ying] ‘yes’ to everything” in its approach to fair use. Dkt#396, Tr.13/81-82. That policy provided, in part, that the use of up to 20% of copyrighted books in digital course readings did not require the otherwise customary permissions payments. *See* Dkt#403, Tr.5/88-89; Dkt#406, Tr.8/118.

In response to this lawsuit, a specially constituted GSU Board of Regents Select Committee on Copyright abandoned the then-existing policy in favor of the 2009 Policy. JX4; Dkt#395, Tr.12/130-131. The 2009 Policy delegates to faculty members sole responsibility for evaluating whether readings to be posted on ERes or uLearn are fair uses. Dkt#276 SF90. The mechanism for faculty to make this determination is a so-called “Fair Use Checklist,” which purports to guide them through the four statutory fair-use

factors. JX4 at 7-8. Under each factor, the checklist identifies several sub-criteria that purportedly weigh either in favor of or against fair use, each with a corresponding checkbox. *Id.* Faculty are instructed to check each sub-criterion that applies, then add up the checks to see whether the statutory factor weighs in favor of or against fair use. *Id.*

In promulgating the 2009 Policy, the GSU Defendants undertook no investigation of how it would work in practice, including the effect of having no permissions budget; indeed, they disbanded the Select Committee that promulgated the policy before actual practice under the policy could be gauged.<sup>4</sup> Dkt#395, Tr.12/65, 126-128, 135-137; Dkt#397, Tr.14/131-134. Nor did the Committee establish any education, supervision, or enforcement protocols. Dkt#395, Tr.12/65, 75, 121-122, 124-129; Dkt#397, Tr.14/7, 129-134. Instead, GSU librarians are simply to assume that faculty “have done what they are supposed to do” as far as copyright compliance is concerned. Dkt#395, Tr.12/75.

The trial revealed the Fair Use Checklist, which actually *encouraged* infringement by so blatantly skewing each statutory factor in favor of fair

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<sup>4</sup> The Select Committee chair acknowledged that the subject of seeking permission in connection with “coursepacks” was not on the committee’s agenda. Dkt#397, Tr.14/118, 133-34.

use, to be a useless compliance tool. For example, the configuration of the checklist, with duplicative “weighs in favor” criteria that apply to every work because of the nonprofit educational purpose of the use, makes it essentially impossible *not* to find any desired use to be fair. Given this, it is not surprising that every one of the 73 checklists in evidence found the proposed reading to be fair use.<sup>5</sup> Not a single checklist identified even *one* statutory factor as weighing against fair use despite the verbatim copying of up to 187 pages from works intended for the higher education market and for which licenses were readily available. JX5 at C-9; Dkt#361. Thirty-two of the checklists did not contain *a single check* in the “weighs against fair use” column, and most of the rest contained only one or two such checks (as compared to between ten and twenty checks in the “in favor of” column).

GSU’s minimal copyright education efforts (more than two-thirds of the testifying faculty did not attend any of the few training sessions offered)<sup>6</sup>

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<sup>5</sup> The Fair Use Checklists are found at PX558, 563-567, 570-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX346-348, 386, 428-429, 464, 473, 474, 480, 481. Their contents were summarized by Appellants at Dkt#409-3 and 409-4.

<sup>6</sup> *See, e.g.*, Dkt#405, Tr.7/61 (Orr), 98-99 (Davis); Dkt#406, Tr.8/142-143 (Hankla); Dkt#407, Tr.9/46 (Hartwig); Dkt#393, Tr.10/135 (Murphy); Dkt#380 (introducing Gainty deposition testimony, Dkt#323 at 45:17-20). *See also* Dkt#409-3 (summarizing training session attendance).

left faculty members with no understanding of key fair-use terms on the checklist (such as “transformative,” “large portion,” and “effect on market”) or of basic copyright principles. Dkt#404, Tr.6/71-72, 113-114, 118-121; Dkt#407, Tr.9/6, 162-164; Dkt#393, Tr.10/25, 64, 68; Dkt#394, Tr.11/54-

56. Some professors relied on arbitrary quantitative limits – typically between 10 and 20% – regardless of the application of any other fair-use factors (*see, e.g.*, Dkt#405, Tr.7/72, 96; Dkt#406, Tr.8/118; Dkt#407, Tr.9/43; Dkt#394, Tr.11/55, 78-79, 105-106), while others believed their distribution of a work would not cause market harm because students might be motivated to purchase the book (Dkt#405, Tr.7/27-28; Dkt#406, Tr.8/120-121, 133, 163-164; Dkt#407, Tr.9/44, 49-50, 77; Dkt#393, Tr.10/47). No professor indicated that the intended use would significantly impair the market or potential market for the work, and none considered the impact of the use on the licensing (as opposed to sales) market. Dkt#404, Tr.6/72, 120; Dkt#405, Tr.7/167; Dkt#407, Tr.9/162-164; Dkt#393, Tr.10/68.

#### **4. GSU's Massive, Unlicensed Digital Copying and Distribution Continues**

Significant unauthorized copying of copyrighted material continues at GSU under the 2009 Policy.<sup>7</sup> ERes reports reveal, for example, that during the Fall 2009 term approximately 1,000 unlicensed digital course readings were posted to ERes and were accessed nearly 4,000 times. JX3 (not counting entries for journals or hard-copy reserves); DX111 ¶¶ 6-10 (stipulations describing format of ERes reports).

The record likewise reveals that GSU professors routinely distribute copies of ten to twenty – and sometimes thirty or more – separate digital reading excerpts for a course.<sup>8</sup> For example, when Professor Lasner taught PERS2001 (Comparative Culture) in the Fall 2009 semester, he did not require students to purchase a textbook or any other reading material; instead, he used ERes to distribute copies of 37 different excerpts to students

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<sup>7</sup> The district court asserted without any record citation that the level of such copying had declined under the 2009 Policy, *see* Dkt#423 at 38, a finding that is especially surprising because the court expressly precluded the Publishers from attempting to prove the opposite. *See, e.g.*, Dkt#261 at 9-14; Dkt#401, Tr.3/79-80; Dkt#406, Tr.8/17-18.

<sup>8</sup> It was stipulated that multiple copies of such excerpts are made every time a GSU student accesses them via ERes: one copy when a student views the work, another when the student saves the material, and another if the student prints the material. Dkt#276 SF57.

– all without permission. PX537 at 1, 4-6; JX3; Dkt#409-2 at B25-26.<sup>9</sup>

Professor Orr, in MUS8840 (Baroque Music), likewise distributed over 30 excerpts to students during the Fall 2009 semester, requiring no purchase of reading material. PX524 at 2-4; JX3; Dkt#409-2 at B23.

The excerpts that make up these unlicensed digital anthologies have been substantial. Professor Kaufmann, for example, provided the students in her 2009 Maymester course EPRS8500 with eighteen excerpts from eleven works (eight published by Appellants), including 103 pages from the third edition of the SAGE Handbook of Qualitative Research – a work she identified as a “staple” of her teaching, Dkt#403, Tr.5/79 – and 78 pages from the second edition. JX5 at A-3; JX1; PX516 at 1, 7-9; Dkt#409-2 at B2. When she taught EPRS8510 during the Summer 2009 term, Professor Kaufmann used another 37 pages from the second edition of the SAGE Handbook. JX5 at B-1; JX2; PX517 at 2, 6-8; Dkt#409-2 at B2. And when she taught EPRS8500 again in the Fall 2009 semester, she provided students

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<sup>9</sup> The full ERes reports for the three 2009 semesters at issue were entered into evidence at JX1-3. In Appendix B to their post-trial filings, *see* Dkt#409-2, Appellants provided the court with course-specific excerpts from those reports corresponding to each of the courses in which a work at issue in the case (i.e., the works identified on JX5) was distributed without permission.

with 151 pages from the third edition of the SAGE Handbook and 36 from the second edition (along with excerpts from six other SAGE and Oxford works). JX5 at C-9; JX3; PX518 at 1, 7-10; Dkt#409-2 at B-13. Professor Kim provided the students in her Fall 2009 course AL8550 with 31 digital excerpts from 16 different books, including multi-chapter excerpts from 11 Cambridge and Oxford works, ranging between 5 and 80 pages (by the court's calculation 1.19% to 25.24% of the books from which they were taken). JX5 at C-2-C-7; PX519 at 2-3; JX3; Dkt#423 at 232, 240.

Unauthorized usage of many of Appellants' works has been repeated over many semesters. For instance, during the Spring 2007, Fall 2007, Spring 2008, Fall 2008, and Spring 2009 semesters Professor Dixon distributed two chapters (78 total pages) from Oxford's celebrated *The Slave Community* (a work Oxford's President Niko Pfund identified as a "gem" of the Oxford catalog, in its 36th reprinting, Dkt#401, Tr.3/46-47; PX460), and continued to provide students with chapter 7 of that work during the Fall 2009 semester. Dkt#366-2 at 364; Dkt#368-2 at 371; Dkt#370-1 at 311; Dkt#372-1 at 364;<sup>10</sup> Dkt#276 SF85; JX3 at 39; Dkt#409-2 at B-7; PX542 at

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<sup>10</sup> Dkt##366, 367, 368, 370, 372 constitute exhibits, including PX702-705, offered at trial by proffer.

3. Professor Kruger distributed the 39-page sixth chapter of Oxford's *Awakening Children's Minds* during the Fall 2007, Summer 2009, and Fall 2009 Semesters. JX2 at 5; JX3 at 6, 35; PX553 at 6; Dkt#409-2 at B-5, B-15; Dkt#367-1 at 26.

The district court refused at trial to admit evidence showing the magnitude of ongoing infringing activity after the Fall 2009 semester. But evidence proffered by the GSU Defendants shows that for just the first month of the spring 2010 semester (the last semester for which discovery was provided), GSU professors already had posted on ERes well over 1,000 works, which had been accessed some 25,000 times, all without payment of permission fees. *See* Dkt#160-7 at 167 (Spring 2010 ERes report).

#### **B. Appellants' and Other Academic Publishers' Vital Role in Higher Education**

Appellants are among the world's leading academic publishers. Cambridge is the not-for-profit publishing house of the University of Cambridge, which has published scholarly works for the past 425 years, including through the New York headquarters of its Americas branch. Dkt#276 SF1-2. Oxford is a not-for-profit headquartered in New York and associated with Oxford University Press in Oxford, England. The Press is the oldest and largest continuously operating university press in the world.

Dkt#276 SF3. Cambridge and Oxford each publish around 1,000 new books per year, including academic books, textbooks, and scholarly monographs. Each also publishes a variety of reference works and over 200 academic and research journals. Dkt#276 SF2, 4. SAGE is a privately-owned Delaware corporation headquartered in Thousand Oaks, California. Dkt#276 SF5; Dkt#400, Tr.2/59. It publishes more than 560 journals and some 500 books and textbooks each year. Dkt#276 SF6; Dkt#400, Tr.2/58.

The 64 books formally at issue in this case – spanning disciplines from American history to literary theory to political science to art to music to psychology – reflect the essential role that academic publishers such as Appellants play in higher education. Cambridge’s Director of Digital Publishing, Mr. Smith, explained that the books Cambridge publishes “are essential for the continuance of lines of research . . . in different fields,” Dkt#399, Tr.1/56-57, and that Cambridge undertakes to ensure that every work it publishes makes “an important contribution to learning and scholarship.” *Id.* at 58, 61.

Oxford’s President, Mr. Pfund, testified that the publisher is “looking for . . . books that will in some way shed a different interpretive light on how we see the world.” Dkt#401, Tr.3/43-44. Oxford looks “first and foremost

for quality” as well as for “originality of research” in the books it publishes – and will pass on publishing even commercially attractive works if they do not “add to the discipline in which they appear” and fit with the mission of the University and of the Press. *Id.* at 32. SAGE’s Director of Licensing, Ms. Richman, testified similarly as to SAGE’s seminal role in the creation and development of the field of qualitative research in the social sciences – a role confirmed by the popularity of the *SAGE Handbook of Qualitative Research* nationally and among GSU professors. Dkt#400, Tr.2/61. All three senior publishing executives testified as to the intensive development and peer-review process to which their houses subject each of their works. Dkt#399, Tr.1/58-63; Dkt#400, Tr.2/60-68; Dkt#401, Tr.3/59-60; *see also* Dkt#276 SF7-11.

More generally, the works published by Appellants and other academic publishers play a crucial role in providing the core readings that fuel learning at the college and university level and in accrediting faculty as leading scholars in their fields. Dkt#276 SF7-8; Dkt#399, Tr.1/54-59; Dkt#400, Tr.2/58-68; Dkt#401, Tr.3/56-58; Dkt#403, Tr.5/38-39; Dkt#407, Tr.9/14.

### **C. The Established Markets for Sales, Licensing, and Permissions of Appellants' Works**

The stipulated record establishes that colleges and universities constitute the largest market for the sale and licensing of Appellants' works, Dkt#276 SF12, 91-99; that Appellants invest tens of millions of dollars each year developing and marketing their publications, *id.* at SF11; and that they rely on income from sales and licensing of their books and journals in the higher education market to enable them to continue to publish high-quality scholarly works. Dkt#276 SF10-12, 91, 95-96.

Sales in digital form constitute an increasingly important component of Appellants' businesses. Dkt#276 SF13; Dkt#399, Tr.1/66-67; Dkt#401, Tr.3/48-55; Dkt#400, Tr.2/73-74. Appellants have made significant and ongoing investments in developing and offering content in electronic formats to meet the evolving needs of, among others, the academic market. Oxford, for example, publishes a variety of digital products, including an electronic online database of its research monographs (Oxford Scholarship Online), other electronic academic research products (e.g., Biblical Studies Online), and e-books. Dkt#401, Tr.3/48-54. As Oxford's President testified: “[I]f people want our content we try to figure out a way to get it to them in a way that works for everyone.” *Id.* at 68. Cambridge likewise

offers eight electronic platforms (e.g., Cambridge Histories Online) that provide subscription access to digital versions of Cambridge books, including some at issue in this case. Dkt#399, Tr.1/67.

As an alternative to purchasing an entire book or journal subscription, Appellants also offer users one-time, excerpt-specific licenses known as “permissions” to photocopy or digitally reproduce portions of their works, a market that includes use in paper coursepacks and through online systems like ERes and uLearn. Dkt#276 SF14, 16, 95. It was stipulated – and the district court found – that permissions to use portions of Appellants’ works, including those at issue in this case, can be obtained directly from Appellants<sup>11</sup> or, as is more common, through Copyright Clearance Center (CCC). Dkt#276 SF17; Dkt#423 at 24.

CCC, a not-for-profit corporation that acts as a centralized clearinghouse for the granting of reproduction rights for books, journals, newspapers, and other works (Dkt#276 SF18), has the nonexclusive right to issue licenses and grant permissions on behalf of tens of thousands of

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<sup>11</sup> SAGE, for example, offers custom compilations that allow professors to select and combine excerpts from various SAGE works into a printed volume that students can purchase like any other textbook. Dkt#400, Tr.2/74.

authors and publishers, including Appellants, commercial and non-profit publishers, university presses, and all significant academic publishers. Dkt#276 SF19; Dkt#402, Tr.4/12. Tens of millions of works are covered by the various licenses offered by CCC. Dkt#402, Tr.4/7, 11, 13-14.

CCC offers two types of transactional, i.e., pay-per-use, licenses to academic users: the Academic Permissions Service (APS) and the Electronic Course Content Service (ECCS) (Dkt#276 SF20), which cover millions of U.S. and foreign works, including many of Appellants' works. Dkt#276 SF22, 26; Dkt#402, Tr.4/25. Approximately 1,000 colleges and universities utilize these services for licensing course reading materials, including GSU for hardcopy coursepacks. Dkt#402, Tr.4/36; Dkt#276 SF24. Permissions typically are processed instantaneously through CCC's website. Dkt#276 SF28-30; Dkt#402, Tr.4/22, 25. The charge for permissions for Appellant's works ranges from \$0.11 per page to \$0.15 per page. Dkt#399, Tr.1/70; Dkt#400, Tr.2/80; Dkt#401, Tr.3/73-74; JX5.

CCC also offers software that allows educational and other institutions to offer CCC licensing directly from the institutions' website. Dkt#402, Tr.4/47-49. GSU personnel could thereby obtain permission from CCC to provide reading material to students from within ERes itself without

having to “leave” the application to visit CCC’s website. GSU, however, has chosen not to utilize this software. *Id.*; Dkt#423 at 35-36; Dkt#349 (introducing Dkt#167 at 111:25-112:7).

CCC also offers an annual subscription license for academic institutions known as the Academic Annual Copyright License (AACL), which permits an academic institution to pay a single annual fee to make unlimited print and digital copies – including for use in hard-copy and digital coursepacks – without the need to secure separate work-by-work permissions. Dkt#276 SF35-36. The AACL repertory contains over 1.3 million works, including those of Oxford and SAGE. Dkt#276 SF37; Dkt#423 at 28-29. (While not covered by the AACL as of the trial, Cambridge’s works have been available for licensing on a per-use basis from CCC for many years. Dkt#276 SF16-17, 31, 33-34; Dkt#399, Tr.1/70.)

These permissions systems, including for distributing digital excerpts via systems such as ERes and uLearn, represent a significant revenue stream for Appellants and often permit them to continue to publish books that otherwise might be not be financially viable. Dkt#276 SF15, 95-97. Cambridge’s Americas branch earned permissions revenue of \$1.21 million in 2009 (\$935,450 coming from CCC). Dkt#276 SF33, 98. Oxford received

\$1.65 million in licensing revenue (including permissions) from CCC for fiscal year 2009. Dkt#276 SF33; Dkt#401, Tr.3/80. SAGE received \$2.14 million in licensing revenue (including permissions) from CCC in fiscal year 2009. Dkt#276 SF33; *see also* Dkt#276 SF31, 38, 98 (detailing CCC payments); Dkt#423 at 31-32.

Every time GSU provides students with unlicensed book excerpts, Appellants are deprived of either revenue from sales of the book or of permissions fees for the excerpt used. Dkt#399, Tr.1/51, 74-75; Dkt#400, Tr.2/57-58, 83-84; Dkt#401, Tr.3/78-79.<sup>12</sup> If GSU's practices were followed at the many schools across the country that also use digital distribution platforms for course readings, *see* Dkt#423 at 42, Appellants' sales and permissions income would erode significantly, potentially endangering Appellants' long-term viability. Dkt#399, Tr.1/55-56, 71-75; Dkt#401, Tr.3/28-29, 75-76; Dkt#400, Tr.2/58, 82.

As Mr. Smith testified, if Cambridge's annual permissions revenue were to dry up (putting aside lost sales), it would do serious damage to

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<sup>12</sup> JX5 summarizes, for each infringement, the sales price of the book from which the excerpt was drawn and the per-student license fee that would have been charged had GSU obtained permission from CCC. Dkt#400, Tr.2/80-85.

Cambridge's business and likely cause the company to publish fewer books.

Dkt#399, Tr.1/71-73. Ms. Richman explained that declines in sales revenue would cause SAGE to publish fewer books and could even lead to layoffs, Dkt#400, Tr.2/82, while Mr. Pfund testified that if GSU's practices were to become prevalent, Oxford "would have to curtail [its] operations," likely starting with cutbacks in the humanities, literary studies, and classics – fields that are not as well financed by universities as the sciences, Dkt#401, Tr.3/71-73, 76 – and that it could "have a really damaging [e]ffect on our ability to continue to operate." *Id.* at 75.

At the same time, there is no evidence that payment of permission fees would impose economic hardship on GSU or its students. At an estimated *annual* cost of about \$3.75 per student, GSU could secure a license covering hardcopy and digital duplication of excerpts from more than 1.3 million copyrighted works, including those at issue for two of the three Appellants as of the time of the trial. Dkt#276 SF35-37; Dkt#402, Tr.4/42-45. \$3.75 a year is a tiny fraction of total student assessment fees at GSU, which currently run around \$800 *per semester*, and it is far less than other fees included in that amount, such as a \$35 library fee, an \$85 technology fee, and a \$90 fee to support GSU's new football program.

Dkt#358 (introducing Becker deposition testimony, Dkt#316 at 10:14-18; 58:12-59:2); Dkt#395, Tr.12/117-119 (Seamans). The GSU Defendants conceded at trial that they could include an annual permission fee in the student assessment. Dkt#358 (introducing Dkt#316 at 64:13-65:24); Dkt#395, Tr.12/117-119. Charges in a similar range to use paper coursepacks have been absorbed by GSU and other institutions without impairing the schools' educational missions, Dkt#397, Tr.14/54, and other convenient and inexpensive mechanisms exist for per-use licensing of works for use on ERes or uLearn. Dkt#276 SF14, 17, 20-28, 37, 39.

### **III. STANDARD OF REVIEW**

This Court reviews the district court's legal rulings after a bench trial de novo. *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1299 n.13 (11th Cir. 2008); *Ogden v. Blue Bell Creameries U.S.A., Inc.*, 348 F.3d 1284, 1286 (11th Cir. 2003). Factual findings are reviewed for clear error. *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1230 (11th Cir. 2009). Fair use involves both questions of law (subject to de novo review) and questions of fact (reviewable for clear error). *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1275 n.32 (11th Cir. 2001).

Whether a party is a “prevailing party” eligible for an award of attorneys’ fees is a legal issue that is reviewed de novo, *Dionne v. Floormasters Enters., Inc.*, 667 F.3d 1199, 1203 (11th Cir. 2012), while the decision to award attorneys’ fees and costs is reviewed for abuse of discretion. *Sherry Mfg. Co. v. Towel King of Fla., Inc.*, 822 F.2d 1031, 1034 (11th Cir. 1987).

### **SUMMARY OF ARGUMENT**

The district court’s disregard of fundamental precepts of copyright law led it to try a different case than the one brought and to resolve that different case erroneously. Appellants presented the district court with an undisputed record of GSU’s systematic, unauthorized copying and distribution of substantial excerpts from their copyrighted works in combination with unlicensed takings from multiple other copyrighted works to form digital “coursepacks” that are used across the range of GSU course offerings. The court recognized that these takings were nontransformative verbatim copies of the originals. Dkt#423 at 73. It was stipulated that universities such as GSU constitute Appellants’ core market and that Appellants rely on sales and licensing (permissions) income to sustain their businesses. It also was stipulated that when GSU faculty supply students

with functionally identical coursepacks in paper format, GSU, in accordance with established precedent, pays the customary permissions fees for use of the component works. Dkt#276 SF52.

Rather than recognize GSU's migration from licensed paper to unlicensed digital coursepacks as a technological convenience that does not alter the school's copyright obligations, the district court rejected the comparison and ignored the Coursepack Cases that set forth the appropriate fair-use analysis. The court instead focused solely on whether individual takings of Appellants' works, isolated from the broader context of ongoing practice at GSU, were infringements or instead were fair uses. Turning on its head the presumption that fair use is an *exception* to the rule that copyright owners are entitled to compensation for the copying and distribution of their works, the court fashioned a uniquely expansive view of fair use that read the all-important issue of transformativeness out of the analysis and instead ascribed inappropriate weight to GSU's educational mission. This unprecedented approach virtually guaranteed that all but the most egregious of the individual takings would be found to be fair use.

The district court's flawed analytical framework produces different legal outcomes depending on whether course-readings anthologies are made

available in paper or electronic form – a result that violates the long-established principle of media neutrality. *See infra* Point I.

The work-by-work fair-use analysis engaged in by the district court was flawed as to each of the four statutory fair-use factors as well as in the mechanical “add up the factors” manner in which the court purported to balance them.

The court’s erroneous conclusion that the nonprofit educational purpose and character of GSU’s conduct tips factor one *automatically* in favor of fair use is contrary to the text and legislative history of the Copyright Act as well as to a body of case law that identifies transformative value (entirely lacking here) – not educational purpose – as the most significant element of the factor-one inquiry. *See infra* Point II.A.

The court’s conclusion that the second factor – the nature of the copyrighted work – uniformly favored fair use because all the works at issue are “informational” is likewise contrary to precedent. *See infra* Point II.B. Nonfiction and scholarly works do not as a rule merit lesser copyright protection.

The court’s ruling as to factor three that fair use favors “decidedly small” takings of up to a full chapter or 10% of most books was an

improperly circular attempt to accommodate GSU’s current practice without regard to the much narrower limits Congress and the courts have indicated are appropriate for educational copying. The court also erred by failing to treat separately authored chapters in compilations as “works” for purposes of the factor-three analysis. *See infra* Point II.C.

By establishing criteria for evaluating the first three factors that guaranteed their resolution in GSU’s favor for virtually every work, and by improperly giving each factor equal weight, the court effectively eliminated the need even to assess the crucial fourth factor: market harm. This in itself was plainly erroneous in a case involving systematic, verbatim copying that directly supplants the Publishers’ market. The court also disregarded the Publishers’ compelling evidence of potential lost sales and license income arising from GSU’s practices. Moreover, even where it found harm to the market for a particular work from lost permissions fees, the court imposed on the Publishers the novel burden to demonstrate that reasonably priced digital licenses were readily available at the time of the unauthorized use. And, in cases where excessive copying tipped against fair use, the court further required proof that the lost permissions fees *did in fact* impact the publisher’s incentives. These evidentiary hurdles have no basis in the law.

In any event, contrary to the district court’s findings, they were plainly met here by each of the Publishers. *See infra* Point II.D.

In addition to finding only five infringements, the district court erred in not enjoining GSU’s ongoing practice of compiling book excerpts into unlicensed digital coursepacks, as the record clearly warrants. This Court should vacate the district court’s unduly narrow injunction and order the district court on remand to enter the broad injunctive relief sought by the Publishers without further factfinding. *See infra* Point III.

Finally, the district court erred in awarding the GSU Defendants attorneys’ fees and costs even though it found them responsible for a copyright policy that was unlawful in several respects and which, even under the district court’s flawed analysis, caused several infringements. *See infra* Point IV.

## ARGUMENT

### **I. THE DISTRICT COURT’S RULING CONTRAVENES FUNDAMENTAL PRINCIPLES OF COPYRIGHT LAW**

The district court misapprehended the role of fair use under copyright law in concluding that the nonprofit educational purpose of GSU’s copying – as opposed to whether it fulfilled a non-market-supplanting transformative purpose – was virtually dispositive of the fair-use analysis. This error led

the court to authorize acts of digital copying that are essentially identical to those held to be infringing when done in connection with paper coursepacks – a result that contravenes the doctrine of media neutrality. Had the district court properly applied basic principles of copyright law, it would not have opened the floodgates of infringement as it did.

#### **A. Fair Use Is Primarily Concerned With Protecting Transformative Uses of Copyrighted Works**

The ultimate purpose of copyright law is to “promote the Progress of Science and useful Arts.” U.S. Const. art. 1, § 8. Copyright law achieves this result by “assur[ing] contributors to the store of knowledge a fair return for their labors.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985); *see also id.* at 558 (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (copyright “spur[s] the creation and publication of new expression”); *Basic Books*, 758 F. Supp. at 1529-30 (copyright “ensur[es] that those who produce intellectual works may benefit from them”).<sup>13</sup>

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<sup>13</sup> The economic incentive applies to publishers as well as to authors. *See, e.g., Princeton Univ. Press*, 99 F.3d at 1391 (“publishers obviously need economic incentives to publish scholarly works”).

Fair use, codified in section 107 of the Copyright Act, 17 U.S.C. § 107, is a privilege built into the fabric of copyright law that “permits 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 v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citation omitted; emphasis added). Fair use is an “equitable rule of reason,” *Letterese*, 533 F.3d at 1308; the four statutory fair-use factors are to be examined and weighed against the facts of the case “in light of the purposes of copyright.” *Id.* (quoting *Campbell*, 510 U.S. at 578); *see also SunTrust Bank*, 268 F.3d at 1268.

As a general rule, a fair use must “carry its own public benefits” arising from employing the copyrighted material “in a different manner or for a different purpose from the original.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990). Disseminating copies of a work *for its intended purpose* without permission does not meet this criterion. *See Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984) (describing defendant’s nontransformative TV news clipping service as “unproductive,” and disfavored under factor one, even though it disseminated news).

These principles are not altered by the illustrative references in the preamble to section 107 to potential types of fair uses (discussed further *infra* pp. 51-53). As the Second Circuit has observed, “the concept of a ‘transformative’ use would be extended beyond recognition” if it were to allow “a newspaper to contend that because its business is ‘news reporting’ it may line the shelves of its reporters with photocopies of books on journalism or that schools engaged in ‘teaching’ may supply its faculty members with personal photocopies of books on educational techniques or substantive fields.” *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 924 (2d Cir. 1994). No differently, supplying students with digital copies of book excerpts may disseminate knowledge, but it does not advance the purposes of copyright law. *See Harper & Row*, 471 U.S. at 569 (“Any copyright infringer may claim to benefit the public by increasing public access to the copyrighted work.”).

As discussed in detail in Part II.A, the district court ignored these fundamental principles. Its embrace of GSU’s educational mission as of paramount importance, along with its observation that “[m]aking small free excerpts available to students would further the spread of knowledge,” Dkt#423 at 86, betray a failure to understand that while copyright law

protects the spread of knowledge by *the Publishers* through their scholarly publications, it does *not* – through fair use – protect GSU’s free riding, to the ultimate detriment of the academic ecosystem, through the unauthorized, verbatim copying and distribution of the Publishers’ works *for their intended purpose*. The latter undermines, rather than advances, the purposes of copyright law.

**B. Media Neutrality Requires Treating Nontransformative Digital Copying the Same as Nontransformative Hard Copying**

The correct application of fair use in the Coursepack Cases (*Princeton Univ. Press* and *Basic Books*) should have guided the district court’s analysis in this case – without regard to the different format in which the copies were made and distributed. GSU cannot evade the law by simply changing the medium in which it supplies course readings.

**1. The Coursepack Precedents**

The Sixth Circuit in *Princeton Univ. Press* and the Southern District of New York in *Basic Books* addressed fact patterns doctrinally indistinguishable from that presented here. The defendants in those cases – copyshops serving universities – prepared custom anthologies created by faculty members as required course readings that students were required to

purchase. Three publishers sued Michigan Document Services on the basis of six illustrative infringements; eight publishers sued Kinko's on the basis of twelve claimed infringements. The suits contended that the copying and distribution of the publishers' works as a part of coursepacks was done without their authorization and that the provision of the unlicensed copies to entire classes of students infringed their copyright rights. The courts rejected the copyshops' fair-use defenses on the ground that the photocopying was nontransformative, qualitatively and quantitatively substantial, and substituted for sales and/or licenses of works such as those sued upon – income from which was necessary to sustain academic publishing. Injunctions were issued barring the defendants from continuing to engage in the challenged copying activities. In the aftermath of those rulings, an efficient market for licensing uses of paper coursepacks developed, and the record shows that this regime of copyright compliance has had no adverse impact on the availability of course reading materials at institutions like GSU. Dkt#402, Tr.4/17-29; Dkt#397, Tr.14/54.

Appellants brought this case to enjoin the same coursepack practices at GSU, the sole distinctions being that (i) the copies compiled at GSU were in electronic form, and (ii) the GSU library, rather than a commercial

copyshop acting on the university’s behalf, made the copies. The district court distinguished the Coursepack Cases on the sole ground that the defendants in those cases (unlike GSU) were for-profit entities. Dkt#423 at 49. As we show in Part II.A.2 below, there is no basis in the law for placing such fair-use weight on the defendant’s nonprofit educational status. The district court also erred, however, in adopting different copyright rules for digital copying and distribution than those GSU accepts and adheres to in connection with paper coursepacks – an anomalous outcome that clearly violates the principle of media neutrality. Moreover, by rejecting the clear analogy to coursepacks in favor of rigid work-by-work fair-use analyses, the district court overlooked the potential adverse market impact of GSU’s anthological practices above and beyond the impact of individual takings – even though ample evidence of such harm was presented at trial.

## **2. The Requirement of Media Neutrality**

This Court has recognized the principle that copyright law is “media neutral” as “a staple of the Copyright Act.” *Greenberg*, 533 F.3d at 1257. In *Greenberg*, the Court relied on media neutrality to hold that section 201(c) of the Copyright Act, 17 U.S.C. § 201(c), allowed National Geographic magazine to publish a CD-ROM compilation of its magazines

without obtaining permission from freelance contributors, as the conversion of the magazines into a different medium did not alter the parties' copyright rights. The Court relied in part on *New York Times Co. v. Tasini*, 533 U.S. 483, 502 (2001), where the Supreme Court noted that the "transfer of a work between media does not alte[r] the character of that work for copyright purposes." (Internal quotes and citation omitted). *See also Faulkner v. Nat'l Geographic Enters., Inc.*, 409 F.3d 26, 40 (2d Cir. 2005) (same).

Media neutrality is central to this case in two respects. First, as discussed in Part II.A.1 below, it dictates the conclusion that the exact digital copying of portions of Appellants' books is not transformative. Second, it requires commensurate copyright treatment of digital and paper coursepacks.

## **II. AN EDUCATIONAL PURPOSE DOES NOT RENDER THE SYSTEMATIC, NONTRANSFORMATIVE COPYING APPROVED BY THE DISTRICT COURT FAIR USE**

The statutory fair-use factors are:

- (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;
- (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 district court held correctly that the GSU Defendants bore the burden of proving fair use. Dkt#423 at 48 (citing *Letterese*, 533 F.3d at 1307 n.21). But, as shown below, the court made across-the-board findings as to all four statutory factors that departed dramatically from settled law. Most notably, although a “nonprofit educational purpose” is a factor the statute identifies as relevant to determining whether an act of copying is fair use, the district court impermissibly exalted this consideration above all others, including the fact that GSU’s copying is not transformative.

Compounding these legal errors, the court gave each statutory factor equal weight, ignoring authority that assigns greater weight to factors one (the purpose and character of the use) and four (market harm) in cases involving nontransformative copying. *See Princeton Univ. Press*, 99 F.3d at 1388 (“In the context of nontransformative uses, at least, and except insofar as they touch on the fourth factor, the other statutory factors seem considerably less important.”); *Texaco*, 60 F.3d at 931 (concluding, in a case involving unauthorized photocopying, that three of the four statutory factors, “including the important first and . . . fourth factors,” favored the plaintiffs).

**A. Factor One: The Purpose and Character of the Use Does Not Favor GSU's Verbatim Copying**

**1. An Educational Purpose Does Not Trump a Lack of Transformative Value**

With respect to factor one –“the purpose and character of the use” – the Supreme Court has held that transformative works “lie at the heart” of fair use. *Campbell*, 510 U.S. at 579. The “central purpose” of the first-factor inquiry is “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.” *Id.* The goal of copyright “is generally furthered” by transformative works. *Id.*; *see also Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (whether a work is transformative is the “more critical inquiry” under the first factor than whether it is commercial).

As this Court has recognized, “a work that is not transformative . . . is less likely to be entitled to the defense of fair use because of the greater likelihood that it will ‘supplant’ the market for the copyrighted work. . . .” *Letterese*, 533 F.3d at 1310 (citation omitted). The likelihood of market substitution arises because an untransformed copy “is likely to be used

simply for the same intrinsic purpose as the original . . . .” *Texaco*, 60 F.3d at 923; *see also Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (“where, as here, appellee’s use [of appellant’s academic article] is for the same purpose as [appellant’s] . . . such use seriously weakens a claimed fair use”); *Pac. & S. Co.*, 744 F.2d at 1496 (holding that TV news clipping service was “neither productive nor creative in any way”); 4 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 13.05[B][5] at 13-224 (2012) (“If . . . plaintiff’s and defendant’s works satisfy the same purpose, then . . . the defense of fair use should not be available because the defendant’s work serves the same functions as that of the plaintiff’s.”). This threat of market substitution is particularly acute where, as here, the use in question is an exact reproduction of the plaintiff’s work.

The district court recognized that GSU’s copying is not transformative. Dkt#423 at 55, 65. In addition to being verbatim copies, the digital reproductions made by GSU are used for the “same intrinsic purpose” served by the Publishers’ works. As the district court found, “[a]ll three Plaintiffs market their books to professors who teach courses in colleges and universities.” Dkt#423 at 21. Indeed, it was stipulated that colleges and universities constitute the Publishers’ largest market. Dkt#276 SF12. These

facts weigh heavily against fair use under factor one. *See Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983) (holding that factor one weighed against fair use where the defendant’s instructional booklet was used for the same purpose as the plaintiff’s booklet); *Texaco*, 60 F.3d at 924-25 (finding no fair use where photocopies of journal articles made by Texaco scientists “serv[e] the same purpose for which additional subscriptions are normally sold, or . . . for which photocopying licenses may be obtained”).

Despite the foregoing authority, the district court gave *no* weight to the admittedly nontransformative nature of GSU’s copying and held that factor one “strongly” favored the GSU Defendants because of the nonprofit educational nature of the use. Dkt#423 at 50. The court sought to justify this anomalous conclusion by citing language from the preamble to section 107 and from section 107(1) that makes reference, respectively, to “multiple cop[ying] for classroom use” and to uses for “nonprofit educational purposes.” Dkt#423 at 47-49. The court also pointed to the footnote observation in *Campbell* that the “straight reproduction of multiple copies for classroom distribution” is an “obvious statutory exception” among the otherwise transformative uses listed in the preamble to section 107. *Id.* at 50. But nothing in the statute supports discounting the significance of

transformativeness in the fair-use calculus, let alone giving dispositive weight to the educational purpose of the use.

Notably, the preamble to section 107 provides that “*fair use*” – not “*any use*” – for one of the enumerated uses (criticism, comment, news reporting, teaching, scholarship) is not infringement. Thus, the preamble does not support the notion that *any* uses for “nonprofit educational purposes” are favored without undertaking a full fair-use analysis. Indeed, as the Supreme Court has emphasized, Congress disavowed reliance on “categories of presumptively fair use.” *Letterese*, 533 F.3d at 1309 (quoting *Campbell*, 510 U.S. at 584); *Harper & Row*, 471 U.S. at 561 (“The drafters resisted pressures from special interest groups to create presumptive categories of fair use”). This Court similarly has rejected short-circuiting a comprehensive fair-use analysis in favor of such a presumption. In *Pac. & So. Co.*, where the district court gave conclusive weight to the preamble to section 107, the Court noted that “[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. 744 F.2d at 1495.

The commercial or nonprofit educational nature of a work is thus “only one element of the first factor enquiry into its purpose and character.”

*Campbell*, 510 U.S. at 584. Indeed, the “mere fact that a use is educational and not for profit does not insulate it from a finding of infringement.” *Id.* In fact, Congress determined that exempting from copyright control reproductions of copyrighted works for educational and scholarly purposes was “not justified.” H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66-67 (1976). Were it otherwise, academic publishers’ core market would be obliterated.

The 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. In *Letterese*, for example, which involved the incorporation of the plaintiff’s book into instructional materials by two nonprofit entities, this Court did not find that the nonprofit educational nature and purpose of the use favored fair use. *See* 533 F.3d at 1310-20. Similarly, in *Rowley*, the Ninth Circuit held that the defendant’s cake-decorating booklet was not fair use even though it was distributed to students for a nonprofit educational purpose. *See* 695 F.2d at 1175; *accord Soc’y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 37, 65 (1st Cir. 2012) (holding that copies of translated religious texts posted on defendant’s website for non-profit educational

purposes was not fair use); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (holding that a church's free distribution of plaintiff's book to church members and potential members was not fair use); *Weissmann*, 868 F.2d 1313 (holding that professor's unauthorized use of copies of plaintiff's academic article for classroom teaching was not fair use); *Encyclopedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1175 (W.D.N.Y. 1982) (holding that taping of television programs by nonprofit educational organization for use in schools was not fair use).

By contrast, when an educational use *is* transformative, courts are more likely to find fair use. *See, e.g., Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 202 (4th Cir. 1998) (holding that the first factor "heavily" favored finding an academic paper to be fair use because its "further purpose" and "different character" made its quotations from an unpublished novel transformative "rather than an attempt to merely supersede" the novel).

Nothing in *Campbell* – a parody case – conflicts with the foregoing precedent. The passing, one-sentence reference in a footnote to the fact that the preamble to section 107 cites classroom copying among the types of uses *potentially* capable of being fair use (depending on application of the

statutory factors), 510 U.S. at 579 n.11, does not support the district court’s sweeping conclusion that lack of transformative value has no bearing on the fair-use analysis. Indeed, the stipulation that GSU “pays permissions fees when copyrighted content is used in hardcopy coursepacks,” Dkt#276 SF52, contradicts the premise of the district court’s factor-one analysis, as such coursepack copying is no less nonprofit educational in its nature and purpose than the digital copying in connection with ERes and uLearn.

In sum, because GSU’s verbatim digital copying “merely supersede[s]” purchased or licensed copies of the Publishers’ works, *Campbell*, 510 U.S. at 579, the district court erred as a matter of law in concluding that factor one favored fair use.

## **2. The Nonprofit Educational Nature of the Use Does Not Render the Coursepack Cases Inapposite**

The district court’s focus on the nonprofit educational nature of the use led it to conclude that the Coursepack Cases are inapposite because they involved copying by a commercial copyshop. *See* Dkt#423 at 49. But this single factual distinction ignores the far more salient similarities of those cases to this case, involving as they did copying of an identically nontransformative nature, initiated by university faculty for the identical

purpose (classroom teaching), and threatening the identical adverse impact on the market for the copyrighted works.

Central to the finding of liability in the Coursepack Cases was the recognition that the defendant's unauthorized market-supplanting copying, if it were to be replicated across the country, would deprive the publishers of a significant revenue stream, with adverse consequences for their publishing activities. *See Princeton Univ. Press*, 99 F.3d at 1387, 1391; *Basic Books*, 758 F. Supp. at 1534. Where and how the acts of copying occur (whether by a for-profit copyshop or an in-house copy center or by physical photocopying or digitization) should have no bearing on the outcome of a fair-use analysis focusing on coursepack dissemination.<sup>14</sup>

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<sup>14</sup> The crux of the profit/nonprofit distinction “is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Harper & Row*, 471 U.S. at 562. Accordingly, the relevant question concerning commercial use is not whether GSU sold copies of the Publishers’ works but whether it benefitted from providing them to students for free, which it plainly did. The GSU Defendants’ motive 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), cuts against fair use. *See also Soc’y of the Holy Transfiguration Monastery, Inc.*, 689 F.3d at 61 (holding that first factor weighed against fair use where the defendant 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”).

**B. Factor Two: The Nature of the Copyrighted Work Does Not Favor Fair Use Simply Because a Work Is “Informational”**

Factor two considers the “nature of the copyrighted work.” 17 U.S.C. §107(2). In general, the more creative the copied work, the more legal protection it is afforded. *Campbell*, 510 U.S. at 586. But the Supreme Court has noted that factual works contain “gradations as to the relative proportions of fact and fancy.” *Harper & Row*, 471 U.S. at 565. The district court, however, adopted an absolute rule that factor two favors a finding of fair use across the board solely because all of the works are “informational” nonfiction, giving *no* weight to their acknowledged creative elements. This was error.

This Court has disapproved of allowing too wide a berth for fair use regarding factual works that contain creative contributions, noting that courts should “take care not to discourage authors from addressing important topics for fear of losing their copyright protections.” *Pac. & S. Co.*, 744 F.2d at 1497. In *Letterese*, which concerned the nonfiction book *Big League Sales Closing Techniques*, this Court noted that “[n]otwithstanding its informational nature . . . [the author] utilizes original expression that surpasses the bare facts necessary to communicate the underlying

technique,” 533 F.3d at 1312, and held that factor two favored neither party. *See also SCQuARE Int’l, Ltd. v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347, 1363 (N.D. Ga. 2006) (finding that factor two weighed against fair use where an instructional manual embodying a technique for solving business problems contained “some creative elements”); *Weissmann*, 868 F.2d at 1325 (“[W]hile recognizing that fair use finds greater application in a factual scientific context, that recognition should not blind a court to the need to uphold those incentives necessary to the creation of works such as [the plaintiff’s article].”); *Princeton Univ. Press*, 99 F.3d at 1389 (noting that scholarly books “contained creative material, or ‘expression’” and that the second factor therefore cut against fair use); *Rowley*, 695 F.2d at 1176 (noting that the plaintiff’s cake-decorating booklet “involved both informational and creative aspects” and finding factor two not of assistance in the fair-use determination); 4 William F. Patry, **PATRY ON COPYRIGHT** § 10:138 (2012) (“[A] broad rule permitting more generous fair use of all factual works than of all fictional works should be avoided”).

The district court acknowledged (with respect to at least some of the Publishers’ works) that they “contain material of an evaluative nature, giving the authors’ perspectives and opinions.” Dkt#423 at 52; *see also* Dkt#399,

Tr.1/29 (observing that a research-based work of scholarship “involve[s] qualitative choices by the researcher such that it would be hard to say that it’s not creative”). Despite this recognition, the court cited the presence of “criticism and comment” among the illustrative fair uses in the preamble to section 107 as justification for weighing these aspects of Appellants’ works in favor of fair use. Dkt#423 at 52. But the preamble lists potential fair uses by a *defendant*; it has no bearing on the factor-two inquiry, which concerns the degree of creativity of the *plaintiff’s* work (which, when present, cuts *against* fair use).

For these reasons, the district court erred in holding that factor two favors fair use. This factor should at worst have been deemed neutral, as it was in *Letterese* and *Rowley*. Even more fundamentally, the court erred by giving this factor weight equal to the others. *See Pac. & S. Co.*, 744 F.2d at 1497 (noting the “necessarily limited impact” of the second factor); *see supra* pp. 48-49 (explaining that in cases involving nontransformative copying, more weight should be attributed to the first and fourth factors).

**C. Factor Three: The District Court’s Analysis of the Amount and Substantiality of the Taking Was Inappropriate for a Nontransformative Use and Otherwise Contrary to Law**

The district court’s erroneous application of factor three – “the amount and substantiality of the portion used,”<sup>17</sup> U.S.C. § 107(3) – was largely colored by its erroneous analysis of factor one (the purpose and character of the use). Specifically, having concluded that factor one “strongly” favored GSU’s nonprofit educational use, the court held that this finding “tends to push the amount of permissible copying toward a greater amount” than that found permissible in the Coursepack Cases. Dkt#423 at 66. The court then found that “all of the selections indeed did further the legitimate educational purposes of the course curriculum” and “were narrowly tailored to accomplish that purpose.” *Id.* at 71.

Although the district court acknowledged that it was required to consider “whether the amount taken is reasonable given the likelihood of market substitution,” Dkt#423 at 55 (citing *Letterese*, 533 F.3d at 1314 n.30), it concluded that for books that contain fewer than ten chapters, unpaid copying of up to 10% of the pages in the book was permissible under factor three, *id.* at 88, while for books that contain ten or more chapters, copying of up to one chapter (or its equivalent) was permissible. *Id.* The

court characterized these as “decidedly small” excerpts, *id.*, even though they far exceed what the Coursepack Cases allow or what is contemplated by the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions With Respect to Books and Periodicals” (the “Classroom Guidelines”), H.R. REP. No. 94-1476 at 68-71, 94th Cong., 2d Sess. (1976) (discussed *infra* Part II.C.2), with its 1,000-word (or 10%, whichever is less) limit. *See* Dkt#423 at 56. The court also determined that where there was no record evidence that a digital license was available for the work, a taking of up to 20% of the work was permissible. *Id.* at 192-94; Dkt#441 at 10.

The court cited no authority for these quantitative safe harbors and appears instead to have fashioned them to correspond with prevailing practices at GSU. Specifically, it noted that the claimed infringements averaged about 10% of the copyrighted work, Dkt#423 at 55, and, regarding the alternative “one chapter” limit, the court observed: “Professors want students to absorb ideas and useful, context-based information. This can be accomplished better through chapter assignments than through truncated paragraphs.” *Id.* at 68-69. In other words, rather than conform GSU’s

practices to the requirements of copyright law, the court conformed the law to its perception of GSU’s needs.

This error-laden analysis requires reversal.

### **1. Nontransformative Copying Is Not Entitled to Quantitative Latitude**

The district court’s deference to GSU’s pedagogical purpose reflects misplaced reliance on *Campbell*, in which the Supreme Court discussed allowing a parodist – a classic transformative user – to use “at least enough” of the original work to “make the object of its critical wit recognizable.” 510 U.S. at 588; *see also SunTrust Bank*, 268 F.3d at 1271. *Campbell* does not suggest that *nontransformative* copying for a *nontransformative* purpose is reasonable so long as it is “narrowly tailored” to suit its purpose. To the contrary, it cautions that the extent of permissible taking is limited by “the likelihood that the [challenged use] may serve as a market substitute for the original.” 510 U.S. at 588. Echoing this point, this Court has held that the third factor weighs against fair use where the copying “could have a substitution effect on the market for [the copyrighted work].” *Letterese*, 533 F.3d at 1315.

Here, unlike a parody case, there is no point at which the copying crosses from permissibly transformative to impermissibly substitutive, as is

potentially true of parody. In this case, *all* of the copying is nontransformative. Thus, the principle articulated in *Campbell* and *SunTrust Bank* of allowing the user to take “at least enough” of the copyrighted work to fulfill its transformative purpose does not apply.

## **2. The Copying Permitted by the District Court Vastly Exceeds the Normative Limits in the Classroom Guidelines**

In addition to having no grounding in the case law, the copying latitude the district court afforded GSU disregards the Classroom Guidelines, which place strict limits on nonprofit educational copying. Congress accepted the Guidelines as “part of [its] understanding of fair use” and included them in the legislative history of the Copyright Act. *See Rowley*, 695 F.2d at 1178 (Congress “approved a set of guidelines” which “represent the Congressional Committees’ view of what constitutes fair use” and “are instructive on the issue of fair use”); *Princeton Univ. Press*, 99 F.3d at 1390 (stating that the Guidelines provide “general guidance” as to the “type of educational copying Congress had in mind”); *Basic Books*, 758 F. Supp. at 1535 (Congress “sought to clarify, through broad mandate, its intentions”).

GSU’s challenged copying falls far outside the Guidelines, as it was more than 5 to as much as 100 times the 1,000 words that the Guidelines allow (assuming 500 words per page). *See JX5* (detailing page counts for takings of 11 to 186 pages). That the challenged copying at GSU is “light years away” from the parameters in the Guidelines, *see Princeton Univ. Press*, 99 F.3d at 1391, weighs heavily against fair use. *See Rowley*, 695 F.2d at 1178 (“Rowley’s copying would not qualify as fair use under the guidelines”); *Basic Books*, 758 F. Supp. at 1536 (finding that unlicensed coursepack copying “clearly deviates from the letter and spirit of the Guidelines”).

In dismissing the Guidelines as irrelevant, the district court noted that they are “so restrictive that no book chapters in this case . . . would qualify for fair use.” Dkt#423 at 70. But unless the object of the fair-use exercise is to validate GSU’s ongoing practices (which it is not), rather than to require that those practices comply with the quantitative (and other) limits Congress had in mind when it adopted section 107, the district court’s reasoning cannot stand.

### **3. As a Percentage of the Entire Book, the District Court Allowed Excessive Takings**

The district court erroneously measured the takings based on the entire book even where the copied material is an independently authored chapter in an edited volume. *See Part II.C.4 infra.* Even so measured, however, the portions of the Publishers' works copied by GSU professors are comparable to those held to be "over the line" in the Coursepack Cases. In *Basic Books*, the takings ranged from 14 pages to 110 pages or 5.2 to 25.1% of the work, and the court found that these amounts weighed against fair use. *See* 758 F. Supp. at 1533. In *Princeton Univ. Press*, the court found that book excerpts ranging from 5% to 30% of the book were "not insubstantial" and that the amounts taken weighed against fair use. 99 F.3d at 1389. In this case, the vast majority of the takings exceeded 5% of the entire book; nineteen were between 10% and 20%; eleven exceeded 20%; and one was just under 30%. JX5; Dkt#361 (narrowing plaintiffs' claims).<sup>15</sup> The takings ranged from 11 to 187 pages or from 5,500 to 100,000 words. JX5; Dkt#361. As in *Princeton Univ. Press*, all of this copying went "well

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<sup>15</sup> While the court also erred in its calculation of the amount taken by holding that material not involving copyrightable expression (such as copyright information and indices) should be included, that error is not addressed herein because it does not bear on the ultimate outcome.

beyond anything envisioned by Congress” and was “light years away from the safe harbor of the guidelines.” 99 F.3d at 1390-91.

#### **4. The District Court Measured the Takings Incorrectly**

The excessiveness of the copying the district court allowed is more egregious when one recognizes that the relevant “work” in the case of an independently authored chapter in an edited volume is the chapter copied, not (as the district court found) the entire book. *See Texaco*, 60 F.3d at 926 (“each of the eight articles in [the *Journal of Catalysis*] was separately authored and constitutes a discrete ‘original work[] of authorship’”); *Encyclopedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243, 251 (W.D.N.Y. 1978) (each article in a medical journal “could be considered a discreet (sic) whole”).<sup>16</sup> To conclude otherwise creates the anomalous result that a work of authorship bound with other works into an edited volume enjoys less copyright protection than if the same work were published in a journal – to which GSU, notably, provides access through licensed subscription databases. *See, e.g.*, Dkt#423 at 35; Dkt#395, Tr.12/110-111;

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<sup>16</sup> If chapters in edited books are properly treated as “works,” the district court’s dubious conclusion that edited books do not have “critical parts” because each chapter addresses a single topic, Dkt#423 at 69, becomes moot, as each chapter was copied in its entirety.

Dkt#406, Tr.8/104-105; Dkt#393, Tr.10/54. *Cf. Tasini*, 533 U.S. at 496

(noting the purpose of 17 U.S.C. §§ 404(a) and 201(c) to preserve the author's copyright in a contribution to a compilation).<sup>17</sup>

The district court expressed “little sympathy” for the Publishers’ argument in opaque reasoning that reveals the court’s determination to apply expansive fair-use parameters to GSU’s copying. The court stated that since publishers have the right to publish all parts of the book, they “have no incentive to assert the rights of the authors of the chapters in the edited books . . . except to seek to choke out nonprofit educational use of the chapter as a fair use.” Dkt#423 at 69.<sup>18</sup>

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<sup>17</sup> The record underscores the lack of a principled basis for treating journal articles and book chapters differently for fair use purposes: (1) several professors referred to chapters in edited volumes as “articles,” *see, e.g.*, Dkt#404, Tr.6/55; Dkt#406, Tr.8/112; Dkt#407, Tr.9/143-144, 168; (2) articles and book chapters were acknowledged to be “functionally equivalent,” Dkt#394, Tr.11/96-97; (3) Professor Kaufmann assigned a chapter from *The Handbook of Feminist Research* without having read the entire book, Dkt#403, Tr.5/185, illustrating the freestanding significance of the chapter; and (4) a chapter from Professor Davis’s then-forthcoming book already had been published in a journal, *see* Dkt#405, Tr.7/125-126. In addition, the Columbia University website advises that a book chapter “might be a relatively small portion of the book, but the same content might be published elsewhere as an article or essay and be considered the entire work in that context.” PX1012 at 16; Dkt#396, Tr.13/110-11.

<sup>18</sup> The court rejected Publishers’ argument principally on the ground that it was raised too late. Dkt#423 at 61-63. However, the Publishers explicitly

## **D. Factor Four: The Publishers Established Actual and Potential Market Harm from GSU's Verbatim Copying**

### **1. The Governing Law**

Factor four looks at “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). In simple terms, factor four embodies the principle that the “adverse effect with which fair use is primarily concerned is that of market substitution.” *Letterese*, 533 F.3d at 1315; *see also Campbell*, 510 U.S. at 591 (noting that an exact duplicate of an original that serves as a market replacement for it makes it “likely that cognizable market harm to the original will occur”); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 110 (2d Cir. 1998) (fourth factor “is concerned with secondary uses that, by offering a substitute for the original, usurp a market that properly belongs to the copyright-holder”; “a use which supplants *any part of the normal market* for a copyrighted work would ordinarily be considered an infringement”) (emphasis added).

Factor four requires the court to consider not just the actions of the defendant but also “whether unrestricted and widespread conduct of the sort

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laid the factual predicate for the argument during the trial, *see, e.g., supra* n.17; the GSU Defendants had ample opportunity to respond and did, *see* Dkt#415 at 21-26; and the court identified no prejudice to the GSU Defendants. The issue is properly preserved for review.

engaged in by the defendant . . . would result in a substantially adverse impact on the potential market” for the copyrighted work. *Campbell*, 510 U.S. at 590. This involves evaluating the likely impact of the infringing conduct on “potential revenues for [a] traditional, reasonable, or likely to be developed market[.]” *Texaco*, 60 F.3d at 930.

A proper market-harm analysis is illustrated by the Sixth Circuit’s assessment of the potential impact on publishers if the unauthorized photocopying of scholarly books for university coursepacks were widely replicated:

If copyshops across the nation were to start doing what the defendants have been doing here, this 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. One could substitute “universities” for “copyshops” in the foregoing quotation and, as the record in this case attests, reach the same conclusion. *See also Letterese*, 533 F.3d at 1317-18 (“The unrestricted and widespread dissemination of the Sales Course – a use that is not transformative of the book and may be regarded as appropriating ‘the heart’ of its expression – . . . may well usurp the potential market for *Big League Sales* and derivative works” (emphasis added)); *Basic Books*, 758 F.

Supp. at 1534 (concluding that the defendant's nationwide business of "usurping plaintiffs' copyrights and profits" could not be sustained because it would frustrate the intent of copyright law to encourage creative expression).

Although the market-harm analysis encompasses potential markets, 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, and courts readily recognize harm to a licensing market where the copyright holder *is already* successfully exploiting the market. *See Princeton Univ. Press*, 99 F.3d at 1387; *Texaco*, 60 F.3d at 930 ("since there currently exists a viable market for licensing these rights for individual journal articles, it is appropriate that potential licensing revenues for photocopying be considered in a fair use analysis"); *Harper & Row*, 471 U.S. at 569 (considering harm to marketability of first serialization rights).

Establishing cognizable market harm does not require a showing of lost profits:

Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. 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.*

*Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (emphasis added); *see also SunTrust Bank*, 268 F.3d at 1275. Accordingly, in cases involving a nontransformative, superseding use, it is not the role of the court to scrutinize the plaintiff's balance sheet and decide whether the plaintiff's entitlement to compensation outweighs the defendant's desire to save money. Rather, the basis for finding market harm from nontransformative uses is logical: "mere duplication" that "'supersede[s] the objects' . . . of the original and serves as a market replacement for it" makes cognizable market harm likely. *Campbell*, 510 U.S. at 591(citation omitted). That is why the Sixth Circuit held that the loss of the publishers' permissions revenue stream could "only have a deleterious effect upon the incentive to publish academic writings." *Princeton Univ. Press*, 99 F.3d at 1391; *see also Letterese*, 533 F.3d at 1317-18. It is also why the district court itself found that GSU's verbatim copying "favors market substitution." Dkt#423 at 55.

## **2. The District Court’s Flawed Analysis**

### **a. The Court’s Work-by-Work Market-Harm Analysis Was Contrary to Law and to the Record Evidence**

GSU’s direct replacement of licensed hardcopy coursepacks or books sales with unlicensed digital versions of the same readings, and the stipulated fact that permissions represent a significant revenue stream for the Publishers, should have made factor four “open and shut” against fair use, while the undisputed record as to the convenient, affordable licensing options for the Publishers’ works, described above (*see* Dkt#423 at 24-30; *supra* pp. 29-35) should have removed any possible doubt. But the district court devalued factor four and distorted the analysis of market harm in a number of respects.

As a threshold matter, the district court deprived the fourth factor of significance with respect to most of the works at issue by giving each of the four fair-use factors equal weight. This deviation from settled law was outcome-determinative in most cases because, as discussed, the court held that the first three factors automatically favored fair use – making the taking fair use under the court’s improperly arithmetic approach to the fair-use assessment. The court rationalized this outcome with the unsupported

reasoning that even where licenses were readily available, unauthorized copying of “decidedly small” excerpts caused “extremely small, though actual, damage to the value of the books’ copyrights,” which, the court declared, “will not discourage academic authors from creating new works, will have no appreciable effect on Plaintiffs’ ability to publish scholarly works, and will promote the spread of knowledge.” Dkt#423 at 79, 89.<sup>19</sup>

Where the court did consider market harm, it relieved the GSU Defendants of their burden of proof on their fair-use defense, *id.* at 48, and invented a novel evidentiary hurdle for the Publishers to overcome, namely, that “[f]or loss of potential license revenue to cut against fair use, the evidence must show that licenses for excerpts of the works at issue are easily accessible, reasonably priced, and that they offer excerpts in a format which is reasonably convenient for users.” *Id.* at 75. The court cited no authority for this requirement (there is none). It compounded the error by holding (without having provided notice at trial) that the Publishers were required to make this showing *for 2009* even though they sought only prospective relief and despite the fact that GSU *never considered the possibility of paying*

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<sup>19</sup> Where digital licenses were *not* found to have been available in 2009, the court asserted that unlicensed use of the excerpts “caused no actual or potential damage[] to the value of the books’ copyrights.” Dkt#423 at 79.

*permissions for digital course readings.* This holding further decisively tilted the factor-four analysis in GSU’s favor with respect to a number of works.

In cases where the taking was not “decidedly small,” the court imposed yet another unprecedeted hurdle by undertaking “further analysis” of the market harm evidence – even where it already had concluded, based on the amount copied and the availability of a license, that factor four *strongly favored* the Appellants – to determine if a finding of fair use would in fact impair the Publisher’s incentives. *See, e.g.*, Dkt#423 at 130.

The district court’s market-harm analysis contains multiple legal and factual errors that warrant reversal.

First, as to the license-availability requirement, although a use is less fair when licensing is readily available, *see supra* pp. 29-35, it does not follow that a use becomes *more* fair if, for a legitimate reason, the plaintiff has *not* offered to license the work. *See, e.g.*, *Castle Rock*, 150 F.3d at 136, 145-46 (finding no fair use where the plaintiff had “evidenced little if any interest in exploiting this market for derivative works”; copyright law “must respect that creative and economic choice”); *Worldwide Church of God*, 227 F.3d at 1119 (finding market harm where plaintiff had failed to exploit the

copyrighted work for ten years and had no concrete plan to publish a new version); *Balsley v. LFP, Inc.*, 691 F.3d 747, 761 (6th Cir. 2012) (plaintiffs’ “current desire or ability to avail themselves of the market for the . . . photograph is immaterial to . . . whether there is potential for an adverse effect on the market for the photograph should the challenged use become widespread”); Nimmer, *supra*, §13.05[B][1] at 13-211-12 (“If the defendant’s work adversely affects the value of any of the rights in the copyrighted work . . . the use is not fair, even if the plaintiff has not yet exercised the right”).<sup>20</sup>

Because the copyright owner is not obliged to accommodate prospective users, fair use cannot be construed to impose such an obligation. Yet that is what the district court did, even though it identified several legitimate reasons why the Publishers may not wish – or may not have the right – to offer digital licenses. *See* Dkt#423 at 28-29.

Allowing market-harm to turn on proof of license availability was especially inappropriate in this case, as none of the testifying professors

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<sup>20</sup> *See also* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260, 65,277 (Library of Congress Oct. 26, 2012) (final rule) (“copyright owners typically have the legal authority to decide whether and how to exploit new formats”).

even investigated whether a license was available, and the Fair Use Checklist was designed to make fair use a foregone conclusion for any reading without regard to license availability. Dkt#404, Tr.6/72-73; Dkt#405, Tr.7/73, 167; Dkt#406, Tr.8/162; Dkt#407, Tr.9/9-10, 24, 164-165; Dkt#355 (introducing Dkt#318 at 101:13-24, 102:22-103:17); Dkt#373 (introducing Dkt#321 at 88:8-89:11); Dkt#409-3 (summarizing professor compliance). Moreover, not only has GSU never budgeted for permissions fees for online course readings, *see* Dkt#423 at 39; Dkt#276 SF59, but the Select Committee *did not even discuss* how to fund permissions fees for course readings found not to be fair use. Dkt#395, Tr.12/117 (Seamans).

Second, the foregoing legal error, while significant, should have been immaterial, as each of the Publishers established that the works at issue *were* available for digital licensing through CCC for a modest per-page per-student fee through the ECCS. *See supra* pp. 29-35. The court's findings as to the availability of both per-use and annual digital licensing options through CCC, Dkt#423 at 74-75, demonstrate the existence of a well-functioning market for the rights at issue and should have conclusively resolved the factor-four inquiry in the Publishers' favor. *See Princeton Univ. Press*, 99 F.3d at 1388 ("A licensing market already exists here . . . .");

*Texaco*, 60 F.3d at 930 (“the publishers . . . have created, primarily through the CCC, a workable market for institutional users to obtain licenses”). This evidence was more than enough to “negate fair use” by demonstrating that if the unlicensed copying at GSU were to become widespread “it would adversely affect the *potential* market for the copyrighted work.”” *Harper & Row*, 471 U.S. at 568 (citation omitted) (emphasis in original).

Third, the court’s further requirement – set forth for the first time in its post-trial ruling – that the Publishers demonstrate the availability of a digital license *in 2009* – was especially inappropriate in this case. The status of licensing in 2009 had no bearing on the question of whether GSU’s policy – going forward – should require either investigation of whether a digital license is available or a presumption that it is. Moreover, the court’s fact-finding as to the lack of license availability in 2009 was clearly erroneous. JX5 – which was admitted with no objection and contained sworn statements from each party as to its truth and accuracy – identified exactly what it would have cost in 2009 to license each of the excerpts at issue. The court claimed that JX5 did not state “whether the works actually were available through CCC,” Dkt#423 at 34, but the exhibit included “[t]he retail cost of each work identified . . . at the time that work was allegedly infringed” and

“[t]he cost of licensing the excerpts of those works that Plaintiffs allege were electronically distributed . . . [i]n other words, the total amount that each instructor . . . would have had to pay in order to license each excerpt.” *See* Dkt##226, 227, 265, 266 (“joint filing” of parties entered at trial as JX5).

Fourth, in holding that “decidedly small” takings do not cause cognizable market harm – notwithstanding its finding that GSU’s verbatim copying “favors market substitution,” Dkt#423 at 55 – the court wrongly dismissed as “glib” and “speculative” the Publishers’ concern with the impact on their businesses if GSU’s copying were held to be fair use. In finding that permissions income was “not a significant percentage of Plaintiffs’ overall revenues,” Dkt#423 at 84, and that there was “no persuasive evidence that Plaintiffs’ ability to publish high quality scholarly books would be appreciably diminished by the modest relief from academic permissions payments” at issue, *id.* at 86, the court ignored both the principle that a superseding copy is “likely to cause a substantially adverse impact on the potential market of the original,” *SunTrust Bank*, 268 F.3d at 1274 n.28 (citation omitted); *see also Campbell*, 510 U.S. at 591, as well as the trial record. The parties stipulated, and the Publishers’ witnesses testified, that academic institutions are the Publishers’ primary market.

Dkt#276 SF12; Dkt#399, Tr.1/54; Dkt#400, Tr.2/91; Dkt#401, Tr.3/33. The parties also stipulated that permissions “represent a significant revenue stream” for the Publishers. Dkt#276 SF15. And the Publishers’ witnesses each credibly described the predictable serious adverse impact on their businesses if the unauthorized posting of substantial excerpts of their books on online course reading systems were to continue and become widespread.

*See supra* pp. 33-34.

**b. GSU’s Anthological Copying Gives Rise to Distinct Market Harm**

Congress understood that market displacement by classroom copying warrants protecting the copyright owner “no matter how minor the amount of money involved.” H.R. Rep. No. 90-83, 90th Cong., 1st Sess. at 35 (1967) (cited approvingly in H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 67 (1976). This reasoning rings especially true in this case, where the challenged practices entail extensive, systematic takings of large numbers of works in the Publishers’ core market. Congress noted that “[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented.” H.R. Rep. No. 90-83 at 35; *see also* S. Rep. No. 94-473, 94th Cong., 1st Sess. 63 (1975) (“Spontaneous copying of an isolated extract by a teacher, which

may be a fair use under appropriate circumstances, could turn into an infringement if the copies were accumulated over a period of time with other parts of the same work, or were collected with other material from various works so as to constitute an anthology.”). This case involves the accumulation of infringements that are *not* minor, and it was improper for the district court to second-guess Congress’s judgment as to the fair-use implications of this conduct. *See, e.g., Princeton Univ. Press*, 99 F.3d at 1391.

The trial record illuminates the market harm caused by the aggregation of unlicensed excerpts on ERes and uLearn to supply a significant portion of the reading for a given course. Such “anthological” copying interferes not just with Publishers’ licensing of single articles but also with their established markets for traditional textbooks and – increasingly – their market for custom, made-to-order textbooks and other innovative products. Oxford’s President testified that one of the “fastest growing aspects of college publishing” is the “custom textbook,” where publishers obtain a professor’s syllabus, obtain permissions for each assigned reading, and bind the syllabus and articles, along with an introduction from the professor, into a single volume. Dkt#401, Tr.3/67; *see*

*also* Dkt#400, Tr.2/74-81 (describing the process whereby SAGE creates custom textbooks individualized to a particular professor's syllabus and sold at affordable prices). He further explained that because professors "are using smaller chunks of information to teach all the time," they are "able to tailor or custom their pedagogy more and more" and are "not held captive by a given book." Dkt#401, Tr.3/75. He testified that Oxford is trying to "provide people with a great many options to facilitate" this new use of its works and that if this pedagogical transition takes place without Oxford being able to continue to recover revenue from the use of its material, it will "have a really damaging effect on our ability to continue to operate." *Id.* The district court took no account of this testimony.

### **III. THE AGGREGATE FAIR-USE ASSESSMENT REQUIRES APPROPRIATE INJUNCTIVE RELIEF AGAINST GSU'S ONGOING INFRINGEMENT**

Even confining its analysis to the immediate works before it and disregarding the systematic nature of the infringements caused by GSU's copyright policies, the district court erred in identifying only five infringements on this record. As applied to the remaining works, factors one, three, and four weigh heavily against fair use, and factor two is, at worst, neutral.

More generally, the district court failed to apprehend the widespread, ongoing infringement facilitated by the 2009 Policy. That policy, as shown, encourages avoidance of licensing by using ERes and uLearn rather than paper coursepacks to distribute course readings. The district court’s unduly narrow focus, limited infringement findings, and failure to fashion meaningful injunctive relief<sup>21</sup> will encourage – at GSU and elsewhere – greater use of unlicensed digitized coursepacks in place of purchased and licensed physical readings and thereby undermine the precedential force of the Coursepack Cases and the efficient licensing markets that have evolved to serve the needs of academic users for both paper and electronic copies.

The dispositive facts (either stipulated or found at trial) and the law dictate a different result. This Court should hold as a matter of law that fair use does not allow GSU to copy and distribute to students substantial, nontransformative digital excerpts from Appellants’ books, including anthological compilations, without authorization from the copyright owner.

The Court is authorized to grant an injunction “on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” 17

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<sup>21</sup> The court admonished the GSU Defendants to “maintain copyright policies for [GSU] which are not inconsistent with the Court’s Order of May 11, 2012 and this Order.” Dkt#441 at 11.

U.S.C. § 502(a). The district court ordered – and the case was tried on the premise – that the GSU Defendants’ conduct during 2009 was representative of ongoing practice. *See* Dkt#261 at 12-14. Because on this record as to GSU’s conduct no further factfinding is needed, the Court should vacate the unduly narrow injunction ordered by the district court and remand with instructions to enter an appropriately comprehensive injunctive in line with the relief proposed by the Publishers below. Dkt#300-1.

#### **IV. THE DISTRICT COURT ERRED IN HOLDING THAT APPELLEES WERE ENTITLED TO ATTORNEYS’ FEES AND COSTS**

The district court found that the GSU Defendants “prevailed on all but five of the 99 copyright claims which were at issue when the trial of the case began,” Dkt#441 at 12, and concluded, on this basis, that the GSU Defendants were “highly successful” and, on balance, were the “prevailing party in this case.” *Id.* at 12-13. The court then exercised its discretion to award the GSU Defendants attorneys’ fees and costs based on its findings that Appellants’ “failure to narrow their individual infringement claims significantly increased the cost of defending the suit.” *Id.* at 14.

Reversing the district court’s erroneous merits rulings will eliminate the basis for its rulings as to attorneys’ fees. But the attorneys’ fees rulings were erroneous, and must be reversed, in any event.

#### **A. Appellees Were Not a “Prevailing Party”**

Section 505 of the Copyright Act provides that the court may award reasonable attorneys’ fees to the “prevailing party.” 17 U.S.C. § 505. The predicate for the district court’s determination that Appellees were the “prevailing party” was the court’s decision to convert the case into a needlessly large number of discrete infringement claims, as if the Publishers were seeking damages for infringement of these works rather than a change in GSU’s copyright policy. The court’s erroneous treatment of the individual claims, including subjecting them to inappropriate evidentiary hurdles such as digital license availability that had no relevance to the legality of GSU’s policy, produced a misleading tally of unsuccessful and successful claims which obscured the fact that the court held GSU’s policy unlawful for allowing excessive copying. *See* Dkt#423 at 337-38.

The appropriate measure of success in this case should not be, as the district court held, which party prevailed on more individual claims, but rather whether GSU’s policy, the legality of which the specific unauthorized

uses litigated were intended to illuminate, was or was not lawful. Even as filtered through the district court’s faulty legal analysis, the 2009 Policy was found to foster copyright infringement. Accordingly, the decision to reward Appellees by deeming them to be the “prevailing party” does not accord with the outcome of the case (notwithstanding the Publishers’ objection to where the court drew the fair-use line) and should be reversed.

**B. The District Court Abused Its Discretion in Awarding Attorneys’ Fees and Costs**

Having erroneously deemed Appellees the “prevailing party,” the court abused its discretion in awarding them attorneys’ fees and costs. *See* 17 U.S.C. § 505 (“the court “may . . . award a reasonable attorney’s fee to the prevailing party”). The factors courts are to consider in deciding whether to award attorneys’ fees to the prevailing party include “frivolousness, motivation, objective unreasonableness . . . and the need in particular circumstances to advance considerations of compensation and deterrence.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 535 n.19 (1994). None of these factors weighs in favor of a fee award in this case.

The district court found that Appellants acted in good faith and that there was “no controlling authority” on the fair use issues presented. Dkt#441 at 14. It nevertheless awarded fees and costs based on Appellants’

“failure to narrow their individual infringement claims.” *Id.* at 14. Holding the Publishers accountable for having tried 74 claims rather than the small sample they urged (to no avail) *see supra* p.10, is highly inequitable – especially as the flaws in GSU’s policy could have been identified far more efficiently had Appellants’ streamlined approach been adopted.

Moreover, awarding attorneys’ fees against parties that asserted meritorious claims in good faith in connection with the systematic, verbatim copying of their works in their principal market – particularly in light of the supportive Coursepack Cases – does not comport with the governing principle that a fee award should be “faithful to the purposes of the Copyright Act.” Dkt#441 at 13 (quoting *Fogerty*, 510 U.S. at 535 n.19). To the contrary, it discourages legitimately aggrieved parties, such as Appellants, from advancing well-founded arguments to protect their rights. “[A] party that advances a reasonable position should not be deterred from doing so for fear that it will have to pay attorney’s fees if it loses.” *Luken v. Int’l Yacht Council, Ltd.*, 581 F. Supp. 2d 1226, 1246 (S.D. Fla. 2008); *see also Donald Frederick Evans & Assoc., Inc. v. Continental Homes, Inc.*, 785 F.2d 897, 916 (11th Cir. 1986).

### **C. Appellees' Expert Witness Fees Are Not Recoverable**

The district court's award of attorneys' fees and costs included \$142,038.54 for fees paid to Appellees' expert, Dr. Kenneth Crews. Dkt#462 at 6. Appellees conceded that Dr. Crews' fees were not recoverable in this circuit under *Artisan Contractors Ass'n of Am., Inc. v. Frontier Ins. Co.*, 275 F.3d 1038, 1040 (11th Cir. 2001), *see* Dkt#444 at 17 n.9, yet the district court purported to find *Artisan* distinguishable because "there was no award of attorneys' fees involved" in that case. Dkt#462 at 9. That is true but irrelevant: Appellants contest the award of *expert witness fees*, which this Court clearly held in *Artisan* are not recoverable. Under *Artisan*, the fee award (if otherwise left to stand) should be reduced by \$142,038.54.

### **CONCLUSION**

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: January 28, 2013

*JMS*

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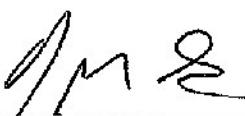
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### CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 17,849 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, Times New Roman, 14 point.



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**CERTIFICATE OF SERVICE**

I certify that on January 28, 2013, a copy of the above and foregoing Appellants' Brief was filed by CM/ECF with the Clerk of the Court for the U.S. Court of Appeals, Eleventh Circuit, and that a copy was also served by CM/ECF on counsel listed below.

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